Course Objectives:

- To teach and discuss the important doctrines of United States constitutional law.
- To help students understand both the legal and political aspects of the important constitutional decisions that have shaped our country. US Constitutional law cannot be discussed or understood without taking into account the political realities that surround most constitutional disputes. Similarly, the outcome of these disputes is profoundly affected by legal argument and precedent.
- To encourage students to think more analytically, write more clearly, and present themselves effectively in class discussions and presentations. Specifically, I expect students to learn to read a text carefully as is required of anyone who works with legal documents. Students should also improve their presentation skills in this class, and they should become better at explaining and defending their ideas to a group. Each student is also expected to write clearly and effectively.

Learning Outcomes:

Our activities in this course will build on several of the learning outcomes listed for the Political Science major at http://learningoutcomes.byu.edu. Our specific course activities as related to those learning outcomes are as follows:

- Be able to articulate principles of faith in political analysis—Students will discuss the moral issues surrounding the constitutional decisions about the death penalty, abortion, death (including a right to die and assisted suicide), discrimination, privacy rights, the free exercise of religion, the establishment of religion, hate speech, and free speech rights.

- Demonstrate a familiarity with each of the four major subfields of political science: American politics, comparative politics, international relations, and political philosophy—Students will learn about some of the most important parts of American politics, the US Supreme Court and its decisions as well as the historical development of the most important legal doctrines of the Supreme Court.

- Possess a factual and theoretical knowledge of countries, political processes, political theories, and political thought—Students will learn both the detailed arguments of important US Supreme Court decisions and the context surrounding those decisions.

- Use appropriate methods of analysis and research, including qualitative and
quantitative methods, historical comparison, and textual interpretation to answer political questions—Through our daily analysis of Court decisions, we will practice textual analysis as it is done by legal professionals. In addition, the oral presentation, papers, and exams will also require a high level of competency at legal textual analysis, testing how well students have acquired this skill from the daily reading and discussion of cases.

- **Write professional grade research papers on political science questions**—Students will write two specialized types of legal research papers, a legal brief for a mock argument before the US Supreme Court and a mock decision from the same Court. Both papers will require significant legal research and argumentation that is expected in a high quality legal research.

- **Communicate effectively by presenting ideas in a high quality oral presentation**—Each student will participate in two oral presentations in class, either as a party to a case brought before the Supreme Court or as a judge of the same Court questioning counsel in a mock Supreme Court case. These presentations will develop the skills of asking critical questions, formulating persuasive answers immediately, simplifying difficult topics, and arguing persuasively. These presentations will differ significantly from the typical oral presentation made in a class and will practice a different set of presentation skills than the typical classroom oral presentation.

- **Think critically, analytically, and synthetically**—In our daily discussion, in mock trial presentations, and exams, and in writing briefs or court decisions, students will practice analyzing and evaluating the logic and arguments used in past Supreme Court decisions.

- **Properly cite sources using a recognized citation style**—Students will be expected to adhere to the highest standards of intellectual honesty in writing both research papers and in their use of materials for their mock legal presentations. Students will also be introduced to the ABA citation style in addition to the Turabian citation style.

- **Participate effectively in political processes by having an appropriate knowledge of international and national politics and political thought**—Students will become more informed voters and participants in political processes by learning the history of US Supreme Court decisions as well as the legal and political logic that underpins those same decisions.

**Tentative Schedule of Classes and Readings:**

Our readings are edited versions of Supreme Court cases. These cases do not have a copyright, so I will be posting them or distributing them to you electronically. The readings are organized according to the topics listed below. Here is the tentative schedule of topics that we will be discussing.

- **Sept 3rd**  Course Introduction
- **Sept 6th**  Judicial Review
## Course Requirements:

### Readings

I expect students to have read the assigned readings **before** the lecture and discussion on the readings. You will find it helpful to bring a copy of the readings that we will be discussing to class. This class combines lectures with discussion; much important material will come out in class discussion that I will summarize at various points in the discussion. As part of my effort to train students to understand legal reasoning, we will approach each new topic by reading several cases. Only after extensive discussion will an outline of the law develop. This method is usually very frustrating to students, but it is through this process of reasoning that the law is interpreted and developed. There are no shortcuts in developing this skill. Students who are uncomfortable with this type of a learning format should consider taking a different course.

### Participation in Class Discussion
This class is not about simply learning the rules of constitutional law. Through discussion and questioning, students will develop skills of expressing their views to a group and defending those views. Students will also learn through practice how to read and understand a complex legal text. A student who does well on an exam may still not have learned these skills. Thus, I create incentives for students to attend class, to prepare the readings for class and to participate in discussion. Students who work at developing these skills will be rewarded.

In evaluating class participation, I will consider:

- **if you are prepared when I call on you to discuss a case.** Every class period I will call on several students to explain or discuss cases in our assigned readings. If you are able to respond to my questions in a way that suggests a familiarity with the assigned readings, you will receive credit for being prepared. If you are unprepared, that will also be counted. Everyone has two free days to be unprepared. After two times being unprepared, deductions will be made to your course participation grade. If you are absent or late to class when your name comes up for me to call on you, that counts as being unprepared.

- **how many class periods in which you have volunteered a comment.** I also expect every student to volunteer a comment, answer, or question in every class period. These comments must be voluntary and not in response to me calling on you for an answer. Each student also has two free days. If more than two days are missed, corresponding deductions will be made to your class participation grade. However, if you complete the course evaluation for the class and release your name as having completed the evaluation, I will give four “free” days for class participation (voluntary comments only, course evaluations do not affect the number of free days that you have for being prepared when I call on you). In addition, if you miss three or more days of class for illness, emergency, or a university excused absence, you will be allowed to make up any absences after the first two days. However, if you have fewer than three excused absences, you are expected to use your “free” days for those absences.

These outlines are the minimum that you must meet to get full credit for class participation. I encourage you, however, to be an engaged listener in class and to ask questions as they arise. If we don’t have time to answer all of your questions, please talk to me outside of class. In addition, you will better develop your skills of legal reasoning if you try to answer all the questions that I pose. Even if you are not being called on, you should try to formulate an answer to each question that I ask and practice, even if it is within your own head, how you would answer a question.

**Writing Requirements**

Every student will write two different legal papers, a brief in a moot court case and a decision in a similar case. Students may choose to write their own individual papers, or if there are multiple judges or multiple people representing one side in a case, it is fine to write a group paper. If you choose to write a group paper, please understand that all participants in the group will get the same grade for the paper. If you anticipate being disappointed by a group grade,
please choose to write individual papers.

Each student in the class will also serve twice in moot court activities. Once you will be a party to a hypothetical lawsuit before the US Supreme Court challenging an existing precedent (one party will be arguing to overturn that precedent, one party will be arguing to maintain that precedent). In a different case you will serve as a judge hearing arguments to overturn an existing precedent. When you serve as one of the parties, your writing assignment will be a legal brief arguing your position (either to overturn or maintain the precedent). When you serve as a judge, your writing assignment will be to write a decision in the hypothetical case.

On the second class day of the semester I will ask you to turn in your top three preferences for cases in which you would like to be a party and also your top three preferences for cases in which you would like to serve as a judge. In addition, if you have friends that you would like to work with, you can submit their names with yours. I will do my best to try to accommodate preferences, but I may not be able to accommodate every preference. In addition, if you don’t have strong preferences, you don’t need to submit them. I will simply assign you where positions are available. Please look at the calendar for possible conflicts before you choose preferred activities. For example, because briefs are due one week before the presentation and decisions are due one week after presentations, some presentations will have deadlines right around the midterm exam.

The possible cases for the moot court activities and their tentative presentation dates are listed above in the course schedule. Most of the moot court activities occur on the same day that we discuss that topic. Three of the early topics are presented on the same day later in the semester.

The deadline for party briefs to the case is one week before the scheduled presentation date. In addition to delivering one copy to Brother Christensen, it is the obligation of each party to deliver a copy of their brief to each of the assigned judges and also copies to the opposing counsel. The deadline for the judicial decisions is one week after the scheduled presentation date. Copies of decisions should be delivered to Brother Christensen and to all parties. When delivering papers to Brother Christensen, please put them under his office door (775 SWKT) if you come before the hallway is locked. If you come after the hallway door is locked, you may turn your papers in at the Department drop box (to the right of the Political Science Department office door at 745 SWKT). If you use the drop box, please follow the directions on the box and put the information required on your paper when you turn it in. The building is locked at about 10:00, so if you come to turn in your paper after the building is locked, then your paper will be late. Late penalties for papers accrue at 10 percent for every day that the paper is late, excluding Saturdays and Sundays. Papers that are e-mailed to me incur an additional 5 percent penalty. Some students decide to take an extra night to work on their papers and submit them in the morning before I pick them up. I am fine with this strategy, as long as I can’t distinguish that your paper actually came in after the deadline. If I can tell that your paper actually came in late (e.g. you put it in the Department paper submission box after the secretary picks up the papers in the morning or you put it under my door after I have come into work and already picked up the papers under my door), then your paper will get a late penalty.

The number of people working on a case may vary. If more than two people are assigned as parties on a case, then one side will have two rather than one person working on that paper. Those two people are welcome to write a joint paper or write separate papers (for the same side). If separate papers are written, please label one of the papers as an amicus (friend of the court) brief. Similarly, the number of judges may vary for a particular case. The judges may all join to
write a majority opinion, or they may each write separate opinions. Two judges may join to write a joint opinion while one judge may decide to write a separate opinion. If three judges write separate opinions, and two judges agree on a position, label one of the two opinions the majority opinion and the other a concurrence. Label the minority opinion a dissent. If you are equally split as to which position wins, the side to uphold the precedent will be called the majority opinion.

I expect to talk with you about your ideas as you work on your papers, both as parties and as judges. I won’t tell you what to argue, but I am happy to respond to your arguments. You should read, as much as you can, your assigned cases, the lower court versions of those cases, the briefs for relevant cases, subsequent cases that have followed that line of precedent (or previous cases in that line of precedent), and law review articles on this line of precedent. If you go to www.oyez.org, you will probably be able to listen to the oral arguments of your case and related cases. Briefs for cases can be found at LexisNexis Academic (accessed from the BYU library site, choose “US Legal” then “Supreme Court Briefs”). Law review articles are at the same LexisNexis site under “US Legal” and “Law Review.” As you go through all of these materials, you should be able to come up with more arguments than you could possibly use. That is good; you can then prioritize the best arguments for your briefs and your oral presentations. These instructions apply to the judges as well as the counsels. The judges will not be able to ask good questions unless they are fairly familiar with the cases and the legal reasoning behind the cases. The judges have the advantage of being able to read the briefs before the moot court activity, but relying only on the briefs will make your questioning of counsel much less effective.

The decision or decisions written by the judges are expected to have “value added.” Do not just repeat the arguments used by the counsel in their briefs. At a minimum, evaluate those arguments and justify why certain arguments raised are persuasive and other arguments raised are not persuasive. In addition, it will help your grade on your decision if you give your own reasons for your decision. Do not feel constrained by the briefs to use only those arguments. In fact, if you limit your arguments and reasoning to only those points raised in the briefs, it will hurt your grade for your decision.

The party or parties arguing to overturn the precedent have the advantage that they are assigned to give the facts of the case. The facts of the case should be delivered to the opposing counsel two weeks prior to the moot court presentation. It may seem like an unfair advantage to give the people seeking to overturn precedent the ability to tailor the facts of this hypothetical case to their advantage. Yes, it is an advantage, but it is no greater advantage than the advantage that the other counsel has in defending an existing precedent of the court. The defenders of the precedent have the advantage of the law on their side, those seeking to overturn that precedent have the advantage of being able to tailor the facts of the case to support their arguments. Be wary, though, about pushing the factual advantage too far. If you make the cases too dissimilar, then it will be easy for opposing counsel and the judges to rule in your favor without overturning the existing precedent. In other words, courts always prefer to distinguish a new case from an existing precedent. It allows them to give the verdict that they think is fair while not overturning precedent (which is usually undesirable from a court’s perspective). If the one side constructs a fact situation that is too extreme, then it will actually make it easier for the court to reject arguments to overturn the precedent.

At the LexisNexis site you can see both the digital version of a brief and a PDF of the actual brief. You may write your brief according to the exact format of a Supreme Court brief, or you can just submit to me the argument section of the brief with a title page. I expect your brief to read like a Supreme Court brief, but I am fine if the formatting differs from an actual Supreme
Court brief. In addition, you should try to follow the citation style used in US legal documents. I found an online summary of the rules at http://www.rbs0.com/lawcite.htm. I will not be a stickler about the minor rules for citing cases, etc., but I do expect you to see how citations to cases, laws, and law review articles are done in both briefs and decisions so that you can generally follow that format. I think that it is less necessary to give models of how judicial decisions are written as every one of our readings is an example.

It should be obvious in reading actual Supreme Court decisions and briefs in Supreme Court cases that a strong legal argument uses precedent extensively. This means, your writing should be full of citations to other legal cases. If there is a case that goes against your position, you need to deal with that case rather than ignore it. Your brief or decision should explain why the current case is different than the prior case. It will be impossible to write a good brief, write a good decision, or do well in your oral arguments if you don’t master the case law surrounding your issue.

Do not, however, ignore the strength of non-precedential arguments. Do some research. Find some facts or statistics. Tell a compelling story. Present a hypothetical. All of these types of arguments are also used in legal settings. Gather the most compelling evidence to support your position, whether it be legal precedent, facts, statistics, anecdotes, or hypothetical situations.

How long should your briefs or decisions be? As long as is needed to cover both the arguments that support your position as well as a response to the arguments of the other side. I am much less interested in the length of your papers than I am in the quality and the comprehensiveness of your arguments. Don’t worry about page length, but do understand that these issues are complex enough that a short paper (say 5 pages, double spaced) would not come close to addressing the issues in a satisfactory way.

It will also seem odd to write a brief or decision when the original briefs and decisions are available. Some of the issues have already been relitigated, with the original Supreme Court decision and then a subsequent Supreme Court decision that upheld the original precedent. Am I just asking you to copy these pre-existing arguments? Yes, and no. It is perfectly fine to use an argument that was already used previously. You should, however, examine all of the arguments and use the ones that seem the strongest. You should think of new arguments or new responses to old arguments. A good paper will show an awareness of the best of the previous arguments that have been made as well as some creativity and research in updating old arguments with new information or thinking of new arguments.

Here is some advice about writing these papers, both the brief and the decision. Much of what I say below will repeat what I have said above. I say it again to stress the importance of some of these points and help you write the best possible papers.

(1) Everyone must use precedent (prior legal cases). Even if you are arguing to overturn precedent, see if there aren’t aspects of that precedent that you can use to your advantage. At a minimum cite the dissents of the previous cases to bolster your arguments.

(2) Everyone should use precedents that go beyond the cases that we read for class. Your brief or your decision will not be a persuasive brief or decision if you only show an awareness of the several cases that we read for class. You need to read and understand the cases on your topic, not just the few that we read for class.

(3) Your goal is to create a new precedent for the Court or to uphold the existing precedent. Make sure that you don’t become confused and start arguing to win your specific case rather than to overturn or uphold the precedent. For example, if you are arguing to overturn a precedent and your arguments make it easy for the judges to rule in the favor of your client while
upholding the precedent, you will have actually lost your case. Decisions at the Supreme Court are not about individuals, they are about legal precedent that affects thousands of people in thousands of similar cases across the nation. Your goal is to either create new precedent or support existing precedent, it is not to win this specific case for your client. Ideally you want to both win the precedent issue and win the case for your client, but don’t make the mistake of focusing on winning your client’s case and thereby lose the more important issue of either upholding or overturning the existing precedent.

(4) If one of the parties makes an egregious mistake in either their facts or their arguments that make it simple for the Court to rule, please address the arguments or the fact situation the parties should have made but did not. It is fine to comment on the mistake of the party, but do not limit the legal analysis in your decision to only those weak or mistaken arguments. Supply the arguments or fact situation that should have been made and give your analysis of those points in your decision.

(5) Always go beyond what the parties have said. Don’t just write a brief that only responds to the arguments of the other party. Don’t just write a decision that only uses the arguments given in each party’s briefs. Please do conduct your own independent analysis of the legal issues.

(6) In addition to precedent, use moral, statistical, logical, hypothetical, or anecdotal arguments. You have to use legal precedent in your briefs and decisions, but don’t limit your arguments to only legal precedent. Great places to find these other arguments are other decisions on the topic, the briefs filed in your assigned case or other related cases, and law review articles on the topic. Of course, you should also do your own research and thinking and come up with your own arguments.

(7) I can’t imagine an excellent brief or decision that didn’t use and rely, to at least a small extent, writings by legal experts on the topic. Their writings will be in law review articles.

(8) If you are writing to uphold an existing precedent, do not just rely on precedent as your argument. You must argue as if the Court were deciding the issue fresh. Obviously, precedent is in your favor and it makes sense to rely on it some, but you still need to make additional arguments to justify the precedent that the Court created in the past. The great majority of your arguments should not be legal precedent arguments. Tell the Court the reasons why that legal precedent is correct and should continue to be upheld.

Oral Presentation

Each student in the class will participate twice in oral presentations, once as a party to a moot court case and once as a judge in a moot course case. For each moot court case, each party will have ten minutes to present to the court. Each party should be prepared to present for ten minutes to the court, but each party should also be prepared to be interrupted repeatedly and simply answer various questions for ten minutes. Each party should also be prepared to go back to his or her presentation after answering a question from a judge. Each judge should be prepared to listen and respond to arguments presented but also come prepared with a list of questions to ask each of the parties. As such the oral presentations are much less like a formal and polished presentation and more like a debate. However, since the judges are the ones to be persuaded, parties should give great deference to the judges. For example, the judges can and should interrupt the parties whenever they want. The parties should never interrupt the judges or ask that the judges wait until the party is finished saying something. Similarly, the judges can say that the party’s argument is ridiculous or absurd. The parties should never say the same about the judge’s
arguments or questions. Brother Christensen will evaluate the quality of oral arguments, both for the parties and for the judges. Being prepared to ask or answer questions, understanding the relevant arguments and laws, and having a persuasive response ready for an anticipated question will all count towards a better oral presentation grade. I expect the judges to interrupt and ask probing questions. A judge that asks few questions or asks only obvious questions will earn a low grade for his or her oral presentation. Similarly, a judge who asks questions that show that the judge does not understand the legal arguments well or has not prepared well will also earn a lower oral presentation grade. Each judge will earn a grade independent of the performance of the other judges. If two people are on the same side as counsel, they will earn a combined oral presentation grade.

Here is some advice on how to do well on your oral presentations. It repeats many of the points given in the instructions above:

1. Every judge needs to ask a good number of questions. If one judge asks 10 questions and another asks 2 questions, the judge who asks fewer questions will not earn a high grade on his or her oral presentation.

2. In contrast, if there are multiple presenters for one side in oral arguments, they all receive the same grade, regardless of how much or how little one of the people talks. It is fine for presenters to designate one person to do the entire presentation.

3. Judges should ask questions that go beyond the issues presented in each party’s brief. It is easy to just ask each side questions based on the arguments given in the opponent’s brief. Judges who only or primarily ask these types of questions will earn lower presentation grades.

4. Similarly, counsel should be prepared to handle all types of questions about a variety of issues, not limited to the issues discussed in each party’s brief. You prepare for these type of questions by reading all of the relevant cases, reading the actual briefs in these cases, and reading law review articles on your topic. If you are prepared in this way, you will be more likely to respond well to unanticipated questions.

5. Concise questions are usually more effective than long, confusing questions. Judges should try to hone their questions down to their most significant points. Counsel should also try to give a succinct answer first upon which they can elaborate if necessary.

6. There are obvious questions and thoughtful questions. Judges who rely primarily on obvious questions will earn lower presentation grades than judges who ask a higher percent of thoughtful questions. An obvious question is something like “Please explain why electrocuting someone shouldn’t be considered a cruel punishment.” A more thoughtful question might be “If the standard for deciding whether a punishment is cruel is based on the amount of physical pain a person suffers, then shouldn’t our decisions about what constitutes cruel punishments be consistent over time? After all, it is just as painful to be electrocuted in 1910 as it is in 2010.”

Exams

*Missing an exam*

If you miss an exam for a medical or family emergency, you will be allowed to make up the exam without a penalty. If you need to miss the final exam for a very good reason that is not a medical or family emergency (weddings, family reunions, plane tickets home, and starting new jobs are not “emergencies”), you should either take a different class or take an incomplete for the course and make up the final exam sometime after the final exam is given. University policy prevents my giving the exam before the date of the final exam. My policies for the midterm exam are less strict. If you know that you will have a problem taking the midterm exam, please
come and see me before the exam is given. Students who miss an exam without a documented family or medical emergency will be allowed to take the exam the following day if they contact me on the day of the exam. They will receive a 10 percent penalty for taking the exam late. Students who fail to contact me the day of the exam will not be allowed to take the exam late. They will receive a zero for the exam. Students who come late to the final exam and wish to stay beyond the ending time of the exam may do so with a 5 percent penalty. Similarly, students who take the midterm exam and exceed the time limit for the exam will also receive a 5 percent penalty.

Content of the exams

Exam questions will be based on both the readings and class discussions. Though I do not provide a study guide for the exams, the cases discussed and the issues illuminated by our discussion will be a useful framework for review. The midterm exam will cover the material up until the date of the exam. The final exam will be comprehensive. You will not be allowed to use any materials in the exam. The exams are not open book or open note exams. The exam consists entirely of essay questions. The essay questions will be in a traditional law school exam format. I will give you a hypothetical set of facts and ask you to write a judicial decision or an argument for one of the parties to the dispute that applies your interpretation of relevant law to the facts of the hypothetical case. Alternatively, I could ask you to answer an essay question about a legal issue.

Because law school exams are quite different than the type of essay exam you might be familiar with, you may want to consider looking at this website <http://lib.law.washington.edu/ref/lawexams.html> There are links to exams given at other schools and there is an excellent essay on how to write good law school exams.

Here is my advice on preparing for exams:

(1) Practice each day of class by reading and preparing the cases. Even if I don’t call on you, try to answer the questions that I am asking the other students. The analysis that we do in class each day is similar to the identification of issues and analysis that is necessary to do well on the exams.

(2) Because the exams expect you to know some cases and associate specific legal doctrines with specific case names, it helps if you can summarize each day’s topic with about a page of notes about the issues and the cases. Learn this material and be able to remember the various issues that surrounded that particular topic as well as the case names that are associated with specific doctrines or represent specific examples of an argument or fact situation used by the Court.

(3) Use a memory trick to help you remember the different topics that we discuss. Sometimes students miss points on exams because they fail to see that the exam answer involves a specific topic of the law. Mentally reviewing the different topics covered while sitting in the exam sometimes helps students to recognize a topic of the law that they might have missed otherwise.

I will give more specific guidance about the exams before the midterm exam.

Grading

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<th>Component</th>
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<tr>
<td>Participation in class discussion</td>
<td>5%</td>
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<tr>
<td>Preparation for class discussion</td>
<td>5%</td>
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<tr>
<td>Paper—Brief</td>
<td>10%</td>
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Paper—Decision 10%
Oral Arguments—Counsel 5%
Oral Arguments—Judges 5%
Midterm 10%
Final Exam 50%

Grades are assigned as follows: 92.5-100% as an "A," 90-92.5 as an “A-,” 87.5-90% as a B+, etc. On most assignments, including participation points, the maximum number of points that can be earned is 95. I reserve the points from 95 to 100 for the occasional paper, presentation, or participation that is phenomenal. If you earn a 95 on any course assignment, pat yourself on the back, you have earned the highest grade that I regularly give.

I also curve up grades to something close to the average grade for an upper division political science class, something around an average GPA of 3.0 or 3.1. I never curve down grades to create a certain number of C or D grades. It is quite possible for everyone in the class to earn a B or A grade. It is also quite possible that several people in the class will earn C grades. If your scores on exams and other course work are in the 70s or lower and your relative ranking to other students in the class is quite low, expect to earn a C or lower for your course grade. As in law school, the exams have a great influence on your course grade. If you do well on the final exam, it will be reflected in your course grade, and if you miss some important arguments on the final exam, your course grade will also be affected significantly. I rarely give D or F grades, but a student who misses many classes or fails to turn in assignments or turns in work that shows only minimal effort will earn a D or failing grade in this class. Please don’t take the wrong message from these warnings; the average course grade in this class will be similar to the average course grade in other political science elective courses.