Constitutional Law
Evening Session,
Fall 2014

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Both professors are Members of the Texas Bar
and are experienced in constitutional litigation.

Monday, 6:00-7:20
Tuesday, 7:30-8:20
Wednesday, 6:00-7:20
213 BLB

Syllabus

Required Text: The casebook is Kathleen M. Sullivan and Noah Feldman, Constitutional Law (18th ed. 2013) (S&F). You need not buy the supplement, which is not worth the price. We will provide any necessary cases via email, or in this syllabus, without charge. We may distribute other materials, including newly decided cases, via email or in hard copy as appropriate.

Attendance: Pursuant to the Law Center's policy, you must attend at least 80 percent of our regularly scheduled classes. Failing to do so will prevent you from receiving credit for the course. Under the UHLC attendance policy, we reserve the right to drop any student who fails to attend 80 percent of our class sessions. You are expected to attend every session; however, if you need to miss a class session because you are ill or have another good reason, please send an email to Professor Casarez to explain. We will keep track of attendance by passing around a sign-in sheet. It is an Honor Code violation to sign in for another student. As a courtesy, please arrive at class on time. We reserve the right to adjust final grades downwards for habitual tardiness.

Class Participation and Decorum: Please come to class on time and prepared to discuss the assigned material. That means that you have read the material carefully and thoughtfully, and not just skimmed it. We will call on students in class, by name, at random, and without warning. We do this because we believe both that thorough preparation is the key to being a good lawyer, and that in-class dialogue is essential to learning and understanding the material. We reserve the right to raise or lower grades by one increment, e.g., raising an exam grade from B to B+, or vice versa, based on class performance, subject to the exigencies of the grading curve. Please note that we will measure classroom participation by the quality and not the quantity of your contributions.

You may bring appropriate technology into the classroom, but please do not use your laptop, tablet, phone or other electronic device during class for anything besides taking notes. Use of the Internet during class is distracting for everyone, and is quite apparent to your instructors. Students who nevertheless use the Internet during class will have their class participation grade lowered, and we reserve the right to ask you to leave.

Grading: Your grade will be determined largely on the basis of the final exam, which will be an in-class, four hour open book exam. You will be allowed to use your notes, but since your computer's memory will be disabled, you'll have to print your notes out. The notes must be yours, but may include those of a study group of which you took an active part and made a substantial contribution. All of the assigned readings, including things we distribute via email or hand out in class, as well as our class discussions, will be fair game for the exam. As stated above, class attendance and participation will also be considered in determining your grade.

Some preliminary thoughts:Constitutional Law is different from the courses you have taken up til now. It isn't daunting and shouldn't worry you, but it is different. The cases are not illustrations of a principle of law; they are the law, generally the only case directly on point. The Supreme Court doesn't repeat its decisions though there may be later variations and nuances that change the meaning of a previous case. The opinions are often long, though they have been drastically edited down, in the casebook by its editors, and on line, by the two of us. There are nine justices on the Court, so it is common to have concurrences and dissents that are often immensely important. In addition, dicta are often as important as holding, and sometimes concurrences or dissents may be more important than the majority or plurality opinion.

When an opinion is joined in by a majority of the justices sitting, normally five out of nine, the opinion is styled the "opinion of the Court," not the opinion of the justice who wrote it, and is binding on lower courts. Sometimes, however, there is no majority, and the first opinion – of a plurality, but not of the Court – is important, but not binding on lower courts. The other opinions reaching the same result but based on different reasoning may end up with greater impact than that of the plurality. Needless to say, these variations often make it difficult to predict how a decision will play out in future years. Some cases have little impact. Others dominate the area after centuries, for example, the first case we read, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

Constitutional Law is based on the Constitution, but it is common to quote former Chief

Justice Charles Evans Hughes's famous aphorism: We are under a Constitution, but the Constitution is what the judges say it is . . . ." That is something of an overstatement, as Hughes certainly knew, but it has a ring of truth. The casebook prints out the Constitution in only fifteen pages (lxv-lxxix), but the cases from the Supreme Court take up the next 1615 pages. (We won't cover more than about half of the material.) We will see that one of the book publisher representatives gives you a pocket Constitution, so that you can more easily refer to its text. Please bring your pocket Constitution to each class.

You are second-year students now, and so some of you may believe that you are above briefing cases. You might, however, want to consider breaking the Rules of the Student Lounge, and briefing the cases in this course, at least until you've decided that you won't benefit from the briefings. Both of us will be available to help you if you are finding a case difficult, and we'll do our best not to play hide the ball. The material is demanding, but the subject is fun, interesting and of the greatest importance, both to you as lawyers and to the nation as a whole.

At times we will put comments in this syllabus, but we'll try to keep the extra reading down to a minimum, doing it only when we think it will be of help to you. In the fourth paragraph of the assignment for our first class, Monday, August 25, 2014, we help you through our first case, the bedrock case of *Marbury v. Madison*. To an extent, we're doing what you need to learn to do on your own, and we debated whether we were doing you a disservice by walking you through, but since *Marbury* is your first case and is difficult, we thought we'd help. Normally, you'll have to do this yourself, though we'll try not to play hide the ball.

I
The Constitution, Judicial Review, and Constitutional Procedural Limitations

Monday, August 25, 2014: The Constitution and Judicial Review. **Read the Constitution. Completely. Then read S&F 1-9.**

We will spend the first half-hour reading the Constitution. It is important to remember that its text is the starting point of all constitutional law. You should always pay attention to its text. Some parts are sort of mechanical, for instance, Article I **§§** 2-7; Art. II **§** 1, second and third paragraphs (usually called clauses), superseded by the Twelfth Amendment, but even these can be critical. The Supreme Court majority in *Bush v. Gore*, 531 U.S. 98 (2000), in which the Supreme Court decided the 2000 presidential election, relied heavily on Art. I § 4, one of those "mechanical" provisions.

While you should not skim any portions of the Constitution, pay particular attention to the Preamble; Art. I **§§** 8 and 9; Art. II §§ 2 and 4; Art. III §§ 1 and 2; Art. VI; the First through Eleventh Amendments; the Thirteenth through the Fifteenth Amendments; and the Nineteenth and Twenty-fifth Amendments. As we've said, every part is important, but let's concentrate on these to begin with. **Do read the entire Constitution.**

Now we turn to judicial review, a particularly American concept, though now widely

used in other legal systems. As today's introduction and the material we will read for tomorrow's class show, *Marbury v. Madison* was the product of the battles between Thomas Jefferson's Republicans (later Democrats – the modern Republican Party was founded in the 1850s) and the Federalists of John Adams, who had been soundly defeated by Jefferson in the 1800 election. John Marshall, whom Adams had made Chief Justice, knew that Jefferson would ignore an order to give William Marbury his commission as a justice of the peace, making the Supreme Court appear ineffectual. As you will see, Marshall carried out a judicial tour de force, admonishing Jefferson and his Secretary of State, James Madison, and yet not giving Marbury his commission.

The critical point is that Marbury sought mandamus, a court order that an officer perform a ministerial act, but sought it not from a federal trial court (then called the Circuit Court), but instead from the Supreme Court. A modern court would first look to its jurisdiction, but Marshall waits until he first decides whether Marbury is entitled to his commission, then whether a court can use mandamus to order an executive officer to perform his duty and only then, whether the Supreme Court is the proper court for the mandamus. In deciding that question, Marshall looks to Section 13 of the Judiciary Act of 1789 (p. 5 n. 1), reads it (rather questionably) to give the Supreme Court original (not appellate) jurisdiction over writs of mandamus, and then goes to Article III §2, clause 2 ("In all Cases affecting Ambassadors. . ."), dealing with the original and appellate jurisdiction of the Court. Finding a collision between that clause of the Constitution and Section 13, he asks whether a statute passed by Congress or the text of the Constitution should govern, and by resolving that question in favor of the Constitution, both gets himself out of the risk of being dissed by Jefferson and creates the critical idea of judicial review. Read his opinion closely and carefully.

Tuesday, August 26, 2014: <u>The Background and Importance of *Marbury*. The Power of the Supreme Court Over State Courts (Over Everybody?).</u> **S&F 9-23 n. 2.**

The discussion about the legitimacy of judicial review still rages. The Court did not hold another federal statute unconstitutional until *The Dred Scott* Case in 1857, and it can be argued that the issue is resolved by the Court's consistent use of judicial review since then. Nonetheless, if there is doubt about the legitimacy of judicial review, that is an argument against its aggressive use. Bear these arguments in mind throughout the course.

Martin v. Hunter's Lessee and *Cohens v. Virginia* make clear the Court's power over state courts, which was always less in doubt than its judicial review over federal law. *Cooper v. Aaron*, decided at a very important point in the early civil rights days, finds the Court rejecting the southern racists' unconvincing arguments that a state can nullify a decision of the Supreme Court, but also saying that the courts are the ultimate interpreters of the Constitution. (In effect, "We are the Supremes. Get out of the way!") Does *Marbury* justify *Cooper v. Aaron*?

Wednesday, August 27, 2014: <u>Limitations On the Court – Political and Procedural.</u> **S&F 23 n. 3-47 n. 3; Note on *Clapper v. Amnesty International* (U.S., 2013).**

The political overtones of the Supreme Court have been much discussed, particularly in the last several years, in which the Court made important rulings on the Voting Rights Act, the

Affordable Care Act, same sex marriage and the right of a closely held corporation to assert its owners' religious beliefs to get out of having to pay for medical insurance providing forms of contraceptives. The next president will probably make at least three appointments to the Court, affecting its balance for the next twenty years or more. (Justice Ruth Bader Ginsburg is 81 and has had bouts of cancer, though she shows no sign of retiring; Justice Stephen Breyer is 76 and Justices Anthony Kennedy and Antonin Scalia are each 78. Note, however, that Justice John Paul Stevens remained on the Court until he was 90. You can look at the justices' ages in the Table of Justices, S&F 1617-24.) The composition of the Court is likely to be a major topic in the 2016 election.

Standing has to do with whether a plaintiff is permitted to raise a legal argument or advance a legal claim, of himself or a third party or of the general public. Justiciability deals with whether a claim satisfies the requirement of Article III §2. limiting the jurisdiction of the federal courts to "cases" and "controversies." The issue whether a dispute can even be heard by a federal court, whether a plaintiff can raise a substantive legal argument, and whose rights he or she can raise are critical to a litigator. The first requirement in a lawsuit is to get into court. It does no good to have a good constitutional argument if the courts say you can't make it.

Are the rules of justiciability and standing limitations on judicial power, or are they devices that judges use to avoid deciding for plaintiffs in cases where the judges really like the defendants' substantive positions, but don't want to say so? (Note the lineups in *Lujan* and *Massachusetts v. EPA.)* In *Lujan* the Defenders of Wildlife seem to have a strong statutory argument that the change in the agency ruling on the applicability of Section 7(a)(2) was incorrect and beyond the Interior Department's powers. But it has trouble finding plaintiffs who can claim an injury in fact. What does that mean, and what does Justice Scalia mean by "redressability?" In *EPA* the agency denied that it had to regulate greenhouse gasses, but the decision of the Supreme Court upholding Massachusetts's claim required the Bush Administration to do so.

The *Lujan* opinions are also useful in showing the difficulties of figuring the legal impact of Supreme Court opinions. Note that Scalia's opinion on redressability (Part III–B) is not an opinion of the Court. There are three separate opinions, involving five justices. Justices Kennedy and Souter join in Part IV, but with "the following observations." What does that concurrence mean for Part IV? When you see the introduction listing which justices joined which parts of an opinion, it makes sense to mark that in the margin by the parts in question. That way you can see which parts are binding on lower courts and which are not (or are in doubt, as with Part IV here).

A post-casebook decision: In *Clapper v. Amnesty International*, 570 U.S. ___, 133 S. Ct. 1138 (2013), the Court rejected, on "Article III standing" grounds, a challenge to the Foreign Intelligence Surveillance Act (FISA) that allowed the Attorney General and the Director of National Intelligence to get approval from the Foreign Intelligence Surveillance Court (FISC or "the FISA Court" – a secret court that has recently been the subject of considerable attention and criticism) to obtain foreign intelligence information from surveillance of persons who are not "United States persons." The challenge was brought by a group of attorneys and human rights, media and other organizations that claimed they were in contact with individuals who were likely targets of the surveillance, and that they would have to take burdensome precautions to protect

the confidentiality of their communications with these persons. The majority said that the "threatened injury must be *certainly impending* to constitute injury in fact," and alleging "*possible* future injury" is not adequate (emphasis in the original), and found that the government might not use this procedure, might not get the FISA Court's permission, and might not target the people in question. Justices Ginsburg, Breyer, Sotomayor and Kagan dissented, saying that the harm was not speculative (the FISA Court rarely has refused government requests for surveillance authorization) and was "as likely to take place as are most future events that common sense inference and ordinary knowledge of human nature tell us will happen."

Monday, September 1, 2014: Labor Day. No class.

Tuesday, September 2, 2014: Prudential and Constitutional Standing Rules; Political Questions. **S&F 47 n. 4 - 71.**

II
Limits on Federal Power

A. The Basic Notion of Federalism

Wednesday, September 3, 2014: The States and the National Government. **S&F 73-96. Read Art. I §8, cl. 18 (the Necessary and Proper Clause); Art. VI, cl. 2 (the Supremacy Clause); the Tenth Amendment.**

Monday, September 8, 2014: Are There Limits to the Necessary and Proper Clause? Where Do We Find Them? **S&F 96-107.**

B. The Commerce Power

Tuesday, September 9, 2014: The Early Cases, the New Deal, and The Court-Packing Scheme. **S&F 109-24.**

Wednesday, September 10, 2014: The Revolution of 1937 and the Radical Expansion of Federal Power. The Partial Counter-Revolution of 1995 and 2000; the Counter-Counter-Revolution of 2005? **S&F 125-154.**

Monday, September 15, 2014: The Current Court and the Commerce Power – the Concept of "Commandeering": of Broccoli and the Tenth Amendment. **S&F 154-79.**