In *Federalist* 78, Alexander Hamilton famously wrote that the federal courts “may truly be said to have neither force nor will, but merely judgment,” and thus would be, relative to Congress and the President, the part of government “least dangerous to the political rights of the Constitution.”

At first glance, these seem rather straightforward and perhaps even self-evident statements. But for generations, they have spurred significant disagreement—not just between rival ideological groups, but even within what we now consider modern conservatism.

In this course, students will explore debates and disagreements among conservatives and libertarians over how to best understand the Constitution generally and the judicial power specifically. We will consider debates over originalism, natural law, traditionalism, and the burgeoning debate between advocates of “judicial restraint” and advocates of “judicial engagement.” To that end, we will read not just modern authors but also their historical antecedents.

This course will consist of two sessions per day over a one-week period. Each morning, students will participate in seminar discussion led by legal expert Adam White. Each afternoon, they will hear from a leading scholar or practitioner on that individual’s area of expertise.

**Monday, July 23, 2018**

9:00 a.m. to Noon  |  Constitutional Courts: Foundational Debates

**Readings:**

- *Brutus* No. 15
- *Federalist* 78 (Hamilton)
- *Federalist* 37 (Madison)
- *Federalist* 51 (Madison)
- Tocqueville, *Democracy in America* (excerpts)
- *Gibbons v. Ogden* (1824)

**Discussion Questions:**

1. What is the nature and character of judicial power, according to Publius? To Tocqueville?
2. Why does Publius believe that the judiciary is the “least dangerous branch?” What assumptions (e.g., about the branches of government, law as a profession, human nature, etc.) are reflected in this argument?

3. Is judicial independence a constitutional virtue or a constitutional vice?

4. In a constitutional government based on popular sovereignty, how much power should we commit to the countermajoritarian body of judges and lawyers?

 Noon to 1:30 p.m. Lunch Break

1:30 p.m. to 3:00 p.m. Guest Speaker: Matthew Spalding, Kirby Center, Hillsdale College

Tuesday, July 24, 2018

9:00 a.m. to Noon Liberty and “Judicial Restraint”

Readings:

- Pierce v. Society of Sisters (1925)
- Lochner v. New York (1905)
- Buck v. Bell (1927)
- Griswold v. Connecticut (1965)
- Eisenstadt v. Baird (1972)
- Alexander Bickel, “Notes on the Constitution” (1975)

Discussion Questions:

1. What is judicial restraint? How is it opposed to judicial activism?

2. In deciding cases and controversies, how should judges go about exercising “merely judgment?” Is judicial restraint an answer to this problem?

3. What is the “counter-majoritarian difficulty” facing judges? Why might judicial review have a tendency to “weaken the democratic process” over time?

4. How much deference should judges give to Congress? To the will of the majority?

 Noon to 1:30 p.m. Lunch Break

1:30 p.m. to 3:00 p.m. Guest Speaker: Randy Barnett, Georgetown University Law Center

Wednesday, July 25, 2018

9:00 a.m. to Noon Conservative “Originalism”

Readings:

- Edwin Meese, “Speech Before the ABA” (1985)
Discussion Questions:

1. What is originalism, according to Meese and Scalia? How is original intent different from original meaning?
2. Can the Constitution’s “objective” meaning be ascertained and applied by impartial judges? What should judges do when that meaning is not readily apparent—and, more important, how can they know when they’ve arrived upon such an ambiguous case?
3. Why does Scalia call originalism “the lesser evil”?
4. Is Wilkinson correct in arguing that originalism lacks judicial restraint?

12:00 p.m. to 1:15 p.m. Lunch on Careers in Law – Adam White

1:30 p.m. to 3:00 p.m. Guest Speaker: Ed Whelan, Ethics & Public Policy Center

Thursday, July 26, 2018

9:00 a.m. to Noon Libertarian “Judicial Engagement”

Readings:

- Clarence Thomas, “The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment” (1989)
- Hadley Arkes, “A Natural Law Manifesto” (2011)

Discussion Questions:

1. What is judicial engagement? How is it different from judicial restraint or judicial activism?
2. How strongly bound should judges be to the doctrine of stare decisis?
3. Should judges read the Constitution in light of natural rights theory or the natural law principles of the Declaration of Independence? Does such an approach constrain or empower judges?
4. How should conservative jurists balance their devotion to a law’s original public meaning with other conservative principles in judicial decision-making (e.g., precedent, federalism, popular rule, etc.)?

Noon to 1:30 p.m. Lunch Break
1:30 to 3:00 p.m.  
**Guest Speaker: Hadley Arkes, James Wilson Institute**

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**Friday, July 27, 2018**

9:00 a.m. to Noon  
“Republican Remedies”

**Readings:**

- Abraham Lincoln, First Inaugural Address (1861)
- Mary Ann Glendon, “The Land of Rights” (1991)
- Alexander Bickel, “Watergate and the Legal Order”

**Discussion Questions:**

1. What is conventionalism? Why should conservatives prefer conventionalism, according to Merrill?
2. What is the “conservative idea of liberty,” according to Levin?
3. How much deference should judges give to states and local communities? To practical experience and tradition?
4. To what extent does the legitimacy of a democratic government rest on the consent of the people, and to what extent does it rest on the correctness of its principles?

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12:00 p.m. to 1:15 p.m.  
**Lunch & Guest Speaker — Yuval Levin, *National Affairs* Institutions in America**

1:30 to 3:00 p.m.  
**Guest Speaker: Carrie Severino, Judicial Crisis Network**