



CONSTITUTIONAL LAW SYLLABUS

Fall 2021



Professor Peter M. Malaguti

Massachusetts School of Law

500 Federal Street

Andover, MA 01810

malaguti@mslaw.edu

(978) 681-0800

This Syllabus will also be available on TWEN.

Because no one can predict the course of the pandemic, it is possible that the structure and rules of the course will be modified on short notice. I will communicate any changes via TWEN email blasts and modify the Syllabus from time-to-time if necessary. You will need to routinely check the TWEN site for changes in case you miss any of the notifications.

REQUIRED READING

Casebook: *Chemerinsky, CONSTITUTIONAL LAW (6th Ed. 2020, Wolters Kluwer Pub.)*

Note: The 6th edition was recently released. I understand that it is not cheap. If you choose to work from the 5th edition, please understand that there are many newly decided cases in the 6th edition that will not be in the 5th edition. You are responsible for finding these new cases from another source (Westlaw, etc.) if you choose to use the 5th edition.

NON-REQUIRED SUGGESTED SUPPLEMENTAL READING

Glannon Guide to Constitutional Law (2 book bundle)(Wolters-Kluwer). This can be purchased as a bundle for \$53.95 directly from Wolters Kluwer.

May & Ides, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM – EXAMPLES & EXPLANATIONS (3rd Ed. 2004, Aspen Pub.)

May & Ides, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS – EXAMPLES & EXPLANATIONS (3rd Ed. 2004, Aspen Pub.)

Chemerinsky, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES (4th Ed. 2015, Aspen Pub.)

I have also found that the “Law in a Flash” Con Law flashcards are pretty good study aids. They come in two sets: Con Law I and Con Law II.

PREPARATION FOR CLASS

Because the classes are highly interactive, the assignments are estimates only. The students are expected to attend every class and keep track of the pace. The students should also understand that, due to the complex nature of the issues and policy questions involved, and the sometimes-lengthy Supreme Court cases, the reading load in *Constitutional Law* is higher than in most classes. I expect you to be prepared for every class and will mark you as absent if you are not prepared.

There is no law school course in which it is more important to read the cases than in Constitutional Law; indeed, most of the questions on the MBE section are based on the fact patterns of the cases you read in Constitutional Law. Therefore, I will call on students to do the cases in class and will expect you to be prepared to be able to recite facts and answer questions about the cases.

GOALS AND OBJECTIVES OF THE COURSE

This is an introductory survey course in American Constitutional Law. Successful students will master the complicated structure and functions of the doctrines, legal methods, legal reasoning and legal analysis employed by lawyers who expect to practice constitutional law, the process by which our American legal system orders its government and protects the individual rights of its citizens. It is expected that students achieving a grade of “C” or better will have mastered the law and legal processes sufficiently to pass the constitutional law sections of the bar examination. It is also expected that successful students will achieve an understanding of the fundamentals of constitutional law that is sufficient to enable

them to take the first steps to handle constitutional law issues upon graduation from the Massachusetts School of Law. Students who fail to master the law and legal processes sufficiently enough to pass the constitutional law sections of the bar examination, or who lack the fundamental knowledge requisite to handle constitutional law issues upon graduation, will receive a grade below that of "C."

GRADING

Your final grade shall be composed of three (2) components:

1. With the exception of the first two week of class and last week of class, you will receive one (1) five-question multiple choice quiz at the end of each week for a total of 12 quizzes. I will drop the lowest 2 quiz scores and add up the remaining 10 for a potential of 50 raw points. There will be no makeups for missed quizzes.
2. Your final exam given during exam week.

Each component of your grade will count as follows:

The 12 Weekly Quizzes:	25%
Comprehensive Final Exam:	75%

Old exams, back to 2004, are on my website. They will be very useful study tools when you reach crunch time.

READING ASSIGNMENTS

WEEK	CHAPTER/SECTION	PAGES (6TH ED.)
<u>Week One</u>		
<u>Class 1</u> Tuesday, August 24	<p>Introduction to course and discussion of class expectations.</p> <p>Our Constitution and Form of Government (A Primer)</p> <p>R. Beeman, The Constitutional Convention of 1787: A Revolution in Government</p> <p>How to Read Our Constitution: Is It a Sacred Document, a Flawed Document, or a Little of Both?</p> <p>U.S. Constitution, Article I, Section 2, Clause 3</p> <p>U.S. Constitution, Article I, Section 9, Clause 1</p> <p>U.S. Constitution, Article IV, Section 2, Clause 3</p> <p>Race Discrimination and Slavery before</p>	<p>(Posted on TWEN site)</p> <p>xxxix in Casebook</p> <p>xlii in Casebook</p> <p>xlvi in Casebook</p> <p>711-713</p>

	<p>the Thirteenth and Fourteenth Amendments</p> <p><i>Dred Scott v. Sanford (1857)</i></p> <p>Electoral College</p> <p>Debating the Electoral College (National Conference of State Legislators)(Posted on TWEN site)</p> <p>Composition of Senate and House of Representatives</p> <p>R. Rosenthal, What Democracy? Harper's Magazine (May 2004)</p> <p>J. Cost, In Defense of the Senate, National Review, November 20, 2017 -----</p>	<p>713-716</p> <p>(Posted on TWEN site)</p> <p>(Posted on TWEN site)</p> <p>(Posted on TWEN site)</p>
<p><u>Class 2</u> Thursday, August 26</p>	<p><u>Chapter 1: The Federal Judicial Power</u></p> <p>The Authority for Judicial Review</p>	<p>1-11</p>
<p><u>Week Two</u></p>		
<p><u>Class 3</u> Tuesday, August 31</p>	<p><i>Mini-Lecture: Article III and Article I Courts; Limits on The Federal Judiciary (Interpretive limits, Congressional Limits & Advisory Opinions). We will not be covering <i>District of Columbia v. Heller</i> because the 2nd Amendment right to bear arms is not tested on the bar exam. We will later cover a 2nd Amendment case, <i>McDonald v. City of Chicago</i>, to examine the topic of "incorporation," which is tested on the bar exam.</i></p> <p>Congressional Limits: The Exceptions and Regulations Clause (Congress' authority to limit Supreme Court appellate jurisdiction)</p> <p>-----</p>	<p>11-13</p> <p>32-39</p>
<p><u>Class 4</u> Thursday, September 1</p>	<p><i>Mini-Lectures: Appeals to the Supreme Court; Jurisdiction of Lower Courts; Justiciability Limits (Advisory Opinions, Standing, Ripeness, Mootness & the Political Question Doctrine)</i></p> <p>Justiciability Limits</p> <p>Advisory Opinions</p>	<p>39-41</p> <p>41-44</p>

	Standing Constitutional Standing (Injury, Causation & Redressibility) Prudential Standing Ripeness Mootness The Political Question Doctrine <i>Mini-Lecture: The Adequate and Independent State Grounds Doctrine</i>	44 45-66 66-79 79-85 85-90 90-118
<u>Week Three</u> Class 5 Tuesday, September 7	<u>Chapter 2: The Federal Legislative Power</u> Introduction: Congress and the States The Necessary & Proper Clause <p style="text-align: center;">-----</p>	119-150 155
Class 6 Thursday, September 9	The Commerce Power The Initial Era Skip the 1890s-1937 at pages 159 to 166. (I will comment on this briefly.) 1937-1990s The Tenth Amendment Between 1937 and the 1990s 1990s-???: Narrowing of the Commerce Power and Revival of the Tenth Amendment as a Constraint on Congress	155-156 156-159 <p style="text-align: center;">-----</p> 166-181 181-187 187-215
<u>Week Four</u> Class 7 Tuesday, September 14	Does the Tenth Amendment Limit Congress's Authority? Taxing and Spending Power	216-240 240-248

[illegible]

	Treaties and Executive Agreements War Powers: <i>War Powers Resolution</i>	351-354 354-358
<u>Week Six</u> <u>Class 11</u> Tuesday, September 28	Presidential Power and the War on Terrorism Presidential Power over Immigration Checks on the President Suing and Prosecuting the President Impeachment -----	358-395 395-406 406-413 413-419
<u>Class 12</u> Thursday, September 30	<u>Chapter 4: Limits on State Regulatory and Taxing Power</u> Preemption of State and Local Laws Mini-Lecture: The Supremacy Clause Express Preemption Implied Preemption Conflict Preemption Impeding Federal Objective Occupying the Field	419-420 420-422 422-429 429-430 430-435 435-444
<u>Week Seven</u> <u>Class 13</u> Tuesday, October 5	The Dormant Commerce Clause Exceptions to the Dormant Commerce Clause Congressional Approval Market Participant Exception -----	444-480 480-481 481-483 483-489

<u>Class 14</u> Thursday, October 7	<p>The Privileges & Immunities Clause of Article IV, § 2</p> <p><u>Chapter 5: The Structure of the Constitution's Protection of Civil Rights and Civil Liberties</u></p> <p>Introduction</p> <p>Application of Bill of Rights to the States</p> <p>Incorporation of the Bill of Rights Into the Due Process Clause of the 14th Amendment</p> <p>Application of the Bill of Rights to Private Conduct (State Action)</p>	<p>489-501</p> <p>503-504</p> <p>504-516</p> <p>516-532</p> <p>532-536</p>
<p><u>Week Eight</u></p> <p><u>Class 15</u> Tuesday, October 12</p> <p><u>Class 16</u> Thursday, October 14</p>	<p>Exceptions to the State Action Doctrine</p> <p>The Public Functions Exception</p> <p>The Entanglement Exception</p> <p>-----</p> <p><u>Chapter 6: Economic Liberties</u></p> <p>Economic Substantive Due Process</p> <p>Introduction & Early History</p> <p>Economic Substantive Due Process Since 1937</p> <p>Rebirth of Economic Due Process?</p> <p>The Contracts Clause</p>	<p>536-537</p> <p>538-553</p> <p>553-578</p> <p>579-599</p> <p>599-606</p> <p>606-618</p> <p>618-631</p>
<p><u>Week Nine</u></p> <p><u>Class 17</u> Tuesday, October 19</p>	<p>The Takings Clause</p> <p>-----</p> <p><i>Please note that, at this point, we are skipping ahead in the casebook.</i></p> <p><u>Chapter 9: First Amendment Freedom of</u></p>	<p>631-682</p>

<p><u>Class 22</u> Thursday, November 4</p>	<p>-----</p> <p>What Places Are Available for Speech</p>	<p>1531-1574</p>
<p><u>Week Twelve</u></p> <p><u>Class 23</u> Thursday, November 9</p> <p><u>Class 24</u> Thursday, November 11</p>	<p><u>Chapter 10: First Amendment Freedom of Religion</u></p> <p>Introduction</p> <p>The Free Exercise Clause</p> <p>-----</p> <p>The Establishment Clause</p> <p><i>Please note that, at this point, we are jumping back in the casebook to Equal Protection.</i></p>	<p>1665-1675</p> <p>1675-1717</p> <p>1717-1736</p>
<p><u>Week Thirteen</u></p> <p><u>Class 25</u> Tuesday, November 16</p> <p><u>Class 26</u> Thursday, November 18</p>	<p><u>Chapter 7: Equal Protection</u></p> <p>Introduction</p> <p>The Rational Basis Test</p> <p>Race and National Origin (Strict Scrutiny)</p> <p>-----</p> <p>Race and National Origin (Strict Scrutiny) <i>Continued</i></p>	<p>683-689</p> <p>689-711</p> <p>711-769</p> <p>769-836</p>
<p><u>Week Fourteen</u></p> <p><u>Class 27</u> Tuesday, November 23</p>	<p>Gender Classifications (Intermediate Scrutiny)</p> <p>Alienage Classifications (Sometimes Strict Scrutiny,</p>	<p>836-876</p> <p>876-891</p>

	The Right to Vote	1053-1083
	The Right to an Education	1121-1128

CLASS EXPECTATIONS

Anticipated Due Dates

I CALL ON STUDENTS RANDOMLY, AND YOU ARE EXPECTED TO BE PREPARED FOR EVERY CLASS. The Constitutional Law section of the bar exam is largely based on the most important Constitutional Law cases that we will read in class. It is essential that you read these cases closely and understand them.

Because the classes are intended to be highly interactive, the listed anticipated due dates are to be considered aspirational. At times, especially at the beginning of the semester, we may fall behind of the anticipated due dates; it is also possible that we will move more quickly at times than anticipated. You therefore should continuously match those dates to what we have actually completed in class. Please be prepared for every class by staying slightly ahead of the anticipated due dates and by adjusting and readjusting as the semester progresses.

If you have read ahead substantially, we expect you to review what you have already read just before class. It is no excuse to state, "I read the case too long ago to remember it." Lawyers often write briefs months before they argue in court and, like you, are expected to know the material when they are called on to discuss the legal issues.

Notes and Tape Recorders in Class

We test what we teach, and we teach by the syllabus. This means that, if you do all the reading and come to all the classes, you will see no surprises on the final exam. We are told by former students that those who fail to come to class tend not to do very well on the final exam. You therefore should come to class and develop an effective method of recording what goes on. Since the classes are interactive and it is not always possible to take copious notes on every point, we recommend the use of tape/digital recorders in class. A recorder should assist in rounding out, or filling gaps in, notes. It also can serve as a "safety net" in a fast-paced class.

Some students take notes on a laptops or netbook, and this is fine. One caveat, however: we sometimes notice that students are more consumed with typing out what is said in class word-for-word than with listening and participating. The purpose of class is not for you to be a scribe; it is for you to develop analytical skills, and this cannot be achieved if you are single-mindedly typing. You will always be able to supplement the law we discuss in class with outside reading.

Frequent Absences

We call on students randomly and will have the pleasure of speaking with each of you several times this semester. Obviously, you must be present in class to participate. Professors at MSL are authorized to lower the grades of frequently absent or frequently unprepared students by one-third of a grade. By way of illustration, this means that a final grade of C will be lowered to a C- if the student is absent from class an inordinate number of times; a B- will be lowered to a C+, and so on. If we call on you, and you are either absent or unprepared three (3) or more times, we will lower your grade as described above.

Being Prepared

We expect you to be prepared for every class and treat an unprepared student as an absent student. This is not college, and old college tricks like skimming, cramming and pretending to be prepared simply will not work. Here is what we expect of you before, during and after class:

Before Class

- 1. Read, reread, study and THINK thoroughly about the assigned cases and materials;**
- 2. Do not leave a case or other reading until you are confident that you thoroughly understand the facts sufficiently to restate them if asked to do so in class;**
- 3. Do not leave a case or other reading until you are confident that you understand why the case book author placed the case in the book;**
- 4. Do not leave a case or other reading until you are confident that you can recite the legal issue(s) presented in the case;**
- 5. Do not leave a case or other reading until you are confident that you know and UNDERSTAND each rule of law, and its elements, presented in the case;**
- 6. Do not leave a case or other reading until you are confident that you understand the policy reasons for the adoption of each rule of law implicated in the case;**
- 7. Read, reread, study and THINK thoroughly about the relevant "hypotheticals" or problems pertaining to the subject matter being studied in each class;**
- 8. Do not leave a hypothetical or problem until you are confident that you understand why the professor assigned it;**
- 9. Do not leave a hypothetical or problem until you are confident that you can recite the legal issue(s) presented in it;**
- 10. Do not leave a hypothetical or problem until you are confident that you know and UNDERSTAND each rule of law, and its elements, implicated in the hypothetical or problem.**
- 11. Do not leave a hypothetical or problem until you are confident that you understand the policy reasons for the adoption of each rule of law implicated by the hypothetical or problem.**

During Class

- 1. Be prepared well enough to be able to provide an accurate recitation of the facts and holding of each assigned case, hypothetical or problem.**
- 2. Be prepared well enough to be able to provide a concise recitation of the issue(s) presented in each case, hypothetical or problem.**

3. Be prepared well enough to be able intelligently discuss the legal issues and rules of law presented or implicated by the assigned reading.
4. Be prepared enough to be able to intelligently discuss any factual variations the professor and/or other students propose during class.
5. Be prepared enough to be able to intelligently discuss flaws and strengths in the court's reasoning or in the applicable rule of law;
6. Be prepared enough to be able to intelligently discuss alternative arguments that might have better resolved the dispute at issue in each case;
7. Be prepared enough to be able to intelligently discuss the policy issues relevant to the each case, hypothetical or problem.

After Class

1. Identify and clarify anything confusing about the law or application or law covered in class. If necessary, work with classmates collaboratively to achieve mastery of the law;
2. Rework your class notes and case briefs to reflect a more accurate picture of the cases, issues and rules of law.
3. Think about how the lesson covered in the particular class fits into the overarching body of property law.

You will be expected to read each assignment in its entirety. Reading "case notes," "canned briefs," Westlaw briefs and other shortcut aids, at the expense of the actual cases, will fail to prepare you adequately and will result in you being marked as unprepared.

RULES ON CLASSROOM DECORUM

I expect you to observe the following rules in class. I do not believe any of these rules are unreasonable:

1. **Please Stay Put.** Our day class schedule will be 12:30 p.m. to 2:10 p.m. The evening schedule will be 9:00 p.m. to 10:45 p.m. These are long classes. To the extent possible, please stay in your seat. A parade of students in and out of the class tends to be disruptive to the conduct of the class.
2. **Timeliness.** Please arrive on time. Late arrivals are disruptive to the class. Tardiness should still be the exception rather than the rule. I often take attendance at the beginning of the class. Late students will be marked absent, and I will not change this designation if you come in later.

If tardiness becomes an issue, i.e., if it starts to cause disruptions, I will impose a hard-and-fast rule that those arriving late will not be allowed into the classroom.
3. **Stand, Name, Project.** When you speak in class, whether it's while volunteering or after being called on, please stand, state your first name, face the rest of the class (not me), and project your voice so as to be heard. Please do this for the entire semester. Speaking in public is uncomfortable at first, but even those of you who intend to practice transactional law as

opposed to litigation must realize that the practice of law is a performance art as well as an intellectual endeavor.

4. **Cell Phones and Messaging.** *Except for class purposes, there will be **no cell phone use in class**.* I reserve the right to instruct students to leave the class immediately if they engage in text messaging, instant messaging, social media, or other forms of electronic communication during class, and will do so if this issue becomes a problem. If you refuse an instruction to leave, I will report you to the administration for discipline.
4. **Laptop Computers.** While I believe that laptop computers are an invaluable classroom tool, lately their use sometimes has become troublesome in several ways. Like cell phones, they beep and make noises when starting up. Please arrive early enough to start your laptop prior to class so the start-up noises will not be disruptive. If you cannot set up your laptop prior to class, please ensure that it is on mute and will not be disruptive.

It is never appropriate to use computers to play computer games, send and receive instant messages, surf the net, or perform other computer functions not related to the task at hand. I wander around the room a bit while teaching and will probably catch at least some of such off-focus activity if it occurs.

With limited exceptions, attorneys are not permitted to use their laptops, tabs, or other electronic devices while arguing or trying cases in court. The same will be true in my class. When you end up standing to present a case or answer questions framed by the professor, *you are to close your laptops and put down other devices*. Your focus will be on the professor and other students. If you feel that you are unable to remember all you have gleaned from your reading, you may refer to paper notes.

5. **Talking in Class.** This will be an interactive class, and it is normal for there to be a bit of a “buzz” while we are discussing a case or “hypothetical.” I do not usually get upset if the class is analyzing a hypothetical, and some students do a little “kibitzing” in the process. However, I still expect you to listen while others are talking so you can respond if called upon, and, most importantly, to respect others by not talking over them. I will not tolerate talking that doesn’t involve the subject matter at hand.
6. **Eating/Drinking in Class.** I generally do not approve of anything that might divert your focus from the class discussion, and eating and drinking in class certainly falls into that category. On the other hand, I do understand that stressed-for-time students, especially evening students, often are unable to take meals at normal hours, and therefore need some sustenance to get them through. Generally, therefore, I tolerate small snacks and drinks during class. I will not tolerate full meals, full “submarine” sandwiches, or anything of the like. I also will not tolerate undue noise while eating, e.g. stubborn plastic wrappers, crunchy foods, etc. I will ban all foods and drinks in class if I think they are becoming a distraction.
9. **Civility above All Else.** There is often intellectual tension in a law school classroom especially with subjects like Constitutional Law, on which reasonable minds can differ. Students and professors can differ -- sometimes widely -- in their views on morals, ethics, society, politics and ways of life. It is my intention to treat each of you with the utmost courtesy

and respect, even when we disagree. In turn, I expect that each of you will also treat each other with respect and courtesy. Passionate argument is terrific if kept civil and respectful. Remember: argue the issues, not the personalities!