Organizational Matters

Course Objectives

The goals of this course are to teach you to:

A. Craft constitutional law arguments of the highest quality by the standards of the legal profession, with the aim of persuading judicial decisionmakers. As in your other courses, this will require you to (1) master the relevant policy, text, history, and precedent and (2) integrate those elements into an intellectually satisfying whole; and

B. Provide appropriate advice to clients whose problems involve constitutional law issues.

Course Policies

The course policies are the same as they were in this section of Constitutional Law I during the fall semester. Most of you took that course from me, so I reproduce only a compressed version below for your convenience. A complete set of Constitutional Law I materials is available on TWEN and from my assistant. You will find me notably unsympathetic later to any crises arising from your failure to abide by these policies.

Examinations and Grading

This is a one semester, 3-credit course. It will be graded by a closed-book examination at the end of the semester. I may or may not circulate the fact pattern a few days in advance.

Although the syllabus numbering is continuing sequentially to assist you in putting the forthcoming material into context, we are in a new course now. Whether you had me during the first semester or are starting with me at this point, and whether you did well or poorly in Constitutional Law I, you begin on a fresh page.

You are required to take two of the three Review Exercises that will be administered this semester. The policies in this regard are the same as those in the handout entitled “Review Exercises” that was circulated in the first semester (App. 1).

Communications

My office is in room 212, ext. 35167, LAWEMF@Hofstra.edu. You will find my
assistant, Joyce Cox, LAWJAC@Hofstra.edu, ext. 36339, Rm. 216 helpful on all administrative matters relating to the course and are encouraged to make contact there in the first instance regarding them. These include obtaining extra copies of class announcements or handouts and assistance in determining the best time to see me or way to contact me.

In addition, you may generally expect to find me in my office this semester on Wednesdays 9:10 AM – 10:00 AM, the hour immediately following our Wednesday class.

The TWEN page from the first semester remains operational and if you were signed up then you need do nothing additional. If you were not, sign up. In the event of any difficulties consult Joyce.

You are responsible for the contents of notifications distributed by any of the foregoing methods, as well as the information contained in this and subsequent parts of the course syllabus.

Each class will be audio-recorded, and you will have online access for review purposes. If you need assistance in this regard, consult Joyce.

**Attendance Policy**

I will provide sign-in sheets for each regularly-scheduled class hour, which will be the dispositive evidence of your attendance. Each student is responsible for being present at the time class begins and for signing in. Any attempt to subvert the accurate recording of student attendance during each class hour, by falsification of the sign-in sheets or otherwise, is a violation of the Code of Academic Conduct.

You may miss no more than six class hours this semester. Accommodations may be made for students who must be absent for religious reasons and in cases of truly compelling hardship. In the event that you believe yourself to be in such circumstances, you communicate with Joyce at the time of the absence. I will do nothing respecting these issues until late in the semester. At that point I will review the file of anyone with more than the prescribed number of absences and determine whether to grant any excuses that may have been sought or instead to forward the file to the Office of Student Affairs with a view to denying you credit for the course.

**The Syllabus**

The materials for each assignment are listed in the order in which you should read them. Except as otherwise indicated, you are responsible for all the material in the assigned pages, whether or not specifically discussed in class. This includes (a) the notes and problems, (b) all of the terminology appearing in the cases, (c) the constitutional, statutory and other materials referred to in the assigned pages. And, of course, you need to know the basis of subject matter jurisdiction in each case that we read. On this point, as on many others, you may find that much confusion disappears (and new insights emerge) if you take the time to read the unedited version of the case.
Unless otherwise instructed, you should assume that we will cover one assignment per class hour. This means that on days when we meet for two class hours, two assignments are due.

Resource Note

Two study aids that, used with appropriate care, you might find helpful this semester are Christopher N. May & Allan Ides, CONSTITUTIONAL LAW, INDIVIDUAL RIGHTS: EXAMPLES AND EXPLANATIONS (Aspen) and Paul E. McGreal & Linda S. Eads, QUESTIONS AND ANSWERS: CONSTITUTIONAL LAW (LexisNexis).

Assignments

XII. Equal Protection

Note: I suggest you look at App. 2-3 and App. 338-39 of the Constitutional Law I materials as a reminder of where we are at this point, viz. at Paragraph 4 of App. 338. (Proceeding from there, Paragraph 5 will be covered in Unit XIII below; Paragraph 6 in Unit XIV; and Paragraph 7 in Unit XV).

A. Strictish Scrutiny: Racial Classifications

Asst. 28 - Course Book 520-22; 465 n.2-472; 523-26; App. 399-401.

Notes:

I haven't done anything mysterious in organizing the CB portion of this Assignment. I have simply put the cases into chronological order for you.

If you are interested in a bit more on the final article in the Assignment, try “He Lost in Court, Won in History,” Los Angeles Times (1/31/2011) 2011 WLNR 1914691 and/or http://www.nytimes.com/2012/01/04/us/gordon-hirabayashi-wwii-internment-opponent-dies-at-93.html?_r=0 and/or https://www.nytimes.com/2011/08/06/us/06internment.html?pagewanted=1&_r=2&ref=us

As usual, you will find on reserve a good deal of background reading to give you a sense of the historical context of the cases. One particularly valuable source is Eric Foner's history of Reconstruction, entitled FOREVER FREE. For enjoyable leisure reading relevant to this assignment try David Guterson's novel, SNOW FALLING ON CEDARS (1995).


Note: A good book placing Loving in its broad historical context is Pascoe, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2008). The case has also been the subject of a well-done HBO documentary, The Loving Story (2012), from which you may learn, among other things, that the lawyers who litigated the case did so just after graduating from law school.

Asst. 30 - Course Book 540-61; App. 414-23.
Notes:
The Supreme Court’s latest foray into this field is Fisher v. University of Texas (Supp. 41), which I mention for your awareness of current events but am not assigning, since it adds nothing to the law.

As a purely optional review resource if you take a look at my remarks on http://c-spanvideo.org/program/EducationMor (starting around the 10:35 mark on the recording) you are likely to hear a number of themes from the semester so far.

B. Rational Basis Scrutiny: Toothless and Toothier

Asst. 32 - Course Book 497-520.

C. Intermediate Scrutiny: Reality and Sexuality

Asst. 33 - Course Book 696-714; 717 n. 2-719.

Asst. 34 - Course Book 629-33; App. 424; Course Book 633-73; App. 425.

D. Reprise

Asst. 35 –App. 426-53; Supp. 48-64 (an overly-long version of the case, which you should feel free to skim).

Notes: This material is not here principally to present the current state of affirmative action law. Rather, the assignment is intended to give us a chance to think broadly about many of themes of the course to date – starting with the nature, purposes, techniques and control of judicial review and progressing through the political history we have talked about in connection with various doctrinal subjects. Before class, see how many of these connections you can think of for yourself. (Then, if you are interested in reading one effort along these lines, take a look at App. 454-460).

Your reward should be the conclusion that you have actually learned a great deal so far this year. If you want further proof, skim Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427 (2007).

XIII. Implied "Fundamental" Rights

Note: A number of the cases in this unit are among the most controversial in all of constitutional law -- in some instances because of their outcomes, in others because of their methodology. We will be recurring to the questions: Does the Court have any business in this area at all? If so, what objective standards exist to constrain its decisionmaking? These are open issues, and you need not necessarily believe everything you read.

Asst. 36 – App. 461-67; Course Book 776-88; 807-24.
Note: The Court's most recent incorporation case is *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) (CB 741). I don't consider it worth reading.

Asst. 37 - Course Book 824-41.

Asst. 38 - Course Book 841-70; Skim Course Book 873-909.

Note: The object here is not for you to attempt to grasp whatever fleeting rules may exist today with respect to the validity of particular regulations of abortion. Rather, our focus will be on the questions indicated in the first Note to this unit, as well as on some persisting themes in the course respecting judicial power.

Asst. 39 - Course Book 909-37; App. 468-73; Supp. 69-82; App. 474-75 (a chart to which I would have added *City of Clerburne* (CB 505); Course Book 937-51; App. 476.

Note: I expect to take two class hours to cover this Assignment.

XIV. Procedural Due Process

Asst. 40 - Course Book 953-73; App. 477-79.

XV. State Action

Asst. 41 - Course Book 1555-82.

Note: The outline at App. 480-81 summarizes Assts. 41-42. Make use of it at whatever points during your reading you find helpful.

Asst. 42 - Course Book 1582-1608.

Notes:

To review the subject of state action you might take a look at *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 2014 U.S. App. LEXIS 18532, 39 I.E.R. Cas. (BNA) 145 (2d Cir. 2014), a simple fact pattern that the court dealt with appropriately and that I would expect you to be able to handle easily on an examination.

To review a number of issues covered in the course to date you might take a look at *United States v. Nelson*, 277 F.3d 164, 2002 U.S. App. LEXIS 213 (2d Cir. N.Y. 2002). You should be able to understand every legal position taken by the parties, as well as the court’s dispositions.