



Written by [Joe Wolverton, II, J.D.](#) on June 1, 2010

Harvard Law Dean Kagan Replaced Constitution Studies With International Law

On May 10, 2010, President Obama nominated Elena Kagan to the Supreme Court to fill the vacancy from the impending retirement of Justice John Paul Stevens at the end of the Supreme Court's 2009-2010 term. A significant entry in the catalog of Ms. Kagan's remarkable achievements is her deanship of the über-prestigious Harvard Law School. In 2003, she was named, as the school's first female dean, to succeed Robert C. Clark, who had held that post for over a decade. While manning the helm at Harvard Law, she attracted attention of alumni and observers for steering the ship away from the tried and true "case-law method" of studying the law.



A central plank in Kagan's revolutionary platform is the abandonment of the requirement that students at Harvard Law School study constitutional law. The course's place in the curriculum was replaced by classes examining the laws of other nations and international law.

In fact, according to the requirements for receiving a J.D. as listed on the Harvard Law School [website](#), the study of our republic's founding document is nowhere to be found.

In 2006, after the changes were proposed by Kagan and approved by the faculty committee evaluating the suggestions, the school published a news release to explain the changes and Kagan offered the following justification for the de-emphasis of constitutional law studies:

From the beginning of law school, students should learn to locate what they are learning about public and private law in the United States within the context of a larger universe — global networks of economic regulation and private ordering, public systems created through multilateral relations among states, and different and widely varying legal cultures and systems. Accordingly, the Law School will develop three foundation courses, each of which represents a door into the global sphere that students will use as context for U.S. law.

The [press release](#) identifies the three new required courses Kagan introduced to take precedence over constitutional law. The first covers comparative international law and was designed to "introduce students to the sources, institutions and procedures emerging over time through the bilateral and multilateral arrangements among states as well as the participation of nongovernmental actors."

The second class, called "Legislation and Regulation" is designed to familiarize students with the world of legislation, regulation, and administration that creates and defines so much of our legal order." In other words, the regulations and codes promulgated by the bureaucracy are more critical to the definition of our legal order than is the Constitution.



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The final course, on comparative law, “will introduce students to one or more legal systems outside our own, to the borrowing and transmission of legal ideas across borders and to a variety of approaches to substantive and procedural law that are rooted in distinct cultures and traditions,” the release said. Again, Elena Kagan, President Barack Obama’s nominee to sit on the Supreme Court, believes a survey of “legal systems outside our own” is more valuable than a study of the Constitution.

Apart from the statements included in the press release, Elena Kagan explained her justification for the curriculum changes she instituted at Harvard in a 2008 [article](#) published in *The Green Bag*, a legal journal dedicated to publishing brief, readable articles about the law. In the piece, Kagan explained that the effect of global crises and the call for global governance made it necessary to minimize the role of constitutional studies in favor of classes more apropos to the equipping of lawyers with “tools for all the roles they will be called on to play.”

One of the very important roles that these future leaders will play, according to the article, is the quest to find workable solutions to problems “ranging from climate change to terrorism to economic insecurity.”

Neither the press release nor *The Green Bag* article indicates why Kagan believed that these classes could not be added to the curriculum without relegating the study of the Constitution to elective status.

While the benefits of the courses of study created by Elena Kagan are debatable, it is difficult to find a single sound argument for downgrading the study of constitutional law to elective status. That is not to say that a class improving students’ international perspective is unnecessary. As a matter of fact, many of our own Founding Fathers made the study of international law one of the key aspects of their own education in anticipation of the Constitutional Convention of 1787.

The unanswered question is: Why could Elena Kagan not find room for these new classes without pushing the study of constitutional law to the margins of the Harvard course catalog? Why was it an either/or situation, and why did she come down on the side of international and regulatory law and against the Constitution?

It would be similar to the English Department at Harvard determining that Shakespeare would no longer be required reading for students interested in a PhD in Elizabethan English literature.

Robert Alt, senior legal fellow and deputy director of the Center for Legal and Judicial Studies at the Heritage Foundation, reckons that the changes made by Kagan at Harvard offer a glimmer of insight into Kagan’s perception of the Constitution and its place in American jurisprudence. Even a scintilla of evidence is valuable given the dearth of reliable indications of Kagan’s constitutional mien.

“One of the things [that] we don’t know about Kagan, which she has not been terribly forthcoming on in previous questioning (during her nomination) for solicitor general, is how she views international law,” Alt said. “Should domestic law be influenced or modified by international law? We don’t know what she thinks.”

Article 2, Section 2 of the U.S. Constitution grants the president power to nominate and appoint, with the advice and consent of the Senate, judges of the Supreme Court. It is the responsibility of the Senate to enquire into Elena Kagan’s constitutional bent and her propensity for interpreting our foundational document in a manner consistent with established principles of federalism, separation of powers, and limited government.

As Mr. Alt, understandably concerned with the message sent by Kagan’s near obliteration of



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constitutional law from the basic curriculum of Harvard Law School, observed, “This is an important question because there are others in the Obama administration, like Harold Koh, for instance, who have suggested with regard to the First Amendment, for instance, that perhaps the First Amendment should be modified in some way in accordance with international norms, in order to facilitate compliance with international agreements.” Harold Koh is the Legal Adviser to the Department of State and is controversial for his advocacy of using tenets of international law and foreign legal precedent to inform the deliberative process of judicial decision making in the United States.

The First Amendment that Koh would “modify” to conform to international standards of liberty reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

This article was modified to reflect the fact that constitutional studies were not wholly abandoned, but were purposefully de-emphasized and reduced to little more than elective status in the curriculum of the Harvard Law School while Elena Kagan was dean.

Photo: Elena Kagan, right, and her predecessor as dean of Harvard Law School, Robert C. Clark, during announcement of Kagan’s appointment as dean on April 3, 2003. (Harvard University President Lawrence Summers was also in attendance out of picture): AP Images



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