

PS-118: Law and Public Policy Spring 2019

Professor: Miranda Yaver

Email: miranda.yaver@tufts.edu

Class Time: Tuesday/Thursday 10:30-11:45am

Office Hours: Thursday 12:30-2:30pm or by appointment

Office Location: 309 Packard Hall

Course Description:

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

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. This course is aimed at introducing students to the American legal system, across four key dimensions of lawmaking: constitutional law, administrative law, statutory law, and direct democracy. While courts play a central role in all of these dimensions of lawmaking, the course will also emphasize how Congress, courts, agencies, and states interact in the development of public policy over time. We will address questions such as, What is the proper level of review with which courts should address discrimination on the basis of sex and sexual orientation? What is the scope of Congress’s constitutional authority to regulate health care? To what extent should courts defer to agencies’ interpretations of their regulatory authority, and what are the policy implications in environmental law and beyond? How is direct democracy used as a vehicle to advance or hinder minority rights? Reading and discussing Supreme Court cases and academic analyses, 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; and to understand how America’s complex and fragmented lawmaking apparatus contributes to the ways in which policy battles are played out and the outcomes we observe. Historical and contemporary examples will be drawn from such areas as health policy, environmental policy, education policy, and civil rights.

Course Requirements:

1. Two short papers on fact patterns (5 pages, double-spaced, 12-point font, submitted through Canvas by the start of class): 15% each
 - (a) Equal Protection (Due February 14)
 - (b) Administrative law (Due March 28)
2. Long paper (approximately 15 pages): 30% (Due April 25)
 - Students will be given a short statute as well as a brief legislative history. 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.

3. Final Exam: 25%

- Students will have 72 hours to do a take-home (open-book, open-note) final exam comprised of a set of short essay questions and one longer essay question.

4. Attendance and participation in class: 15%

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 received an extension in advance. Work will not be accepted at all more than one week late unless said extension was granted in advance. All students take the final exam at the assigned day and time, with the only exception of university-approved absences. If you have concerns regarding your ability to complete your work on time due to physical or mental health reasons, you are encouraged to seek appropriate treatment from campus services (<http://students.tufts.edu/health-and-wellness>) and to discuss with me *in advance* whether an extension is needed.

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 (<http://students.tufts.edu/student-accessibility-services>). 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. Students are encouraged to consult Writing Support services (<https://students.tufts.edu/academic-advice-and-support/academic-resource-center/what-we-offer/writing-support>) for additional assistance on writing and citation so as to avoid plagiarism.

I reserve the right to prohibit the use of laptops in class if they prove to be an impediment to active class participation.

Textbooks

The following textbooks are required:

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

- Lovell, George. 2003. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*. Cambridge University Press.
- Chafetz, Josh. 2018. *Congress's Constitution: Legislative Authority and the Separation of Powers*. Yale University Press.

The following textbooks are recommended:

- Miller, Kenneth P. 2009. *Direct Democracy and the Courts*. Cambridge University Press.
- Melnick, Shep. 1983. *Regulation and the Courts: The Case of the Clean Air Act*. Brookings Institution Press.
- Farhang, Sean. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton University Press.
- Cortner, Richard C. 2001. *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*. University Press of Kansas.
- Silverstein, Gordon. 2009. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. Cambridge University Press
- Whittington, Keith. 2001. *Constitutional Construction: Divided Powers and Constitutional Meaning*. Harvard University Press.
- Patashnik, Eric. 2008. *Reforms at Risk: What Happens After Major Policy Changes Are Enacted*. Princeton University Press.
- Melnick, Shep. 2018. *The Transformation of Title IX: Regulating Gender Equality in Education*. Brookings Institution Press.
- Jenkins, Jeffery A. and Eric Patashnik, eds. 2012. *Living Legislation: Durability, Change, and the Politics of American Lawmaking*. University of Chicago Press.
- Miller, Mark C. and Jeb Barnes, eds. 2004. *Making Policy, Making Law: An Interbranch Perspective*. Georgetown University Press.
- Burke, Thomas. 2004. *Lawyers, Lawsuits, and Legal Rights*. University of California Press.

All other readings will be made available online. Students will be expected to come to class having read the material and being prepared to engage in the arguments that they present. Students will be alerted in advance to what readings are recommended rather than required, or are skim-worthy. It is imperative that students check their email regularly, as that is how class announcements will be made.

Useful websites on law and courts:

- <https://www.oyez.org/>
- <https://www.supremecourt.gov/>
- <http://www.scotusblog.com>

- <https://www.lawfareblog.com/>
- <http://electionlawblog.org/>
- <https://abovethelaw.com/>
- <https://constitutioncenter.org/>

Useful podcasts on law and policy: What Trump Can Teach Us About Con Law, First Mondays, We the People, At Liberty, Amicus, Politico’s Pulse Check, Vox’s The Impact, PolicyCast The Brookings Cafeteria

Course Outline:

Thursday, January 17: Course Introduction

- United States Constitution
- Chafetz, *Congress’s Constitution*, Prelude, Ch. 1
- Optional reading:
 - Kerr, Orin. 2007. “How to Read a Legal Opinion.” *The Green Bag* 11 (2007): 51-63.

Tuesday, January 22: Introduction to the Judiciary and the American Legal System

- *Federalist 51, 78*
- *Marbury v. Madison* (1803)
- Murrill, Brandon J. 2018. CRS Report: The Supreme Court’s Overruling of Constitutional Precedent
- Fallon, Richard. *The Dynamic Constitution: An Introduction to American Constitutional Law* (Cambridge University Press, 2004), Introduction, Ch. 9

CONSTITUTIONAL LAW

Thursday, January 24: Theories of Constitutional Interpretation

- Roosevelt, Kermit. 2007. “Originalism and the Living Constitution: Reconciliation.” *American Constitution Society for Law and Policy*.
- Segall, Eric. 2017. “Judicial Originalism as a Myth.” *Vox*.
- Hollis-Brusky, Amanda. 2016. “Here’s why originalism won’t be buried with Scalia.” *The Washington Post Monkey Cage*.
- Optional reading:
 - Reid, Brad. 2016. “Fourteen Ways to Interpret the Constitution.” *Huffington Post*.

Tuesday, January 29: 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).
- Chafetz, *Congress’s Constitution*, Ch. 2
- Fallon, Richard. *The Dynamic Constitution*, Ch. 10
- Optional reading:
 - Whittington, Keith. 2003. “Legislative Sanctions and the Strategic Environment of Judicial Review.” *The International Journal of Constitutional Law* 1(3):446-474.
 - Chafetz, *Congress’s Constitution*, Ch. 4

Thursday, January 31: Race and Equal Protection: Voting Rights

- Case excerpt: *Shelby County v. Holder* (2012)
- Tolson, Franita. 2014. “The Constitutional Structure of Voting Rights Enforcement.” 89 *Washington Law Review* 379. (2014).
- “*Shelby County* One Year Later.” The Brennan Center. 2014.
- Persily, Nathaniel and Thomas Mann. 2013. “*Shelby County v. Holder* and the Future of the Voting Rights Act.” *The Brookings Institution*.
- Ford, Matt. “How the Roberts Court Caused Georgia’s Election Mess.” *The New Republic*, November 5, 2018.

Tuesday, February 5: Race and Equal Protection: Affirmative Action

- Case excerpts: *Regents of the Univ. of CA v. Bakke*, *Grutter v. Bollinger*, *Gratz v. Bollinger*.
- Fallon, Richard. *A Dynamic Constitution*, p. 106-129
- Jaschik, Scott. “Trump Administration Rescinds Guidance on Affirmative Action.” *Inside Higher Ed*, July 5, 2018.
- Optional reading:
 - *Fisher v. UT Austin*
 - Estlund, Cynthia L. 2005. “Putting *Grutter* to Work: Diversity, Integration, and Affirmative Action in the Workplace.” *Berkeley Journal of Employment and Labor Law* 26(1): 1.
 - Bybee, Keith. 2000. “The Political Significance of Legal Ambiguity: The Case of Affirmative Action.” *Law & Society Review* 34(2).

Thursday, February 7: Gender and Equal Protection

- Case excerpts: *Reed v. Reed*, *Frontiero v. Richardson*, *Craig v. Boren*, *US v. Virginia*.
- Fallon, Richard. *A Dynamic Constitution*, p. 129-133
- Williams, Wendy Webster. 2013. "Ruth Bader Ginsburg's Equal Protection Clause." *Columbia Journal of Gender and Law* 25: 41-49.
- Optional reading:
 - Ginsburg, Ruth Bader. 1975. "Gender and the Constitution." *University of Cincinnati Law Review* 44(1): 1.
 - Siegel, Reva. 1992. "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection." *Stanford Law Review* 44(2): 261.

Tuesday, February 12: LGBT Rights and Equal Protection

- Case excerpts: *Lawrence v. Texas*, *United States v. Windsor*, *Obergefell v. Hodges*
- Fallon, Richard. *The Dynamic Constitution*, p. 133-144, 147-150
- Robinson, Russell K. 2016. "Unequal Protection." *Stanford Law Review* 68: 151.
- Rosen, Jeffrey. "The Dangers of a Constitutional 'Right to Dignity.'" *Atlantic*, April 29, 2015.
- Optional readings:
 - Eskridge, William N. 2010. "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?" 50 *Washburn L.J.*
 - 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).
 - Murray, Melissa. 2016. "*Obergefell v. Hodges* and Nonmarriage Inequality." 104 *California Law Review* 1207.

Thursday, February 14: Interstate Commerce and Congress's Power to Regulate Civil Rights Policy

- Case excerpts: *Heart of Atlanta Motel v. US*, *Katzenbach v. McClung*
- Fallon, Richard, *The Dynamic Constitution*, Ch. 7, 11
- Melnick, Shep. 1996. "Federalism and the New Rights." *Yale Law & Policy Review* 14(2).
- Schwinn, Steven. 2014. "Civil Rights Act of 1964: Enduring and Revolutionary." *American Bar Foundation*.

Thursday, February 19: Interstate Commerce and the Limits of Congressional Power

- Case excerpts: *US v. Lopez*, *US v. Morrison*

- Fallon, Richard. 2002. “The ‘Conservative’ Paths of the Rehnquist Court’s Federalism Decisions.” *The University of Chicago Law Review* 69(2).
- Forte, David. 2011. “Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause.” The Heritage Foundation.
- Chafetz, *Congress’s Constitution*, Ch. 3
- Optional reading:
 - Chemerinsky, Erwin. 2002. “Have the Rehnquist Court’s Federalism Decisions Increased Liberty?” 29 *Hum. Rts.* 3
 - Dinan, John. “Congressional Responses to the Rehnquist Court’s Federalism Decisions.” 32 *Journal of Federalism* (2002): 1-24.
 - Frickey, Phillip & Steven Smith. 2001. “Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique.” 111 *Yale L.J.* 1707.
 - Huberfeld, Nicole. 1997. “The Commerce Clause Post-Lopez: It’s Not Dead Yet.” 28 *Seton Hall Law Review* 182.

Thursday, February 21: Monday schedule → no class

Tuesday, February 26: Commerce Clause and Health Policy

- Case excerpts: *Gonzales v. Raich*, *National Federation of Independent Business v. Sebelius*
- Rosenbaum, Sara. 2005. “*Gonzales v. Raich*: Implications for Public Health Policy.” *Public Health Reports* 120(6).
- Hall, Mark A. 2011. “Commerce Clause Challenges to Health Care Reform.” *University of Pennsylvania Law Review* 159(6).
- Posner, Richard. 2012. “Affordable Care Act upheld: Why the Commerce Clause should have been enough.” *Slate*.

ADMINISTRATIVE LAW

Thursday, Tuesday, 28: The Administrative State: Delegation and Control of Administrative Power

- Krause, George. “Legislative Delegation of Authority to Bureaucratic Agencies,” in *The Oxford Handbook of American Bureaucracy*, 2010.
- Epstein, David & Sharyn O’Halloran. 1999. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers.*, Ch. 2, Ch. 6, Ch. 8.
- Optional reading:
 - Rudalevige, Andrew. 2013. “The Perils of (Vague Delegations of) Power.” *The Monkey Cage*.

- McNollgast. 1987. “Administrative Procedures as Instruments of Control.” *Journal of Law, Economics, and Organization* 3: 243-77.
- Farber, Daniel and Anne Joseph O’Connell. 2014. “The Lost World of Administrative Law.” *Texas Law Review* 92.

Tuesday, March 5: Judicial Deference and Oversight

- Case excerpts: *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.* (1984), *Food and Drug Administration v. Brown & Williamson Tobacco Corp* (2000), *Massachusetts v. EPA* (2007), *Arlington v. FCC* (2013)
- Optional readings:
 - Case excerpts: *Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co* (1983), *FCC v. Fox Television Stations, Inc.* (2009)
 - Sunstein, Cass. 2006. “Chevron Step Zero.” 92 *Virginia Law Review* 187.

Thursday, March 7: Judicial Deference and Oversight

- 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*.
- Wood, Jonathan. 2018. “Overruling Chevron Could Make Congress Great Again.” *The Regulatory Review*.
- Optional reading:
 - Hemel, Daniel. 2018. “Hating on Chevron.” *SCOTUSBlog*
 - McConnell, Michael. 2018. “Kavanaugh And The ‘Chevron Doctrine.’” The Hoover Institution. Monday, July 30, 2018

Tuesday, March 12: Judicial Deference and Environmental Policy

- Elliott, E. Donald. 2005. “Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law.” *Villanova Environmental Law Journal* 16(1).
- Warren, Phillip Dane. 2018. “The Impact of Weakening Chevron Deference on Environmental Deregulation.” *Columbia Law Review* 118(2).
- Meyer, Robinson. “How the U.S. Protects the Environment, From Nixon to Trump: A curious person’s guide to the laws that keep the air clean and the water pure.” *The Atlantic*, March 29, 2017.

Thursday March 14: Controversies and Challenges to Agency Implementation

- Gersen, Jacob & Anne Joseph O’Connell. “Hiding in Plain Sight?: Timing and Transparency in the Administrative State.” 76 *Univ. 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.
- Arrieta-Kenna, Ruairi. “Trump’s Environmental Agenda Is Crashing Into the Courts.” *Vox*, August 11, 2017.
- Optional reading:
 - Raso, Connor. 2018. “Trump’s deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate.” Brookings Institution Report.

STATUTORY LAW

Tuesday, March 26: 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

Thursday, March 28: Introduction to 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*
- Posner, Richard A. 1983. “Statutory Interpretation – In the Classroom and in the Courtroom.” 50 *University of Chicago Law Review* 800.
- Optional reading:
 - Gluck, Abbe and Richard Posner. 2018. “Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals.” 131 *Harvard Law Review* 1298.

Tuesday, April 2: Strategic Statutory Design

- 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.
- Farhang, Sean & Miranda Yaver. 2016. “Divided Government and the Fragmentation of American Law.” *American Journal of Political Science*.
- Schuck, Peter H. 1992. “Legal Complexity: Some Causes, Consequences, and Cures.” *Duke Law Journal*. 42(1): 1-52.

Thursday, April 4: Public Policy Implications of Statutory Interpretations and Design

- Lovell, George. *Legislative Deferrals*, Ch. 1, 4, 6, 7.

Tuesday, April 9: Public Policy Implications of Statutory Interpretations and Design

- Maltzman, Forest & Charles Shipan. 2008. “Change, Continuity, and the Evolution of the Law.” *American Journal of Political Science* 52(2): 252-267.
- Melnick. Shep. 2018. “The Strange Evolution of Title IX.” *National Affairs*.
- VanSickle-Ward, Rachel & Amanda Hollis-Brusky. “An [Un]clear Conscience Clause: The Causes and Consequences of Statutory Ambiguity in State Contraceptive Mandates.” *Journal of Health Health Politics, Policy and Law*.
- Bagley, Nicholas. 2015. “Three Words and the Future of the Affordable Care Act.” *Journal of Health Politics, Policy and Law* 40(3).
- Optional reading:
 - Burbank, Stephen & Sean Farhang. “The Rise of Civil Rights Litigation.”
 - Eskridge, William. 1991. “Overriding Supreme Court Statutory Interpretation Decisions.” *Yale Law Journal* 101(2): 331-455.

DIRECT DEMOCRACY

Thursday, April 11: Introduction to Direct Democracy

- Frickey, Philip P. “Interpretation on the Borderline: Constitutions, Canons, Direct Democracy.” 1 *N.Y.U. J. Legis. & Pub. Policy* 105 (1997).
- Miller, Kenneth P. 2009. *Direct Democracy and the Courts*, Ch. 1-2

Tuesday, April 16: Introduction to Direct Democracy

- 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.
- Miller, Kenneth P. 2009. *Direct Democracy and the Courts*, Ch. 6

Thursday, April 18: Policymaking Via Direct Democracy

- Kousser, Thad & Mathew D. McCubbins, “Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy.” 78 *S. Cal. L. Rev.* 949 (2005).
- Miller, Kenneth P. 2009. *Direct Democracy and the Courts*, Ch. 5
- Japsen, Bruce. “Idaho Medicaid Expansion Sails To Victory.” *Forbes*, November 7, 2018.
- Optional reading:
 - Phillips, Justin & Elizabeth Gerber. 2005. “Evaluating the Effects of Direct Democracy on Public Policy: California’s Urban Growth Boundaries.” *American Politics Research* 33(2).
 - Donovan, Todd. 2013. “Direct Democracy and Campaigns Against Minorities.” *Minnesota Law Review*: 1730.

Tuesday, April 23: Direct Democracy and the Court

- Case excerpts: *Perry v. Schwarzenegger* (2012), *Hollingsworth v. Perry* (2013)
- Steiner, Ronald L. 2009. “Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny.” *Chap. J. L. & Policy* 81.
- Miller, Kenneth P. 2009. *Direct Democracy and the Courts*, Ch. 4, 7

Thursday, April 25: Wrap-Up

- Frickey, Philip. 1996. “Interpretation on the Borderline: Constitution, Canons, Direct Democracy.” *Ann. Surv. Am. L.* 477.
- Chafetz, *Congress’s Constitution*, Conclusion

72-hour take-home final exam due at end of university-designated exam period (May 6th, 5:30pm)