

POL 2145
Fall 2010
Section 251: M/W 5-6:15 PM
Furst 307

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Hours: TBA
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Constitutional Law

“Justice Oliver Wendell Holmes... had just had lunch with Judge Learned Hand. As they said good-bye, Hand told Holmes, ‘Do justice, sir, do justice.’ Holmes responded swiftly: ‘That is not my job. It is my job to apply the law.’”¹

This course explores the Constitution, the law surrounding it, and the politics of constitutional interpretation. We will begin this semester by focusing on the primary institutions of the national government, including a close examination of the judiciary; congressional powers; presidential powers; and the unique American form of federalism. In the second half of the course, we will examine civil rights and civil liberties, including the Establishment Clause and the freedom of religion; freedom of speech; the right to bear arms; the right to privacy; and equal protection.

Unlike many other classes in constitutional law, in this course you will not only be reading cases and opinions written by the Supreme Court (though you will do plenty of that, too!). The readings are also concerned with a wide variety of related issues such as how the Court operates; how it interacts with the other branches of the government; why the Court comes to certain conclusions; and the role of the courts in society. For those of you planning to attend law school, you will find that this course provides you with a solid background in *political* concerns prior to concentrating on strictly *legal* issues.

Required Books

There are 2 required texts for this course. They are available at Barnes and Noble:

- Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: A Short Course* (4th edition) ISBN 978-0-87289-605-5.

- David M. O’Brien, *Judges on Judging: Views from the Bench* (3rd edition) ISBN 978-0-87289-951-3.

Other articles and materials will be made available through Angel.

Course Learning Objectives

This is a demanding course that requires substantial reading, writing, and intensive class discussions. Students are expected not only to learn the substantive material, but also to apply

¹ Jan Crawford Greenburg, *Supreme Conflict* (New York: Penguin, 2007), 189.

concepts across multiple areas of constitutional law and criticize theories presented by scholars. By the end of the semester, students should be able to write concisely and thoroughly regarding a topic in constitutional law, critique scholarly work by relying on empirical evidence, and generate their own reasoned perspectives on issues in constitutional law.

Course Requirements

- 1) Complete all readings on schedule. If you miss a class, email me for the next reading assignment, as the schedule may change.
- 2) Attend on time and actively participate in class discussions. Those who arrive more than 5 minutes late, or who leave in the middle of class, will automatically be marked for half an absence. Each student is allowed only **two** unexcused absences. Your participation grade will be reduced by one-third of a letter for each unexcused absence over two. Not being active during class discussions will also result in a lowering of your participation grade. Use of phones, blackberries, or music players during class is **absolutely prohibited** and will result in a lowering of your participation grade.
- 3) Keep up with the news! We will frequently discuss current events as they relate to the concepts we are discussing in class. This way, we will try to connect what can be vague ideas to real-world outcomes. Read a newspaper, visit cnn.com, or do anything that helps makes you an informed citizen.
- 4) I will occasionally conduct quizzes in short answer format. I do this to ensure that everyone is completing the assigned reading and participating in discussions.
- 5) Take the final exam. It will consist of essay questions and will be given in-class. I will likely give you sample questions ahead of the test.
- 6) We will be conducting a Supreme Court simulation. Each student will be assigned to be one of the current sitting justices or a lawyer arguing the case in front of the Court. I will inform you of the case to be discussed well in advance of the simulation.

The purpose of the simulation will be to have a hands-on experience in a courtroom setting. As such, I expect each student playing a justice to be fully prepared before the day of the simulation. This will be accomplished by writing a 6-8 page paper that will be due 2 weeks prior to the day of the simulation. This paper will cover the professional background of the student's assigned justice, as well as the justice's preferred approach to a case and method of interpretation. The paper will also analyze 2 opinions written by the justice relating to an issue we are discussing this semester. **No late papers will be accepted.** However, if you turn the paper in on time, I will give you the option of revising it, if you wish. You **must** use outside sources besides those provided in the syllabus - at least 4 sources.

After the simulation has been completed, each student-justice will then write an opinion regarding the case presented. The opinion will rely on Court precedents and that justice's style of

argumentation. The opinion must be no less than 8 pages long; there is no upper limit. Opinions are due no later than 2 weeks after the simulation is completed; again, **no late papers will be accepted**. If you turn the paper in on time, I will give you the option of revising it.

Students who are assigned to play the role of a lawyer arguing in front of the Court have different assignments. Four weeks prior to the date of the simulation, they will turn in a 6-8 page paper that briefly reviews the professional background and interpretive style of each justice of the Court. This will allow each student-lawyer to be prepared to face the justices in the simulation. You **must** use outside sources besides those on the syllabus - at least 4 sources. Two weeks prior to the simulation, each student-lawyer will turn in a case brief that discusses the case in detail and presents a set of arguments that attempt to convince the justices to rule for that side. The brief must be at least 8 pages long; there is no upper limit. It should be based on Court precedents and the student's best estimation of how to win over the justices. **No late papers will be accepted**. If you turn in the papers on time, I will give you the option of revising them.

Grades for the simulation will be based on the written assignments as well as the student's performance during the simulation. The more accurately you approximate your designated justice or lawyer, the better your grade.

All written assignments must be typed in a 12 point font, double spaced, with one-inch margins, and have page numbers. Papers not meeting these criteria will be penalized.

Grading

Work conducted towards the end of the semester will be more heavily weighted in my mind when dispensing final grades; in other words, *improvement counts*.

Attendance/Participation: 10%

Quizzes: 20%

Simulation: 40%

Final: 30%

Incompletes will only be given for valid, documented emergencies.

NOTE ON PLAGIARISM: Any student found plagiarizing work will automatically receive a grade of **zero** for that assignment and an **F** for the course. **It is your responsibility to avoid plagiarism; if you are uncertain about what constitutes plagiarism, please ask!**

Accessibility

Students with disabilities who are enrolled in this course and who will be requesting documented disability-related accommodations should make an appointment with the Office of Disability Services, (646) 685-0118, during the first week of class. Once you have been approved for accommodations, contact me to ensure the successful implementation of those accommodations.

Schedule of Classes and Exams

August 25th: Introduction

August 30th and September 1st: Origins of the Constitution

Articles of Confederation [<http://www.usconstitution.net/articles.html>] and the Constitution [Epstein and Walker, Appendix 1; or widely available online]

Thurgood Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution” [Angel]

William Bradford Reynolds, “Another View: Our Magnificent Constitution” [Angel]

September 13th and 15th: How the Court Works

Epstein and Walker, pp. 3-50

Alex Kozinski, “What I Ate for Breakfast and Other Mysteries of Judicial Decision Making,” in O’Brien, pp. 97-102

Lewis F. Powell, Jr., “What Really Goes on at the Supreme Court,” in O’Brien, pp. 109-112

William H. Rehnquist, “The Supreme Court’s Conference,” in O’Brien, pp. 113-116

John Paul Stevens, “Deciding What to Decide: The Docket and the Rule of Four,” in O’Brien, pp. 117-125

John M. Harlan, Jr., “The Role of Oral Argument,” in O’Brien, pp. 126-129

October 4th and 11th: Constitutional Interpretation

Benjamin N. Cardozo, “The Judge as a Legislator,” in O’Brien, pp. 148-151

William H. Rehnquist, “The Notion of a Living Constitution,” in O’Brien, pp. 152-162

William Wayne Justice, “A Relativistic Constitution,” in O’Brien, pp. 163-173

Antonin Scalia, “Originalism: The Lesser Evil,” in O’Brien, pp. 198-206

William J. Brennan, Jr., “The Constitution of the United States: Contemporary Ratification,” in O’Brien, pp. 212-223

Ruth Bader Ginsburg, “Speaking in a Judicial Voice: Reflections on *Roe v. Wade*,” in O’Brien, pp. 224-230

Stephen G. Breyer, “Our Democratic Constitution,” in O’Brien, pp. 231-245

Recommended readings:

Robert H. Bork, “Tradition and Morality in Constitutional Law,” in O’Brien, pp. 186-192

Richard A. Posner, “What Am I, a Potted Plant? The Case Against Strict Constructionism,” in O’Brien, pp. 193-197

Richard A. Posner, “Against Constitutional Theory,” in O’Brien, pp. 246-254

October 13th and 18th: *Marbury v. Madison*, Judicial Power and Judicial Review

Alexander Hamilton, *Federalist* #78 [O’Brien, Appendix B; Epstein and Walker, Appendix 2]

Epstein and Walker, pp. 53-82

Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker” [Angel]

October 20th: Legislative Authority

Epstein and Walker, pp. 83-122

October 25th and 27th: Presidential Power

Epstein and Walker, pp. 123-173

Louis Fisher, “Unchecked Presidential Wars” [Angel]

John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers” [Angel] – only read pp. 170-196, 235-269

November 1st: Federalism

Epstein and Walker, pp. 177-208

Summary of *Gonzales v. Raich* [http://www.oyez.org/cases/2000-2009/2004/2004_03_1454/]

November 3rd and 8th: The Commerce Clause

Epstein and Walker, pp. 209-256

November 10th and 15th: Freedom of Religion and the Establishment Clause

Epstein and Walker, pp. 351-410

November 17th and 22nd: Freedom of Speech and Assembly

Epstein and Walker, pp. 411-458

The Nazi march in Skokie, Illinois, 1977 [<http://www.skokiehistory.info/chrono/nazis.html>]

Geoffrey R. Stone, "Remembering the Nazis in Skokie"

[<http://uchicagolaw.typepad.com/faculty/2009/04/remembering-the-nazis-in-skokie.html>]

Wednesday, November 24th: Supreme Court Simulation

November 29th and December 1st: The Right to Bear Arms (???)

Epstein and Walker, pp. 501-510

Skim through *McDonald v. City of Chicago* [<http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>]

December 6th and 8th: The Right to Privacy

Epstein and Walker, pp. 511-554

Reread Ruth Bader Ginsburg, "Speaking in a Judicial Voice: Reflections on *Roe v. Wade*," in O'Brien, pp. 224-230

December 13th and 15th: Equal Protection

Epstein and Walker, pp. 635-685

Gerald Rosenberg, "Substituting Symbol for Substance: What Did *Brown* Really Accomplish?" [Angel]

Monday, January 3rd, 1-3:15 pm: Final Exam