

Syllabus For

CONSTITUTIONAL LAW II

(Course No. 6380-20; 3 credits)

Professorial Lecturer Gregory E. Maggs

Content of the Course:

This course covers individual rights under the U.S. Constitution. Subjects covered include the application of the Bill of Rights to the states; the freedom of speech, association, and religion; the right to keep and bear arms; procedural and "substantive" due process of law; equal protection of the laws; citizenship; the "privileges or immunities" of citizens of the United States; and legislative protection of constitutional rights.

Learning Outcomes (ABA Accreditation Standards 301 & 302)

For the expected "learning outcomes" for this course, please see the "learning outcomes statement" at the end of this syllabus.

Class Schedule:

This course will meet via Zoom from 6:00-8:00 p.m. every Wednesday and every other Friday (i.e., Friday 1/8, 1/22, 2/5, 2/19, 3/12, 3/26, and 4/9). The first class is on Wednesday 1/6. The class will not meet during the week of spring break (3/1 - 3/5). On the last day, Friday 4/9, the class will meet from 6:00-6:55 p.m.

Office Hours, Email, Telephone:

I will hold "office hours" for answering questions via Zoom at times to be announced. You also may contact me by email at gmaggs@law.gwu.edu.

Required Books:

The assigned casebook is: Gregory E. Maggs & Peter J. Smith, *Constitutional Law: A Contemporary Approach* (5th ed. 2021), ISBN: 9781684675715. Several students have asked whether the 4th edition of this textbook will suffice because they already own it

or because they can obtain a used copy cheaply. The choice is difficult. On one hand, the 5th edition is expensive and we will read only a handful of cases that appear in the 5th edition but not the 4th edition. On the other hand, using the 4th edition might be inconvenient because the page numbers in the 5th edition have changed. One compromise might be to start with the 4th edition if you already own it, and buy the 5th edition only if using the 4th edition turns out to be too much of a hassle.

#### Final Examination:

This course will have a three-hour, open-book examination. The Law School has not yet announced final plans for administering spring examinations. But it is likely that you will have a 24-hour period, beginning on Tuesday, April 27, at 6:30 p.m., in which to take the examination.

#### Class Participation:

We will conduct class via Zoom. A panel of students will be "on-call" during each hour of our class sessions. Members of the on-call panel will participate with their video cameras turned on. Students who are not members of the on-call panel will participate using the chat window, with their video cameras turned off. I will direct some questions to these non-panel members, to which anyone may respond simply by typing answers in the chat window.

#### Recording of Classes:

All classes will be recorded. The recordings may be viewed through the Law School portal.

#### Reading Assignments and Problems:

At the end of each class, I will tell you how far to read for the next class. You need not read the notes and problems following the text and cases in the casebook unless they are specifically assigned.

### I. THE CONSTITUTION AND INDIVIDUAL RIGHTS

#### A. INTRODUCTION

Text, pp. 551, 553-556

Points for Discussion (a) & (b), pp. 556-558

#### B. APPLICATION THE BILL OF RIGHTS TO THE STATES

Text, p. 558

Barron v. Baltimore, pp. 558-559

Points for Discussion (a) & (b), p. 560

Text, pp. 560-561, 571-573

Adamson v. California, pp. 573-578

Point for Discussion (a), pp. 578-580

## II. FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT

### A. INTRODUCTION

Text, pp. 997, 999-1003

Points for Discussion (a), (b) & (d), pp. 1000-1002

### B. TYPES OF RESTRICTIONS AND REGULATIONS

#### 1. Content-based Restrictions

Text, pp. 1003-1005

Reed v. Town of Gilbert, Arizona, pp. 1005-1014

Point for Discussion (a), p. 1014

Iancu v. Brunetti, pp. 1019-1024

Points for Discussion (a) & (b), p. 1024

#### 2. Reasonable Time, Place, or Manner Restrictions

Text, p. 1025

Ward v. Rock Against Racism, pp. 1025-1029

#### 3. Generally Applicable Regulations of Conduct

Text, p. 1030

United States v. O'Brien, pp. 1031-1034

Point for Discussion (a) & (b), pp. 1034-1035

#### 4. Prior Restraints

Text, pp. 1042

New York Times v. United States, pp. 1043-1048

Point for Discussion (a), pp. 1048-1049

5. Vague or Overbroad Restrictions

Text, pp. 1050-1051

NAACP v. Button, pp. 1051-1056

Point for Discussion (a), p. 1056

C. CATEGORIES OF SPEECH

1. Incitement and Advocacy of Crime

Text, pp. 1067-1072

Brandenburg v. Ohio, pp. 1073-1074

Point for Discussion (a), p. 1075

2. Defamation and Related Torts

Text, pp. 1076-1077

New York Times Co. v. Sullivan, pp. 1078-1083

Point for Discussion (e), pp. 1085-1086  
[United States v. Alvarez]

3. Obscenity

Text, pp. 1095-1096

Roth v. United States, pp. 1096-1100

Points for Discussion (a) & (d), pp. 1100-1101  
[Miller v. California]

4. Symbolic Conduct

Text, pp. 1107-1108

Texas v. Johnson, pp. 1108-1114

Points for Discussion (a) & (d), pp. 1115-1116

5. Provocative Speech

Text, p. 1116

Chaplinsky v. New Hampshire, pp. 1116-1118

Points for Discussion (b) & (c), pp. 1118-1119

Text, p. 1119

Cohen v. California, pp. 1119-1122

Points for Discussion (a) & (b), pp. 1122-1123

Text, p. 1123

R.A.V. v. City of St. Paul, Minn., pp. 1123-1130

Point for Discussion (b), p. 1131

#### 6. Commercial Speech

Text, pp. 1132-1134, 1134-1135

44 Liquormart v. Rhode Island, pp. 1135-1140

Point for Discussion (a) & (b), pp. 1140-1141

#### 7. Campaign Contributions and Expenditures

Text, p. 1142

Buckley v. Valeo, pp. 1142-1150

Points for Discussion (a) & (b), p. 1150

Text, pp. 1151-1152

Citizens United v. FEC, pp. 1152-1160

Points for Discussion (a) & (b), p. 1160

#### 8. Speech of Public Employees

Text, pp. 1160-1161

Garcetti v. Ceballos, pp. 1161-1165

Point for Discussion (a), p. 1166

Executive Summary, pp. 1170-1173

### III. FREEDOM OF THE PRESS UNDER THE FIRST AMENDMENT

#### A. APPLICABILITY OF GENERAL LAWS TO THE PRESS

Text, p. 1175

Point for Discussion (b), p. 1176

Text, pp. 1176-1177

Branzburg v. Hayes, pp. 1177-1182

Points for Discussion (a), (b) & (d), pp. 1182-1183

Cohen v. Cowles Media Co., pp. 1188-1191

Point for Discussion (a), p. 1191

#### B. PRESS ACCESS TO GOVERNMENT PROCEEDINGS

Text, p. 1202

Richmond Newspapers, Inc. v. Virginia, pp. 1202-1208

Point for Discussion (a) & (b), pp. 1208-1209

Executive Summary, pp. 1209-1210

### IV. FREEDOM OF ASSOCIATION UNDER THE FIRST AMENDMENT

#### A. PENALIZING INDIVIDUALS FOR JOINING GROUPS

Text, pp. 1211-1212

Point for Discussion (b), p. 1213

Text, pp. 1213-1214

NAACP v. Claiborne Hardware, pp. 1214-1216

Points for Discussion (a) & (b), p. 1216

Baird v. State Bar of Arizona, pp. 1217-1220

#### B. FREEDOM NOT TO ASSOCIATE WITH OTHERS

Text, pp. 1226-1227, 1232

Boy Scouts of America v. Dale, pp. 1232-1238

Janus v. American Federation, pp. 1239-1243

Executive Summary, pp. 1244-1245

V. FREEDOM OF RELIGION UNDER THE FIRST AMENDMENT

A. THE ESTABLISHMENT CLAUSE

1. Introduction

Text, pp. 1247-1248

Points for Discussion (a) & (b), pp. 1248-1251

2. Government Aid to Religious Institutions

Text, pp. 1253-1254, 1262-1263

Lemon v. Kurtzman, pp. 1263-1267

Points for Discussion (a)-(c), pp. 1267-1270

Zelman v. Simmons-Harris, pp. 1272-1279

Point for Discussion (a), p. 1280

Text, pp. 1281-1282

3. Religion in Governmental Institutions

Text, pp. 1282-1285

Engel v. Vitale, pp. 1286-1289

Point for Discussion (a) & (c), pp. 1289-1290

Marsh v. Chambers, pp. 1315-1318

Point for Discussion (a)-(e), pp. 1318-1321

Am. Legion v. Am. Humanist Assoc., pp. 1348-1358

Points for Discussion (a) & (b), p. 1358

B. THE FREE EXERCISE CLAUSE

Text, pp. 1359-1362

Sherbert v. Verner, pp. 1362-1366

Employment Div. v. Smith, pp. 1373-1383

Points for Discussion (a) & (d), pp. 1383-1384

Text, p. 1385

Trinity Lutheran v. Comer, pp. 1397-1405

Point for Discussion (a), p. 1405

Executive Summary, pp. 1417-1418

VI. THE RIGHT TO KEEP AND BEAR ARMS UNDER THE SECOND AMENDMENT

District of Columbia v. Heller, pp. 23-36

Points for Discussion (b) & (e), pp. 36-38

VII. THE RIGHT TO DUE PROCESS UNDER FIFTH & FOURTEENTH AMENDMENTS

A. PROCEDURAL DUE PROCESS

Text, p. 733

Cleveland Bd. of Educ. v. Loudermill, pp. 733-738

Points for Discussion (a) & (b), pp. 738-742

Executive Summary, pp. 742-743

B. SUBSTANTIVE DUE PROCESS AND ECONOMIC LIBERTY

Text, pp. 597-599

Lochner v. New York, pp. 599-603

Point for Discussion (a), pp. 603-604

Text, pp. 604-605

West Coast Hotel Co. v. Parrish, pp. 606-608

Point for Discussions (a)-(c), p. 608

Text, p. 609

[United States v. Carolene Products Co.]

Williamson v. Lee Optical Co., pp. 610-611

Points for Discussion (a)-(c), pp. 611-612

C. SUBSTANTIVE DUE PROCESS AND FUNDAMENTAL RIGHTS

1. Early Cases

Text, p. 613

Pierce v. Society of the Sisters, p. 614

Points for Discussion (a)-(c), p. 615

Text, pp. 615-616

Skinner v. Oklahoma, pp. 616-619

Point for Discussion (a), p. 619

## 2. Contraception and Abortion

Text, p. 620

Griswold v. Connecticut, pp. 620-627

Points for Discussion (c) & (e), pp. 628-629

Roe v. Wade, pp. 629-635

Points for Discussion (a) & (b), p. 635

Text, p. 637

Planned Parenthood v. Casey, pp. 637-650

Points for Discussion (a)-(c), p. 650

## 3. Marriage and Family

Text, p. 667

Loving v. Virginia, pp. 667-668

Michael H. v. Gerald, pp. 671-678

## 4. Sexuality

Text, p. 681

Lawrence v. Texas, pp. 682-688

Point for Discussion (c) & (d), pp. 688-689

Obergefell v. Hodges, pp. 691-704

Point for Discussion (a), pp. 704-705

## 5. Death

Text, p. 712

Cruzan v. Missouri Dep't of Health, pp. 713-718

Point for Discussion (d), p. 719

Executive Summary, pp. 725-727

## VIII. THE RIGHT TO EQUAL PROTECTION

### A. INTRODUCTION

Text, pp. 745, 747-750

### B. APPLICATION TO THE FEDERAL GOVERNMENT

Text, p. 750

Bolling v. Sharpe, pp. 750-751

Point for Discussion (a) & (c), pp. 751-753

### C. RATIONALITY REVIEW

Text, p. 753

NYC Transit Authority v. Beazer, pp. 757-760

Points for Discussion (a) & (b), pp. 760-761

Executive Summary, pp. 761-762

### D. DISCRIMINATION ON THE BASIS OF RACE

#### 1. Facial Discrimination

Text, pp. 767, 771-772

Strauder v. West Virginia, pp. 772-774

Text, p. 775

Korematsu v. United States, pp. 775-781

Point for Discussion (a), p. 781

#### 2. Discriminatory Purpose and Effect

Text, pp. 783-785

Yick Wo v. Hopkins, pp. 785-786

Point for Discussion (a), p. 787

Text, p. 788

Washington v. Davis, pp. 788-790

Points for Discussion (a)-(c), pp. 790-791

3. "Separate But Equal" Laws

Text, p. 793

Plessy v. Ferguson, pp. 793-796

Brown v. Board of Education, pp. 797-800

Points for Discussion (c)-(e), pp. 800-804

Loving v. Virginia, pp. 804-806

Point for Discussion (a), pp. 806-807

4. Affirmative Action

Text, pp. 808-810

Grutter v. Bollinger, pp. 816-822

Points for Discussion (d)-(f), pp. 826-827

E. DISCRIMINATION ON THE BASIS OF SEX

Text, pp. 850-852

Craig v. Boren, pp. 852-856

Points for Discussion (a)-(c), p. 856

United States v. Virginia, pp. 856-861

Points for Discussion (a) & (b), p. 861

F. DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Romer v. Evans, pp. 891-895

Points for Discussion (a) & (b), pp. 895-900

Executive Summary, pp. 900-902

G. FUNDAMENTAL RIGHTS AND EQUAL PROTECTION

1. The Right to Vote

Text, pp. 903-904

Harper v. Virginia Bd. of Elections, pp. 905-908

Bush v. Gore, pp. 910-914

Point for Discussion (a), pp. 914-915

2. Apportionment

Text, p. 916

Reynolds v. Sims pp. 916-919

Points for Discussion (a) & (b), pp. 919-921

Rucho v. Common Cause, pp. 922-933

Points for Discussion (a) & (b), p. 933

3. Welfare and Education

Dandridge v. Williams, pp. 934-937

Points for Discussion (a) & (b), p. 937

Text, p. 942

Plyler v. Doe, pp. 942-945

Points for Discussion (a) & (b), pp. 945-946

4. Access to the Courts

Text, p. 947

M.L.B. v. S.L.J., pp. 947-949

Points for Discussion (a) & (b), p. 949-950

Executive Summary, p. 950

IX. OTHER FOURTEENTH AMENDMENT PROTECTIONS

A. CITIZENSHIP FOR THOSE BORN IN THE UNITED STATES

Text, pp. 767-768

Dred Scott v. Sandford, pp. 768-770

Point for Discussion (a)-(c), pp. 770-771

B. "PRIVILEGES OR IMMUNITIES"

Text, pp. 560-561

Slaughter-House Cases, pp. 561-569

Points for Discussion (a)-(e), pp. 569-571

Text, p. 580

McDonald v. City of Chicago, pp. 580-590

Point for Discussion (c), p. 591

Executive Summary, p. 952

X. LEGISLATIVE PROTECTION OF INDIVIDUAL RIGHTS

A. ENFORCEMENT OF THE 13TH AMENDMENT

Text, pp. 953-954

Jones v. Alfred H. Mayer Co., pp. 954-956

Points for Discussion (a) & (b), p. 957

B. ENFORCEMENT OF THE 14TH AND 15TH AMENDMENTS

Text, pp. 957-958

United States v. Guest, pp. 958-961

Point for Discussion (a), p. 961

Text, pp. 961-962

South Carolina v. Katzenbach, pp. 962-965

Point for Discussion (a), pp. 965-966

Text, pp. 966-967

Shelby County, Alabama v. Holder, pp. 967-976

Points for Discussion (a) & (b), pp. 977  
Text, p. 982

City of Boerne v. Flores, pp. 982-985

Point for Discussion (a), p. 985

Text, p. 986

United States v. Morrison, pp. 986-989

Points for Discussion (a)-(b), pp. 989-990

Executive Summary, pp. 991-992

## **LEARNING OUTCOMES STATEMENT**

This statement 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 Law II, students should know and understand the law pertaining to the application the Bill of Rights to the states; the freedoms of speech, association, and religion; the right to keep and bear arms; procedural and "substantive" due process of law; equal protection of the laws; citizenship; and "privileges or immunities" of citizens of the United States.

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

When assigned to read a constitutional law case, students should be able to:

1. 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;
2. apply the holding to hypothetical variations of the facts;
3. discuss the logical strengths and weaknesses of the parties' arguments and the court's reasoning; and
4. 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 any remedies that they might seek.

Students should be able to parse and explain constitutional law provisions, identify ambiguities in statutory provisions, and suggest improved ways of drafting statutory provisions.

Students should be familiar with the history of the Supreme Court's interpretation of the U.S. 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 in similar cases.

Students should be able to identify and discuss ethical issues that arise in constitutional law cases, in raising technical defenses to avoid liability, and in giving legal advice that might encourage perjury.

- (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 contract 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 as they enter into contractual arrangements and resolve or litigate disputes.