

**The Supreme Court in United States History:
PSC 212
Joel Seligman**

SYLLABUS

In this syllabus, Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* (10th ed. 2012) is termed Casebook; materials in the additional packet of materials are termed Handout.

Jan. 27 READING A CASE: *Brown v. Board of Education*, Casebook 670-674, Handout 1-7.

WRITING ASSIGNMENT ONE: Pass/Fail – Due Jan. 27, beginning of class. Maximum length two pages.

Write a brief for the *Brown* case, using the format given in the Handout at page 7.

Feb. 3 THE CONSTITUTION AND THE SUPREME COURT. Articles of Confederation, Handout 8-11; United States Constitution, Casebook liii-lxiii; *Marbury v. Madison*, Casebook 1-9; Excerpt from Federalist Paper No. 78, Casebook 10-11; Using the Parts of a Judicial Decision, Handout 12-13.

WRITING ASSIGNMENT TWO: Pass/Fail: Due February 3, beginning of class.

Read the material in the Packet entitled, Using the Parts of a Judicial Opinion, Handout 12-13, before preparing your response to the following problem.

You are Counsel to President Jefferson. The President is unsure of the significance of a recent U.S. Supreme Court decision, *Marbury v. Madison*, and seeks your advice. You are to brief the case in 1-2 pages, and prepare a one page memorandum advising the President on two concerns he has raised (3 pages for the total assignment).

First, the President wants to know if he can publicly dismiss what the Court said about his and Madison's actions as mere *dicta*. Please clarify

what is holding and what is *dicta* in the opinion, and advise the President whether the language about the Jefferson Administration's actions is *dicta*. Second, while the President feels that he "won" this time, he is concerned about the possibility that the Supreme Court might declare unconstitutional the Repeal Act of 1802, which abolished the jobs of the new circuit judges appointed by the outgoing Federalists. Please formulate the rule applicable to future cases on judicial constitutional review of legislation that you formulate from *Marbury v. Madison*. Finally, briefly advise the President on whether in your opinion *Marbury* would support the Court ruling that it had the power to declare the Repeal Act of 1802 unconstitutional, or is too narrow a holding to justify such a ruling.

Feb. 10 The Supreme Court Before the Civil War. Casebook 70-77, 82-89, Handout 14-23.

Feb. 17 Presidential War Powers. Casebook 305-307; *Boumediene v. Bush*, Casebook 325-337; Handout 24-50.

WRITING ASSIGNMENT THREE: Graded; due on February 17, beginning of class.

Write in no more than 3 pages a closing argument to the Senate grounded on Lincoln's suspension of the writ of habeas corpus. Although other legal issues are raised, this is the only issue you are to address.

As sources use: *Marbury* and *Merryman* as your only case precedents; the text of the Constitution before the 13th, 14th, and 15th amendments; and the relevant facts you gleaned from the transcript of "The Impeachment Trial of President Abraham Lincoln." Include in your discussion of *Ex Parte Merryman*: 1) whether the legal issues are the same or analogous in *Merryman* and the impeachment trial; 2) any relevant *Merryman* facts and those from the impeachment trial transcript; and the general classifications under which you determine the facts are or are not relevant; and 3) whether the reasoning in *Merryman* is likely to lead to a similar result in the Senate trial of President Lincoln.

Unlike Writing Assignment Two, you are writing not to report the law to a member of your team, but to *persuade* an outside decisionmaker that your client's position is sound and should be adopted. In persuasive legal argumentation, the conclusion urged should appear in the first paragraph. The argument should be as simple and easy to follow as possible, with a clear organization evident in the topic sentences of the paragraphs. The best arguments should be first, and should be the most fully developed. Emphasize the favorable law and facts; deal with the unfavorable, but in affirmative ways if possible.

To be a complete legal argument, this assignment should include both statement and explanation of the law and also an application of the law to the facts. Statement and explanation of the governing rules of law precedes its application in legal writing. In this portion, one would specify the textual provisions of the Constitution that are relevant, the rule to formulate from the precedent of *Ex Parte Merryman*, and other principles that may or should determine the outcome.

Application of these rules to the facts of the Lincoln impeachment case should follow discussion of the law. Here one would state what Lincoln did and why/why not that violated the governing constitutional rules on suspension of the writ of habeas corpus. For this portion of the argument, read the material in the Handout at 51-53, Using the Parts of a Judicial Opinion, III-IV, about reasoning by analogy and applying precedent to a new fact problem.

Feb. 24 Economic Regulation After the Civil War. *Lochner v. New York*; *Muller v. Oregon*; *Bunting v. Oregon*; *Adkins v. Children's Hospital*; *Nebbia v. New York*, Casebook 487-497; *Carolene Products*, Casebook 235-237; *United States v. Darby*, *Wickard v. Fillburn*, Casebook 201-207; *Gonzales v. Raich*, Casebook 254-255; Note on Nat'l Federation of Independent Business v. Sebelius and NY Times opinion, Handout 54-57.

March 3 Implied Rights. *Griswold v. Connecticut*, Casebook 846-852; *Eisenstadt v. Baird*, Casebook 852-853; *Roe v. Wade*, Casebook 854-861; *Planned Parenthood of Southeastern Pa. v. Casey*, Casebook 865-882; *Gonzales v. Carhart*, Casebook 884-886; *Lawrence v. Texas*, Casebook 895-90, Note on *United States v. Windsor*, Handout 58-59.

March 17 The 13th and 14th Amendments. The Slaughter-House Cases, Casebook 479-484; the Civil Rights Cases, Casebook 596-602; Brown v. Board of Education II, Casebook 676-678; Swann v. Charlotte-Mecklenburg Bd. of Educ., Handout 60-66; Freeman v. Pitts, Handout 67-72.

March 24 Race and Gender Classifications. Adarand Constructors, Inc. v. Pena, Casebook 730-735; Parents Involved in Community Schools v. Seattle School District, Casebook 722-728; Craig v. Boren, Casebook 760-764; Ricci v. DeStafano, Handout 73-80; Fisher v. Univ. of Texas (excerpt), Handout 81-82; Mississippi Univ. for Women v. Hogan, Casebook 770-774; United States v. Virginia, Casebook 774-775; Levels and Standards of Judicial Review, Handout 83.

Note: On March 28, 2014, Columbia University President Lee Bollinger will deliver the keynote address for our 2014 Diversity Conference. The address will take place in the Interfaith Chapel at 8:45 a.m.

WRITING ASSIGNMENT FOUR: Graded, due beginning of class, March 24.

Maria Jones has been asked to serve on the Board of Directors of a private liberal arts college for women, and is seriously considering doing so, although she has little free time and must be selective in making such commitments. Although the 14th amendment does not apply because the school is private, she nevertheless has reservations based on her respect for equal protection values and her understanding of Supreme Court cases on gender discrimination. One concern is whether any justification for single sex education is outdated. She is aware that women are substantially more likely to graduate from high school and to attend college than their male counterparts and that they comprise approximately 55 percent of the nation's college students.

Jones asked the President of the College, Leigh Hunt Greenhaw, why in the 21st Century the school restricts its enrollment to women. Greenhaw responded that single sex education conveys unique educational benefits and should be available to both women and men. She is convinced that it is part of a wide array of educational options crucial to the future strength of this Nation. In addition, she believes single gender education at the college level serves real needs of the young women of today and is important to the preparation and formation of women leaders for our society. This latter

point she links in part due to past legal discrimination – not only in access to higher education, but in property and contract rights, voting, access and participation in the legal system, and guardianship of children. This discrimination reflected deep seated beliefs that persist and inhibit the development of women, even if barriers today are more informal than in previous eras. She also links service to young women’s needs to the fact that women differ from men in developmental needs; biological functions, such as pregnancy and childbirth; and social roles, such as child-raising.

President Greenhaw says attending a women’s college has been shown to be positively associated with numerous factors, including baccalaureate completion, satisfaction with faculty and overall quality of instruction, leadership measures, writing skills, analytical and problem-solving skills and critical thinking ability. Indeed, women’s colleges are more effective than coeducational colleges in improving their students’ academic ability and social self-confidence. Greenhaw agrees with scholars who suggest that “a partial reason for the positive impact of women-only colleges is that their women students are surrounded by peers having high intellectual self-esteem.” She thinks women only colleges appear to provide students better opportunities to be actively involved in student organizations, to exercise leadership, and thus to improve their social self-confidence.

In addition, Greenhaw says a diverse body of literature suggests that women attending single sex schools may be more likely than their peers at coeducational schools to pursue male dominated careers, such as college professor, lawyer, physician, accountant, business executive, business owner, engineer, scientific researcher, and religious professional.

Maria Jones asks your advice: Can an “exceedingly persuasive justification” for single sex colleges be made after *Mississippi Univ. for Women v. Hogan* and *United States v. Virginia*?

Before answering, please review, Using Several Judicial Opinions, Handout 84-86.

March 31 Freedom of Expression. *Schenck v. United States*, Casebook 955-956; *Abrams v. United States*, Casebook 956-957; *Gitlow v. New York*, Casebook 957-959; *Whitney v. California*, Casebook 959-963; *Brandenburg v. Ohio*, Casebook 964-966; *Shuttlesworth v. City of Birmingham*,

Casebook 996-1000; International Society for Krishna Consciousness, Inc. v. Lee, Casebook 1018-1024; Texas v. Johnson, Casebook 1208-1215.

April 7 To be assigned.

April 14 The Religion Clauses. School District of Abington Township v. Schempp, Casebook 1331-1335; Gobitis and West Va. State Bd. of Educ. V. Banette, Casebook 1335-1337; Eppenson v. Arkansas, Casebook 1341-1345; Wisconsin v. Yoder, Casebook 1387-1390; Employment Div. v. Smith, Casebook 1401-1407; Cox v. Miller, 296 F-3d 89 (2d Cir. 2002), Handout 123-136.

WRITING ASSIGNMENT FIVE. Graded.

By **April 10**, Sasha Tulgan will let you know which proposed amendment to advocate and the student who will be opposing the amendment.

Due April 17, by 5:00 pm.

Each student must finalize the precise language of his/her proposed Constitutional Amendment, and submit his/her proposed amendment, together with a written argument in support of the amendment, to (1) Sasha Tulgan, and (2) the student opposing the amendment.

Based solely on the readings in this course, propose an amendment to the United States Constitution and write an argument explaining why your amendment should be adopted. Each student will present her or his amendment to the class, assembled as a Constitutional Convention which ultimately will vote on whether to adopt each amendment.

Please submit your materials using email to:
sasha.tulgan@rochester.edu.

A good amendment may be brief. For example, in the United Nations Declaration of Human Rights, there are 30 Articles. See Handout 137-145. You may propose one of these articles or part of one of these articles.

The essence of this assignment is to explain why adopting your proposal is wise. In doing so, you will want to compare the United States Constitution and discuss relevant cases.

Page limit: 5 pages

1-inch document margins

12-point font

Line spacing: Double

April 21 Constitutional Convention.

(Class Location: Witmer House – 630 Mt. Hope Ave.)

We will have a double class during which each student will present his/her amendments and rebuttals. The presenting student will have 5 minutes to present, the rebutting student will have 3 minutes to rebut. There will then be a time for general discussion of the proposed amendment.

After all the presentations are done, the class will vote on the amendments.

Please feel free, but not obliged, to use PowerPoint to augment your oral presentations. If you plan to include a PowerPoint presentation, please email it to Sasha Tulgan by **April 17** with your assignment.

Shuttle Service Schedule to the Witmer House

4:35 p.m. Shuttle pick up at Wallis Hall parking lot and drive to the Witmer House (630 Mt. Hope Avenue)

4:50 – 7:30 p.m. Class convenes at the Witmer House

(President Seligman's house)

- Student presentations
- Buffet dinner

9:00 p.m. Shuttle from the Witmer House to Wallis Hall parking lot

Please note: Class members with special dietary needs should contact Kimberly Downs at Kimberly.downs@rochester.edu or 275-7570 no later than April 16, 2014.

GRADING INFORMATION

Your final grade for the course will be determined on the basis of three graded writing assignments and the oral presentation/defense an amendment to the Constitution that you propose. Each writing assignment is weighted as 25% of your final grade, and collectively, the writing assignments will account for 75% of your final grade.

The remaining 25% of your grade will be based upon your preparation for, and participation in, class discussions, as well as your oral presentation/defense of a Constitutional amendment.

CONTACT INFORMATION FOR SASHA TULGAN

Please feel free to ask Sasha Tulgan questions about the course content in general, and/or about writing assignments. You can reach her by email at: sasha.tulgan@rochester.edu.