

POL SCI 411
Constitutional Law: Government Powers & Federalism
University of Wisconsin – Milwaukee (Fall 2021)

Instructor: Prof. Erin B. Kaheny
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Teaching Assistant (TA): Aleksander Henson
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E-mail Alek Henson to schedule an online TEAMS appointment.

COURSE MEETING TIMES & LOCATION: MW 11:00 am -12:15 pm in Bolton (BOL) B84

COURSE DESCRIPTION:

In this course, we will explore constitutional developments in defining the nature and scope of judicial, congressional, and executive power. The course will also address the enduring constitutional debates surrounding the appropriate balance of power between the national and state governments.

COURSE PREREQUISITE:

Junior or senior status

Legal Research Assignment Due: September 29

Midterm Exam: Wednesday, October 27 (regular class time)

Final Exam: Wednesday, December 22 (10:00 am – 12:00 pm)

Moot Court #1: Wednesday, December 1

Moot Court #2: Monday, December 6

Moot Court #3 (If applicable): Wednesday, December 8

REQUIRED TEXTBOOK & ONLINE CASE ARCHIVE:

Epstein, Lee, and Thomas G. Walker. 2020. *Constitutional Law for a Changing America: Institutional Powers and Constraints*. Tenth Edition. Washington, D.C.: CQ Press.
ISBN: 978-1-5443-6930-3

Online Case Archive: Access is free to those who purchase a new copy of the textbook (with the above ISBN). For those purchasing a used copy, you may purchase access through the following Web site:
<https://us.sagepub.com/en-us/nam/constitutional-law-for-a-changing-america-resource-center/book250212>.

CLASS REQUIREMENTS AND POLICIES:

Panther Community Health and Safety Standards

UWM has implemented reasonable health and safety protocols, taking into account recommendations by local, state and national public health authorities, in response to the COVID-19 pandemic. As a member of our campus community, you are expected to abide by the Panther Interim COVID-Related Health & Safety Rules. These standards apply to anyone who is physically present on campus, in UWM-controlled facilities, or participating in a UWM-sponsored activity.

With respect to indoor spaces on UWM facilities (classrooms, labs, performance spaces, etc.):

Masks are always required while indoors on UWM campuses and in UWM controlled facilities, with limited exceptions – environments where hazards exist that create a greater risk by wearing a mask (for example, when operating equipment in a lab with the risk of a mask strap getting caught in machinery, or when flammable materials are being used). Such exceptions must be approved in advance. A student who comes to class without wearing a mask will be asked to put on a mask or to leave to get one at a mask handout station. Failure to do so could result in student discipline. You should check daily for COVID symptoms by completing the self-check at <https://uwm.edu/coronavirus/symptom-monitor/>. Symptoms may appear 2-14 days after exposure to the virus and include fever, cough, or shortness of breath or difficulty breathing. See the CDC's Website for more information about COVID-19 symptoms. If you test positive for or are diagnosed with COVID-19 based on symptoms, you should complete this Dean of Students Office form:

https://cm.maxient.com/reportingform.php?UnivofWisconsinMilwaukee&layout_id=4. By doing so, you will get information on resources, help UWM identify individuals you may have come into contact with on campus so that UWM can work with the local health department, and allow UWM to clean campus areas you visited as appropriate.

Attendance Policy

You should not attend class if you are feeling ill. Do not attend class if you have COVID-19, if you are experiencing symptoms consistent with COVID-19, if you have been in close contact with others who have symptoms, if you need to care for an individual with COVID-19 or have other health concerns related to COVID-19. In case of illness, you should contact me immediately to discuss options for completing course work while ill. Please contact me if illness will require late submission or other modifications to deadlines. If remaining in a class and fulfilling the necessary requirements becomes impossible due to illness, contact me to discuss other options.

As your instructor, I will trust your word when you say you are ill and, in turn, I expect that you will report the reason for your absences truthfully.

Please read the syllabus section below on “submitting course assignments and late penalties” for further details regarding the steps I need you to take if you are seeking an extension on an assignment and a late penalty waiver on an assignment due to illness or a University-excused absence. Protocol for seeking a make-up opportunity on course exams is found under the “Exams” section of this syllabus.

Face-to-Face Class Recordings (Lecture Capture and Distribution Restrictions)

This semester, I *may* opt to record class sessions via “lecture capture” for students who are unable to attend in person on a given day (please note: this is, in part, contingent upon whether our assigned room is equipped with this technology). Students who participate during an in-person class session this semester are agreeing to have their audio/video or image recorded via lecture capture, if employed.

Students are not permitted to video or audio record class sessions on their own without the permission of the instructor, nor are students permitted to distribute or copy any class recorded sessions provided via “lecture capture” or posted on the associated course Canvas site (if applicable).

Student Conduct

I seek to create a classroom environment marked by mutual respect. At all times, I expect students will conduct themselves in a professional and courteous manner. Please do not arrive late, leave early, or talk while the instructor is talking or a classmate has the floor. Under no circumstances should students spend class time surfing the Internet, on their cell phones, or reading outside materials, etc. ***The use of cell phones in this class will not be tolerated.*** Please silence the ringer of your cell phone prior to entering the classroom.

If you need to leave a class early, or if you know that you will be late, please inform me in advance whenever possible.

Students are expected to abide by the rules of conduct outlined in the UWM Student Handbook in all class meetings, activities, online postings (if relevant), and in all e-mail communication surrounding this class.

Canvas, E-Mail Communication & Canvas Web Site

Students are expected to regularly check their UWM student e-mail accounts for messages regarding this class or for responses to e-mail inquiries. In addition, if you wish to contact the instructional staff via e-mail, you should do so using your UWM e-mail account. We will only reply to a student’s UWM e-mail address. Students should allow up to 72 hours (standard *business* days, i.e., M-F) for a response to most e-mail inquiries. E-mail inquiries will typically be answered during regular business hours (i.e., 8 am – 5 pm), Monday-Friday.

Note that I will use Canvas to post important announcements and reading assignments regarding this class. Therefore, in conjunction with checking your UWM e-mail, you should also regularly consult our course Canvas page. You are expected to do so until the final course grades are posted on PAWS.

Class Participation

While I will not grade you on regular class participation and attendance this term (aside from the in-class component of the moot court simulation (see below)), I will strive to create a classroom atmosphere where students actively participate in class discussions. To encourage broad class participation, students will be encouraged to volunteer to help discuss cases for each class, and I will do my best to foster good discussion during each meeting. As part of this process, students will be asked to comment on the facts of the case, the major legal questions, the nature of the majority opinion and any separate opinions featured in the case excerpts.

Exams

There will be two exams in this class. The final exam will emphasize material covered since the midterm exam, but it might also include some questions that are cumulative in nature. Both exams will be closed book and will involve essay questions. Both exams will also present students with at least one hypothetical case scenario that will require a written response. All responses are required to be written in ink. The instructor will supply blue books for the examinations.

If you are ill, have a University-excused absence on the date of an exam, or believe you have some other

legitimate reason for missing a class exam (e.g., family emergency), you should notify me via email **prior** to the exam to discuss a make-up opportunity.

Legal Research Assignment

A legal research assignment will be distributed to students (and posted on our Canvas site) on **September 15** and will be due *in class* on **September 29**. The assignment is required to be typed, and students are not to collaborate with peers or other individuals on the assignment. If you need help with the assignment, please contact either me or our course TA.

Moot Supreme Court & Bench Memo/Attorney Argument Brief

Each student will be assigned to play the role of a Supreme Court justice or an attorney in a moot Supreme Court. The scenarios you argue might be hypothetical or might be an actual pending matter before a district, circuit, or the U.S. Supreme Court. Students wishing to volunteer to play the role of an attorney should contact me early in the semester as these positions are limited. **Please make sure you are fully committed to serving as an attorney prior to volunteering for this role!** Case assignments will be distributed to students approximately one month prior to their moot court date.

At the moot court, each attorney will be allotted 20 minutes to present their oral argument. Those assigned to be justices are required to ask questions of each attorney. Students assigned the role of a justice should note that active participation (asking a minimum of two informed and well-developed questions) is required to receive a passing grade for the assignment. Therefore, students wishing to earn an above-average score should strive to surpass minimum requirements. To ensure student-justices have the opportunity to ask questions, we will modify the oral argument process from procedures typically followed by the Supreme Court (see Canvas handout for details).

As part of this simulation, students are also required to prepare either a “bench memo” (for those assigned as justices) or an “argument brief” (for those assigned to serve as attorneys). A “bench memo” should include an introductory section (3-4 pages) describing the student’s assigned justice with special attention toward the justice’s ideological leanings, behavioral tendencies, and likely approach to the issues raised in the case (hence, you will need to detail the major legal issues raised in the matter, and you will need to do significant research on your assigned justice). Following this section, the student should list a minimum of ten questions they might ask of the attorneys during oral argument. Please make every effort to evenly divide your questions between those that you can ask of the petitioner and those you can ask of the respondent.

Students assigned as attorneys should submit an “argument brief” with an introductory section (3-4 pages that describes the attorney’s overall strategy for persuading the Court of the strength and validity of their assigned position, paying attention to likely coalitions among the justices and their known approaches to issues raised in the case (hence, you will need to detail the major legal issues raised in the matter, and you will need to do significant research on the Court’s composition). Following this section, the student should provide a minimum of ten talking points or arguments expected to be presented during oral argument.

Bench memos and argument briefs should be typed with double-spaced, one-inch margins, and a 12-point font. They should be *very well researched*, and sources (e.g., journal/law review articles, books, or legal cases) used in the development of the memo or brief must be cited appropriately throughout the text using in-text parenthetical citations. Each student should attach a “works cited” list with full reference information (by definition, all of these sources should be cited in the body of your papers!).

Student bench memos/argument briefs must be submitted by the end of class on the day of the student's moot court. Otherwise, late penalties (ten-percentage point deduction per each day late, including weekends) will apply.

Further instructions for the moot court will be posted on the course Canvas site.

If something should happen that prevents you from attending class on the date of your moot court (e.g., illness), please e-mail the instructor **prior** to the start of class. **This is very important!** If the student has a legitimate reason for missing their assigned session, the student will be permitted to submit a research paper to count for both the in-class simulation and memo/brief requirements. The research paper must be 6-8 pages (typed, double-spaced, one-inch margins on all sides, 12-point font) and must discuss 3-4 major arguments *on both sides* of the student's assigned case. Students must consult and cite multiple scholarly sources (e.g., journal articles, books, law review articles) and relevant case precedents in preparing the paper. Any source used in the development of the paper must be appropriately cited throughout the paper using in-text parenthetical citations, and each student should attach a "works cited" list with full citations. Unless the student provides a reason for and is given a longer extension (please send me an email message if you feel your circumstances warrant more time), the paper will be due to Canvas no later than seven (7) days after the student's original moot court date. Thereafter, late penalties (ten-percentage points/per day, including weekends) will apply unless the student qualifies for an additional late penalty waiver.

Grades

Legal research assignment	10%
Midterm exam	30%
Final exam	30%
Moot court simulation (15% in-class (oral argument), 15% bench memo/argument brief)	30%

Point Scale

A	93-100	C	73-76
A-	90-92	C-	70-72
B+	87-89	D+	67-69
B	83-86	D	63-66
B-	80-82	D-	60-62
C+	77-79	F	...-59

Grading Concerns

If you have questions or concerns regarding how an assignment or exam was graded, your first step should be to discuss the issue with the TA (if applicable) during office hours or by appointment. If you are not satisfied after consulting with the TA (i.e., if the TA graded the assignment or exam), you should meet with me in an appointment. All students who wish to appeal grading matters should do so within one week of the assignment or exam being returned to the class. You may request that I re-grade any assignment or exam in this course; however, I retain the right to raise or lower grades upon review. Please allow 7-10 days for turnaround time on all assignments and exams.

Academic Misconduct

I will not tolerate acts of plagiarism or any form of cheating on exams or assignments. If I suspect a case of academic misconduct, I will follow the academic misconduct and reporting policies of the University of Wisconsin-Milwaukee.

Dropping the Course & Incompletes

It is your responsibility as a student to determine if you should drop this course and, therefore, you need to be familiar with all relevant drop deadlines (please see the UWM calendar for further details). An incomplete may be given to a student who is unable to complete the course requirements due to extenuating circumstances (e.g., illness, injury, family emergency, etc.).

Submitting Course Assignments & Late Penalties

Students should submit hard copies of their legal research assignments and bench/argument briefs *in class* on the dates noted on the syllabus (and prior to the end of class), and it is the student's responsibility to ensure they have submitted their assignments. I will consider an extension without late penalty on the legal research and bench/argument brief assignments if the student emails me **before** the assignment deadline, clearly stating why the student needs an extension (i.e., provides a legitimate reason for a late submission (per the instructor)) and providing a plan for timely completion (within 2-5 days, if possible). If students do not follow the ***prior notification protocol***, I will accept late legal research assignments and bench/argument briefs for possible credit, but I will apply a ten-percentage point deduction for each day the assignment is late, including weekends. If a student was not given a late penalty waiver for submitting a late assignment, and the assignment is submitted after class has ended on the date it is due, it will be treated as being submitted the next day (i.e., it will be counted as being one day late).

Unless directly handed to me or the TA, late work should be submitted electronically via Canvas, and I will use the Canvas time stamp for assessing the late assignment's submission date and time. We will not accept late work left in our departmental boxes or slid under our office doors.

Time Allocation

This is a three-credit hour class. Students, on average, should expect to spend nine hours a week on activities related to POL SCI 411.

Student Accommodations

If you will need accommodations to meet any of the requirements of this course, please contact the instructor as soon as possible. Students should also contact an Accessibility Resource Center (ARC) counselor on campus at (414) 229-6287.

Religious Accommodations

I will follow UWM's policy regarding the provision of religious accommodations. This policy can be found at: <https://www4.uwm.edu/secu/docs/other/S1.5.htm>.

Military Service

Please see the following link regarding accommodations for students who are called for military service: <http://www4.uwm.edu/academics/military.cfm>.

Potential for Reversion to Fully Online Instruction

Changing public health circumstances for COVID-19 may cause UWM to move to fully online instruction at some point during the semester. UWM will communicate with students about moving to fully online instruction if the situation develops. I will post an amended syllabus on our Canvas course site should that occur.

OUTLINE OF TOPICS & CASES

Below is an outline of topics and cases that we will aim to cover this semester. The list of cases and topics is subject to change, and we may not address every matter on this list. Since it may not be possible to determine how much time we will need to spend on each topic/case ahead of time, specific reading assignments and/or content assignments will be posted on the course Canvas site after each meeting. While I make every effort to keep your reading assignments in close alignment to what I think we will be discussing in class on a given day, there may be days where we do not end up reaching a planned case or topic.

**denotes that a case excerpt may be found at <https://edge.sagepub.com/conlaw>*

*** denotes that a case excerpt or related material covering the case will be available on the course Canvas site*

INTRODUCTION TO THE STUDY OF CONSTITUTIONAL LAW

- Brief introduction to the judicial process and online legal research tools (Canvas)
- The U.S. Constitution
- Judicial review – *The Federalist* No. 78
- Modes of constitutional interpretation

THE ROLE OF THE SUPREME COURT IN THE CONSTITUTIONAL SCHEME

- *Marbury v. Madison*
- *Martin v. Hunter's Lessee*
- *Ex Parte McCordle*

THE NATURE AND LIMIT OF JUDICIAL POWER

Advisory Opinions/Collusive Lawsuits

- *Muskrat v. United States*

Mootness

- *DeFunis v. Odegaard**
- *Sosna v. Iowa***

Ripeness

- *United Public Workers v. Mitchell*
- *International Longshoreman's Union v. Boyd*

The Doctrine of Political Questions

- *Baker v. Carr*
- *Nixon v. United States*
- *Goldwater v. Carter**

Standing to Sue

- *Allen v. Wright***
- *Hollingsworth et al. v. Perry et al.* *
- *Rucho v. Common Cause***
- *Flast v. Cohen*

THE LEGISLATURE & POWERS OF CONGRESS

Enumerated and Implied Powers

- *McCulloch v. Maryland*** (Read the excerpt on Canvas)

Inherent Powers

- *United States v. Curtiss Wright Export Corp.*

Amendment-Enforcing Power

- *South Carolina v. Katzenbach*
- *City of Boerne v. Flores**
- *Shelby County v. Holder***

THE EXECUTIVE BRANCH & THE NATURE OF EXECUTIVE POWER

Appointment and Removal Powers

- *Myers v. United States*
- *Humphrey's Executor v. United States*
- *Lucia v. Securities and Exchange Commission***
- *Seila Law v. Consumer Financial Protection Bureau***
- *Collins v. Yellen***
- *Morrison v. Olson*
- *National Labor Relations Board v. Noel Canning*

Executive Privilege & Immunity

- *United States v. Nixon*
- *Clinton v. Jones*
- *Trump v. Vance***
- *Trump v. Mazars***

Executive Power in Foreign Affairs and in Times of War/Emergencies

- *United States v. Curtiss-Wright Export Corporation*
- *The Prize Cases*
- *Ex Parte Milligan*
- *Youngstown Sheet & Tube Co v. Sawyer*
- *Trump v. Sierra Club***

Executive Power & The War on Terror

- *Hamdi v. Rumsfeld*
- *Hamdan v. Rumsfeld**

THE DELEGATION OF LEGISLATIVE POWER & THE SEPARATION OF POWERS

- *J.W. Hampton, Jr. & Co. v. United States*
- *Panama Refining Co. v. Ryan [the Hot Oil Case]*
- *Schechter Poultry Corp. v. United States*
- *Mistretta v. U.S.*
- *Gundy v. U.S.***
- *INS v. Chadha*
- *Bowsher v. Synar*
- *Clinton v. City of New York*

GENERAL SCOPE OF CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE

Defining Commerce: A Point of Departure

- *Gibbons v. Ogden*

Formal & Realist Interpretations

- *United States v. E.C. Knight*
- *Champion v. Ames [The Lottery Case]*
- *Hammer v. Dagenhart [The Child Labor Case]*
- *Houston, East & West Texas Railway Co. v. U.S. [The Shreveport Rate Case]**
- *Stafford v. Wallace*

The Commerce Power & the New Deal

- *Schechter Poultry Corp. v. United States*
- *Carter v. Carter Coal Co.***
- *NLRB v. Jones & Laughlin Steel Corp.*
- *United States v. Darby*
- *Wickard v. Filburn*

Civil Rights, the Fourteenth Amendment, & the Commerce Clause

- *The Civil Rights Cases***
- *Heart of Atlanta Motel v. United States*
- *Katzenbach v. McClung***

Limits on Congressional Use of the Commerce Power

- *United States v. Lopez*
- *United States v. Morrison*

New Developments/Controversies in Commerce Clause Doctrine

- *Gonzales v. Raich**
- *National Federation of Independent Business v. Sebelius*

Commandeering

- *New York v. United States*
- *Printz v. United States*

The Dormant Commerce Clause

- *Hunt v. Washington State Apple Advertising Commission*
- *Maine v. Taylor*
- *Granholm v. Heald**

411 ISSUES AND THE PANDEMIC – FEDERALISM & GOVERNMENTAL POWERS FOCUS

- We the People Podcast: “The Constitution and the Coronavirus” **
- Legislative v. executive authority and the pandemic**
- Debates regarding federal v. state authority and the pandemic**