

Political Science 321

Autumn 2002

Gilkey 113

Tuesday/Thursday 9a.m. - 11:50 a.m

Office Hours: Mon & Wed

10:30 a.m.-12:00 p.m. or by appointment

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7-2811

American Constitutional Law

"In framing a government which is to be administered by men over men the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself." (Madison, Federalist 51)

Introduction:

The Supreme Court stands atop of both the federal and state judicial systems. It is the final arbiter of all federal legal questions. The placement of the Court as referee in our political system means that the Supreme Court, whether liberal or conservative, activist or restrained, is by default a major policy maker. Each time the justices deliver an opinion, the practices, procedures, and powers that govern our polity are affected.

However, most people when they thinking of the impact of the Supreme Court tend to focus on the Court's role in the area of civil liberties. And, most certainly, this portion of the Court's docket and history represents a visible and controversial part of the Court's role in our government. The Court's role in defining how an individual interacts with the government is an important area of study. Yet, just as important--if not more so--are the powers and constraints placed on our government by the fabric of the Constitution. How do the different levels and branches of government interact with one another? What powers does the Constitution bestow on the Court, on the President and on Congress? Are these powers separated or shared? How much or which powers can be shared? Where are the boundaries of these powers? How do we define the relationship between the federal and state governments? Is the current Court changing this relationship and how? The answers to these questions determine how our government functions, and these answers can be found by studying the trends of constitutional doctrine from the founding to the present, with a strong emphasis on the cases of the founding period through the early 1900s. We will not, however, ignore the current trends in these subject areas informed by decisions of the Rehnquist Court.

In this course, we will analyze the powers of the Court, the president and the legislature, as well as discuss issues of interstate commerce, and federalism. Through analysis of the case law, we will gain knowledge of the Constitution and its possible interpretations, as well as an understanding of the Supreme Court, the role it plays as interpreter of the Constitution, and the legal and political facets of this role. Through these exercises, we will begin to understand that the nature of our government changes even though the Constitution has, for the most part, remained unchanged.

While we will spend most of our time concentrating on the Supreme Court and its decisions, it is foolish to presume in a federal system, with equal institutions sharing power, that values state sovereignty that the Supreme Court is the only institution that affects the meaning of our Constitution. Throughout this term, we will examine the role of other institutions in creating meaning for parts of the Constitution both in the earlier period of our country's development and in the modern era.

We will pay considerable attention to many areas of governmental powers and constraints, however in depth study of this subject matter is impossible in the time frame of one term. Therefore, we will look at our subject areas as snapshots, looking briefly at particular times, interpretations, and doctrines by highlighting and studying the leading cases in each area or the leading events that promote lasting meanings or constitutional doctrines. It is important to remember, as we study individual areas of law, that doctrines are created, modified or disavowed concurrently. We cannot forget as we study the powers of the President the boundaries of legislative power or vice versa. Nor can we forget that there can be multiple interpretations of Supreme Court decisions, doctrines, and motives. Howard Gillman's *The Constitution Besieged* will make this point abundantly clear.

Even with this modest goal, this course is not to be taken lightly. The course is based mostly on Supreme Court case law. This is not easy reading; the justices write in formal and difficult prose, especially in cases dating back to the 19th Century. Students will be expected to analyze and break down the arguments presented by the justices-- cursory reading is not sufficient. Please be forewarned. Additionally, our supplemental texts and discussions will tackle academic as well as current debates. In other words, this is not a course suggested for students without any background in American government or for students who, for whatever reason, cannot consistently attend to the readings and come to class.

Advisories:

I am required to advise students of certain policies:

1. **Plagiarism:** This concept causes many students confusion, so I will try and put it plainly. Academic work must be your own work. It is plagiarism to claim work (such as writing, exams, or presentations) done by anyone other than the author named. Plagiarism also includes cutting and pasting information from internet websites without attribution or paraphrasing someone else's ideas or writing without attribution. It is not sufficient to re-arrange or re-state someone else's writing or ideas. Plagiarism unacceptable. Any plagiarized writing or work turned in for this course will result in a course grade of "F."
2. **Disrespectful behavior:** In the university we are all students, seeking truth and understanding. Skin color, gender, age, or other characteristics over which individuals have no choice are irrelevant to that pursuit, as are religious preference or sexual orientation. Students will be expected to treat all others with the same respect as they would want afforded themselves. Disrespectful behavior to others in the course is unacceptable and can result in a course grade of "F."
3. **Disabilities:** Students with documented disabilities should be registered with the Office of Services for Students with Disabilities (OSSD). Students with documented disabilities who may need accommodation should make an appointment with the professor as early

as possible, but no later than the first week of the quarter. The same requirements apply to students who may need to have known emergency medical information. Students should make alternative testing requests and arrangements at least one week in advance of the test.

Required Texts:

- Epstein, Lee and Thomas G. Walker. 2001. *Constitutional Law for a Changing America: Institutional Powers and Constraints*. 4th edition. Washington, D.C.: Congressional Quarterly Press. (EW)
- Gillman, Howard. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. (H)
- Recommended
 - van Geel, T.R. 1997. *Understanding Supreme Court Opinions*. 2nd edition. New York: Longman.

Course Requirements:

Participation:

Although this is a large class, participation is required. Throughout the term, students will be asked to identify and discuss cases assigned, and to participate in class discussions and in-class simulations. Class participation is expected in an upper level course and the Professor reserves the right to call on students during class if participation is not forthcoming voluntarily. A consistent lack of participation or inability to contribute will affect your final grade.

To aid your performance in this course, it is recommended that students brief at least the landmark or major cases presented in each section. You will also notice that during the first week, your readings include the copy of our Constitution located in the appendices of your text. This is not suggested reading. You should make sure that you are very familiar with the actual wording of this text as it stands at the center of all constitutional law. The recommended text, *Understanding Supreme Court Opinions*, will assist you greatly in the preparation for course discussions and exams.

Reading:

All reading assignments are required. The material should be read prior to the start of each topic. Be prepared to ask and to answer questions and to discuss the issues presented in the readings. ALL reading assignments, regardless of whether they are discussed in class, are fair game for examination questions.

Exams:

There will be a midterm essay examination and a final essay examination. Dates are tentative. Any schedule changes will be announced at least one week before the original exam date.

Reports on the Current Docket:

Throughout the term, students will review and write a 3-5 page report on a case under consideration by the Supreme Court. Students will have their choice of cases; however, you will be randomly assigned to choose one that was either accepted or denied consideration. Additionally, students should avoid duplication of their choices. You are expected to detail the facts and issues of the case, the earlier rulings by the lower courts, and the potential import and impact of the case. This last section should focus on both constitutional and political facets of the case. Are there amicus curiae filing in the case, either at the Supreme Court or the lower courts? Why? Who will this ruling affect? Will this change the likely balance of power between any levels of government? What are the consequences of placing this case on the docket or denying it a space? Placing the case in context with its precedents is a good way to explore both the importance and the likely influence of a decision or a denial. These reports will be made available to the entire course and be the basis for a discussion and debate about the Rehnquist court. Are they shirking their responsibility by docketing so few cases?

Moot Court:

During the term, we will hold a moot court simulation, of sorts. There will be a written and oral component to the simulation and it will be based upon a hypothetical case. Participation is mandatory. Each student is required to write one paper based upon this scenario. Each student will be assigned to write either a petition for or against a writ of certiorari, a brief on the merits for either the petitioner or the respondent, an amicus curiae brief in favor of the petitioner or respondent or an opinion on the merits. The assignments will be distributed randomly.

I expect the opinions/papers to be well written. Grammatical and spelling errors will severely hurt the overall grade. More information on the paper will be available prior to the simulation.

Late papers will not be accepted.

The oral portion of the assignment will occur in class. Students will be assigned to small groups for a discussion/debate on the merits of the case. This discussion can include a debate regarding the propriety of the grant of certiorari. Each "court" will assess the and come to some conclusion regarding the final disposition of the case.

Grading:

Midterm:	20%
Case Report	10%
Moot Court paper:	25%
Dead Week Oral Participation:	10%
Final:	35%

Make-up Assignments:

ALL students are expected to take exams at the scheduled times. Makeup will be allowed only under **EXCEPTIONAL** circumstances and with **PRIOR** consent of the instructor. Exceptional

circumstances will require documentation of that circumstance. Makeup exams will be essay exams without the benefit of choice among questions.

Contacting me:

Students should feel free to stop by during office hours or to contact me via e-mail. If you are unable to attend office hours, contact me for an appointment. If you have questions or concerns, please do not wait until before an exam or an assignment is due to stop by my office. If you choose to contact me via e-mail, you should make sure that you sign your name and use an address that accepts replies. I do not respond to anonymous messages. If you send an e-mail message after 4:00 pm Monday through Thursday, I will not respond until the following day. If you send a message after 4:00 pm on Friday, then the earliest I will respond is the following Monday. I will try to attend to your messages promptly, but do not anticipate immediate responses. If your query requires an extensive reply, I will respond by suggesting an appointment.

Course Outline and Reading Assignments

TOPIC	DAYS	READING
Introduction: Politics of the Supreme Court	10/1	EW: pp. 3-58; 633-42; 643-46
The Judiciary	10/1; 10/3 & 10/8	EW: pp. 61-119 W: Chap 2 Article by Robert Clinton* Bush v. Gore (2000) pp. 647-54
The Executive	10/10 & 10/15	EW: pp. 185-251; 271-96
The Legislature	10/17; 10/22 & 10/24	EW: pp. 121-83; 252-71
Exam	10/29	
Federalism	10/31; 11/5 & 11/12 No class on 11/7	EW: pp. 299-383 Via Lexis: Saenz v. Roe No. 98-97
Commerce Clause	11/14 & 11/19	EW: pp. 385-460
Economic Due Process	11/21 & 11/26	EW: pp. 554-599 Gillman: The Constitution Besieged
Moot Court Simulation	12/3	
Shrinking Docket Debate	12/5	Read each other's case reports
Final Exam		

* Clinton, Robert. 1994. "Game Theory, Legal History, & the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison." *American Journal of Political Science*. 38: 285-302. Available at Rod Library Reserve Desk.