

L32-337: Law and Public Policy

Spring 2016

Class Time: Tuesday/Thursday 10-11:30am
Instructor: Miranda Yaver
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Office: 253 Seigle Hall
Office Hours: Wednesday 9:30-11:30 or by appointment

“Scarcely any political question arises that is not, sooner or later, transformed into a legal question.” – Alexis de Tocqueville, *Democracy in America* (1838)

Introduction to the Course: The United States separation-of-powers system necessitates close consideration of the interactions among the branches as they work to shape law and implement policy. These conflicts have important implications with respect to the laws that pass through Congress and the ways in which those laws are structured, the laws that are signed versus vetoed by the President, and upheld in the federal judiciary, as well as the stability of these laws over time. Moreover, given increasingly prevalent conditions of partisan conflict and legislative complexity, it becomes all the more important to consider not just the underlying laws, but also the real-world effects on matters of public policy and the laws that endure.

This course is a survey that is aimed at introducing students to the American legal system, across four key dimensions of lawmaking: Constitutional Law, Administrative Law, Statutory Law, and Direct Ballot. While courts play a central role in all of these dimensions of lawmaking, the course will also emphasize the role of congressional (and citizen) delegation in statutes that, if challenged, come before the courts. The course is taught mainly through reading and discussing primary legal materials (mainly judicial opinions, but also statutes and regulations), alongside academic analyses of the topics covered over the summer term. The course is aimed at helping students to become familiar with analyzing legal materials; understand the different sources of law and how they interact with each other; understand better how America’s complex and fragmented lawmaking apparatus contributes to the ways in which policy battles are played out and the outcomes we observe; and to understand the ways in which law operates as a constraint on policy movement from the status quo. Gaining a better grasp on these issues should empower students to become better equipped to engage in policy analysis, legal work, and to understand better the complexities of American institutions at large.

COURSE REQUIREMENTS:

There is one required textbook for the course:

Fallon, Richard H. 2004. *The Dynamic Constitution: An Introduction to American Constitutional Law*. New York, NY: Cambridge University Press.

All other readings will be made available on Blackboard. Students will be expected to come to class having read the material and being prepared to engage in the political and legal arguments that they present. There are many readings in the course, and I will notify you in advance which ones are skim-worthy. Only select slides will be posted online – most will not.

Two short papers (3-5 pages): 10% each.

- Short paper 1: Fact pattern on equal protection.
- Short paper 2: Fact pattern on administrative law.

Long paper (12-15 pages): 35%

- You will divide into groups and write a brief statute, as well as provide a record of the legislative history (that is, the debates that you had over the course of its drafting). I will then randomly assign another group's statute/legislative history for you to analyze. Drawing on the class readings and discussions about constitutional implications, legislative design and statutory interpretation, delegation, and judicial deference, walk through the legal and policy implications of how this law would be carried into effect and interpreted by courts given its text, legislative history, and the policy it seeks to produce.
 - *The statute and legislative history will account for 10%. Templates will be provided. The remaining 25% will be based on your individual analysis.*
 - *You may provide in advance a paper summary (1-2 pages) with the opportunity for feedback before writing the full paper, or discuss during office hours your proposed paper, though drafts themselves will not be reviewed in advance.*

Final exam: 35%

- The first portion of the exam will consist of a set of IDs and multiple choice.
- One week in advance, I will distribute a list of 7 essay questions that are cumulative from across the course material. 5 of these 7 questions will appear on the exam, and students will write short essays on 4 of them. Students are encouraged to prepare outlines in advance (and in groups, if you wish), but may not bring notes to the exam itself. I will provide a review session before the exam, and you may discuss questions with me during office hours as well.

Attendance and participation: 10%

Papers shall be submitted as hard copies during (or before) class. Papers should be double-spaced in 12 point font with one-inch margins.

Final Course Grading: The final grade for the course will be assigned based on the following scale:

A: 93+%	A-: 90-92%	B+: 87-89%
B: 83-86%	B-: 80-82%	C+: 77-79%
C: 73-76%	C-: 70-72%	D+: 67-69%
D: 63-66%	D-: 60-62%	F: > 60%

Policy Regarding Late Assignments: It is imperative that students turn in work at the specified deadlines. Failure to do so will result in a third letter grade reduction per day late unless you have requested and received an extension in advance (granted for medical or family emergencies only). Work will not be accepted at all more than one week late unless said extension was granted in advance. All students must sit for the final exam at the assigned day and time, with the only exception of university-approved absences.

All members of the academic community should be able to engage fully in the academic opportunities and services provided, regardless of disability status, and to that end accommodations to this course can be made if necessary. Please feel free to discuss with me any concerns you may have.

Statement on Academic Integrity: It is expected that all students will work in accordance with the student honor code. Thus, plagiarism, cheating, and receiving unauthorized assistance with the work in this course will not be tolerated. Should a student violate academic integrity in this class, the matter will be reported to the university administration. If you have questions about citations of sources, ask prior to submitting the given assignment.

COURSE OUTLINE:

Note: Readings subject to change. I will highlight during class the readings of most importance for the purposes of lecture.

General background readings (not required, but potentially quite useful):

- L. Friedman, "What Is a Legal System?," *American Law: An Introduction* (W.W. Norton, 2nd ed., 1998), 15-34.
- O. Kerr, "How to Read a Legal Opinion," *The Green Bag* 11 (2007): 51-63.
- Gellhorn & Levin, *Administrative Law and Process* (reference text on administrative law and procedures).

UNIT 1: COURTS AND THE CONSTITUTION

Part A: Introduction:

- R. Fallon, *The Dynamic Constitution: An Introduction to American Constitutional Law* (Cambridge University Press, 2004), 1-25 (overview of the American constitutional system); “Judicial Power,” 189-204 (overview of the role of courts in the system).
- Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Wolters Kluwer, 4th ed., 2011), chapter 1 (brief overview of competing theories of how to interpret a constitution and who has the authority to do it).
- Mark Tushnet, “How Courts Implement Social Policy.”

Part B: The Constitution and Individual Rights:

General Topics on Rights in the Separation-of-Powers (SOP) System:

- Eskridge, William N. “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” *California Law Review* 79(2):613-684 (1991).
- Whittington, Keith. 2003. “Legislative Sanctions and the Strategic Environment of Judicial Review.” *The International Journal of Constitutional Law* 1(3):446-474.

Race and Equal Protection: Voting and Education:

- Civil Rights Act of 1964.
- Voting Rights Act of 1965.
- Voting case excerpts: *Shelby County, Alabama v. Holder*.
- Elmendorf, Christopher S. & Douglas M. Spencer. 2015. “Administering Section 2 of the Voting Rights Act After *Shelby County*.” *Columbia Law Review* 115.
- Education case excerpts: *Grutter v. Bollinger*, *Gratz v. Bollinger*, *Parents Involved in Community Schools v. Seattle School District No. 1*.
- Brody Jr., Carl E. “Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court.” 29 *Akron L. Rev.* 291 (1995).

Gender and Equal Protection:

- Gender case excerpts: *Reed v. Reed*, *Frontiero v. Richardson*, *Craig v. Boren*, *United States v. Virginia*.
- R. Fallon, *The Dynamic Constitution*, “Equal Protection of the Laws,” 106-37 (overview of equal protection doctrine).

LGBT Rights:

- Defense of Marriage Act
- LGBT case excerpts: *Hollingsworth v. Perry*, *United States v. Windsor*
- Powers, Courtney A. “Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny.” 17 *Duke J. Gender L. & Policy* 385 (2010).
- Eskridge, William N. “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny.” 50 *Washburn L.J.* 1(2010)

Part C: The Constitution and the Structure of Governance: Interstate Commerce and Congressional Regulatory Power

- Commerce Clause case excerpts: *US v. Lopez*, *US v. Morrison*, *Gonzales v. Raich*, *National Federation of Independent Business v. Sebelius*
- R. Fallon, *The Dynamic Constitution*, 157-72, 225-36 (overview of legislative authority, focusing on commerce power).
- McCoy, Thomas R. & Barry Friedman. “Conditional Spending: Federalism’s Trojan Horse.” *The Supreme Court Review* (1988): 85-127.
- Dinan, John. “Congressional Responses to the Rehnquist Court’s Federalism Decisions.” 32 *Journal of Federalism* (2002): 1-24.
- Frickey, Phillip & Steven Smith. “Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique.” 111 *Yale L.J.* 1707.
- Ferejohn, John & Barry Weingast. 1997. *The New Federalism: Can the States be Trusted?* Stanford, CA: Hoover Institution Press. “Conclusion.”

UNIT 2: THE ADMINISTRATIVE STATE.

Part A: Statutory Delegation

The Administrative State: Delegation and Control of Administrative Power:

- Melnick, R. Shep. “Courts and Agencies,” in *Making Policy, Making Law: An Interbranch Perspective* M. Miller and J. Barnes, eds. (Georgetown 2004), 89-104.
- Epstein, David & Sharyn O’Halloran. 1999. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Chapter 2: Choosing How to Decide, Chapter 6: Delegation and Congressional-Executive Relations, Chapter 8: Delegation and Issue Areas.

- McNollgast. 1987. “Administrative Procedures as Instruments of Control.” *Journal of Law, Economics, and Organization* 3: 243-77.
- *Recommended:* Halpern, Stephen C. *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act*, Chapter 3: The Johnson Years: Implementing and Redefining the Right to Equal Educational Opportunity, Chapter 4: The Nixon-Ford Years: Litigating against the Political Backlash.

Judicial Deference and Oversight:

- FEC Rules.
- EPA Rules.
- Judicial deference and discretion case excerpts: *Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co*, *Massachusetts v. EPA*, *FCC v. Fox Television Stations, Inc.*, *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, *Food and Drug Administration v. Brown & Williamson Tobacco Corp*, *Arlington v. FCC*
- Landes, William & Richard Posner. “The Independent Judiciary in an Interest-Group Perspective.” *Journal of Law and Economics* 18 (1975): 875-901.
- Miles, Thomas J. & Cass R. Sunstein. “Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron.” 73 (2008) *The University of Chicago Law Review*.
- *In-class Activity: Arlington v. FCC oral argument.*

Part B: Controversies and Challenges to Agency Implementation

- Gersen, Jacob & Anne Joseph O’Connell. “Hiding in Plain Sight?: Timing and Transparency in the Administrative State.” 76 *University of Chicago Law Review* 1157 (2009).
- Shipan, Charles. 2004. “Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence.” *American Political Science Review* 98(3): 467-480.
- Hume, Robert. 2009. *How Courts Impact Federal Administrative Behavior*. Ch. 6: Agency Nonacquiescence.
- Spriggs, James. 1997. “Explaining Federal Bureaucratic Compliance with Supreme Court Opinions.” *Political Research Quarterly* 50:567-93.
- *Recommended: Kerwin: Chapter 6: Oversight of Rulemaking*

UNIT 3: LEGISLATION

Part A: Introduction to Statutory Interpretation

- CRS Report to Congress: “Statutory Interpretation: General Principles and Recent Trends,” <http://www.fas.org/sgp/crs/misc/97-589.pdf>
- Eskridge, William & Philip Frickey. 1990. “Statutory Interpretation as Practical Reasoning.”
- White Slave Traffic Act
- Statutory interpretation case excerpts: *Caminetti v. United States*, *Mortensen v. United States*, *Cleveland v. United States*, *Griggs v. Duke Power Company*, *United Steelworkers of America v. Weber*
- Friedman, Lee. “The Structure of American Law: Statutes and Statute Makers.” *American Law: An Introduction*, 108-127.
- Posner, Richard A. 1983. “Statutory Interpretation – In the Classroom and in the Courtroom.” 50 *University of Chicago Law Review* 800.

Part B: Strategic Statutory Design

- Civil Rights Act of 1991.
- Farhang, Sean. 2008. “Public Regulation and Private Lawsuits in the American Separation of Powers System.” *American Journal of Political Science* 52 (2008): 821-39.
- Moe, Terry M. “The Politics of Bureaucratic Structure.” In *Can the Government Govern?*, John E. Chubb and Paul E. Peterson eds (1989). Washington, D.C.: The Brookings Institution Press.
- Schuck, Peter H. 1992. “Legal Complexity: Some Causes, Consequences, and Cures.” *Duke Law Journal*. 42(1): 1-52.

Part C: Policy Implications of Interpretations and Design

- Lovell, George. *Legislative Deferrals*, Ch. 1, 4, 6.
- Maltzman, Forest & Charles Shipan. 2008. “Change, Continuity, and the Evolution of the Law.” *American Journal of Political Science* 52(2): 252-267.
- Gersen, Jacob E. 2006. “Overlapping and Underlapping Jurisdiction in Administrative Law.” *The Supreme Court Review* 1: 201-47.

UNIT 4: DIRECT BALLOT

- Kousser, Thad & Mathew D. McCubbins, “Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy.” 78 *S. Cal. L. Rev.* 949 (2005).

- Frickey, Philip P. “Interpretation on the Borderline: Constitutions, Canons, Direct Democracy.” 1 *N.Y.U. J. Legis. & Pub. Policy* 105 (1997).
- Elmendorf, Christopher S. & Douglas M. Spencer. “Are Ballot Titles Biased? Partisanship in California’s Supervision of Direct Democracy.” 3 *UC Irvine L. Rev.* (2013).
- Lupia, Arthur. 1994. “Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections.” *American Political Science Review* 88:63-76.
- Steiner, Ronald L. 2009. “Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny.” *Chap. J. L. & Policy* 81.
- Downey, Rachel et al. 2004. “Direct Democracy: A Survey of the Single Subject Rule as Applied to Statewide Initiatives.” 13 *Journal of Contemporary Legal Issues* 579.
- Bowler, Shaun, Todd Donovan, & Trudi Happ. 1992. “Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter.” *The Western Political Quarterly* 45(2): 559-68.
- Miller, Kenneth P. *Direct Democracy and the Courts* (chapters 1-2).