

**The Supreme Court in United States History:
The Great Questions Today
PSC 212
Joel Seligman**

SYLLABUS

Welcome to the Supreme Court in United States History. This is a seminar that relies on class discussion to help you develop familiarity with the Constitution and an understanding of its role in history. Class participation is an essential part of the class and learning process. You are expected to come to class prepared to discuss all readings. From time to time, we all have life events that make preparation difficult or impossible. If you should find yourself in such a scenario, please send an e-mail to Sasha Tulgan before class (sasha.tulgan@rochester.edu) to let her know you will not be prepared. Similarly, if you must miss class for a legitimate reason, such as an illness, family emergency, or University-sponsored activity, you should contact Sasha as soon as possible (which means before the missed class, whenever possible). If you have more than three unexcused absences, your class participation grade will be affected.

Each of you will have one “on call” day, which may be shared with one other student, depending on scheduling. When you are “on call,” you should prepare as you otherwise would, but you should also expect to lead the discussion for approximately 20 minutes of class time, meaning that you will share your thoughts about the reading’s themes and ask questions of your colleagues to help develop an understanding of the material.

Your final grade for the course will be determined on the basis of the three graded writing assignments and the oral presentation/defense of an amendment to the Constitution that you propose. Each writing assignment is weighted as 25 percent of your final grade, and collectively, the writing assignments will account for 75 percent of your final grade.

The remaining 25 percent of your grade will be based upon your preparation for, and participation in, class discussions, as well as your oral presentation/defense of a Constitutional amendment. Your participation in class will be graded on giving well reasoned answers, taking part in conversations and activities, offering thoughtful comments, and active listening. Disagreement and debate is part of a healthy intellectual

discourse, and is strongly encouraged. Students must, however, remain civil with and respectful to all members of the class.

In this syllabus, Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* (11th ed. 2015) is termed Casebook and materials in the additional packet of materials available for download from Blackboard are termed Handout.

Jan. 23 READING A CASE. *Brown v. Board of Education*, Casebook 720-724, Handout 1-7.

WRITING ASSIGNMENT ONE: Pass/Fail; Due Jan. 23, beginning of class. Maximum length two pages, double-spaced. Please bring a paper copy to class.

Write a brief for the *Brown* case, using the format given in the Handout at page 7.

Jan. 30 THE CONSTITUTION AND THE SUPREME COURT. Article III of the United States Constitution, Casebook lxi-lxii; Federalist Paper No. 78, Handout 8-12, *Marbury v. Madison*, Casebook 1-9; Alexander Bickel, *The Least Dangerous Branch* (excerpt), Handout 13-21; Using Parts of a Judicial Decision, I-II, Handout 22-23.

Framing Questions:

1. Should the Court alone have the right to declare laws unconstitutional?
2. Should the Supreme Court justices be appointed for lifetime tenure?

WRITING ASSIGNMENT TWO: Pass/Fail; Due January 30, beginning of class. Maximum length three pages total, double-spaced. Please bring a paper copy to class.

Read the material in the Packet entitled, Using Parts of a Judicial Opinion, Handout 22-23, before preparing your response to the following problem.

You are Counsel to President Jefferson. The President is unsure of the significance of a recent U.S. Supreme Court decision, *Marbury v. Madison*, and seeks your advice. You are to brief the case (in no more than

two pages) and prepare a one page memorandum advising the President on two concerns he has raised.

First, the President wants to know if he can publicly dismiss what the Court said about his and Madison's actions as mere *dicta*. Please clarify what is holding and what is *dicta* in the opinion, and advise the President whether the language about the Jefferson Administration's actions is *dicta*. Second, while the President feels that he "won" this time, he is concerned about the possibility that the Supreme Court might declare unconstitutional the Repeal Act of 1802, which abolished the jobs of the new circuit judges appointed by the outgoing Federalists. Please formulate the rule applicable to future cases on judicial constitutional review of legislation that you formulate from *Marbury v. Madison*. Finally, briefly advise the President on whether in your opinion *Marbury* would support the Court ruling that it had the power to declare the Repeal Act of 1802 unconstitutional, or is too narrow a holding to justify such a ruling.

Feb. 6 STRUCTURE OF CONSTITUTIONAL POWERS. United States Constitution, Casebook liii-lxiii; *McCulloch v. Maryland*, Casebook 75-83; *Korematsu v. United States*, Handout 24-31; *Youngstown Sheet & Tube Co. v. Sawyer*, Casebook 344-351; *United States v. Nixon*, Casebook 414-420.

Framing Questions

1. Why are there three branches of government?
2. Why are powers of Congress limited?
3. Should a different Constitution apply in war time rather than peace time?

Feb. 13 VOTING RIGHTS. 15th Amendment; *South Carolina v. Katzenbach*, Casebook 996-1001; Case commentary, Casebook 1001-1004; *Shelby County v. Holder*, Casebook 1004-1011; *Citizens United v. Federal Election Commission*, Casebook 1267-1280; *McCutcheon v. Federal Election Commission*, Casebook 1283-1284; *Bush v. Gore*, Casebook 865-875.

Feb. 20 ECONOMIC REGULATION. *Lochner v. New York*; *Muller v. Oregon*; *Bunting v. Oregon*; *Adkins v. Children's Hospital*; *Nebbia v. New York*, Casebook 529-540; *Carolene Products*, Casebook 250-252; *United States v. Darby*, *Wickard v. Fillburn*, Casebook 213-220; *Gonzales v.*

Raich, Casebook 268-269; Nat'l Federation of Independent Business v. Sebelius Case and Note, Handout 32-47.

WRITING ASSIGNMENT THREE: Graded; due on February 20, beginning of class. Maximum length four pages, double-spaced. Please bring a paper copy to class.

Ellie's Deli is a family-owned restaurant in Utica, New York, specializing in vegan cuisine and homemade pies, with a seating capacity of 220 customers. It is located near an exit off Interstate 90 and a somewhat greater distance from railroad and bus stations. The restaurant purchases locally the majority of its \$570,000 worth of food supply per year; the remainder (primarily apples for the pies) comes from an organic farm owned in partnership by the restaurant and a cooperative of local farmers. A new agricultural law recently passed by Congress caps the amount of independently grown apples the restaurant can use for its business, requiring it to buy about 70 percent of its apple supply from the interstate market. Based only on the cases in today's assignment and particularly *Nat'l Federation of Independent Business v. Sebelius*, is this a valid use of Congress's commerce power?

To prepare for this assignment review the material in the Handout at 48-53, Using the Parts of a Judicial Opinion, III-IV and Using Several Judicial Opinions, I-II, about reasoning by analogy and applying precedent to a new fact problem.

Feb. 27 THE 13TH AND 14TH AMENDMENTS. The Slaughter-House Cases, Casebook 521-527; the Civil Rights Cases, 639-645; *Brown v. Board of Education II*, Casebook 726-728; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, Handout 54-60; *Freeman v. Pitts*, Handout 61-66; *Parents Involved in Community Schools v. Seattle School District*, Casebook 770-776.

For Discussion: Is group representation or color blindness the better ideal?

March 6 RACE AND GENDER CLASSIFICATIONS. *Adarand Constructors, Inc. v. Peña*, Casebook 778-783; *Grutter v. Bollinger*, Casebook 759-768; *Schuette v. Coalition to Defend Affirmative Action*, Handout 67-73; *Fisher v. Texas*, Handout 74-92; *Craig v. Boren*, Casebook 810-813; *Mississippi Univ. for Women v. Hogan*, Casebook 820-824;

United States v. Virginia, Casebook 824-825; Note on Equal Rights Amendment, Handout 93-96; Levels and Standards of Judicial Review, Handout 97.

For Discussion:

Make the case for or against constitutional ratification of an Equal Rights Amendment, similar to the one proposed in 1923 and nearly ratified in 1977 when the amendment received 35 of the necessary 38 state ratifications. Two students will be assigned to argue for the ERA and two students will argue against the ERA.

March 13 – NO CLASS (Spring Break)

March 20 IMPLIED RIGHTS I. Griswold v. Connecticut, Casebook 898-905; Eisenstadt v. Baird, Casebook 905; Roe v. Wade, Casebook 907-914; Planned Parenthood of Southeastern Pa. v. Casey, Casebook 918-931; Whole Women’s Health v. Hellerstedt, Handout 98-126.

For Discussion: How do the following hold up under the most recent Court decision?

A bill in State A proposes to make abortions illegal at 12 weeks of pregnancy, when a fetal heartbeat can typically be detected by abdominal ultrasound.

A State B law bans all abortions after 22 weeks, based on the theory that a fetus can feel pain at that point. There are exceptions when the woman’s health is at risk and for cases of rape and incest.

State C is attempting a new law that requires physicians performing abortions to have at least an arrangement with a physician who has admitting privileges at a local hospital, and also requires women to wait 72 hours after an initial in-person appointment, which includes mandatory counseling, in order to receive an abortion.

March 27 IMPLIED RIGHTS II. Loving v. Virginia, Handout 127-132; Lawrence v. Texas, Casebook 944-949; Obergefell v. Hodges, Handout 133-160; Cruzan v. Director, Missouri Department of Health, Casebook 960-964.

WRITING ASSIGNMENT FOUR: Graded; due beginning of class, March 27. Maximum length four pages, double-spaced. Please bring a paper copy to class.

Gloucester County High School has a policy requiring students to use bathrooms corresponding to their “biological sex.” Gavin Grimm, a transgender boy who was born female and is now in his freshman year of high school, has a deep voice and facial hair, as a result of hormone therapy. He alleges that the school’s policy is discriminatory and violates his civil rights. He wants to be able to use the male bathrooms and locker rooms in the school. The case is now pending before the Supreme Court. Using only the cases addressing implied rights in the last two classes, write an argument defending the position of either Gavin Grimm and his right to use the bathroom of the sex with which he identifies, or or the Gloucester County School Board for their “biological sex” bathroom policy.

Before writing, please review Using the Parts of a Judicial Opinion, III-IV and Using Several Judicial Opinions, I and II, Handout 48-53.

April 3 FREEDOM OF EXPRESSION I. Schenck v. United States, Casebook 1013-1014; Abrams v. United States, Casebook 1014-1015; New York Times v. Sullivan, Casebook 1149-1154; Gitlow v. New York, Casebook 1016-1017; Whitney v. California, Casebook 1017-1021; Shuttlesworth v. City of Birmingham, Casebook 1056-1060; Texas v. Johnson, Casebook 1243-1250.

For Discussion:

Can the state require public school children to salute the flag? What if a student agrees to salute the flag but does not have to say “under God”?

April 10 FREEDOM OF EXPRESSION II. Caplinsky v. New Hampshire, Terminiello v. Chicago, Feiner v. New York, Casebook 1087; Brandenburg v. Ohio, Casebook 1023-1024; Collin v. Smith, Casebook 1092-1093; R.A.V. v. City of St. Paul, Casebook 1093-1101; Virginia v. Black, Casebook 1103-1107; Snyder v. Phelps, Handout 161-169.

For Discussion:

1. An all-Asian American Chinatown dance-rock band called the Slants wishes to register a trademark for its name, noting that record labels and agents require bands to register their names as trademarks. The Patent and Trademark Office (PTO) denied the trademark, arguing that a decades-old law forbids official recognition of trademarks that “may disparage” members of a particular ethnic group, in this case, fellow Asians. Groups supporting the position of the PTO argue that granting the trademark would open the floodgate for hate speech in this country. The Slants say that through the band’s name, they want to make a statement about racial and cultural issues in this country. They note that just for musical bands, the PTO has registered *White Trash Cowboys*; *Whores from Hell*; *Hookers & Blow*; *The Pricks and Barenaked Ladies*, among others. Which side should prevail? Would granting the patent effectively be giving the federal government’s stamp of approval to hateful speech?
2. Should the First Amendment include a “hate speech” exception? How would the category be defined? Bigoted speech? Blasphemy? Rudeness? Evil ideas? Unpatriotic speech? What viewpoints should the government be able to suppress?

April 17 THE RELIGION CLAUSES. School District of Abington Township v. Schempp, Casebook 1370-1374; Gobitis and West Va. State Bd. of Educ. v. Barnette, Handout 170-172; Epperson v. Arkansas, Casebook 1380-1385; Wisconsin v. Yoder, Casebook 1427-1431; Employment Div. v. Smith, Casebook 1439-1444; Burwell v. Hobby Lobby Stores Note, Handout 173-179.

For Discussion:

A Missouri church that runs a preschool and daycare center is excluded from a state program that provides grants to purchase rubberized surface material for children’s playgrounds. Although the state highly ranked the center qualified for the program, it denied the center’s application because a church runs the daycare. The church argues that its disqualification from the state grant program for a facially non-religious

function solely because it is a church is not permissible. Is the state correct to deny funding in this case?

By **April 19**, Sasha Tulgan will be in touch with you to determine which proposed amendment you will advocate at the Constitutional Convention at the last class (related to Writing Assignment Five, below). Each student will also be assigned to oppose (orally only) one other student's amendment.

April 24 SECOND AMENDMENT AND CAPITAL PUNISHMENT. District of Columbia v. Heller and Notes, Casebook 611-628; Roper v. Simmons, Handout 180-186.

WRITING ASSIGNMENT FIVE. Graded. Due April 27, by 5:00 pm. By email to sasha.tulgan@rochester.edu.

Based solely on the readings in this course, propose an amendment to the United States Constitution and write an argument explaining why your amendment should be adopted. Each student will present her or his amendment to the class, assembled as a Constitutional Convention which ultimately will vote on whether to adopt each amendment.

The essence of this assignment is to explain why adopting your proposal is wise. In doing so, you will want to compare the United States Constitution and discuss relevant cases.

You may propose any amendment of your choosing. Some examples to generate your thought process exist in the 30 Articles of the United Nations Declaration of Human Rights. See Handout 187-195. You may propose one of these articles or part of one of these articles if you choose.

In addition to submitting a final proposed amendment and argument by email to Sasha Tulgan, each student must submit a copy to the student assigned to oppose the amendment.

Page limit: 5 pages
1-inch document margins
12-point font
Line spacing: Double

May 1 CONSTITUTIONAL CONVENTION.
(Class Location: Witmer House – 630 Mt. Hope Ave.)

We will have an extended class during which each student will present his/her amendments and rebuttals. The presenting student will have 5 minutes to present, the rebutting student will have 3 minutes to rebut. There will then be a time for general discussion of the proposed amendment.

After all the presentations are done, the class will vote on the amendments.

Please feel free, but not obliged, to use PowerPoint to augment your oral presentations. If you plan to include a PowerPoint presentation, please email it to Sasha Tulgan by **April 27** with your assignment.

Shuttle Service Schedule to the Witmer House

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|------------------|---|
| 4:35 p.m. | Shuttle pick up at Wallis Hall parking lot and drive to the Witmer House (630 Mt. Hope Avenue) |
| 4:50 – 7:30 p.m. | Class convenes at the Witmer House (President Seligman’s house) <ul style="list-style-type: none">• Student presentations• Buffet dinner |
| 8:00 p.m. | Shuttle from the Witmer House to Wallis Hall parking lot |

Please note: Class members with special dietary needs should contact Kimberly Downs at Kimberly.downs@rochester.edu or 275-7570 no later than **April 24**.

GRADING INFORMATION

Your final grade for the course will be determined on the basis of three graded writing assignments and the oral presentation/defense an amendment to the Constitution that you propose. Each writing assignment is weighted as 25 percent of your final grade, and collectively, the writing assignments will account for 75 percent of your final grade.

The remaining 25 percent of your grade will be based upon your preparation for, and participation in, class discussions, as well as your oral presentation/defense of a Constitutional amendment.

CONTACT INFORMATION FOR SASHA TULGAN

Please feel free to ask Sasha Tulgan questions about the course content in general, and/or about writing assignments. You can reach her by email at: sasha.tulgan@rochester.edu.