

CONTEMPORARY CONSTITUTIONAL DEVELOPMENT

Political Science 4853 - Spring Semester 2009

Prerequisites: Three semester hours in public law or permission of the instructor; junior standing or above.

Class Meetings: Tuesday, Thursday, 12:30-1:45, Coleman 2140

Instructor: Karen Swenson Office: 2321 Coleman Hall

Office Hours (drop-in): 2:00-4:00, Tuesday; 2:00-5:00, Thursday; appointments are also available other times as arranged

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Course Material: The assigned texts for this course are The Supreme Court by Lawrence Baum, A Matter of Interpretation by Antonin Scalia, and Active Liberty by Stephen Breyer. Selected readings will be assigned from Constitutional Law for a Changing America: Institutional Powers and Constraints and Constitutional Law for a Changing America: Rights, Liberties and Justice, both by Lee Epstein and Thomas G. Walker. You will be required to obtain assigned Court opinions not found in the book on your own from the Internet, including those released during the semester. Internet sources for opinions and other Supreme Court information include Lexis-Nexis Academic Universe (available through the Booth library website; has opinions from all levels of courts, state and federal); www.findlaw.com; www.medill.nwu.edu/docket/; www.supct.law.cornell.edu; and www.supremecourtus.gov. A good hard copy source for current Supreme Court news and recent opinions is U.S. Law Week (available in library).

Course Objectives: More than most public law classes, this class will focus on explaining and predicting why the Supreme Court decides cases as it does, not only by understanding precedent and the doctrine of *stare decisis* and by appreciating different philosophies of constitutional interpretation, but by understanding other influences on the Court and individual Justices. By the end of this course, you should have a good understanding of the various *political* as well as legal theories of judicial decision-making. You will also get a sense of some important constitutional doctrines created by the Court, and the role of the Court in shaping contemporary social issues.

Our primary vehicle for exploring the Supreme Court will be the Court's October 2008 term. Thus we will be reading and discussing cases pending before the Court, and very recently decided cases. In addition to reading cases, we will do substantial research on the background of the Justices of the Roberts Court. The key project for this course, a Prediction Paper, will allow us to tie together what we have learned about the Court and the Justices, law and politics. As explained further below, everyone will write and present a research paper predicting how three

Justices will vote on a case currently pending before the Court.

Many of the cases we will read for this course are not excerpted in the Epstein & Walker volumes. Another objective for this course is for students to be able to brief appellate court cases from the original text, identifying the important facts, legal principles, and the reasoning of the majority opinion, concurring opinion, and dissenting opinions.

This class will be taught in seminar style; you will lead the class in discussion more than the instructor will. Expectations will be particularly high for graduate students. Thus another goal for this course is for students to be able to lead and participate in an informed discussion of legal issues under consideration by the Supreme Court from both a legal and political perspective.

Assessment: Class Participation, including Justice Report - 30%; Quizzes: 10% each (30% total); Research Presentation - 10%; Prediction Paper - 30%.

Quizzes: In order to ensure that you keep up with the readings, there will be three quizzes. The quiz will only cover the material since the previous quiz. Quiz dates: **Thursday, February 5; Thursday, March 5; Tuesday, April 14.**

Class Preparation and Participation: Class participation is central to the quality of this class. This is a seminar, not a lecture class. After the introductory classes are completed, we will spend classes discussing key cases on the Supreme Court's October 2008 Term docket. I will divide the cases up into broader topics (examples I anticipate include: "Current Issues Concerning the First Amendment Freedom of the Press"; "Current Issues Concerning the Rights of Post 9/11 Enemy Combatant Detainees"; "Current Issues Concerning Federal-State Relations". Several students will be assigned to lead each topic. (Depending on the breadth of the topic, this will include 1-3 class periods) These students will also be in charge of setting the curriculum for the designated topic. By the class prior to your assigned class, give me a list of assigned readings and I will e-mail it to the other students and post it on WebCT. For cases that the Court has recently decided, this will (of course) include the case itself, and the most important relevant prior cases. (For prior cases, use cases in your Epstein&Walker textbooks whenever possible, but feel free to go beyond the textbook cases.) Also be familiar with - and require fellow students to be aware of - the briefs of the parties and the *amicus curiae* filed with the Supreme Court. For pending cases (those not yet decided), readings will include the lower court case as well as relevant precedent and briefs. Feel free to consult with me in identifying appropriate readings.

In presenting cases, be sure to elicit from the class key elements in a brief; i.e., identify the important facts, legal questions, constitutional provisions interpreted, legal principles, and the reasoning of the majority opinion, and concurring and dissenting opinions if you think they are important. Also discuss the political implications of the case. Why did the Court accept this case for review? Are there *amicus curiae* filing in the case? Who? Why? Who will this ruling affect?

Topic leaders should call on their fellow students to answer questions. You may also call on me. This motivates everyone to be prepared for class!

Even if it is not your day to lead the class, preparation in advance of class is generally a necessity. Much of the discussion will involve analyzing court cases; the best way you can prepare for class is to brief the most important cases in the style discussed in Appendix 8 of the Epstein & Walker textbooks. (Doing so will also make studying for the quizzes easier.) Either prepare briefs for these cases, or be able to identify all of the items found in a brief.

Grading will be on a 30 point scale, based on contributions to the class discussion. Up to 15 points will be awarded for performance during classes you are assigned to lead, including your oral justice report and assigned posts on WebCT; 15 points for participation during other classes. A student who leads assigned classes in a prepared and thoughtful manner, and who makes thoughtful contributions to discussion on a fairly regular basis will receive all 30 points. It will not be possible to contribute regularly if you do not attend regularly, and your attendance record in and of itself will be taken into account if your course grade is on the border.

Oral Justice Report: Who are these 9 people that we call the “Roberts Court?” As political scientists, we need to explore the possibility that *who* these people are affects the decisions they make. Everyone will be assigned a Justice to research. Give us some idea of his or her background, career history, any highlights of the confirmation process, and a characterization of his or her ideology. Each report should take about 5 minutes. (Your research for this report will be helpful in getting you started on your Prediction Paper also.) Justice assignments will be made during the first week of class, and the reports will be given during the second and third weeks of class. One or two students will be assigned to each Justice; if there are two of you, try to coordinate your efforts so you cover different ground.

Supreme Court Prediction Paper: This paper is the centerpiece of your work in this course. (a) Each student will choose a case on the Supreme Court’s October 2008 Term docket that is scheduled for a late-season oral argument (March or April or as yet unscheduled). The case should involve a constitutional question, not simply one of statutory interpretation. (b) Each student will be assigned three of the Justices, including at least one from each loose ideological grouping that we call “Liberal” and “Conservative”. (Students will get to do the Justice about whom they delivered the oral report.)

In the paper you will present and justify predictions about the positions that each of the three justices takes when the Court decides the case. These positions include the outcome of the case (who wins) and the legal doctrines or rules that the Justice supports. The justification will be based on relevant information about the case, about past cases involving similar issues, and about the Justices themselves.

I would like to thank Professor Larry Baum of the Ohio State University for developing the idea of a prediction paper.

The paper should be at least 15 pages in length. It will be due on the date of the final examination as set forth by the University Final Exam Schedule (**Tuesday, May 5**). Warning: Though the final, polished written document is not due until later, you must have completed your research in time to prepare an effective paper presentation.

More details on the content of the paper will be provided later in the semester. Case and Justice assignments will be made early in the semester, after we have discussed the pending cases.

WebCT: The course will make use of WebCT to ensure that we are all informed as to course organization and to what readings are assigned for each class. In addition, I encourage students to post comments in "discussions" about substantive course content or assignments.

Dishonesty: No dishonest practices on the prediction project or the exams will be acceptable, and any suspected cases of dishonesty will be reported to the appropriate departmental committee and the University Judicial Affairs Office and handled according to departmental and university policy. Plagiarism is a dishonest practice, and includes borrowing the ideas of another author without attribution, as well as paraphrasing (or directly quoting) the words of another author without attribution.

Special Needs: Students who have special needs under the Americans with Disabilities Act as documented by the Office of Disability Services should make their needs known to the instructor as soon as possible. Reasonable accommodation will be arranged in consultation with the Office of Disability Services.

Course Schedule:

This sketches a rough order of the topics we will cover, and is subject to change. I will generate a new course outline once we settle on topics and discussion leaders.

Weeks One-Five: Introduction to the Court and Constitutional Interpretation

- Weeks One-Four: Read Baum book in its entirety. Read Chapter 1 "Understanding the U.S. Supreme Court" from either Epstein & Walker volume. Read and critique article: Richard Brest, "Supreme Court 2.0," ABA Journal, October 2008.
 - Baum Chapters 1-3 for Thursday (week one) [students with last names A-D, post a discussion question (or more) on WebCt]
 - Chapter 4 [students with last names E-K, post a discussion question (or more) on WebCt]

- Chapter 5 [students with last names L-S, post a discussion question (or more) on WebCt]
- Chapter 6 [students with last names T-Z, post a discussion question (or more) on WebCt]
- Weeks Four-Five: Read Scalia and Breyer books. Also read Griswold v. Connecticut (1965) and preface materials, pp. 430-438 (Epstein & Walker, Rights, Liberties & Justice)
- Week Two-Four: Oral Justice Reports

Week Six: Setting the Course Agenda

- Assignment: Look over the cases pending before the Court this term, and generate a “Discuss List” of those the class should focus on this semester. We will limit ourselves to cases involving interpretation of the constitution. Select a few on topics that should be the focus of extended class treatment (which will include reading and discussing related prior cases as well as briefs filed by the parties and *amicus curiae*), and real gems that you might want to explore in the Prediction Paper. (The Prediction Paper cases must be ones set for argument in April or March, or unscheduled.) If you find some good sources for researching pending cases other than those listed above in the “Course Material” section, bring those to class to share.

Weeks Six - Thirteen

- Topics T.B.A., led by groups of students.

Weeks Fourteen - Fifteen: Presentations