Phil 324: Law and Morality

Module 1 Reading Guide

# Instructions

The reading guides are designed to help you follow the assigned readings. The questions below are organized in the order they are addressed in the text. The most important ones are **bolded**.

To earn a ***check*** on a reading guide, you are asked to write out brief answers to all of the bolded questions in your own words (unless explicitly instructed to copy from the text).

* You don’t need to answer the question correctly in order to receive a check, but it must demonstrate at least serious, good-faith effort.
* Your answer can be as short as one or two sentences, and please feel free to make lists, draw diagrams, or use other heuristics that help *you* process and absorb the material.
* You are not allowed to copy directly from my handout—doing so does not show that *you* have tried to understand the reading.
* If a question is not bolded, you don’t need to answer it.

To earn a ***check-plus***, you are asked, additionally, to:

1. write the page number of the relevant passage next to each of the unbolded questions (doing so will make it easier for you to locate the passage later);
2. leave occasional questions, comments, or other sorts of reactions to the reading as you answer the reading guide questions (this helps me see that you are actually thinking about and engaging with the text; do keep in mind that Word’s commenting function is not supported by D2L, so always write directly in the main text itself); and
3. go back to the reading guide after watching my lectures and revise your answers to the bolded questions (please leave your original answers there and use a different color and/or font to clearly identify the revision).

You are welcome to print the reading guide out and complete it that way if it might work better for you (but don’t use a pencil and write as legibly as you can).

# Some Suggestions for Reading Philosophy

It’s useful to keep in mind that both philosophical and legal writing is, at bottom, *argumentative*—that is, its goal is to *defend* or *criticize* a particular view. As you do the readings, be sure to:

* Keep track of what the author says they mean by a particular term or distinction, and take note of terms and distinctions that don’t quite make sense to you.
* Identify the view the author is defending and the argument they are offering in support of their view (be careful to distinguish passages where the author is speaking for themself and where they are explaining another author’s view or considering objections!), and write down thoughts and questions in the margin as you react to each step in the argument.
* Ask yourself if you think what the author is saying is not only plausible but well-argued. If not, think about why not: Is it because the author’s argument relies on a false premise, or is it because the author’s reasoning is fallacious? Is there a more plausible or more arguable way of formulating the point the author hopes to make? Are there countervailing considerations, alternative positions, or further complications that the author fails to take into account? Even if you agree with the author, try to anticipate objections that other readers may reasonably raise and think about how you can respond to them on the author’s behalf.

A very helpful guide on reading philosophy is Connie Rosati’s “Some Suggestions for How to Approach Reading a Philosophical Article or Book,” which I have linked on GitHub.

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# Lon Fuller, “Appendix: The Problem of the Grudge Informer”

1. This appendix is an allegory about the “grudge informers” under the former regime of the “Purple Shirts.” Who were the Purple Shirts? How did they exercise their political power? What did these grudge informers do?
2. **Please fill in the following table as best as you can:**

|  |  |  |
| --- | --- | --- |
|  | What should we do? | Why? |
| Deputy 1 |  |  |
| Deputy 2 |  |  |
| Deputy 3 |  |  |
| Deputy 4 |  |  |
| Deputy 5 |  |  |

# U.S. Constitution, Article III; Amendments I–X, XIII–XV, XIX

## Article III

1. **The first sentence of Section 1: Which entities exercise the judicial power? Are lower federal courts created directly by the Constitution? Which entity has the authority to create lower federal courts?**
2. The second sentence of Section 1 provides judges with two constitutional protections: they are allowed to “hold their Offices during good Behavior” (which has been interpreted to mean life tenure) and their salaries cannot be reduced during their tenure.
3. The first sentence of Section 2 specifies the categories of “cases” and “controversies” that federal courts can hear, which are generally understood to fall under two broader categories: cases that raise a “federal question” and those that involve “diversity of citizenship.” (The Supreme Court famously interprets the text to mean only disputes that involve “cases” or “controversies” are justiciable, that is, can be heard by federal courts. For example, federal courts cannot hear purely hypothetical disputes, like Fuller’s grudge informer case, because they do not involve any actual “cases” or “controversies.” But there is now a very real worry that the Court’s recent decision in *303 Creative* [may have violated this requirement](https://newrepublic.com/post/173675/supreme-court-just-used-fake-case-make-easier-discriminate-gay-people).)
4. The second sentence of Section 2 specifies the Supreme Court’s original and appellate jurisdiction. When a court has original jurisdiction over a case, it means the court can hear the case as the initial—rather than appellate—court (yes, some cases do originate at the Supreme Court).
5. Skim the rest of Article III.

## Amendment I

1. What rights and freedoms does the First Amendment protect?

## Amendment II

1. The Second Amendment is divided into a prefatory clause (“A well regulated Militia, being necessary to the security of a free State”) and an operative clause (“the right of the people to keep and bear Arms shall not be infringed”). A major controversy has been whether the prefatory clause imposes restrictions on the scope of the operative clause—in other words, whether the operative clause protects only the right of a *state* to arm its militia, not the right of an *individual* to possess firearms. In a 2008 case, *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment does extend to an individual’s right to possess firearms.

## Amendment III

1. What does the Third Amendment prohibit?

## Amendment IV

1. What does the Fourth Amendment protect?

## Amendment V

1. **Please identify the text of each of the following clauses. I filled out two as an example.**

|  |  |
| --- | --- |
| Clause | Text |
| Grand Jury Clause | “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.” |
| Double Jeopardy Clause |  |
| Self-Incrimination Clause |  |
| Due Process Clause (Note that the Due Process Clause will appear again in the 14th Amendment) |  |
| Takings Clause | “[N]or shall private property be taken for public use, without just compensation.” |

## Amendment VI

1. What rights does a federal criminal defendant have under the Sixth Amendment?

## Amendment VII

1. What right does the Seventh Amendment protect?

## Amendment VIII

1. **Please identify the text of each of the following clauses.**

|  |  |
| --- | --- |
| Clause | Text |
| Excessive Bail Clause |  |
| Excessive Fines Clause |  |
| Cruel and Unusual Punishments Clause |  |

## Amendment IX

1. What does the Ninth Amendment say about rights not enumerated in the Constitution?

## Amendment X

1. What does the Tenth Amendment say about the relationship between federal and state governments?

## Amendment XI

1. What does the Eleventh Amendment modify?

## Amendment XIII

1. What does the Thirteenth Amendment abolish?

## Amendment XIV

1. **Focus on Section 1 of the Fourteenth Amendment. Please identify the text of each of the following clauses.**

|  |  |
| --- | --- |
| Clause | Text |
| Citizenship Clause |  |
| Privileges or Immunities Clause |  |
| Due Process Clause |  |
| Equal Protection Clause |  |

1. Skim the rest of the Fourteenth Amendment. The Disqualification Clause in Section 3 came under the spotlight in the immediate aftermath of January 6th, and the Public Debt Clause in Section 4 the recent debt ceiling crisis.

## Amendment XV

1. What right does the Fifteenth Amendment protect?

## Amendment XIX

1. What right does the Nineteenth Amendment protect?

# SCOTUSblog, “Supreme Court Procedure”

1. This short piece helpfully explains some of the basic background knowledge about federal appellate procedure by describing the life of a fictional case from the federal district court level all the way to the Supreme Court. At times, it gets more technical than is strictly needed for our purposes, but having at least some familiarity with the more technical aspects can still be useful.
2. What are the facts of this fictional case? (Note especially: Who is suing whom? What, as the plaintiff alleges, did the defendant do to him?)
3. What are the legal questions that the case presents?

## Lower Courts

1. Note that Mr. Lyon can sue his employer in a federal district court because the case raises a federal question: the Civil Rights Act of 1964 is a federal law, and the U.S. Constitution, of course, is the federal constitution.
2. The Second Circuit hears appeals from federal district courts in Connecticut, New York, and Vermont.
3. **What is the difference between an initial hearing by a three-judge panel, a rehearing by the three-judge panel, and an *en banc* rehearing/review (all at the federal circuit court level)?**

## Petition for Certiorari

1. **What is a petition for a writ of certiorari?**
2. How many votes are needed to grant certiorari in a case?
3. What is the job of the circuit justice?
4. Focus on the parenthesis at the end of the third paragraph: What is the focus of a cert petition?
5. What are the brief in opposition and the reply brief?
6. What is an *amicus curiae* (plural is “*amici curiae*”)? What is an *amicus* brief?
7. What is the discuss list? How many votes are needed to put a case on the discuss list?
8. What is the conference?
9. What is the dead list?
10. What is the order list?

## Merits Stage

1. What are the opening brief, the respondent’s brief, and the reply brief?
2. Who is the Solicitor General? What is their job?

## Oral Argument

1. What function does the oral argument serve?

## Decision

1. **What is the majority opinion? Who gets to decide who will write the majority opinion?**
2. **What are dissenting and concurring opinions?**
3. Make sure you understand what these terms mean: “reverse,” “affirm,” “vacate,” and “remand.”

# Stephen Vladeck, Statement before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

## What Is the “Shadow Docket”?

1. **What is the difference between the Supreme Court’s merits docket and its shadow docket?**
2. In what sense is the shadow docket “in the shadows”?
3. What kinds of cases are decided on the shadow docket?

## The Rise of the Shadow Docket since 2017

1. **In which six aspects did the shadow docket practice change in 2017–21 compared to 2001–17?­**
2. Which four factors does Vladeck think can explain the change?
3. Vladeck then introduces and rejects an alternative explanation. What is this alternative explanation and on what grounds does Vladeck argue it is false?
4. What are the two procedural shifts that Vladeck argues explain why the Court decides shadow docket cases the way it does today?

This is the four-factor test that Vladeck refers to: “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”[[1]](#footnote-1) Preliminary injunction is a form of emergency relief that can be granted by a court *before* it decides on the merits of the case. What Vladeck means is: A majority of justices now think, whenever a government action is enjoined by a court, the government necessarily suffers an irreparable harm (satisfying [2]) and the balance of equities necessarily tips in the government’s favor (satisfying [3]), regardless of what that government action is. And, of course, if the government is likely to succeed on the merits (factor [1]), then ruling in favor of the government will be in the public interest (satisfying [4]). As a result, the four-factor test is effectively reduced to a one-factor test: if the government is likely to succeed on the merits, then it can get emergency relief *before* the court actually decides on the merits (it’s like: if you are likely to graduate, then you can get your diploma *before* you actually graduate). This is problematic, or so Vladeck would think, because the bar for *extraordinary* relief should at least be higher than what is required for ordinary relief.

1. We will read *Higgs* for our weekly discussion. Writ of certiorari before judgment is another kind of emergency relief, which allows the Court to review a case *before* a federal circuit court decides it. Rule 11 of the Rules of the Supreme Court provides that this kind of relief “will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” The Court recently used cert before judgment [in order to decide the affirmative action cases](https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment/).
2. Don’t worry about the Morley article—Vladeck doesn’t take care to explain what Morley’s argument is. Don’t do this in your own writing.

## Why the Rise of the Shadow Docket Is a Problem

1. **What are the eight reasons, according to Vladeck, for thinking the Court’s current shadow docket practice is problematic, even if one agrees with the outcomes of the shadow docket rulings?**
2. Skim the rest of the reading, where Vladeck mentions some of the policy proposals currently in the air.

1. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). [↑](#footnote-ref-1)