

POLSC 340
Fall 2009
Section 001: M/TH 9:45-11:00 AM
HW 207
Email: williamadler@gmail.com

Prof. William D. Adler
Office: 1742HW
Hours: Monday 11:15-12:30,
and by appointment
<http://adlers.home.att.net/william/>

Constitutional Law: Organizing the Government

“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 focus on the primary institutions of the national government, including federalism and the separation of powers. Of particular interest will be the extent of presidential powers, especially during times of war.

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 non-judicial sources of constitutional law. 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 Shakespeare Bookstore:

- David M. O'Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability* (7th edition) (W.W. Norton, 2008), ISBN 978-0-393-93038-2.

- Course Pack for POLSC 340, produced by Campus Course Paks (www.ccpaks.com).

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 3 minutes late, or who leave in the middle of class, will be marked absent. Each student is allowed only **two** unexcused absences. Your participation grade will be reduced by one-third of a letter

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

for each unexcused absence over two. Not being active during class discussions will also 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. Make-up exams will only be given in the event of an emergency, verified with proper documentation.

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. Depending on the number of students enrolled, we will have either one or two simulations during the semester. 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 personal and 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 3 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 background and professional 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. One week 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. All papers must also be submitted to www.turnitin.com (note that I **will not** accept papers not submitted to turnitin.com):

Class ID - 2767970
password - court

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. As well, please note that Hunter College rules specify that credit/no credit grading may only be used if a student has completed all the work assigned for the course.

NOTE ON PLAGIARISM: Any student found plagiarizing work will receive a grade of **zero** for that assignment and an **F** for the course. If you are not sure what plagiarism is, familiarize yourself with it now! Check out this website about "Avoiding Plagiarism:" <http://owl.english.purdue.edu/owl/resource/589/01/>.

Schedule of Classes and Exams

August 31st: Introduction

September 3rd, 10th, and 14th: Judicial Power and Judicial Review
(Monday, September 7th: No classes)

The Constitution, entire

Thurgood Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution” (course pack #1)

William Bradford Reynolds, “Another View: Our Magnificent Constitution” (course pack #2)

Hamilton, *Federalist* 78 (course pack #3)

O'Brien, pp. 23-38, 43-55, 58-66.

Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker” (course pack #4)

Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, chapter 1 (course pack #5)

Keith Whittington, “The Political Foundations of Judicial Supremacy” (course pack #6)

September 17th, 21st and 24th: Constitutional Interpretation

O'Brien, pp. 66-101.

Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” and Stephen Breyer, “Our Democratic Constitution” (course pack #7)

Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment outside Article V” (course pack #8)

September 29th and October 1st: How the Court Works
(Monday, September 28th: No classes; Tuesday, September 29th: Monday schedule)

O'Brien, pp. 102-130, 175-205.

Lawrence Baum, *The Supreme Court*, chapter 2 (course pack #9)

Jan Crawford Greenburg, *Supreme Conflict*, chapter 4 (course pack #10)

October 5th, 8th, and 14th: Presidential Power (Foreign Affairs)
(Monday, October 12th: No classes; Wednesday, October 14th: Monday schedule)

O'Brien, pp. 232-243, 264-337.

Louis Fisher, *Presidential War Power*, chapter 1 (course pack #11)

John C. Yoo, excerpts from *The Powers of War and Peace* (course pack #12)

October 15th, 19th, and 22nd: Presidential Power (Domestic)

O'Brien, pp. 338-389, 398-430, 433-480.

Phillip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements" (course pack #13)

Curtis A. Bradley and Eric A. Posner, "Presidential Signing Statements and Executive Power" (course pack #14)

October 26th and 29th: Congress as an Institution

O'Brien, pp. 481-501, 539-541.

November 2nd and 5th: Congressional Powers

O'Brien, pp. 542-597, 602-626, 642-667.

Monday, November 9th: Supreme Court Simulation #1

November 12th and 16th: Federalism

O'Brien, pp. 681-697, 728-739, 758-769, 820-823.

J. Mitchell Pickerill and Cornell W. Clayton, "The Rehnquist Court and the Political Dynamics of Federalism" (course pack #15)

Thursday, November 19th: Supreme Court Simulation #2

November 23rd, 30th, and December 3rd: Voting Rights and Elections
(Thursday, November 26th: No classes)

O'Brien, pp. 833-866, 873-935, 940-966.

Howard Gillman, "Judicial Independence Through the Lens of *Bush v. Gore*" (course pack #16)

December 7th and 10th: Economic Rights and Capitalism

O'Brien, pp. 988-1008, 1020-1052, 1054-9, 1068-77.

Thursday, December 17th, 11:30-1:30 pm: Final Exam