

Constitutional Law I: Governance (PS-338)

M-W 1:00pm-2:15pm
Tydings, Room 2109
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“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

*Alexis de Tocqueville
Democracy in America*

In *Federalist 78*, Alexander Hamilton (yes, *that* Alexander Hamilton!) argued that of all the institutions created by the Constitution, the Supreme Court would be the weakest. After all the “judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . .” Over 230 years have passed since Hamilton made this statement, and this semester, we’re going to spend a considerable amount of time looking at the Supreme Court’s output to determine the extent to which this argument is correct, if it ever was. The answer to this question has profound implications for the continued survival of American democracy.

Course Objectives

In no particular order, here are the things I hope to help you learn in this class

- How American courts, consistent with democratic principles, have attempted to interpret and apply the vague text of a relatively ancient document to modern problems;
- How to make sensible predictions about the way justices are likely to think about new problems they are asked to resolve;
- How to begin reasoning like a lawyer;
- How to read and brief Supreme Court cases;
- How to make convincing legal arguments;

- How to assess legal arguments offered by others;
- How to assess the quality of Supreme Court majority opinions, concurrences and dissents;
- Basic principles of American Constitutional Law; and
- How to use and understand basic legal terminology.

Course Format

In this course, I will use the “Socratic Method,” which is a teaching system that depends on a professor asking students questions about the materials assigned and demanding oral answers in class. For a slightly sadistic example of how this works, take a look at this clip from the movie *The Paper Chase*:

<https://www.youtube.com/watch?v=WCKMDvikGNM> I think that this is the best way to teach law related subjects, and, in fact, it is the basic method law schools use. It keeps the classes highly interactive, and it will help you learn *how* to think about legal problems rather than *what* to think about them. Here is how it will work in this class:

Every student will select a seat on the second class session, and must occupy that seat for every class session thereafter. Though this may seem a little authoritarian and even juvenile, it will help me get to know you, and it will also facilitate taking attendance.

Everyone in class will participate. There is no need to volunteer to speak. I will simply recognize students, in order, when I need a participant. Given the size of the class, it is likely that every student will be called upon to speak at least once during every third class. Of course, if you have a question or something to say, I will be happy to recognize you.

Here are some of the things you can expect to be asked about:

- Who are the parties to this case?
- What did the parties do or try to do that led them to file or defend the suit?
- Are there any key facts that make this case different from other cases on the same topic?
- Is there a statute involved in this case? If so, what does the statute say?
- Why were the parties unable to resolve this case outside of the courtroom?
- What are the values at stake?

- What did the lower court decide?
- Did the Supreme Court issue a majority opinion, or was the best the court could do a plurality opinion?
- Why don't the authors of the dissenting and concurring opinions agree with the majority opinion?
- Which of the opinions issued in the case, the majority opinion, the concurrences, or the dissents, do you think is the most persuasive? Did the Supreme Court reach the correct decision in this case?
- Many of the cases we will study this semester date from 50 to 125 years ago. Has the case we are considering stood the test of time? Are the more recent cases we study likely to stand the test of time?
- What might have happened if the Court had ruled the other way?
- Do you agree with the Court's opinion?
- Do you agree with what your classmate just said?
- If you wanted to disagree with what your classmate just said, what would you say.
- Should the Supreme Court have ruled on the case at all, or, instead, left it to another branch of the government?

Make sure you have answers to all of these questions for every case we study.

Obviously, in order for this to work, you will have to be prepared for each and every class. This is not the kind of class where you can hide out in the back of the room taking notes. Though it is not my intention to embarrass anyone, I know from sad personal experience that it *is* embarrassing to be called on and interrogated when you aren't prepared. To be prepared, you'll need to read the cases and have something to say about them. It's OK if you don't understand everything you read. Even if you get it wrong, I have great respect for people who try. You *will* get this eventually if you try.

Course Deliverables and Grades

Grades in this course will be based on the following:

Attendance:	10%
Case Briefs:	10%
Brief Spot Check	10%

Book Review	20%
Midterm:	25%
Final:	25%

Attendance and Participation: Attendance and participation in this course are mandatory and amount to 10% of your final grade. You will check in electronically by responding to a single quiz question with a unique code we will post on the board prior to the start of class (calling an absent friend with the code so he or she can check in without actually being present is a no-no and a serious violation of the University's honor code). I am relatively lenient on what kinds of things will excuse an absence. I'll excuse an absence if (i) you send Ryan a notice via ELMS at least an hour before class stating that you won't be in class; AND (ii) you provide one of the following excuses: (a) illness or injury; (b) varsity athletic competition; (c) family emergency; (d) internship or employment interview; (e) bona fide religious observance; (f) funeral; (g) traffic or car problem that prevents you from arriving on time for class; or (h) other emergency. Being unprepared for class or needing class time to prepare for another one of your classes will not be excused. Unexcused absences and evidence that you haven't prepared for a class session will count against you. I start off with the assumption that if you are present, you are also prepared. If you are present, but after calling on you, it is clear you aren't prepared, you won't get credit for attendance that day.

Case Briefs: As a first-year law student, the basic skill you need is the ability to summarize a case in enough detail so that you will be able to discuss it intelligently in class. Briefs have a particular structure that I will go over during one of our first classes. You will find instructions for writing briefs on ELMS as well as a sample brief I have written on *Heller v. District of Columbia*. You will submit to me 1 case brief for a case of your choice in accordance with a schedule posted on ELMS. Each brief must be emailed to Ryan through ELMS before the start of the class for which the case you have briefed was assigned. Briefs will receive one of three grades. You will get a four (4) if you follow my format and include what Ryan considers to be a sufficient amount of information. You will get a two (2) if you deviate materially from my format or do not include what Ryan considers to be a sufficient amount of information. You will get a zero (0) if you fail to submit your brief on time or otherwise do an awful job on it. We will aggregate your scores on these briefs and scale the total so that it accounts for 10% of your grade.

Brief Spot Check: Lawyers have to be prepared for everything. In fact, some lawyers see their jobs as being thoroughly prepared for legal battles that may never be fought. To check your preparation, we will spot check four (4) students chosen at random every class to insure that you have briefed the cases required for that day's class. We are just looking to see whether you did enough work on your briefs so that you can participate effectively, and the spot checks will be graded on the same 4-point scale used to grade the briefs. We will pay a great amount of attention to your comments on the case. Because we are using a random process it is possible that you may be called for Brief

Spot Check every class or never. Again, it is my assumption that you are prepared, and so if you are never called, you'll still get full credit for Brief Spot Check.

You cannot hide your failure to prepare by being absent! If you are absent, regardless of whether you are chosen for Brief Spot Check, you must submit copies of your briefs for the day to Ryan by email before the scheduled start time of the class. Briefs submitted on a day you are absent will not count toward the total number of briefs you have to submit this semester. If you fail to submit all of the required briefs for the day, not only will your absence not be excused, but your grade for Brief Spot Check will be reduced by 10%.

This doesn't have to be miserable. In law school, it is common for students to form small study groups to share the heavy workload. I encourage you to do this. We will accept briefs written by other students in the class as yours during spot checks, provided that (i) the name of the student who actually prepared the brief is included; (ii) you have received the briefs before the start of class; (iii) the briefs appear in a paper or electronic notebook, organized in such a way as to make it easy for you to find them; (iv) the briefs are of the general quality required; and (v) the comments on the brief are your own.

Book Review: I have assigned *The Most Dangerous Branch* by David A. Kaplan for you to review. Kaplan's thesis is that over the last two centuries, the Supreme Court has gotten itself involved in public policy disputes that are more properly consigned to Congress, the President or the states, and has done so in a way that poses a threat to the U.S.'s status as a democratic republic. Your book review should address Kaplan's thesis. You should comment on:

- Whether Kaplan is right or wrong;
- Whether the evidence Kaplan presents is persuasive;
- What you think are weaknesses in Kaplan's argument;
- Whether you think the problem Kaplan is addressing is as serious as he believes it is;
- What, if anything, should be done to address the problem Kaplan's book addresses;
- Whether our system of government would work if the Supreme Court did not have the power it has now.

Please bear in mind that I am looking for an argument from you and not a report of what Kaplan wrote. I'm expecting you to support your argument with citations to cases we have discussed in class. You may feel free to cite other cases (Ryan and I will check these cases to ensure that they say what you claim they say) to support your argument, though I'm not expecting extensive research.

Your book review should be no less than 1,250 words nor more than 2,500 words. Observing the word length and format requirements will be taken into account when we grade your submission. You must send your book review to Ryan through ELMS not later than midnight on **December 1**.

Midterm Exam: This will be an open book take home exam. Part I will include multiple choice, fill in the blank, short answer, and other types of more or less objective questions. You may not collaborate on Part I with anyone else on it. Part II will be a fact pattern that calls for you to write an essay explaining the issues the facts raise and a discussion of how those issues should be resolved by a Court. You may collaborate with classmates on this part of the exam. The Midterm Exam will be worth 25% of your grade. Short answer and essay questions will be subject to word minimums and maximums. Failure to meet word minimums and maximums will have an adverse effect on grades.

Final Exam: On or around **December 2** I will distribute the questions for the final exam. The final exam is completely open book. You may use any of the materials covered in class and your notes. You may not use any case that is not listed on the syllabus. Essay questions will be subject to word minimums and maximums. Failure to meet word minimums and maximums will have an adverse effect on grades.

You have probably never taken an essay test like the midterm and final before. The exams will include questions that present you with fact patterns we have not discussed in class. For each of the questions, it will be up to you to identify as many Constitutional law issues as possible, and, based on the applicable case law, decide how those issues should be resolved by an appellate court. For most of these fact patterns there will be no absolutely correct answer. Your grade will depend on how well you (i) see the issues the facts present; (ii) identify and discuss the precedents relevant to deciding the case; (iii) apply the law to the fact pattern; (iv) address potential counterarguments; and (v) deliver a cogent, persuasive, grammatical and logical argument for your decision.

I don't believe that true learning can take place in a vacuum. You are not learning a trade in this class. Instead, you are learning to think in a way most of you have never had to think before. Part of what there is to think about are the different ways legal problems can be perceived. Part of what you are learning is how to distinguish stronger arguments from weaker ones. For that reason, though you are responsible for what you turn in, I **strongly** suggest that after you get the exam questions, you discuss them thoroughly with a small group of classmates before you write. The essay portion of the midterm exam must be submitted to Ryan through ELMS by Sunday, October 20 by midnight and the final must be submitted to Ryan through ELMS not later than Thursday, December 12 by 5:00 p.m. We will deduct points if you submit late or if you do not submit your work through ELMS.

Spelling, grammar, syntax and formatting count, so feel free to have somebody help you proofread before you submit.

Text

There are two textbooks Required for this course:

Constitutional Law (Undergraduate Edition, Volume 1) by Gregory E Maggs and Peter J. Smith, West Academic Publishing (2019), ISBN: 978-1-68328-897-8

The Most Dangerous Branch; Inside the Supreme Court's Assault on the Constitution by David A. Kaplan, Crown Publishing Group, ISBN 978-5247-5990-2

There are a number of other cases that we will study that have been photocopied and placed on ELMS for your convenience.

Tentative Class Schedule

August 26—Course Introduction

Topics: Review the syllabus, course requirements and deliverables, Constitutional Scavenger Hunt

Reading: None

August 28—Introduction Continued

Topics: Prelude to the Constitution. Textbook pages 3-32

September 4—Introduction Concluded

Topics: Law student stuff.

Reading:

1. How to Read a Judicial Opinion: A Guide for New Law Students
2. Textbook pages 33-53

Video: Antonin Scalia and Stephen Breyer Debate the Constitution:

<https://www.youtube.com/watch?v=4n8gOUzZ8I>

September 9—Judicial Review

Reading:

1. Textbook pages 57-78
 - a. Marbury v. Madison
 - b. Martin v. Hunter's Lessee
2. Waldron, J. (2009) Legislatures Judging in Their Own Cause (ELMS)

September 11—Judicial Review

Reading:

1. Textbook pages 78-86
 - a. Cooper v. Aaron

- b. Dredd Scott v. Sanford (ELMS)
- c. Swann v. Charlotte-Mecklinburg School District (ELMS)

September 16—Limits on the Court's Power

Readings:

- 1. Textbook pages 123-130, 99-104
 - a. Ex Parte McCardle
 - b. Muskrat v. United States

September 18—Limits on the Court's Power

Readings:

- 1. Textbook pages 86-99; 104-123
 - a. Baker v. Carr
 - b. Nixon v. U.S.
 - c. Allen v. Wright
 - d. Lujan v. Defenders of Wildlife

September 23—Federal Legislative Power

Readings:

- 1. Textbook pages 137-160
 - a. McCulloch v. Maryland
 - b. U.S. v. Comstock

September 25—Justice Marshall's view of the Commerce Power

Reading:

- 1. Textbook pages 160-166
 - a. Gibbons v. Ogden

September 30—The Lochner Era

Reading:

- 1. Lochner v. New York (ELMS)
- 2. Textbook pages 166-169; 175-183
 - a. U.S. v. E.C. Knight
 - b. Hammer v. Daggenhart
 - c. Carter v. Carter Coal Company

October 2—The New Deal

Reading:

- 1. Textbook pages 185-201
 - a. NLRB v. Jones & Laughlin Steel
 - b. U.S. v. Darby
 - c. Wickard v. Filburn

October 7—The Commerce Clause and Civil Rights?

Reading:

- 1. Textbook pages 195-201

- a. Heart of Atlanta Motel v. U.S.
- b. Katzenbach v. McClung

October 9—Commerce Clause Retrenchment

Reading:

1. Textbook pages 201-229
 - a. United States v. Lopez
 - b. United States v. Morrison
 - c. Gonzales v. Raich

October 14—Health Care

Reading:

1. Textbook 229-245
 - a. National Federation of Independent Business v. Sebelius (Commerce Clause)

MIDTERM EXAM TO BE POSTED ON ELMS

October 16—The Spending Clause

Reading:

1. Textbook pages 262-283
 - a. U.S. v. Butler
 - b. South Dakota v. Dole
 - c. NFIB v. Sebelius (Medicaid)

MIDTERM EXAM DUE ON SUNDAY NIGHT, OCTOBER 20 BY MIDNIGHT

October 21—The Taxing Clause

Reading:

1. Textbook pages 245-262
 - a. Child Labor Tax Case (Baily v. Drexel Furniture)
 - b. U.S. v. Kharigar
 - c. NFIB v. Sebelius

October 23—State Interference with Federal Power

Reading:

1. McCulloch v. Maryland (reprise)
2. Arizona v. U.S. (ELMS)

October 28—Federal Encroachment on State Power

Reading:

1. Textbook pages 299-315
 - a. New York v. U.S.
 - b. Prinz v. U.S.
2. Shelby County v. Holder (ELMS)

October 30—Dormant Commerce Clause

Reading:

1. Textbook pages 346-367
 - a. Gibbons v. Ogden (reprise)
 - b. Wabash, St. Louis & Pacific Railway Company v. Illinois
 - c. Dean Milk Co. v. City of Madison
 - d. Hughes v. Oklahoma

November 4—Dormant Commerce Clause continued

Reading:

1. Textbook pages 378-387, 399-404
 - a. Kassel v. Consolidated Freightways Corporation
 - b. City of Philadelphia v. New Jersey
 - c. United Hauler's Association v. Oneida-Herkimer Solid Waste Management Authority

November 6—The Powers of the President

Reading:

1. Textbook pages 441-455, 486-507
 - a. Youngstown Sheet & Tube v. Sawyer (pay close attention to Justice Jackson's concurring opinion)
 - b. Hamdi v. Rumsfeld

November 11—The President and the Legal System

Reading:

1. Textbook pages 507-534
 - a. U.S. v. Nixon
 - b. Nixon v. Fitzgerald
 - c. Clinton v. Jones

November 13—President's Authority over Foreign Affairs

Reading:

1. Textbook pages 455-474
 - a. Dames & Moore v. Regan
 - b. U.S. v. Curtiss-Wright Export
 - c. Zito v. Kerry
 - d. Trump v. Hawaii

November 18—Separation of Powers

Reading:

1. Textbook pages 535-567
 - a. Whitman v. American Trucking Association
 - b. INS v. Chadha
 - c. Clinton v. New York

November 20—Separation of Powers Continued

Reading:

1. Textbook pages 612-616

- a. NLRB v. Noel Canning
2. Chevron v. NRDC (ELMS)

November 25—Congressional Control over Executive Officials

Reading:

1. Textbook pages 567-616
 - a. Myers v. U.S.
 - b. Humphrey's Executor v. U.S.
 - c. Bowsher v. Synar
 - d. Morrison v. Olson
 - e. Free Enterprise Fund v. Public Company Accounting

December 2—The Supreme Court and Democratic Processes

Reading:

1. Textbook pages 422-437
 - a. U.S. Term Limits v. Thornton
2. Arizona State Legislature v. Arizona Independent Redistricting Commission (ELMS)

December 4—The Supreme Court and Democracy

Readings:

1. Bush v. Gore (ELMS)
2. Rucho v. Common Cause (ELMS)

December 9—The Most Dangerous Branch

Reading: None, but come to class prepared to discuss your review of *The Most Dangerous Branch*.