“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary, as distinguished from technical meaning; where the intention is clear, there is no room for construction, and no excuse for interpolation or addition.” Martin v. Hunter's Lessee

“Judges are like umpires. Umpires don’t make the rules; they apply them,” Chief Justice John Roberts in his opening statement for his confirmation hearings

“The [umpire] metaphor might suggest to some people that law is a kind of robotic enterprise, there there’s a kind of automatic quality to it. Judges do, in many of these cases, have to exercise judgment. They’re not easy calls.” Associate Justice Elena Kagan during her confirmation hearings

The United States Constitution is the oldest written constitution in the world. The fact that it’s written could lead some to conclude that it is a clear and unambiguous governing document. But the comments above reflect several underlying tensions that surround this document. As a legal document, its interpretation seems to be best exercised by judges and lawyers, suggesting that constitutional interpretation is best left to the “experts.” However, as a document that defines a democracy, its framers hoped that citizens would be able to read and understand it themselves. This raises the issue of who has the authority to definitively interpret the Constitution’s meaning. Second, as a document that is written in broad language, the Constitution raises the question of how the meaning of the Constitution is to be understood and applied. One Supreme Court justice has referred to the Constitution as a “living document.” Another has referred to the Constitution as “dead.” What do they mean by these descriptions? What factors guide and inform the decisions of those who interpret and decide cases that arise under the Constitution and what difference does it make? These tensions between expert interpretation and citizen understanding, and different sources for, and kinds of, interpretation generate continued questions about the meaning of our Constitution. The answers to those questions are often resolved by political conflict and legal judgment—at least temporarily. Consideration and discussion of these constitute the first goal of this course.

Although this course deals with constitutional law, this course is not, nor is it meant to be, an equivalent to a law school course on constitutional law. Unlike a law school course, the purpose of this course is not to provide students with an understanding of the Constitution based solely on legal principles. Rather, I hope this course will get you to think about constitutional law as a part of the political process. Thus, the second goal of the course is for students to gain an understanding of this branch of government. How does the Court work? What is the nature of its power? How does it “play” with the other branches? The political importance of the Court is evident in the controversy surrounding nominations to the Court, the reactions to the decisions that the justices make, and finally, in the effects that Supreme Court decisions have on American politics and the public.

A third goal of the course is for students to examine and think about Supreme Court decisions in both legal and political terms. That is, although the cases we examine can be understood and should be understood as a result of legal doctrine, they must also be understood as reflecting political factors as well. Thus, we will approach cases not only as applications of legal doctrine, but also as political phenomena. We will consider the nature of the decision--was this decision the only one possible? What other possible decisions could have been made? What factors--both legal and political—might account for this decision? What is the impact of the decision--i.e., what interests are helped or hurt by the outcome? Thus, we will discuss the role of the Court in the political process.
By understanding the political dimensions of the Court’s decisions, I also hope that students will gain a better understanding of the interactions between law and politics. Although most people think about the law as a set of concrete rules (see above), it is important to see that the cases considered by the Court are ones where “the rules” are not sufficient guidelines for decisions. The choices that the Court makes are often guided by extralegal factors. Does this mean that the Court’s decisions are simply reflections of political pressures and judicial ideology? Not at all. But the fourth goal of the course is for students to understand that focusing solely on legal rules and precedents provides only a partial understanding of the decisions made by the Court. I hope this recognition will provide a deeper understanding of the relationship between law and politics.

These four goals provide the context for the course material. The first part of the course is devoted to an overview of the Constitution and the Supreme Court. Here we examine the political, historical, and ideological context of the Constitution. We will also go over the workings of the Supreme Court, the process and impact of judicial selection, and the nature, scope, and limits of the Court’s power. The second part of the course will focus on the development of the scope and power of the federal government as reflected by the relationship between national and state governments (otherwise known as federalism) and the federal government’s regulatory power as exercised through the commerce and tax powers and the due process clause and powers of eminent domain. Finally, we will take a look at the other two branches of government: the Congress and the Presidency—what role has the Court played in defining and shaping their powers, and vice versa? Throughout the course, we will consider the legal and political factors that shape the Court’s decisions and their effects.

Course requirements: It should go without saying that you are expected to read the assigned materials and attend lectures and discussion sections. Attendance in discussion sections is mandatory. Sections provide opportunities for more extended examination of the course material; they should help you better understand the material and your TA will be a great resource for you in that regard.

Grades in this course will be based on several components: a short briefing exercise; three exams; quizzes; and class participation.

BRIEFS: The briefing exercise will require you to “brief” or summarize a case. The purpose of briefing cases is to provide you with a way of quickly summarizing the important facts, holdings, and reasoning for the Court’s decision. This is a valuable skill that will help with case understanding and studying for exams this semester and will help you with law school in the future. The brief will be assigned and is due in section.

EXAMS: There will be three exams. The first is an in-class exam on Wednesday, October 16. This exam will be a combination of multiple choice and short essay questions. The second exam is a take-home exam that will require you to analyze a hypothetical case. More details on this exercise will be provided later in the semester. The hypothetical for this exercise will be provided to you at least a week before the due date. This second exam will be due in lecture on Wednesday, November 13. The final exam will be a take-home exam, due on Monday, December 16 at noon.

PARTICIPATION: Besides section participation, there will be opportunities for students to participate in lecture.

QUIZZES: Finally, there will be 6-8 in-class quizzes during the course of the semester. The quizzes will provide me with feedback on the clarity of the lectures and on your understanding of the material, as well as provide a measure of your lecture attendance. Students may miss up to two of these without penalty; as a result, there is no way to make up a missed quiz. Quizzes are worth three (3) pts each; one pt is awarded simply for taking it. These points will be added up to make one score that will be curved and included in the calculation of your final grade.

Final grades will be determined as follows:

Case brief: 5%
Participation (in section and lecture): 5%
Two midterm exams: 50%
Quizzes: 10%
Final Examination: 30%
Please note that I want to fully include persons with disabilities in this course. Please let me know during the first two weeks of the course if you need any special accommodations in the curriculum, instruction, or assessments of this course to enable you to fully participate. I will maintain the confidentiality of the information you share with me.

**Late paper/makeup exam policy:** Work is due at the times noted. Extensions will be provided only in the case of illness or other serious personal circumstances, and only if I am contacted **in advance**. Late papers will be penalized one full grade for each day past the deadline. As a general rule, there are no makeup exams except in the case of documented emergency. In all cases, the decision to award extensions or to provide a makeup exam is at my discretion.

I have tried to schedule exams/papers to avoid conflicts with religious holidays. If, despite my efforts, it should happen that a due date for an exam or paper conflicts with your observance of a religious holiday, please let me know during the first two weeks of the semester so we can work on an accommodation.

**A note on academic conduct:** It should go without saying that you are expected to conduct yourself honorably in this class. This means treating yourself and others with respect. Please do not disrupt the class (e.g., do not read the paper, keep your cellphone on, listen to your MP3/Ipod, clean out your backpack, update your Facebook page, etc.) during class. I will expect students to use laptops appropriately in class—if laptops are a distraction, I reserve the right to restrict their use. In discussion, please respect the views of others; discussion should be civil.

It is also expected that you will do your own work in this course. The university has rules defining academic misconduct, and those who commit it are subject to penalties. I expect that you understand what academic misconduct is. The formal definitions are posted on the Dean of Students’ web site: [http://www.wisc.edu/students/saja/misconduct/academic_misconduct.html](http://www.wisc.edu/students/saja/misconduct/academic_misconduct.html). Those who commit academic misconduct will be prosecuted, so please don’t do it.

**Readings:** The text for this course is Lee Epstein and Thomas R. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints* (8th ed.). Readings in Epstein and Walker are noted as E&W; all cases are in E&W unless otherwise noted (readings in bold are available in the online case archive or, if noted, by email). Other readings outside the text will be distributed via email. Please note that readings may be subject to change during the course of the semester.

**Week of Sept. 2** (Note: No class on Monday, Sept. 5, Labor Day)  Introduction

**Week of Sept. 9**  Toward an understanding of the highest court in the land
- Read the Constitution and amendments in E&W, pp. 699-710
- E&W, Part I, pp. 3-10, Chap. 1, pp. 11-45; Part II, 49-56; and Chap. 2, pp. 58-88
- *Federalist* 78 and readings by Brutus, distributed by email

**Week of Sept. 16**  The nature of judicial power
- E&W, Remainder of Part II, Chap. 2; pp. 89-118

Some short additional readings on judicial selection will be distributed via email.

**Week of Sept. 23**  Federalism or, what if they gave a Tea Party….
- E&W, Part III, Chap. 6; pp. 323-363

**Week of Sept. 30** More on federalism
- E&W, Part III, Chap. 6; pp. 376-390
Week of Oct. 7  Federalism and the commerce clause at the start (New Supreme Court Term!)
E&W, Part III, Chap. 7, pp. 392-428

Week of Oct. 14 The modern commerce clause  (First Midterm IN CLASS on Wednesday, Oct. 16)
E&W, Part III, Chap. 7, pp. 429-473

Week of Oct. 21 States and the modern commerce clause
E&W, Part III, Chap. 7, pp. 482-501

Week of Oct. 28 The only sure things are death and…
E&W, Part III, Chap. 8, pp. 503-549 (relevant cases only)

Week of Nov. 4 Tax limits
E&W, Part III, Chap. 8, pp. 538-560
Cases: National Federation of Independent Business v. Sebelius (this case is also included in the commerce clause section, so please read that part of the case and the part included in this section), Complete Auto Transit v. Brady, Quill Corp. v. N. Dakota

Week of Nov. 11 The transformation of due process (Second Midterm Exam due Wednesday, Nov. 13 in lecture)
E&W, Part III, Chap. 10, pp. 606-654

Week of Nov. 18 “Takings”
E&W, Part III, Chap. 11, pp. 663-680

Week of Nov. 25 “Takings” (cont.)  (No class on Wednesday, Nov. 27. Happy Thanksgiving!)
E&W, Part III, Chap. 11, pp. 681-694
Berman v. Parker, Hawaii Housing Authority v. Midkiff, Kelo v. City of New London

Week of Dec. 2 The Executive
E&W, Part II, Chap. 4, pp. 183-255 (relevant cases only)

Week of Dec. 9 The Legislature
E&W, Part II, Chap. 3, pp. 120-123, 144-175

Final Exam (take-home) due on Monday, Dec. 17 at noon—Hope you have a good holiday break!