The George Washington University Law School

Fall Semester 2022

Syllabus For

CONSTITUTIONAL LAW I

(Course No. 6214-22; 3 credits)

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Content of this Course:

Constitutional Law I concerns the structure of the government under the U.S. Constitution. The course covers these topics: judicial review; federalism-based limitations on state powers; selected federal regulatory powers (including the powers to regulate commerce, to tax, and to spend money, and to use the war and treaty powers for regulatory purposes); state immunity from federal regulation; the President's powers; the separation of powers; selected limitations on legislative power (including the prohibitions against bills of attainder, state law impairment of contracts, and the taking of property without just compensation); and the state action doctrine.

Most law students take Constitutional Law II (Course No. 6380) as an elective after their first year. Constitutional Law II addresses individual rights and liberties. It typically covers the privileges and immunities of national citizenship, the guarantees of due process and equal protection, the freedom of speech and religion, and so forth. The Law School also offers several advanced courses (described in the Law School Bulletin) that concern other constitutional law topics.

Learning Outcomes (ABA Accreditation Standards 301 & 302)

Syllabus Appendix C identifies the expected "learning outcomes" for this course.

Class Schedule:

The course meets on Mondays from 6:00 p.m. to 7:25 p.m. and Thursdays from 7:35 p.m. to 9:00 p.m. We do not have class on Labor Day (9/5) or Thanksgiving Day (11/24).

Office Hours and other Contact Information:

I am available to discuss the class in person or by telephone. My office is at the U.S. Court of Appeals for the

Armed Forces, 450 E Street, N.W., Washington, D.C. (near the Judiciary Square Metro station). Please contact my assistant, Ms. Veronica Sevier, to schedule an appointment. Her telephone number is (202) 761-1458. You may reach me directly by email at gmaggs@law.gwu.edu.

Required Book:

We will use this book: Maggs & Smith, Constitutional Law: A Contemporary Approach (5th ed. 2021) (West Academic Publishing) (ISBN 9781684675715).

Final Examination:

This course will have an open-book, three-hour examination on Wednesday, December 14, at 6:30 p.m. In completing the examination, you may use any written materials that you have brought with you. On the portal, you can obtain copies of my past examinations and their grading guides.

Class Participation:

Please come to class prepared to discuss the assigned material. Class participation does not affect your final grade.

Reading Assignments:

At the end of each class, I will tell you how far to read for the next class. Please study carefully all of the constitutional provisions cited in the reading. The text of the Constitution appears in the textbook on pages 1499-1517. You do not have to read the notes following the cases unless they are specifically assigned. Syllabus Appendix A summarizes the basic principles of the cases assigned below.

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A. JUDICIAL REVIEW

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B. OBSTACLES TO JUDICIAL REVIEW

1. Political Question Doctrine

A. PREEMPTION

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Silkwood v. Kerr-McGee Corp., pp. 283–288

Points for Discussion (a)–(c), pp. 288–289

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B. THE "DORMANT" OR "NEGATIVE" COMMERCE CLAUSE DOCTRINE

1. Introduction

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Gibbons v. Ogden, pp. 133–34 (1st ¶) & pp. 292–295

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2. When a Uniform National Standard is Needed

Text, p. 296

Cooley v. Board of Wardens, pp. 296–299

Wabash, St. L. & P. Ry. v. Illinois, pp. 299–301

Points for Discussion (a)–(c), p. 301

3. Discrimination Against Interstate Commerce

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Dean Milk v. City of Madison, pp. 302–305

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Hughes v. Oklahoma, pp. 306–308

Points for Discussion (a)–(c), p. 308

4. Excessive Burdens on Interstate Commerce

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South Carolina v. Barnwell Brothers, pp. 309–312

Points for Discussion (a) & (b), pp. 312–313

Southern Pacific v. Arizona, pp. 313–316

A. DOMESTIC AFFAIRS

Text, pp. 363–364

Youngstown Sheet & Tube v. Sawyer, pp. 364–374

Points for Discussion (a)–(c), pp. 374–375

B. FOREIGN AFFAIRS

Text, p. 375–376

United States v. Curtiss-Wright, pp. 382–386

Points for Discussion (a)–(c), pp. 386–387

Text, pp. 387–388
[Whitney v. Robertson]

Goldwater v. Carter, pp. 389–391

Points for Discussion (a)–(c), pp. 391–392

C. EXECUTIVE PRIVILEGE

Text, p. 410

United States v. Nixon, pp. 411–416

Points for Discussion (a)–(b), p. 416

Syllabus Appendix A, Part V [for review]

VI. SEPARATION OF POWERS

A. UNORTHODOX ATTEMPTS TO EXERCISE LEGISLATIVE POWER

Text, pp. 459–462, 467–468

INS v. Chadha, pp. 469–477

Points for Discussion (a) & (b), p. 477

Text, p. 478

Clinton v. City of New York, pp. 478–484

Points for Discussion (a)–(c), p. 485

B. UNORTHODOX ATTEMPTS TO EXERCISE EXECUTIVE POWER

Text, pp. 485–486, 502

Bowsher v. Synar, pp. 502–511

Points for Discussion (a) & (d), p. 511

Text, p. 512

Morrison v. Olson, pp. 512–522

Points for Discussion (a)–(d), pp. 522–523

Seila Law v. CFPB, pp. 530–543

Points for Discussion (a)–(b), p. 544

C. STATE ATTEMPTS TO REGULATE THE HOUSE AND SENATE

Text, pp. 349–350

U.S. Term Limits, Inc. v. Thornton, pp. 350–358

Points for Discussion (a)–(c), p. 358

Syllabus Appendix A, Part VI [for review]

VII. LEGISLATIVE POWER AND SELECTED INDIVIDUAL RIGHTS

A. BILLS OF ATTAINDER

Federalist No. 44 (excerpt), Syllabus Appendix B

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B. IMPAIRMENT OF CONTRACTS BY STATE LAWS

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Home Building & Loan v. Blaisdell, pp. 1426–1429

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Allied Structural Steel v. Spannaus, pp. 1429–1433

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C. GOVERNMENT TAKINGS OF PRIVATE PROPERTY

1. Physical or Possessory Takings

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[Loretto v. Teleprompter Manhattan]

Yee v. City of Escondido, pp. 1439–1441

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2. Public Use Requirement

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Kelo v. City of New London, pp. 1453–1458

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3. Regulatory Takings

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[Pennsylvania Coal Co. v. Mahon]

Andrus v. Allard, pp. 1446–1447

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Lucas v. S.C. Coastal Council, pp. 1448–1451

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VIII. STATE ACTION DOCTRINE

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The Civil Rights Cases, pp. 1464–1469

APPENDIX A: SUMMARY OF PRINCIPLES AND DOCTRINES

This appendix briefly summarizes the constitutional law principles and doctrines established by the cases in the reading. While no concise statement can capture all the implications of a Supreme Court decision, the most important ideas should not remain a mystery. We will elaborate in class on these points.

VII. JUDICIAL REVIEW AND ITS LIMITS

The power of "judicial review" is the power and duty of a court to refuse to enforce unconstitutional legislation or unconstitutional executive actions. Although the Supremacy Clause, art. IV, cl. 6, expressly prohibits courts from enforcing unconstitutional state laws, no provision in the Constitution expressly directs judges to refuse to enforce unconstitutional federal laws. The Supreme Court, however, has held that the power of judicial review of federal legislation is implicit in the Constitution. Marbury v. Madison (1803) [p. 48].

The Supreme Court and other federal courts can exercise the power judicial review only when they have jurisdiction. To prevent the exercise of judicial review in a particular case, a party might cite a jurisdiction-limiting principle. These are some examples of such principles:

(1) article III, § 2, cl. 2 limits the kinds of cases over which the Supreme Court may exercise original (as opposed to appellate) jurisdiction (see below), Marbury v. Madison (1803) [p. 48];

(2) precedent has established that federal courts may not decide "non-justiciable political questions" (see below), Nixon v. United States (1993) [p. 74];

(3) article III, § 2, cl. 1 empowers federal courts to exercise jurisdiction only over genuine cases or controversies (see below), Muskrat v. United States (1911) [p. 81];

(4) precedent has established that federal courts may not decide issues that are not yet ripe (see below), Anderson v. Green (1995) [p. 84], or that have become moot (see below), United States Parole Comm'n v. Geraghty (1980) [p. 85];

(5) precedent has established that federal courts may not exercise jurisdiction if the litigant seeking judicial review lacks standing (see below), Lujan v. Defenders of Wildlife [p. 93]; or

(6) article III, § 2, cl. 2 empowers Congress to create statutory exceptions to the Supreme Court's appellate jurisdiction (see below), Ex Parte McCardle (1869) [p. 101].

Article III, § 2, cl. 2 expressly empowers the Supreme Court to exercise original (as opposed to appellate) jurisdiction only over cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party. Congress may not grant the Supreme Court original jurisdiction over mandamus or other actions that do not fall within these categories. Marbury v. Madison (1803) [p. 48].

A non-justiciable political question is an issue that the Constitution commits to a branch of the government other than the judiciary. In determining whether an issue is a non-justiciable political question, courts consider whether the text of the Constitution directs Congress or the President to decide the issue, whether there are judicially manageable standards for resolving the issue, and other factors. Nixon v. United States (1993) [p. 74].

Article III permits the federal courts to exercise jurisdiction only to decide cases and controversies. Prior to actual litigation, the courts may not give Congress or anyone else advisory opinions about the constitutionality of legislation. Congress may not overcome this prohibition by declaring the United States to be a party in lawsuit in which it does not truly have an interest. Muskrat v. United States (1911) [p. 81].

A legal dispute is not ripe if it has not yet developed into an actual controversy, has not yet caused injury, or is otherwise asserted prematurely. Anderson v. Green (1995) [p. 84]. A controversy is moot if the parties no longer have any meaningful and concrete stake in its resolution. United States Parole Comm'n v. Geraghty (1980) [p. 85].

To have standing under Article III, the plaintiff must properly allege: (1) that the plaintiff has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is redressable by a favorable decision. Lujan v. Defenders of Wildlife (1992) [p. 93]. The injury must be concrete and particularized, and actual or imminent, rather than speculative or conjectural. Id. Congress lacks power to authorize suits by persons who do not satisfy the test for Article III standing. Id.

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Article III expressly authorizes Congress to create exceptions to the Supreme Court's appellate jurisdiction. Congress in some instances has used this power to prevent judicial review by the Supreme Court. The scope of Congress's power to create exceptions for this purpose, however, remains undecided. Ex Parte McCardle (1869) [p. 101].

VIII. GOVERNMENTAL POWERS UNDER THE CONSTITUTION

The "doctrine of limited powers" says that Congress only has the powers granted to it by the Constitution. Amend. 10. The "doctrine of implied powers" says that Congress has not only expressly enumerated powers, but also implied powers through the Necessary and Proper Clause, Article I, § 8, cl. 18. The Necessary and Proper Clause empowers Congress to enact a law if the law constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. Or as Chief Justice Marshall famously put it: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland (1819) [p. 114].

IX. FEDERALISM-BASED LIMITATIONS ON STATE POWER

Under the Supremacy Clause, federal law can supercede and render null a state law through "field preemption" or "conflict preemption."

(1) Field Preemption: "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." Silkwood v. Kerr-McKee (1984) [p. 283]; and

(2) Conflict Preemption: "If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law . . . ." Id. Conflict preemption may occur either "when it is impossible to comply with both state and federal law" or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id.

The Dormant Commerce Clause Doctrine and the Supremacy Clause say that a state law affecting interstate commerce is invalid if:

(1) the state law is pre-empted by a federal statute (see above), Gibbons v. Ogden (1824) [p. 292];

(2) the state law concerns a subject for which national uniformity is necessary (see below), Cooley v. Board of Wardens (1851) [p. 296], Wabash, St. L. & P. Ry. Co. v. Illinois (1886) [p. 299].

(3) the state law treats interstate commerce differently from intrastate commerce, either intentionally or in practical effect, when there is a reasonable, non-discriminatory, alternative way of furthering the state's legitimate interests (see below), Dean Milk v. City of Madison (1951) [p. 302], Hughes v. Oklahoma (1979) [p. 306], Camps Newfound v. Town of Harrison (1997) [p. 325]; or

(3) the state law imposes a burden on interstate commerce that is excessive in relation to legitimate local interests (see below), South Carolina Department of Transportation v. Barnwell Brothers (1938) [p. 309], Southern Pacific v. Arizona (1945) [p. 313].

A uniform national standard may be necessary when allowing multiple states to regulate a subject could result in conflicting regulations with which compliance would be impossible. Wabash, St. L. & P. Ry. Co. v. Illinois (1886) [p. 299].

For the purposes of the Dormant Commerce Clause Doctrine, legitimate local interests include protecting health and safety and conserving natural resources but do not include protecting local businesses from competition. Dean Milk v. City of Madison (1951) [p. 302], Hughes v. Oklahoma (1979) [p. 306], South Carolina Department of Transportation v. Barnwell Brothers (1938) [p. 309], Southern Pacific v. Arizona (1945) [p. 313].

Congress may authorize the states to pass legislation that otherwise would violate the Dormant Commerce Clause Doctrine. Prudential Ins. Co. v. Benjamin (1946) [p. 336].

The Privileges and Immunities Clause prohibits discrimination against out of state residents or citizens (but not corporations or aliens) if the discrimination might jeopardize interstate harmony, unless the discrimination is necessary to promote a substantial state interest. Baldwin v. Fish & Game Commission (1978) [p. 342]. Discrimination is likely to jeopardize interstate harmony if it concerns important economic privileges but not if it involves recreational activities. Id.

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X. SELECTED FEDERAL LEGISLATIVE POWERS AND THEIR LIMITS

The Commerce Clause empowers Congress to enact legislation regulating:

(1) interstate commerce, and its channels and instrumentalities, Gibbons v. Ogden (1824) [p. 133]; and

(2) intrastate economic activities, provided that Congress rationally could conclude that the activities might have a substantial effect on interstate commerce, either by themselves or through their repetition nationwide, United States v. Darby (1941) [p. 156], Wickard v. Filburn (1942) [p. 159], Heart of Atlanta Motel v. United States (1964) [p. 162], Katzenbach v. McClung (1964) [p. 164], United States v. Lopez (1995) [p. 168], Gonzales v. Raich (2005) [p. 184].

Congress's power to regulate commerce among the states is plenary. Gibbons v. Ogden (1824) [p. 133]. In reviewing legislation enacted under the Commerce Clause, courts will not consider:

(1) whether the actual purpose of the legislation is to regulate interstate commerce, United States v. Darby (1941) [p. 156]; or

(2) the wisdom, workability, or fairness of the legislation, Wickard v. Filburn (1942) [p. 159].

Congress's plenary power to regulate commerce, however, does not enable Congress to create commerce by compelling individuals to purchase an unwanted product. NFIB v. Sebelius (2012) [p. 192].

The "penalty doctrine" says that Congress may not create tax penalties which have the primary purpose, not of raising revenue, but instead of regulating intrastate activities that Congress could not regulate under the Commerce Clause. (The doctrine does not prevent Congress from imposing taxes designed to regulate subjects that Congress may reach under the Commerce Clause.) Child Labor Tax Case (Bailey v. Drexel Furniture) (1922) [p. 205].

The more recent doctrine of "objective constitutionality" greatly limits the penalty doctrine by requiring courts to uphold tax laws unless they contain provisions "extraneous to any tax

need." Under this doctrine, so long as tax laws actually raise revenue, courts cannot invalidate them merely because Congress intended them to have a regulatory effect. United States v. Kahriger (1953) [p. 208]; NFIB v. Sebelius (2012) [p. 210].

"Direct taxes" must be apportioned so that each state pays in proportion to its population. U.S. Const. art. I, § 2, cl. 3; id. § 9, cl. 4. Direct taxes include taxes on the ownership of land or personal property. But a tax on "going without health insurance" is not a direct tax. NFIB v. Sebelius (2012) [p. 210].

The General Welfare Clause implicitly grants Congress power to spend money to promote the general welfare, so long as the spending does not violate any other constitutional limitation. Congress, therefore, may appropriate funds for purposes unrelated to the specific powers enumerated in article I, section 8. United States v. Butler (1936) [p. 219].

The courts generally will defer to Congress's determination of which expenditures promote the general welfare, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis (1937) [p. 223]. Congress may condition a rebate of a tax (i.e., a partial refund of a tax that has been paid) on upon conduct of the taxpayer, even if the purpose of the rebate is to motivate or tempt the taxpayer to engage in the conduct. Charles C. Steward Machine Co. v. Davis (1937) [p. 223].

Congress may use its spending power under the General Welfare Clause to induce states to enact laws that Congress itself could not pass, provided that:

(1) Congress is seeking to further the general welfare;

(2) Congress expresses any conditions on the spending unambiguously so that states may exercise their options knowingly;

(3) the conditions imposed on receipt of federal funds are related to a federal interest in particular national projects or programs;

(4) there is no independent constitutional bar preventing the state's enactment of the laws; and

(5) the financial inducement offered to the states does not "pass the point at which pressure becomes compulsion."

South Dakota v. Dole (1987) [p. 223]. With respect to element (5) of this test, a threatened loss of over 10 percent of a State's overall budget is an example of "economic dragooning that leaves the States with no real option but to acquiesce." NFIB v. Sebelius (2012) [p. 227].

After Congress has declared war, the Necessary and Proper Clause empowers Congress to enact legislation for remedying the "evils" which have arisen from the war. This power may extend beyond the time at which active hostilities end. Woods v. Cloyd W. Miller Co. (1948) [p. 237].

After the President makes, and Congress approves, a treaty under article II, § 2, cl. 2, the Necessary and Proper Clause empowers Congress to enact legislation necessary and proper for implementing the treaty even if Congress could not pass the legislation in the absence of the treaty. Although a treaty cannot "contravene any prohibitory words" in the Constitution (e.g., violate the Bill of Rights), a treaty can address at least some matters that are beyond Congress's enumerated legislative powers. Missouri v. Holland (1920) [p. 239].

The general rules with respect to intergovernmental immunity are as follows:

(1) The federal government is immune from state regulation and taxation. McCulloch v. Maryland (1819) [p. 114].

(2) State governments and governmental agencies are not immune from federal commerce regulations that apply equally to non-governmental entities. Garcia v. San Antonio Metro. Transit Authority (1985) [p. 245].

(3) Congress cannot compel the states to pass legislation or administer federal programs. New York v. United States (1992) [p. 250]; Printz v. United States (1997) [p. 256]

(4) Congress may induce states to pass legislation by (a) threatening to withhold federal funds if they do not (see below); or (b) offering states the choice of either regulating according to federal standards or having state law pre-empted by federal regulation. New York v. United States (1992) [p. 250].

Even when state governments are subject to federal law (as in Garcia), they are generally immune from lawsuits challenging their compliance with federal laws both in federal court, see U.S. Const. Amend. 11, and in state court, Alden v. Maine (1999)

[p. 265]. Exceptions to this general rule of immunity (as explained in Alden) are the following:

(1) states may consent to lawsuits notwithstanding their immunity;

(2) Congress can abrogate state's immunity from lawsuits by using power granted in U.S. Const. Amend. 14, § 5; Fitzpatrick v. Bitzer (1976);

(3) the states' immunity from lawsuits does not apply to suits between two states or between the federal government and a state;

(4) the states' immunity from lawsuits does not extend to municipalities and other state subdivisions; and

(5) courts may enjoin state officials to follow federal law prospectively, Ex Parte Young (1908).

XI. THE PRESIDENT'S POWERS

With respect to domestic affairs, the Supreme Court has not adopted the view that the President has extra-constitutional powers. Instead, the President may exercise only those powers granted expressly or implicitly by a statute or by the Constitution. Youngstown Sheet & Tube v. Sawyer (1952) [p. 364]. Accordingly, the President does not have the power to seize private property outside the theater of war except pursuant to a statute. Id.

The President has a duty to execute the laws faithfully, and this duty requires the President to obey the legislative choices made by Congress. Id.

The theory of the "extra-constitutional origin of the foreign affairs power" says that the United States may exercise not only the powers that the Constitution expressly grants, but also other foreign affairs powers enjoyed by all sovereigns. United States v. Curtiss-Wright Export (1936) [p. 382].

The Non-Delegation Doctrine limits the discretion that Congress may give the President in enforcing statutes. The needs of diplomacy require that Congress be allowed to give the President more discretion and freedom from statutory restriction in international matters than is authorized in domestic affairs. Id.

As a practical matter, the President can exercise some foreign affairs powers not expressly granted in the Constitution because the federal courts will decline to review the President's actions under the political question doctrine or other doctrines. For example, the Constitution grants Congress the power to rescind treaty obligations by statute, Whitney v. Robertson (1888) [p. 387]; the Constitution does not say whether the President alone also has this power, but the Supreme Court has declined to consider a challenge to a President's attempt to rescind treaty obligations, Goldwater v. Carter (1979) [p. 389].

The Executive Privilege doctrine, which is said to be constitutionally implied by the need for the effective discharge of executive power, says that the President has:

(1) an absolute right to keep confidential any communications with executive advisors regarding "military, diplomatic, or sensitive national security secrets"; and

(2) a presumptive right to keep confidential any communications with executive advisors on other subjects, but this presumptive right must "yield to the demonstrated, specific need for evidence in a pending criminal trial."

United States v. Nixon (1974) [p. 411].

XII. THE SEPARATION OF POWERS

Congress and the President may exercise legislative power only by enacting laws pursuant to the Bicameralism and Presentment requirements in article I, § 7. INS v. Chadha (1983) [p. 469]; Clinton v. City of New York [p. 478]. Legislative power consists of actions that have "the purpose and effect of altering the legal rights, duties, and relations of persons." INS v. Chadha (1983) [p. 469].

The following principles govern the removal from office of a federal official who exercises executive power:

(1) Congress may remove the official under the procedures for impeachment and trial in Art. I, § 2, cl. 5 & Art. I, § 3, cls. 6 & 7.

(2) Congress may not give itself any other role in removing the official. Bowsher v. Synar (1986) [p. 502].

(3) Congress may not entirely prevent the President, acting alone or through a subordinate, from removing the official. Id. (interpreting Myers v. United States (1925)).

(4) Congress may condition the President's power to remove the official on a showing of cause for removal (e.g., neglect, disability, etc.), id. (interpreting Humphrey's Executor v. United States (1935)), unless the "standard for removal unduly trammels on executive authority," Morrison v. Olson (1988) [p. 512].

(5) Congress cannot restrict the President's ability to remove the single director of an independent agency that wields significant executive power. Seila Law v. CFPB (2020) [p. 530].

The Appointments Clause permits Congress to vest in the courts the power of appointing inferior executive officers, such as prosecutors, and to give the courts some discretion in defining the nature and scope of the appointed officer's jurisdiction. Morrison v. Olson (1988) [p. 512].

Article III permits federal judges to exercise ministerial functions not traditionally limited to the executive branch. Id.

Article I sets forth the only qualifications for members of Congress. U.S. Term Limits, Inc. v. Thornton (1995) [p. 350]. The states may not attempt to impose additional qualifications indirectly by limiting the ability of candidates to have their names appear on general ballots. Id.

XIII. LEGISLATIVE POWER AND SELECTED INDIVIDUAL RIGHTS

In determining whether a law is bill of attainder, the courts will consider precedent and a variety of factors, including (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute furthers nonpunitive legislative purposes; and (3) whether the legislative record evinces an intent to punish. Nixon v. Admin. of General Services (1977) [p. 545]. A law is not a bill of attainder merely because it imposes burdens on only one person. Id.

The Contracts Clause prohibits the substantial impairment of existing contracts by state legislatures unless the law is responding in a limited way to conditions similar to those in Home Building & Loan v. Blaisdell (1934) [p. 1398]. In

determining whether a law violates the Contracts Clause, courts consider various factors, including (1) whether the law is intended to deal with a broad, generalized economic or social problem; (2) whether the law operates in an area already subject to state regulation at the time the affected contractual obligations were undertaken; (3) whether the law effects simply a temporary alteration of contractual relationships; and (4) whether the law applies to everyone making the affected kinds of contracts or only a narrow group of persons. Allied Structural Steel v. Spannaus (1978) [p. 1430]. A state can impair a contract not merely by decreasing, but also by increasing, the duties of one party to the contract. Id.

The Fifth Amendment requires the federal government to pay just compensation when it takes private property. The government effects a possessory or physical taking of private property when it confiscates the property or requires the property owner to submit to a complete or partial physical occupation of the property. Loretto v. Teleprompter Manhattan (1982) [p. 1439]. Although the United States has immunity from liability for the tort of nuisance, the Court may deem a direct and immediate interference with the use and enjoyment of the property to be a physical occupation requiring compensation. United States v. Causby (1946) [p. 1435]. Rent control legislation is not a possessory taking because it does not require the landlord to submit to any physical invasion of the landlord's property (although such legislation could conceivably be a regulatory taking). Yee v. City of Escondido (1992) [p. 1439].

The government may take private property for the "public purpose" of private economic development. Kelo v. City of New London (2005) [p. 1453].

While private property may be regulated "to a certain extent," if a new regulation goes "too far," it is a taking. Pennsylvania Coal Co. v. Mahon [p. 1442]. New laws restricting the sale of property, but not other traditional property rights, are seldom takings even if they cause a loss of future profits. Andrus v. Allard (1979) [p. 1446]. A new regulation that deprives the property owner of all previously permissible economic uses of land goes too far and is per se a taking unless background principles of nuisance and property law already prohibited the use. Lucas v. South Carolina (1992) [p. 1448].

XIV. STATE ACTION DOCTRINE

The "state action" doctrine recognizes that the Constitution restrains the actions of federal, state, and local governments and government officials, but generally does not limit the

actions of private individuals and corporations. The Civil Rights Cases (1883) [p. 1464].

The "public function" exception to the state action doctrine requires courts to apply constitutional limitations to private entities when they engage in functions traditionally exclusively reserved to the government. Under this doctrine, the Court has held that a company town must afford speakers the protection of the First Amendment, but that a shopping center does not. Marsh v. Alabama (1946) [p. 1471]; Hudgens v. NLRB (1976) [p. 1475].

The "judicial enforcement" exception to the state action doctrine says that a court's enforcement of a private agreement may constitute state action. Accordingly, judicial enforcement of a restrictive covenant that requires an unwilling party to discriminate on the basis of race violates the Fourteenth Amendment. Shelley v. Kraemer (1948) [p. 1479].

The "joint participation" exception to the state action doctrine says that a private party may engage in state action in the following situations:

(1) when the private party takes an action and has a close and interdependent financial relationship with the government, such as a lease in a public building, Burton v. Wilmington Parking Authority (1961) [p. 1483];

(2) when the private party exercises powers under a statute or other law in circumstances making it fair to say that the private party is a state actor, Lugar v. Edmondson Oil Co. (1982) [p. 1483]; Edmonson Leesville Concrete Co. (1991) [p. 1488]; or

(3) when the government or a government official takes an action pursuant to a conspiracy with the private party, NCAA v. Tarkanian (1988) [p. 1491]; Dennis v. Sparks (1980) [p. 1496].

APPENDIX B: SUPPLEMENTARY MATERIALS

Federalist No. 44 (excerpt)

"Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." Federalist No. 44 (James Madison)

Note on Federal Civil Rights Legislation

The 13th and 14th Amendments provide important civil rights protections. The 13th Amendment bans slavery, while the 14th Amendment prohibits any state from denying to any person within its jurisdiction the "equal protection of the laws." You will learn more about the 13th and 14th Amendments if you take Constitutional Law II. We are interested in the 13th and 14th Amendments in Constitutional Law I because they touch upon the distinction between "state action" (i.e., action by the government or a government official) and "private action" (i.e., action by individuals and corporations).

Section 2 of the 13th Amendment and section 5 of the 14th Amendment each grant Congress the power to enact legislation to enforce them. An example of legislation passed by Congress using its power under section 2 of the 13th Amendment is 42 U.S.C. § 1982. This statute provides:

APPENDIX B: SUPPLEMENTARY MATERIALS

42 U.S.C. § 1982. Property rights of citizens

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

An example of legislation passed by Congress using its power under section 5 of the 14th Amendment is 42 U.S.C. § 1983. This statute provides:

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

We will see examples of 42 U.S.C. § 1983 in Lugar v. Edmondson Oil Co. [p. 1483], Edmonson v. Leesville Concrete [p. 1488], NCAA v. Tarkanian [p. 1491], and Dennis v. Sparks [p. 1496].

APPENDIX C: LEARNING OUTCOMES

This appendix identifies the "learning outcomes" for this course in accordance with ABA Accreditation Standards 301 and 302 and the Guidance to these Standards.

(a) Knowledge and understanding of substantive and procedural law

Upon completing Constitutional I, students should know and understand the substantive and procedural law pertaining to these subjects:

1. Judicial review of the constitutionality of federal and state laws
2. Political Question doctrine
3. Case or Controversy requirement
4. Ripeness and Mootness doctrines
5. Requirement of standing
6. Statutory limitations on the Supreme Court’s jurisdiction
7. Preemption of state laws under the Supremacy Clause
8. "Dormant" or "Negative" Commerce Clause doctrine (including the uniform national standard test, the discrimination test, the excessive burden test, and the congressional consent exception)
9. Powers of Congress in general
10. Modern Commerce Clause doctrine
11. Taxing powers
12. Spending powers
13. War and Treaty power
14. State governmental immunity from federal regulation
15. President's powers over domestic affairs
16. President's powers over foreign affairs
17. Separation of powers in general
18. Unorthodox attempts to exercise legislative power
19. Unorthodox attempts to exercise executive power
20. State attempts to regulate the House and Senate
21. Bills of Attainder
22. Impairment of contracts by state laws
23. Physical takings of private property

24. Regulatory takings of private property
25. State Action doctrine
26. Public Function, Judicial Enforcement, and Joint Participation exceptions to the State Action doctrine

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context

When assigned to read a case, students should be able to identify and discuss the facts, the plaintiff's claim, the defendant's defense, the remedies sought, the pertinent legal rules, the issue for decision under these rules, the arguments of the parties, and the holding and reasoning of the court; apply the holding to hypothetical variations of the facts; discuss the logical strengths and weaknesses of the parties' arguments and the court's reasoning; and identify and analyze competing policy considerations about what the law should be.

When given a hypothetical problem, students should be able to identify and discuss any claims and defenses that the parties might assert and the remedies that they might seek.

Students should be familiar with the history of the drafting of the Constitution, the goals of its Framers, criticism of these goals, and alternative theories about how to interpret the Constitution.

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system

Students should be able to evaluate the legal advice that was given in actual cases, suggest what would have been better legal advice, and formulate advice that should be given in the future.

Students should be able to identify and discuss various ethical issues that arise in constitutional cases (e.g., whether lawyers should advise government officials that they can violate the Constitution because various doctrines might prevent judicial review).

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession (including, but not limited to, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and

management of legal work, collaboration, cultural competency, and self-evaluation)

Students should be able to present arguments as if they were representing clients in constitutional disputes.

Students should be able to discuss controversial legal and policy issues in a professional and respectful manner.

Students should understand the role of lawyers in advising clients (including government officials) about constitutional issues.

Students should be familiar with those events in U.S. history (e.g., the Revolutionary War, the Founding Era, Slavery and the Civil War, the Great Depression, World War II, the Civil Rights Era, Watergate, etc.) that are necessary for understanding the constitutional issues covered in the course.