

CONSTITUTIONAL LAW: CIVIL RIGHTS AND LIBERTIES<http://homepages.gac.edu/~arosenh/395index.html>

Monday, Wednesday 2:30-4:20

OM 04

Office: 204H Old Main**Office Hours:** Mondays and Wednesdays 8:30-10:00am, and by appointment**Email:** arosenth@gustavus.edu**Phone:** 933-7437**COURSE DESCRIPTION**

The purpose of this course is to give the student an understanding of constitutional rights and liberties as the interpretation of them has evolved over time. It will treat the Constitution and the Supreme Court not as abstract islands unto themselves but as real entities shaping and being shaped by the times and the institutional context in which they exist.

Part 1 of this course examines the invention and development of American constitutional principles, specifically focusing on the relationship between the Supreme Court and the rest of the political system in the definition of political rights and liberties. We will focus on the overtly political rights and liberties protected by the Constitution and give primary attention to First Amendment, Eighth Amendment, and privacy concerns.

Part 2 of this course focuses on the Fourteenth Amendment and related case law. We will study the variety of specific guarantees for groups as well as the emergence of protection for fundamental rights. In particular, we will investigate the framework of equal protection for people of color, women, and the regulation of sexuality.

For the most part we will be reading and discussing written opinions of the United States Supreme Court. Your textbook also contains excellent explanatory material that provides the historical, political, social, and economic context for these opinions. Law schools typically focus on the doctrines and rationales of the opinions, and so will we, but we will also spend a good deal of time on their context, and their social and political effects. This enables us to have a more informed and realistic picture of the Supreme Court as a political institution.

COURSE OBJECTIVES

By the end of the semester, students will:

- Discuss the relationship between the Court's political context and its constitutional decisions;
- Understand legal concepts used by the Court in its constitutional jurisprudence;
- Discuss recent trends in constitutional decision-making;
- Understand the philosophical and legal foundations of the Constitution;
- Understand and articulate current and historical standards and legal tests used by the Court;
- Brief court decisions and engage in appellate court research.

REQUIRED TEXTS

- David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, Seventh Edition, W.W. Norton: New York, 2008. [Referred to as O'Brien]
- David M. O'Brien, *Supreme Court Watch 2009*, W.W. Norton: New York, 2009. [Referred to as SCW]
- Additional readings available on-line. These must be printed and brought to class on days for which they are assigned. I have placed all the reserve readings for POL 395 on the Readings page of the

course website. There is one (large) Adobe Acrobat file that contains all the reserve readings (Spring 2010 Readings) or you can download each file individually.

COURSE REQUIREMENTS AND ASSESSMENT

I need to emphasize at the outset that this is a very demanding course. Plan to spend a minimum of 3 hours outside of class for each hour in class. That is the amount of time I estimate you should spend on reading, briefing cases, and preparing for class sessions. Weeks in which you have additional assignments due will require more time. At a minimum, I anticipate that you will spend 12 hours per week on this course.

Legal reasoning can be dense, complex, obfuscatory and at times non-existent. Consequently, class attendance, constant reading, and participation are essential and mandatory. I expect every student to attend virtually every class, to be on time, and to be prepared. Our agenda requires you to do a large amount of reading and to do it carefully and punctually.

If you do not feel that your schedule or interest will support such a heavy reading load and time commitment, please do not take this class.

Attendance

Consistent attendance is a minimum condition of class membership. Students do not receive credit for attending but failure to attend class will negatively affect grades. In a discussion-oriented class such as this one, missing class discussion is missing coursework that cannot be made up.

Participation (25%)

This is an upper-level seminar and we will proceed by means of discussion. Students should be prepared to raise questions and offer critical insights about the reading material and the issues that it raises. Vigorous class debate and discussion is both expected and desirable. That said, respectful engagement of opposing and differing views is an essential condition of reasoned discourse and I will expect you to demonstrate such respect.

Presence alone does not earn participation credit: a passively silent and/or clearly unprepared student earns no credit for participation. You need not speak constantly to participate meaningfully in class. Attentive, thoughtful, respectful, and reflective listening to others constitutes one form of active participation. Come to class having read the material carefully and thoughtfully. Participate in class to the greatest extent you can. Speak when you have something to say. Ask questions when you have them. Listen carefully and respectfully to others. Engage in small group discussions. Come to my office hours. Send me e-mail.

Note, however, that although I construe course participation broadly, you cannot earn an A, B, or C for participation without speaking in class on a regular basis. At some point in your life, you will have to speak publicly. You might as well start now.

Late arrivals are distracting and disrespectful. Persistent tardiness will lower your participation grade.

Case Book (25%)

Since the course will use the case method in examining court decisions, it is important that you be prepared to participate at each class meeting. This course rests upon the conviction that constitutional law is more than just a collection of legal rules. It is a blend of politics, history, and interpretation. Because the Supreme Court acts by deciding cases, students must acquire a talent for reading and comprehending cases as a means toward discovery of what the Supreme Court has done. Briefing

individual cases and maintaining a casebook of those cases best accomplishes this. For information about how to brief a case, see the "How to Brief a Case" handout available on the Handouts page of the course website.

Students must bring their casebooks to every class. Students are required to brief each case prior to the class for which it is assigned, and be prepared to present assigned cases for the class. In presenting the case, the student will summarize the facts and findings of the Court and will provide an analysis of the logic employed in reaching the majority opinion. A summary of any concurring or dissenting opinions is also necessary. I will collect each student's casebook twice during the semester and once at the end of the semester. These dates will not be announced ahead of time, so it is essential that your casebook is present at each class and is kept up to date. In addition, I may, on occasion, collect briefs due for a particular class. These "spot-checks" also count toward your casebook grade.

Students have two "free passes" regarding casebook collection that they may use during the semester. Use of the "free pass" option must occur before I announce whose casebooks are to be submitted that day. To use your free pass, simply hand me a sheet of paper with your name, the date, and the words "free pass" before class begins. You are still responsible for briefing the cases assigned for the date on which you use your free pass. Note: use of a free pass does not excuse you from a "spot-check" of briefs due on that day.

I will evaluate casebooks based on their overall completeness and the quality of the briefs within. Briefing cases can be challenging and I strongly encourage you to see me early in the semester to discuss your briefs.

Note that all the usual rules pertaining to academic honesty apply to case briefs. While you are encouraged to work with classmates on understanding the Court's opinions, your case briefs must ultimately reflect your own analysis and thought.

Case Presentation (10%)

Each student will present one case to the class. This will require you to prepare a 20-25 minute presentation of the case to the class, and field questions from class members (and me) about the content and significance of the case.

You may choose the case you would like to present from the list of cases we will be reading this semester. Look over the list of required briefs and then email me your top three choices. I will assign cases on a first-come, first-served basis. The following cases are **not** options for case presentations:

- *Buck v Bell*
- *Roe v Wade*
- *Planned Parenthood of SE Pennsylvania v Casey*
- *Dred Scott v Sandford*
- *Plessy v Ferguson*
- *Brown v Board of Education 1*
- *Bolling v Sharpe*
- *Brown v Board of Education 2*

Your presentation should be based on the full court opinion rather than the edited versions in the O'Brien text. Note that cases range from very short (5-10 pages) to very long (230+ pages). Good sources for the full opinion include the Lexis-Nexis database available through the library and the [Legal Information Institute at Cornell University](#). **I must receive an email copy of your brief of the case you are presenting at least one class day before you present the case to the**

class. So, for example, if you are presenting on Tuesday at 2:30pm, I must have your brief in my inbox by Monday at 2:30pm. I encourage you to consult with me regarding your presentation plans.

Essay (10%)

1000-1250 words; due in class on March 1. Assignment specifics will be provided on a separate handout that will be available on the Handouts page of the course website.

Moot Court Exercise (30%)

This semester, we will, as a class, conduct a moot court session that will simulate aspects of the appeal of *Sullivan v Florida*, a case that the U.S. Supreme Court heard this fall. Early in the semester, you will be assigned a role as a justice on the U.S. Supreme Court. You will be responsible for uncovering, reading, disseminating, and organizing as much material as possible related to the your justice's approach to the issues raised in *Sullivan v Florida*, court precedents related to it, and the arguments for and against the constitutionality of the policy at issue in the case. Each justice will complete two research memos relating to his/her justice's judicial philosophy and his/her justice's approach to the 8th Amendment. Justices will then be presented with briefs from both the petitioner and the respondent in this case and will hear oral arguments. Following this, justices will hold a conference to discuss their views of the case, to arrive at a majority decision, and to assign the writing of majority and dissenting opinions (and concurrences, as necessary.)

Please note that the due dates for moot court assignments do not appear on the class schedule. Soon after arriving on a date for the moot court exercise, I will distribute the assignments and relevant due dates. They will also be available on the Handouts page of the course website.

A note about the date for the moot court exercise: At our class meeting on Wednesday, February 17, we will vote as a class for the date and time of the court's conference. Attendance at this session is mandatory. Once we have settled upon the date, it is your responsibility to arrange your schedule so that you can attend the oral arguments. No excuses. No exceptions.

More specific information regarding the moot court exercise, assignment dates, and your responsibilities will be provided on the "Moot Court Exercise" handout distributed in class.

[Final Exam (15%)

It is my hope that no final exam will prove necessary for this course. The percentages listed above reflect that hope. If, however, I believe that class preparation and engagement is less than satisfactory, I reserve the right to administer a final exam in take-home form, during the exam period, or both. In this event, the percentages for Participation, Case Book, and the Moot Court exercise will each be decreased by 5%.]

N.B.

Failure to complete any major component of the course (e.g., failure to attend an adequate number of classes, failing to adequately prepare for substantial numbers of classes, or failing to complete assignments related to the moot court exercise) may entail failing the course as a whole, regardless of performance on the completed components.

Late assignments will be docked 1 full grade per day for 2 days after the original due date. Except under extraordinary circumstances and with prior permission, assignments will not be accepted if more than 48 hours have passed since the assignment was due. No extensions will be permitted on the submission of casebooks. Assignments will not be accepted via e-mail without prior permission.

ACADEMIC HONESTY

I take the principles of academic honesty seriously and will uphold the policies and procedures of Gustavus Adolphus College. Your continued presence in this class indicates that your work for this course will comply with the academic honesty policy and the Honor Code.

Dishonesty of any kind with respect to examinations, course assignments, alteration of records, or illegal possession of examinations is considered cheating. Students are responsible not only to abstain from cheating, but also to avoid making it possible for others to cheat. Submitting someone else's work as your own constitutes plagiarism. Academic honesty requires the full acknowledgement of ideas taken from another source for use in a course paper or project. You must include citations for material that you quote or paraphrase from another text; in general, it is better to overcite than to undercite.

All work that you submit for this course may be submitted only to this course and should be based upon work and thought undertaken only for this course.

Violations of the Academic Honesty Policy will result in at least a grade of 0 for the specific assignment and/or failure of the course. Students accused and/or penalized for these violations and students who become aware of such violations have specific rights and responsibilities as outlined in the Honor Code section of the College Catalogue.

Please see Appendix I to this syllabus for copies of the relevant policies.

ACCOMMODATIONS

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (1990) work together to ensure 'reasonable accommodation' and non-discrimination for students with disabilities in higher education. A student who has a physical, psychiatric/emotional, medical, learning, or attentional disability that may have an effect on the student's ability to complete assigned course work should contact the Disability Services Coordinator in the Advising Center, who will review the concerns and decide with the student what accommodations are necessary. Upon receipt of documentation from Laurie Bickett, Disability Services Coordinator, I will be happy to work with you on appropriate accommodations.

CLASS SCHEDULE (SUBJECT TO CHANGE AS NECESSARY)

February 8

Course Introduction

- Letter of Introduction due via email by 5pm on February 9, 2010. Assignment available on the Handouts page of the course website.

February 10

Supreme Court Background

O'Brien, 1-21 (with particular emphasis on Amendments 1-10 and 14), 175-205; SCW 1-5; [Primer on Supreme Court Procedures](#) (online); Tushnet, "[The Politics of Constitutional Law](#)" (online).

- Know 9 current justices of U.S. Supreme Court; know content of first 10 amendments to the Constitution; familiarize yourself with glossary terms from Handouts page of the course website.

February 15

Theories of Constitutional Interpretation

O'Brien, 66-101; Farber and Sherry, "[The Originalism Debate](#)" (online); "[Theories of Constitutional Interpretation](#)" (online).

- Complete the chart on the last page of the "Theories of Constitutional Interpretation handout.
- *Theories of Constitutional Interpretation essay assignment distributed.* Also available on the Handouts page of the course website after 2/15.

February 17

Nationalization of the Bill of Rights

Levy, "Why We Have the Bill of Rights"(online); O'Brien, 324-339.

- Know five approaches to incorporation described on page 337 in O'Brien.

February 22

Free Speech and the First Amendment

Kairys, "Freedom of Speech" (online); O'Brien 408-427; *Schenk v United States* 427-428; *Gitlow v United States* 428-433; *Schenck* and *Gitlow* flyers (online).

- Brief *Schenk v United States*; *Gitlow v United States*. Bring extra copy of *Gitlow* brief to hand in.

February 24

Free Speech and the First Amendment

Dennis v United States 433-444; *Brandenburg v Ohio* 445-447; Smith Act of 1940 (online).

- Brief *Dennis v United States*; *Brandenburg v Ohio*.

March 1

Cruel and Unusual Punishment

Levy, "The Eighth Amendment" (online); Wittes, "Cruel and Unusual?" (online); O'Brien 1157-1163.

- Theories of Constitutional Interpretation essay due in class.

March 3

The Eighth Amendment and the Death Penalty

Scalia, "God's Justice and Ours" (online); Latzer, "Capital Punishment: The Law and the Issues" (online); *Francis v Resweber* (online).

- Brief *Francis v Resweber*.

March 8

The (Temporary) Abolition of the Death Penalty

O'Brien 1168-1178; *Furman v Georgia* 1178-1188; *Gregg v Georgia* (online).

- Brief *Furman v Georgia*; *Gregg v Georgia*.

March 10

Capital Punishment and Non-Homicides/Racial Disparities

Coker v Georgia (online); *McCleskey v Kemp* 1194-1204.

- Brief *Coker v Georgia*; *McCleskey v Kemp*.

March 15

Capital Punishment and Juveniles

Atkins v Virginia 1208-1214; *Roper v Simmons* 1214-1222.

- Brief *Atkins v Virginia*; *Roper v Simmons*.

March 17

The Latest Decisions

SCW 120-122; *Baze v Rees* SCW 122-134; *Kennedy v Louisiana* 134-143.

- Brief *Baze v Rees*; *Kennedy v Louisiana*.

March 22

Privacy and Liberty: Sterilization, Contraception, and Abortion

O'Brien, 1232-1246, 357-358, 1249-1253; *Buck v Bell* 1247-1248; *Griswold v Connecticut* 359-368; *Roe v Wade* 1253-1262.

- Brief *Buck v Bell*; *Griswold v Connecticut*; *Roe v Wade*.

March 24

Privacy and Liberty: Abortion

O'Brien, 1270-1271; *Planned Parenthood of Southeastern Pennsylvania v Casey* 1271-1283.

- Brief *Planned Parenthood of Southeastern Pennsylvania v Casey*.

March 29**Spring Break****March 31****Spring Break****April 5****Spring Break****April 7**

Privacy and Liberty: Abortion

Stenberg v Carhart (online); *Gonzales v Carhart* 1283-1292.

- Brief *Stenberg v Carhart*; *Gonzales v Carhart*.

April 12

Privacy and Liberty: Sex and Sexual Orientation

O'Brien, 1296-1305; *Bowers v Hardwick* (online); *Lawrence v Texas* 1304-1315.

- Brief *Bowers v Hardwick*; *Lawrence v Texas*.

April 14

Racial Discrimination and State Action

O'Brien, 1334-1360; *Dred Scott v Sandford* 1360-1371; *The Civil Rights Cases* 1371-1378.

- Brief *Dred Scott v Sandford*; *The Civil Rights Cases*.

April 19

Racial Discrimination and State Action

Plessy v Ferguson 1379-1383; *Shelley v Kraemer* 1383-1385.

- Brief *Plessy v Ferguson*; *Shelley v Kraemer*.

April 21

Racial Discrimination in Education

O'Brien, 1388-1401; 1406-1412 *Brown v Board of Education (1)* 1401-1406; *Bolling v Sharpe* 1412-1413; *Brown v Board of Education (2)* 1413-1416.

- Brief *Brown v Board of Education (1)*; *Bolling v Sharpe*; *Brown v Board of Education (2)*.

April 26

Racial Discrimination in Education

O'Brien, 194-195; *Cooper v Aaron* 1416-1421; *Swann v Charlotte-Mecklenberg Board of Education* 1422-1426.

- Brief *Cooper v Aaron*; *Swann v Charlotte-Mecklenberg Board of Education*.

April 28: MayDay!

Racial Discrimination in Education

Milliken v Bradley 1427-1430; *O'Brien*, 1434-1439; *Parents Involved in Community Schools v. Seattle School District No. 1* 1440-1453.

- Brief *Milliken v Bradley*; *Parents Involved in Community Schools v. Seattle School District No. 1*.

May 3

Racial Discrimination in Education

O'Brien, 1456-1463; *Regents of the University of California v Bakke* 1464-1473; *Gratz v Bollinger* 1500-1505; *Grutter v Bollinger* 1505-1513.

- Brief *Regents of the University of California v Bakke*; *Gratz v Bollinger*; *Grutter v Bollinger*.

May 5

Gender-Based Discrimination

O'Brien, 1513-1517; *Frontiero v Richardson* 1521-1524; *Craig v Boren* 1525-1529.

- Brief *Frontiero v Richardson*; *Craig v Boren*.

May 10

Gender-Based Discrimination

Michael M. v Superior Court of Sonoma County 1529-1532; *United States v Virginia* 1533-1544.

- Brief *Michael M. v Superior Court of Sonoma County*; *United States v Virginia*.

May 12

Sexual Orientation-Based Discrimination

O'Brien, 1548-1549; *Romer v Evans* 1550-1560.

- Brief *Romer v Evans*.

May 17

Wealth and Alienage-Based Discrimination

San Antonio Independent School District v Rodriguez 1567-1574; *Plyler v Doe* 1583-1588.

- Brief *San Antonio Independent School District v Rodriguez*; *Plyler v Doe*.

May 19

Polstitutional Olympics!

APPENDIX I

Gustavus Adolphus College Honor Code

Every Gustavus Adolphus College student is required to sign the following statement before final admittance into the College:

As a community of scholars, the faculty and students of Gustavus Adolphus College have formulated an academic honesty policy and honor code system, which is printed in the Academic Bulletin and in the Gustavus Guide. As a student at Gustavus Adolphus College I agree to uphold the honor code. This means that I will abide by the academic honesty policy, and abide by decisions of the joint student/faculty Honor Board.

Through information provided in syllabi and/or other means, faculty members will explain to students how the Honor Code will operate in their respective courses. The following statement is suggested as a pledge for students to sign on all graded assignments and projects:

On my honor, I pledge that I have not given, received, or tolerated others' use of unauthorized aid in completing this work.

A similar statement may be signed by students at the beginning of a course, indicating that their work for that course will comply with the academic honesty policy and the Honor Code.

Gustavus Adolphus College is proud to operate under an honor system. The faculty and students have jointly created an Honor Board to enforce this policy. In signing this statement a student is promising that his or her work complies fully with the authorized aid as defined by the professor. It is each professor's responsibility to state course penalties for academic honesty policy violations, and to define the level of authorized aid appropriate to the work in the course or to the particular assignment. However, the student is responsible to ask questions about any reasonable doubt regarding the professor's definition.

Academic Honesty Policy

The faculty of Gustavus Adolphus College expects all students to adhere to the highest standards of academic honesty, and to refrain from any action that impinges upon academic freedom of other members of the college community. In all academic exercises, examinations, presentations, speeches, papers, and reports, students shall submit their own work. Footnotes or some other acceptable form of citation must accompany any use of another's words or ideas. Students are especially cautioned that quoting or paraphrasing from electronic sources without proper citation is as serious a violation as copying from a book or other printed source.

In the case of cheating or plagiarism, the instructor will inform the student and the Office of the Provost of the nature of the offense, the penalty within the course, and the recommendation of the instructor as to whether further disciplinary action is warranted. Another instance of academic dishonesty will result in review of the student's record by the probation committee and may result in the student being placed on academic probation. If a pattern of academic dishonesty continues, the student may be permanently dismissed from the College.

A student may not submit work that is substantially the same in two courses without first gaining permission of both instructors if the courses are taken concurrently, or permission of the current instructor if the work had been submitted in a previous semester.

The faculty regards the damaging of library materials and failing to sign out or to return them properly, and the misuse of computer files and programs as equally serious violations of the ethical standards of courtesy, fairness, and honesty that bind together a community of scholars.

Individuals who use the College's computer facilities assume the responsibility of seeing that these resources are used in an appropriate manner. Misuse of computer hardware, software, data, and output is a violation of College policy and regulations and may also be a violation of law if data of other computer users are disturbed or the privacy of individuals is violated.

Finally, students who serve the College in positions of responsibility in which they deal with test materials, letters of recommendation, and other matters that must be held in confidence are expected to maintain confidentiality and to adhere to the same high standards of personal integrity.