

Rule of Law in a Constitutional Democracy

Session I Constitutional Foundations

Readings:

- Hamilton, Alexander, *The Federalist*, No. 1 [4 pp.]
- Hamilton, Alexander, *The Federalist*, No. 78 [8 pp.]
- Brutus No. 15 [5 pp.]
- De Tocqueville, Alexis, *Democracy in America*, vol. 1 ch. 6 & 8 [15 pp.]
- Madison, James, *The Federalist*, No. 10 [8 pp.]

Guiding Questions:

- What is a Constitution? How is it formed?
- What is the proper role of judges in our constitutional system? What is Hamilton's view, in *Federalist No. 78*?
- "Brutus" is suspicious of the federal courts' power to decide whether a given statute is unconstitutional. Why? And what is his alternative?
- Why does Tocqueville expect judges to play a beneficial role in politics and government?

Session II

Interpreting the Law

Readings:

- Madison, James, *The Federalist*, No. 37 (excerpt) [4 pp.]
- Scalia, Antonin, *Originalism: The Lesser Evil* [18 pp.]
- Brennan, William, Speech at Georgetown [16 pp.]
- Wilkinson, J. Harvie, *Activism Masquerading as Restraint* (excerpt) [8 pp.]

Guiding Questions:

- Does Madison's discussion of legal interpretation in *Federalist No. 37* conflict with Hamilton's theory of judicial review in *Federalist No. 78*?
- Why does Scalia describe his theory of interpretation ("originalism") as "the lesser evil?"
- How would Brennan have judges interpret the Constitution?
- For Wilkinson, how do the "vices" of originalism relate to its virtues?

Session III

Courts and Liberty

Readings:

- *Pierce v. Society of Sisters* (1925) [2 pp.]
- *Buck v. Bell* (1928) [3 pp.]
- *Employment Division v. Smith* (1990) [7 pp.]
- Bickel, Alexander, “Notes on the Constitution” [5 pp.]
- Thomas, Clarence, *Toward a “Plain Reading” of the Constitution* [13 pp.]
- Scalia, Antonin, Dissent in *Planned Parenthood v. Casey* (excerpt) [17 pp.]

Guiding Questions:

- What constitutional right does the Court protect in *Pierce*?
- Why did the Court not protect Carrie Buck from forced sterilization?
- In *Employment Division v. Smith*, what does Scalia see as the best protection for religious liberty?
- What is the proper relationship between the Constitution and the Declaration of Independence, according to Thomas?
- In *Planned Parenthood v. Casey*, what effect does Scalia expect the Court’s decision to have in the political arena?

Session IV

Courts and Constitutional Structure

Readings:

- Madison, James, *The Federalist*, No. 51 [6 pp.]
- Hamilton, Alexander, *The Federalist*, No. 70 [8 pp.]
- *Gibbons v. Ogden* (1824) [7 pp.]
- *United States v. Lopez* (1995) [14 pp.]
- Thomas, Clarence, Concurrence in *Michigan v. EPA* (2015) [5 pp.]

Guiding Questions:

- In *Federalist No. 51*, what is the relationship between constitutional *structure* and constitutional *liberty*?
- In *Federalist No. 70*, Hamilton asserts that “energy in the executive is a leading character of good government.” Is he correct?
- What role should the Supreme Court play in preserving constitutional structure?
- What role should the *other* branches of government play in preserving constitutional liberty? When should judges “defer” to other branches?

Session V

The Rule of Law in a Constitutional Republic

Readings:

- Madison, James, *The Federalist*, No. 49 [5 pp.]
- Lincoln, Abraham, First Inaugural Address [3 pp.]
- Glendon, Mary Ann, “The Land of Rights” [17 pp.]
- Bickel, Alexander, “Watergate and the Legal Order” [7 pp.]

Guiding Questions:

- What role should “the people” play in preserving our Constitution, according to Madison in *Federalist No.49*? Does he agree with Brutus? With Scalia in *Planned Parenthood v. Casey*?
- If Lincoln would not have the Supreme Court be the ultimate arbitrator of constitutional questions, then what is his preferred alternative?
- According to Glendon, what is the danger of “rights talk?” Should we not talk about rights at all?
- Bickel sees a relationship between the Supreme Court’s actions in the 1960s and the President’s actions in the 1970s. What is that relationship?