The Pedagogical Considerations of Using a Constitutional Law Textbook in Political Science

CONSTITUTIONAL LAW AND POLITICS, 3d Edition. 2 vols. By David M. O'Brien.† New York, New York: W.W. Norton & Company, 1997. Vol. 1, pp. xx, 877; vol. 2, pp. xxii, 1520.

*Reviewed by Christopher P. Banks**

I. INTRODUCTION

Political scientist Jerry Goldman recently challenged public law scholars to "reexamine the fundamentals of constitutional law" and consider whether political scientists should agree on a "canon"[1] that would guide the pedagogical use of constitutional law casebooks employed in the field.[2] In evaluating twelve casebooks that (in his estimation) represent "a substantial segment of the 100,000 or so [undergraduate] students who likely enroll in constitutional law classes" annually, Goldman suggests that the lack of a guiding canon prevents political scientists from adequately defending the choices they make in adopting a text and teaching a constitutional law course from the social science perspective.[3]

While Professor Goldman correctly acknowledges the contemporary diversity of the "great public law tradition in political science,"[4]

---

† Professor of Law, University of Virginia School of Law.

* Assistant Professor of Political Science, The University of Akron; B.A. 1980, University of Connecticut; J.D. 1984, University of Dayton School of Law; Ph.D. 1995, University of Virginia.

1. Goldman defines "canon" as "a widely accepted body of rules, principles, and norms exemplified in a common set of Supreme Court opinions." Jerry Goldman, *Is There a Canon of Constitutional Law?* 10 LAW & POL. BOOK REV. 134 (1992) <http://www.unt.edu/lpbr/subpages/reviews/goldman2.htm>.

2. *Id.* at 137.

3. *Id.*

4. The public law tradition, which includes the subfields of constitutional law, administrative law, international law, and jurisprudence, gradually disintegrated as scholars embraced the principles underlying Sociological and Legal Realist thought (i.e., that law cannot be understood apart from its social context). This trend, in part, not only widened the chasm between legal studies and political science, but also made "traditional" constitutional law the "chief representative of legal studies in modern political science." HARRY P. STUMPF, AMERICAN

his suggestion that working from a homogenous list of cases ought to be a priority for professors teaching constitutional law is questionable. What Goldman suggests is not only impracticable, but also ignores the reality that political science and legal study are inherently different academic enterprises. Indeed, the eclecticism of constitutional law scholarship and its utilization of social science techniques to study political behavior is a distinctive element of the public law subfield. Moreover, from a social science perspective, reducing constitutional law to a rote list of U.S. Supreme Court doctrine is unwise because it overemphasizes legal doctrine at the expense of understanding judicial policy making and its vital historical and political context. The selection of any constitutional law textbook by a political scientist, therefore, should tend to celebrate, and not to disparage, what makes political science preeminent: that law is really a function of politics.[5]

Yet, asserting that all constitutional law is "politics" is too simplistic and does little to explain the dynamics of casebook selection in political science. The selection of a casebook is a decision implicating a variety of pedagogical concerns that affect how constitutional law is taught in the classroom. While not an exhaustive list, these considerations include: (1) an analysis of the state of the public law subfield; (2) the professional training of the instructor; (3) the scope of coverage of the casebook and its intended application to undergraduate political science classes; and, (4) an evaluation of the casebook and its effectiveness in a public law course. Whereas the first two considerations deal with casebook selection, the remaining two affect the way in which the text is an extension and affirmation of the professor's teaching philosophy, style, and preference.

This Review first describes the importance of each consideration by analyzing how a two-volume constitutional law casebook,[6] written

---

JUDICIAL POLITICS 18 (2d ed. 1998). For this reason, for purposes of this essay, reference to the "public law subfield" is intended to encompass political scientists engaged in the study of constitutional law.

5. Unlike its more radical connotation that is epitomized by the tenets of Critical Legal Studies, STUMPF, *supra* note 4, at 34-36, this argument conceptualizes the study of law and courts, or judicial politics (of which constitutional law is a part), as "political jurisprudence." Generally, political jurisprudence rejects legal positivism and assumes that courts are political agencies that are part of the larger political process. *Id.* at 21. *See generally* Harry P. Stumpf et al., *Whither Political Jurisprudence: A Symposium*, 36 W. POL. Q. 533-69 (1983).

6. 1 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY (3rd ed. 1997) explores separation of powers, federalism, and the electoral process. The second volume, 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES (3d ed. 1997) concerns the protection of civil rights and liberties in a system of limited government. Notably, Professor O'Brien annually updates the material in each volume through his analysis of the Court's most

by Professor David M. O'Brien of the Woodrow Wilson Department of Government and Foreign Affairs at the University of Virginia, can be admirably employed to teach the principle that constitutional law is, in fact, politics. Overall, the volumes are excellent undergraduate political science constitutional law texts. However, the casebook volumes have two flaws. First, they do not address the vital question of "what is political science?," a query that ought to be routinely asked by anyone teaching public law courses. Second, they omit sufficient explanation of the fundamentals of conducting legal research and writing, including citation style. These criticisms are explored in more detail in the Review's concluding section.

II. THE PEDAGOGICAL DECISION TO ADOPT (AND THEN USE) A CONSTITUTIONAL LAW TEXT

Political science professors teaching constitutional law classes enjoy a wide range of choices in confronting the decision of which book to adopt. In 1992, twelve casebooks (including O'Brien's) were identified by Professor Goldman as texts commonly used by political scientists.[7] Recent or noteworthy entries into the public law subfield also include several other texts that were not part of Goldman's analysis.[8] With

---

recent term in DAVID M. O'BRIEN, SUPREME COURT WATCH.

7. Excluding the O'Brien casebooks, an updated version of this list includes the following texts: LUCIUS J. BARKER & TWILEY W. BARKER, CIVIL LIBERTIES AND THE CONSTITUTION: CASES AND COMMENTARIES (6th ed. 1990); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (3d ed. 1992); CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION (6th ed. 1996); LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA, 2 volumes, (3d ed. 1997); LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW (2d ed. 1995); SHELDON GOLDMAN, CONSTITUTIONAL LAW: CASES AND ESSAYS (2d ed. 1991); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997); JAMES C. FOSTER & SUSAN M. LEESON, CONSTITUTIONAL LAW: CASES IN CONTEXT, (1998); WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER, & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS (8th ed. 1996); ROBERT J. STEAMER & RICHARD J. MAIMAN, AMERICAN CONSTITUTIONAL LAW: INTRODUCTION AND CASE STUDIES (1991); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, CONSTITUTIONAL LAW (3d ed. 1996). Goldman, *supra*, note 1, at 134-5.

One text, RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW: CASES AND INTERPRETATIONS (4th ed. 1995), was not reviewed by Goldman but is the subject of an independent case book review (by Dr. Patricia Pauly) by the Law and Court Section of the American Political Science Association. *See* Susan Gluck Mezey, *Introduction, in* LAW & POL. BOOK REV. 121-33 (1992) <http://www.unt.edu/lpbr/subpages/reviews/mezey2.htm>.

8. THOMAS R. HENSLEY, CHRISTOPHER E. SMITH, & JOYCE A. BAUGH, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES (1997); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (1997); WALTER F. MURPHY, JAMES E. FLEMING, & SOTIRIOS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION (2d ed. 1995); ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, THE SUPREME COURT, RACE, AND

so many alternatives at hand, the fledgling or seasoned professor makes an adoption decision that is invariably idiosyncratic but that still fairly represents the professor's own professional experience when the Constitutional Law course is taught. Less experienced instructors probably draw heavily upon graduate training to select a casebook, especially in their first teaching position. Book selection is affected by whether the young professor (as a graduate student) was under the tutelage of a respected senior faculty member. If so, the decision to adopt may be as simple as whether the new professor is familiar with a textbook that is published by a mentor.

Still, it is reasonable to think that a choice of the textbook may involve more introspective analysis about what *kind* of political scientist the young scholar wishes to be when entering the profession. In those instances, a basic pedagogical factor carrying almost presumptive weight in the adoption decision is the answer to the question: "What is political science?" For the constitutional law teacher, this inquiry can be restated as: "What is public law?" Both queries provide a point of departure for acquiring a sense about the state of the discipline that, in turn, becomes instrumental in casebook choice and the formulation of a coherent pedagogical approach to public law instruction.

A. What Is Public Law?

Defining modern "public law" begins with what the state of this subfield looked like before and after (roughly) the 1950s and 1960s. Prior to that time, public law was an amalgam of disciplines that loosely fell under the larger subject matter of American politics, public administration, and international relations.[9] Yet, because judicial studies had a distinctly legalistic and formalistic approach that was preoccupied with the U.S. Supreme Court and constitutional law, it was a relatively isolated academic enterprise that never quite fit into the political science mainstream. Cross-discipline and comparative investigations were rare and pertinent studies within the field had a legal bias and a fixation on the U.S. Supreme Court. As a result, by emphasizing "all things legal," constitutional law pedagogy in political science tended to be more traditional, normative, and descriptive.[10]

CIVIL RIGHTS (1995).

9. Martin M. Shapiro, *Public Law and Judicial Politics*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II 365, 366-81 (Ada W. Finifter ed., 1993).

10. *Id.* at 365-66. *See also* STUMPF, *supra* note 4, at 3-27. The most analogous modern-day approach to the traditional one is what some scholars label the "jurisprudence of values." *Id.* at 36-38, 43-44.

For a variety of reasons, however, including some that are jurisprudential,[11] the scope and direction of the subfield began to change in the 1960s. For one thing, its core became much more diverse and, in some quarters, took on more of an antilegalistic and less formalistic hue. Behavioralist scholars, in particular, were dissatisfied with the controlling legal paradigm in public law and increasingly focused their attention on making quantitative explanations for judicial decisions. Hence new research centered on examining (among other things) court outputs, judges' attitudes, judicial impact, organizational influences, institutional constraints, and policy preferences.[12] Despite the "outward and downward" movement of the public law subfield away from its constitutional law and Supreme Court moorings and the resultant increasing pluralism (in subject matter) over the years,[13] the current pedagogy remains sequestered from the mainstream[14] and is still very traditional for many.[15] Therefore, from a methodological standpoint, in one fundamental respect (at least since the 1950s) the subfield has become a house divided against itself: many scholars endorse the traditional approach to public law while others are committed to seeking empirical answers to research questions.[16]

---

11. *Stumpf*, *supra* note 4, at 3-31.

12. Lawrence Baum, *Judicial Politics: Still A Distinctive Field*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 189, 190-95 (Ada W. Finifter ed., 1983).

13. Shapiro, *supra* note 9, at 376-77.

14. Kim Lane Scheppele, *Political Science and Legal Studies: The Case for Dualism*, 1 LAW & CTS. NEWSL. 9 (Spring 1996).

15. *See* STUMPF, *supra* note 4, at 19; Stumpf et al., *supra* note 5, at 535 (commentary by Stumpf).

16. Stumpf et al., *supra* note 5, at 536-37 (commentary by Stumpf); Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 309 (1964) (observing that "political scientists have for some years been engaged in a great debate between behaviorists and non- or antibehaviorists"). This division is characterized by a variety of labels (traditional, descriptive, normative, nonbehavioral *versus* empirical, behavioral, quantitative, realist). The essential idea, though, is best captured by conceptualizing the competing methodological positions as endorsing either a "qualitative" or a "quantitative" approach to the study of law and courts. A sample of pertinent literature reveals that this debate (however it is correctly labeled) continues to thrive in the context of whether "new institutionalism" is a coherent methodology that can unify the public law subfield by reconciling the descriptive and empirical elements pertaining to the study of law and courts. *See, e.g.*, Rogers M. Smith, *Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 101-07 (1988); Howard Gillman, *The New Institutionalism, Part I*, LAW & CTS. NEWSL. 6 (Winter 1996-97); Lee Epstein and Jack Knight, *The New Institutionalism, Part II*, LAW & CTS. NEWSL. 4 (Spring 1997); Howard Gillman, *Placing Judicial Motives in Context: A Response to Lee Epstein and Jack Knight*, LAW & CTS. NEWSL. 10 (Spring 1997); Lee Epstein & Jack Knight, *A Postscript from Epstein and Knight*, L. & CTS. NEWSL. 13 (Spring 1997); David Walden Levin, *Comment: Building a Bridge Between Attitude and Institution, Preference and Precedent*, LAW & CTS. NEWSL. 7 (Winter 1997-98).

This internal division is really a continuing debate about what is the best method to study judicial politics.[17] In both his earlier essays[18] and in his provocative 1993 essay on the state of the discipline,[19] political scientist Martin Shapiro reenergized public law by implying that the subfield would never reach respectability as a distinctive entity unless its membership mostly aligned itself with the behavioralist side of the discipline. The traditional approach to courts, Shapiro insinuates, is too value-laden to be meaningful because it myopically centers on using legal doctrine as the touchstone to explain judicial behavior. This predisposition, Shapiro fears, trivializes the study of law and courts within political science by reducing public law scholars to role-playing the part of the "little law professor" for undergraduates in the classroom. Thus, Shapiro fears the subfield is robbed of its own unique identity and is perpetually kept at the margins of the profession.[20] While some disagree with Shapiro's assessment,[21] there is strong evidence that the internal conflict in political science continues unabated.[22] Indeed, in saying that the "study of Supreme Court decision making has reached a critical point," one public law scholar claims that it is "imperative to reconcile the resurgence of institutionalism with the attitudinal perspective."[23] Restated, some feel it is essential to bridge the gap between descriptive and empirical social science study.

This background about the state of the discipline is significant because the constitutional law teacher invariably makes a decision to adopt a text after considering the methodological predilection of a casebook's author. A text featuring mostly cases and descriptive accounts of the U.S. Supreme Court's decision making in the political

---

17. Michael McCann, *Its Only Law and Courts: But I Like It*, LAW & CTS. NEWSL. 6 (Spring 1996). *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL xv (1993) (suggesting that historical, anecdotal, legalistic, tendentious, or doctrinal study of Supreme Court behavior is not scientific enough to be called political science). *See generally* STUMPF, *supra* note 4, at 22-24.

18. Shapiro, *supra* note 16; Stumpf, et al., *supra* note 5.

19. Shapiro, *supra* note 9.

20. Shapiro, *supra* note 9, at 376-77; Stumpf, et al., *supra* note 5, at 543 (commentary by Shapiro). *See also* McCann, *supra* note 17, at 7 (arguing that Shapiro's scholarship on political jurisprudence "tends to privilege work in the tradition of realist-behavioral empirical study").

21. *See generally* McCann, *supra* note 17.

22. The judicial behavioralists appear to control the literature. *See* Thomas R. Hensley & Ashlyn Kuersten, *Studying the Studies: An Assessment of Judicial Politics Research in Four Major Political Science Journals, 1960-1995*, LAW & CTS. NEWSL. 14 (Spring 1996-97) (reporting that 67% of literature in leading political science journals was quantitatively oriented over past 36 years). The debate thrives in the Law and Courts section of the American Political Science Association. *See, e.g.*, *supra* note 16.

23. Levin, *supra* note 16, at 7.

process is likely to be chosen by someone who prefers to instruct in the traditional mode. Similarly, one inclined to favor quantitative methods probably wants a casebook that includes both legal doctrine and an appreciation for utilizing scientific explanations (and not simply descriptive or normative accounts) of the Court's work.

A cursory examination of Professor O'Brien's publication record[24] and his constitutional law texts reveal that his scholarship is oriented toward traditional constitutional law study.[25] Specifically, O'Brien assumes in his two-volume constitutional law set that "constitutional law, history, and politics are intimately intertwined."[26] Thus, both volumes rely upon the description of constitutional history and key political events to make the legal decisions of the U.S. Supreme Court comprehensible and politically relevant.

Three central features of the set reinforce this point well. First, the beginning chapter of each text contains an insightful discussion of the origins (and controversial application) of judicial review and, more significantly, the politics of constitutional interpretation. This latter topic is critical because O'Brien uses it to demonstrate that the cases of the High Court make little sense without an understanding of how the justices construe text by what he calls "constitutional choices."[27] "Interpreting the Constitution," in other words, "presupposes a judicial and political philosophy and poses inescapable questions of substantive value choices."[28] He adds, "[i]nterpretivists, no less than noninterpretivists, cannot evade making basic constitutional choices in their conceptions and formulations of the underlying principles of constitutional provisions."[29] Early on, then, O'Brien challenges students to think of the Constitution as a political document that is shaped by value-laden choices imposed by justices holding specific judicial philosophies.[30] Given that the core subject matter of the cases is not presented until after rival theories of judicial interpretation are

---

24. *See, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (4th ed. 1995); DAVID M. O'BRIEN, WHAT PROCESS IS DUE?: COURTS AND SCIENCE-POLICY DISPUTES (1987); DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT (1981).

25. Other political scientists concur. *See* STUMPF, *supra* note 4, at 43; Stumpf et al., *supra* note 5, at 543 (commentary by Shapiro).

26. 1 O'BRIEN, *supra* note 6, at xv.

27. 2 O'BRIEN, *supra* note 6, at 83.

28. 1 O'BRIEN, *supra* note 6, at 90.

29. *Id.* at 84.

30. While some textbooks afford considerable attention to explaining various methods of constitutional interpretation, *see, e.g.*, MURPHY, ET AL., *supra* note 8, others give the topic very little printed space. *See, e.g.*, FOSTER & LEESON, *supra* note 7.

explained, the emphasis on justices making constitutional choices is a central organizing principle of the O'Brien volumes.[31]

The large number of edited cases included in both texts is the second aspect undergirding O'Brien's traditional style that features court opinions in historical and political context. In his 1992 analysis of twelve casebooks, Goldman reports that O'Brien's first edition text (both volumes) contained the most cases (211) of the twelve.[32] In 1997, O'Brien's third edition boasts 231 edited cases (80 in Volume 1 and 151 in Volume 2).[33] While some have criticized Volume Two for containing too much material,[34] O'Brien clearly sees the book's length as an asset because it promotes greater flexibility for the instructor in assigning cases; and it gives students a ready resource for additional study beyond a course's minimum requirements.[35] Suffice it to say that O'Brien clearly errs on the side of more rather than less in his quest to expose students to case opinions that provide a sense of what constitutional doctrine, standing alone, represents. More significantly, this calculation indirectly hammers home the point that the case method of instruction, which is very much a staple of legal education, also has a primary role in the political study of constitutional law.

Perhaps the most distinctive aspect of the O'Brien books, though, is what they omit. Unlike other casebooks written by political scientists that incorporate a behavioralist approach into their writing,[36] O'Brien conspicuously avoids any mention of quantitative explanations for judicial behavior either in the text or, to a lesser extent, in the selected bibliography accompanying each chapter. Whereas some authors couch the judicial process and Supreme Court decision making in terms of statistical models of legal and extralegal behavior,[37] O'Brien sticks to the more conventional view that constitutional law is a political process informed by key historical and sociological happenings. As he reminds us:

---

31. Presumably it is by design, too, that O'Brien made the editorial decision to present students with a full rendition of the U.S. Constitution and the Bill of Rights *before* the first chapter on judicial review and constitutional politics. Most other texts relegate these documents to an appendix in the back (and not the front) of the casebook. The decision makes a subtle but effective point that any interpretation of the document (political or otherwise) must proceed from the words the Framers committed to paper. *See* O'BRIEN, *supra* note 6, at 3-23.

32. Goldman, *supra* note 1, at 137.

33. O'BRIEN, *supra* note 6. Cases that were consolidated were counted as a single case. Cases appearing in parentheses and "reprise" cases were not counted.

34. Judith A. Baer, *Constitutional Law and Politics*, 10 LAW & POL. BOOK REV. 161-2 (1992) <http://www.unt.edu/lpbr/subpages/reviews/obrien.htm>.

35. 1 O'BRIEN, *supra* note 6, at xvi.

36. *See, e.g.*, EPSTEIN & WALKER, *supra* note 7.

37. *See, e.g.*, HENSLEY, ET AL., *supra* note 8.

> The Supreme Court's decisions do not occur in a political vacuum, standing apart from history and the political struggles within the Court and the country. Virtually every major political controversy raises questions of constitutional law, no less than do technological changes and social movements and economic forces.[38]

O'Brien reinforces this message in the supplemental material surrounding the introductory text (preceding the edited cases) and the cases. Instead of using visual graphs or tables ordinarily found in more quantitative social science research,[39] O'Brien chooses to rely upon "Development of the Law," "Constitutional History," "Inside the Court," or "In Comparative Perspective" boxes that alternately use descriptive statistics, primary judicial or historical source documents, or author-generated narrative that tend to be from the author's own research efforts.[40]

In the end, O'Brien answers the question of "what is public law?" by portraying constitutional law as the aggregation of political history, legal doctrine, and social movements, all the stuff of traditional constitutional law scholarship. For O'Brien, the Court's work is highly political. But his explanations on what is political are not scientifically based, at least in the empirical sense. Consequently, the quantitative, realist study of public law, it seems, has an insignificant role in O'Brien's constitutional law paradigm. Instead, O'Brien's pedagogical approach is defined by an "old-fashioned" kind of scholarship that shares a key assumption from the sociological component of political jurisprudence: that the Supreme Court makes law as a part of the governing political society.[41]

B. The Impact of Professional Training

The professional training and research interests of the social scientist are closely connected with how constitutional law is taught in the classroom. Those teaching public law in all likelihood have one or two graduate degrees that specialize in legal studies: a J.D. or a Ph.D. or both.[42] Although there are probably exceptions, it is unlikely that

---

38. 1 O'BRIEN, *supra* note 6, at xv.

39. *See, e.g.*, HENSLEY ET AL., *supra* note 8, at 84-89 (using block voting analysis).

40. *See, e.g.*, 1 O'BRIEN, *supra* note 6, at xvii-xviii, 108-09, 111-12, 157-59, 160.

41. *See* Shapiro, *supra* note 16, at 294-5; Stumpf et al., *supra* note 5, at 543 (commentary by Shapiro).

42. *See* AMERICAN POLITICAL SCIENCE ASSOCIATION, DIRECTORY OF UNDERGRADUATE POLITICAL SCIENCE FACULTY (1996-98). A cursory examination of this directory supports this statement because some departments have faculty with a J.D. (as the highest terminal degree) teaching public law courses. *See, e.g., id.*, at 63 (listing two J.D. professors at Morehead State

teachers with only a law degree will use the same type of casebook that a teacher with only a Ph.D. will utilize. The reasons are fairly intuitive.

A person with a J.D. is taught by a formal casebook method of Socratic instruction that does not dwell on the political nature of law. Usually the law student does not have advanced training in quantitative methods because those types of courses are not an integral part of law school. Apart from perhaps using it as a way to present evidence in an advanced trial procedures class, quantitative analysis is superfluous because it is not necessary in routine legal research or for understanding the substantive content of positive or common law. Moreover, a law student is trained to write argumentative papers that rely upon adept application of precise legal principles and statutes in diverse hypothetical factual circumstances. With the exception of legal writing or clinical classes, a law student is tested at the end of the semester by writing an essay examination that puts a premium on "issue-spotting" and legal analysis. Notably, too, at the end of the three-year period of legal instruction, the law student is not required to pass a set of oral or written comprehensive examinations in specific subfields of expertise.[43] Nor is a law student required to write a manuscript or dissertation that is considered by a faculty to be an original contribution to relevant legal literature. Therefore, in the law school setting (where the focus is teaching students to "think and write like a lawyer") law students *usually* are not exposed to the regular utilization of quantitative methods in legal research; and they are not customarily acquainted with the multitude of extra-legal factors that make the law contextual and politically dynamic for the Ph.D student.[44]

A Ph.D., on the other hand, is a degree very distinct from the J.D. Although a constitutional law casebook is used in the Ph.D. classroom setting, the graduate student in political science is not routinely trained with the Socratic method. In fact, since much of the

---

University). It is unclear how often political science departments hire faculty with both degrees, however, because the directory only lists the highest terminal degree achieved by individual faculty.

43. By way of comparison, as part of my Ph.D. training I took written examinations in Constitutional Law and Theory; Jurisprudence; National Institutions; and Modern Political Theory. Satisfactory performance on these tests was required (along with an oral defense of a dissertation proposal) before I could begin to write a dissertation.

44. There is disagreement, however, on the extent to which law schools remain anchored in the doctrinal study of cases and whether they offer political explanations for the law's development. *Compare* Stumpf, et al., *supra* note 5, at 534-41 *with* Stumpf et al., *supra* note 5, at 541-48.

class work leading up to the dissertation is done in a small-class seminar format where in-class discussion is relatively uninhibited, the graduate student is probably prone to ask more questions than the instructor. Discovering legal issues and "thinking like a lawyer" is beside the point as well because most graduate students are principally evaluated by how well they conduct social science research and how well they write lengthy graduate papers using a variety of legal and nonlegal sources. Furthermore, quantitative method instruction is an active part of graduate social science training because Ph.D. students actually incorporate it into their research designs; thus, essay examination performance at the end of the term is not cultivated. Moreover, in order to receive a Ph.D., the graduate student must complete several years of classroom training and, after passing a variety of subfield or comprehensive examinations, successfully complete and defend (in front of a faculty committee) a dissertation relating to some aspect of political behavior.

In short, the instructor with a Ph.D. is more likely to be equipped with the methodological training (and concomitant research agenda) that makes political science an empirical science or more of a highly sophisticated descriptive enterprise (depending upon how they answer the "what is public law?" question). For this reason, after receiving the degree, the public law scholar is more receptive to teaching from a text containing extensive political explanations for judicial behavior. It is probably rare indeed that a political scientist would want to adopt a casebook that, for one reason or another, is perceived to be too legalistic and not having enough political science content.[45]

Accordingly, unless they are expecting a behavioralist perspective, social science scholars adopting O'Brien's constitutional law text will not be disappointed by its lack of political analysis. While legally-trained public law scholars without a Ph.D. might object to (or be unfamiliar with) O'Brien's pedagogy, they probably would appreciate the historical context of the case discussions along with the general selection of case law presented in the text. Ironically, political scientists might find the text deficient because it does not refer to empirical judicial studies or because it uses too many cases. Yet the lawyer without a Ph.D. will favor the legal aspects of the manuscript and enjoy O'Brien's discussion of the Court's judicial politics because

45. *See, e.g.*, Joseph F. Kobylka, *Constitutional Law*, 10 LAW & POL. BOOK REV. 151-52 (1992) <http://www.unt.edu/lpbr/subpages/reviews/gunther.htm> (observing that "[w]hat keeps [Kobylka] from [adopting an earlier version of the Gunther and Sullivan text, *supra* note 7] is the essentially legalistic structure of the work, a structure that too frequently obscures the extent of the political nature of the Court in the American system of governance").

it is something they are not used to seeing in law school casebooks. As a result, the constitutional law teacher's professional training influences the casebook decision. Perhaps the litmus test for its pedagogical use, however, is how it is employed in the undergraduate classroom—the topic of the next section.

C. *Scope of Coverage and Use of the Constitutional Law Casebook in an Undergraduate Class*

Whereas the adoption of a constitutional law casebook greatly depends on the political science professor's graduate training and self-awareness of the state of the discipline, the professor's pedagogical use of the text is a function of personal teaching philosophy, style, and preference. As an assistant professor of political science, I design my courses with the intent of achieving four generic objectives to promote my students' intellectual growth. First, students must learn to be prepared, in and out of class. Second, they must work hard and be challenged by the reading material and lecture presentations. Third, they must learn how to think critically by researching and writing papers that involve complex issues of constitutional law and public policy. Fourth, it is essential that they discover how to refine their ideas through oral participation in class. In general, each teaching objective epitomizes a theme of "learning how to learn." It is my hope that by giving students the opportunity to read, write, and think critically about political and legal issues that define the day (and that inevitably will be useful for post-graduation employment), they will develop the requisite skills to meet their potential.

The revised syllabi reprinted in Appendices A and B illustrate how O'Brien's *Constitutional Law and Politics* assists in accomplishing the pedagogical goals for undergraduate instruction in a two-semester academic year. I typically use the first volume in the fall semester in "The Supreme Court and Constitutional Law" (Appendix A).[46] The second volume is adopted for the spring and applies to a civil liberties course called "The Supreme Court and Civil Liberties" (Appendix B). Although the substantive content of each course is different, my teaching approach is similar in that I try to connect the course work to two basic questions: (1) how do Supreme Court justices interpret the Constitution politically?; and (2) as an unelected, life-tenured institution, what is the "proper" judicial role of the Supreme Court in the

46. Some professors argue that the civil rights constitutional law course should be taught first. *See* Scott D. Gerber, *Reordering American Constitutional Law Teaching*, *in* POLITICAL SCIENCE AND POLITICS 702-705 (1994).

American political system? These questions represent contextual themes that highlight the judicial politics of the Supreme Court that, not surprisingly, coincide with O'Brien's pedagogy.

Because the fall course is not a formal prerequisite for the spring class, the material presented in the first three weeks of each class is identical. Both courses begin with an introduction to the Supreme Court and its present membership; an explanation of how to brief cases and conduct legal research; and a description of how judicial review developed, and how it is exercised politically through different judicial philosophies. The third edition of the O'Brien text facilitates the completion of many, but not all, of these primary tasks. Each volume has a copy of the U.S. Constitution and the Bill of Rights; a biographical description of the current Court and a listing of its membership historically; a handy legal glossary of legal terms; an index of cases; a comprehensive historical and political narrative preceding each set of edited cases; a selected bibliography for additional reading in each section of the book; and, notably, an excellent discussion of judicial review and its application through competing judicial philosophies and the politics of constitutional interpretation.[47]

Because I treat the fall course as an informal prerequisite for the spring Civil Liberties class, an additional two weeks is spent in the first portion of the fall semester to explain Supreme Court jurisdiction, the concepts of justiciability and "access policy-making," and the specific decisional processes (and impact) of the Court. Admittedly, this approach is problematic because this material is not covered in the spring semester in order to give attention to a larger breadth of civil rights and liberties decisions included in Volume Two. Because this material is omitted, students who did not take the fall course are deprived of that key material; but if this material is included, spring students are denied complete coverage of substantive cases in civil

47. Though the O'Brien text covers the basics of how to find Supreme Court decisions—and, with the latest edition, contains a helpful discussion on using the Internet to locate and use law-based websites—it does not offer any substantial aid to students wanting to learn how to brief cases or how to perform legal research. *See, e.g.*, 1 O'BRIEN, *supra* note 6, at 29 ("How to Locate Decisions of the Supreme Court"), *and* at 177 ("How to Locate Supreme Court Decisions and Other Law-Related Materials on the Internet"). Only a few casebooks include this type of study help. *See, e.g.*, FOSTER & LEESON, *supra* note 7, at 36-37 (discussing how to brief cases). As a result, I find it necessary to supplement the text with more instruction that gives students the opportunity to learn about legal research and citation. Specifically, in addition to requiring that students view an introductory video on Supreme Court history and attend a tour of the University's law library, students are given comprehensive handouts that explain how to brief cases, conduct legal research, and accomplish legal (and nonlegal) citation. Moreover, the syllabus (along with class instruction) introduces students to using the Internet for legal research.

rights and liberties. Perhaps this is the sort of teaching dilemma that Professor Judith Baer foresaw when she criticized the length of Volume Two.[48] To be sure, then, at least sometimes the sheer size of the text unintentionally forces professors to make undesirable choices in organizing the structure of a Constitutional Law course, especially if both volumes are adopted in one academic year.

An interesting feature of the O'Brien casebook, however, is the fairly unusual decision to incorporate topics that other casebooks ignore or minimize in analogous two-volume sets that isolate separation of powers material from cases covering individual rights. In addition to covering the usual cases on federalism and the political struggle for power between national institutions, in Volume One O'Brien devotes the last chapter to investigating the Supreme Court's role in superintending the electoral process. Given that this topic ordinarily appears, if at all, in books dealing with civil rights, O'Brien's decision to treat it in Volume One is unique and refreshing.[49] Pedagogically, the choice is defensible. As O'Brien reminds us, questions of representation, voting rights, and electoral politics not only raise issues of equality, but also of the basic structural concerns of a democratic government, such as accountability, federalism, and majority rule.[50] Furthermore, how the Court deals with reapportionment, patronage, and campaign finance is inherently a political issue that forces students to assess the normative issue of whether the Court *ought* to be active in this area of the law.

In terms of case coverage, O'Brien also takes some unconventional steps in Volume Two, the larger civil liberties and rights text. Two come readily to mind. First, unlike most other typical casebooks,[51] Volume Two comprehensively outlines the rights of the accused. While a few two-volume sets written by political scientists discuss cases pertaining to the exclusionary rule and to self-incrimination,[52] O'Brien also includes cases on the Fourth Amendment's automobile exception to the warrants requirement, administrative searches, electronic eavesdropping, plea bargaining, the right to an impartial jury

48. Baer, *supra* note 34, at 162.

49. *See, e.g.*, HENSLEY ET AL., *supra* note 8, at 661-65 (addressing voting rights); EPSTEIN & WALKER, *supra* note 7, at 756-803 (discussing voting rights and political representation).

50. 1 O'BRIEN, *supra* note 6, at 711.

51. Mezey, *supra* note 7, at 132 (noting that there is tacit agreement among authors to not include criminal procedure cases).

52. HENSLEY ET AL., *supra* note 8, at 419-510. *See generally* EPSTEIN & WALKER, *supra* note 7.

trial, and capital punishment.[53] Another innovation is O'Brien's consideration of cases dealing with economic rights, a topic not usually handled by other civil rights and liberties' texts. The scope of economic liberty is first detailed in the Court's Contracts Clause jurisprudence. Then, in the context of substantive due process and the Court's alleged activism in protecting lassiez-faire economic philosophy, O'Brien explores the origins and implications of the *Lochner* era.[54] The logical extension of this discussion is brought up to date by analyzing the Court's contemporary approach in expanding an individual's property rights in the area of Fifth Amendment takings.[55] Presenting criminal and property rights' cases in this fashion provides students with a perspective of the Court's work that is neglected in other constitutional law casebooks.

Overall, the subject matter of both volumes is challenging enough to meet applicable teaching objectives and expectations of students who wish to learn the intricacies of constitutional law over two semesters. The conventional material usually found in a first semester course is covered well: Volume One has landmark cases like the Steel Seizure opinion,[56] the Prize cases,[57] and the legislative veto ruling,[58] which teach students that competing judicial philosophies transform the separation of powers principle into a vital but recurring public policy issue for an evolving constitutional democracy. Volume Two, on the other hand, includes key cases on the Court's approach to controversial political issues that implicate the freedom of speech[59] and religion,[60] the right to privacy,[61] and affirmative action.[62] The careful study of these cases and others entice dedicated students to work hard and prepare for class. Moreover, by analyzing individual liberty and the political relationships existing among principal governmental institutions, students learn the art of critical thinking, which also assists them in writing research papers. And, because participation in class is required through "oral briefing," students are compelled to think extemporaneously. In sum, the O'Brien constitutional law casebooks

53. *See* 2 O'BRIEN, *supra* note 6, at 770-1130.

54. *See* Lochner v. New York, 198 U.S. 45 (1905); 2 O'BRIEN, *supra* note 6, at 245-77.

55. 2 O'BRIEN, *supra* note 6, at 278-87.

56. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

57. The Prize Cases, 67 U.S. 635 (1863).

58. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

59. Texas v. Johnson, 491 U.S. 397 (1989) (flag burning).

60. Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) (free exercise).

61. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (abortion).

62. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

are the foundation for making students familiar with the art of "learning how to learn."

D. The Success of the O'Brien Casebook in Teaching Public Law Courses

Constitutional law may be fun to teach, but it is also tough to learn. Consequently, the pedagogical use of a casebook necessarily involves a continuous reassessment of whether it succeeds in matching the learning expectations of both the instructor *and* the student. Ideally, for the student the text should be informative but not daunting. With the professor's help, it should also convey the idea that the Court is a political institution that routinely makes law and public policy. Naturally, the casebook must fulfill both aims competently because doing so establishes (at least indirectly) that the students are receptive to absorbing the complex material that makes up a public law course.

One measure for evaluating the success of the O'Brien texts in the classroom is the extent to which students either enjoy or dislike using it. On the standardized form (SIR, or Student Instructional Report) employed at the University of Akron to evaluate faculty teaching, one question asks students to rate the quality of the textbook. The results compiled from the SIR indicate that a majority of students found the casebook used in the Supreme Court and Constitutional Law course (Volume One) "excellent" or "good."[63] Volume Two received similar results in its application to the Civil Rights and Liberties course.[64]

In addition to recording their feelings about the course on the standardized form, students also had the choice to complete a supplemental form that gives more feedback about the way in which the course was taught.[65] The answers to two questions that directly

---

63. Volume One was adopted in the spring 1996, fall 1996, and fall 1997 semesters. For the Spring 1996 (N=17), forty-seven percent rated it "excellent"; thirty-five percent said it was "good"; twelve percent stated it was "satisfactory"; six percent deemed it "fair;" and zero percent rated it "poor." For the Fall 1996 (N=19), forty-seven percent rated Volume One "excellent"; forty-two percent said it was "good"; five percent stated it was "satisfactory"; five percent deemed it "fair;" and zero percent rated it "poor." 1996 SIR (fall and spring) (on file with author). The Fall 1997 SIR was not available and is excluded from the analysis.

64. Volume Two was adopted in the spring 1996 and spring 1997. For the spring 1996 (N=20), forty-five percent rated it "excellent"; forty percent said it was "good"; ten percent stated it was "satisfactory"; zero percent deemed it "fair;" and zero percent rated it "poor." For the spring 1997 (N=31), forty-five percent rated it "excellent"; thirty-two percent said it was "good"; sixteen percent stated it was "satisfactory"; zero percent deemed it "fair;" and three percent rated it "poor." 1996 and 1997 SIR (spring semesters) (on file with author).

65. The answers to these questions give more student feedback because they allow the students to write down their impressions in narrative form. With the exception of the summer

ask about the strengths and weaknesses of the assigned texts[66] provide sufficient evidence that the O'Brien casebook meets the academic expectations of students enrolled in both constitutional law courses. For example, an analysis of student responses relative to Volume One reveals that most students reacted positively to the text by commenting that it was informative and easy to understand.[67] Similar findings were obtained for Volume Two. Specifically, most students using the civil liberties text thought it was a good book, and a fair proportion of students believed it was thorough and comprehensible.[68] Of course, these latter findings are limited in scope due to their sample size and the way they were unscientifically derived and interpreted. Even so, in conjunction with the SIR data, the findings give ample proof that the O'Brien texts are favorably received by students and, more importantly, that there is little compelling evidence to conclude that their adoption is not warranted or is counter-productive.

---

course evaluations (where an additional question is asked about overall satisfaction of the course), they are: (1) What do you think were the best aspects, or strengths, of this course?; (2) What do you think were the worst aspects, or weaknesses, of this course?; (3) What do you think were the best aspects, or strengths, of the books assigned in this course?; (4) What do you think were the worst aspects, or weaknesses, of the books assigned in this course?; and, (5) How do you think the educational value of the course can be improved? 1996 and 1997 Supplemental Course Evaluations (spring and fall semesters) (on file with author).

66. *See supra* note 65.

67. In the spring 1996 (N=15) and Fall 1997 (N=18) courses, of 33 students who completed the narrative evaluation, 29 answered question number three, *supra* note 65, and 21 answered question number four, *supra* note 65. Not surprisingly, all those who answered number three (or one hundred percent) made favorable comments about the book; but, of those students answering question number four, only 12, or fifty-seven percent, criticized some aspect of it or offered a suggestion for improvement. Despite the biased wording of question number four, then, forty-three percent presumably did not find anything wrong with the text. Moreover, 11 of the 29 students answering question number three (or thirty-eight percent) thought the text was either clear or easy to understand; and seven (or twenty-four percent) opined it was informative or thorough. Supplemental Course Evaluations for 1996 and 1997 (spring and fall semesters) (on file with author).

68. In the spring 1996 (N=20) course, of 20 students who completed the narrative evaluation, 18 students answered question number three, *supra* note 65, and 13 answered question number four, *supra* note 65. Seventeen students answering question number three (or ninety-four percent) made favorable comments about the book; but, of those students answering question number four, only six (or forty-six percent) criticized some aspect of it or offered a suggestion for improvement. Fifty-four percent, then, presumably did not find anything wrong with the text. Moreover, seven of the 18 students answering question number three (or thirty-nine percent) thought the text was either clear or easy to understand; and six (or thirty-three percent) said it was informative or thorough. Supplemental Course Evaluation for 1996 (spring semester) (on file with author).

III. CONCLUSION

Despite its attractiveness and usefulness as a constitutional law text, each volume of the O'Brien set shares two principal flaws from a pedagogical perspective. The first flaw is that the texts fail to make reference to judicial behavioralism, an important part of public law scholarship. Students consulting the texts will learn, of course, that the Supreme Court is a political institution. They will also realize that constitutional interpretation is at the heart of defining the judicial politics of the Court and its role in American democracy. Yet students will have a hard time comprehending how political science is connected to constitutional law because they are not exposed to how a formidable group of political scientists (namely the more quantitatively inclined) study the Court. Arguably, a more balanced perspective would present at least some discussion (or more bibliographic references) about what political science from a public law perspective represents, and how empirically-based social scientists evaluate judicial behavior.

The second flaw, which is generally linked to the under-utilization of legal research information, is one that Professor O'Brien already seems to be partially aware of in the third edition. Like the vast majority of casebooks on the market, the O'Brien texts need to incorporate more material about how students can study Supreme Court opinions and, significantly, how students can accomplish legal research (especially with regard to Internet-based research and the use of multimedia instructional techniques). Unless a particular instructor makes an effort to acquaint students to this vital aspect of studying the Supreme Court (either through in-class discussion or ordering additional texts), the student is often clueless on how to proceed in reading cases or researching what the Court does.

Appendices A and B reinforce why making changes to address these two flaws would help students learn constitutional law. By examining the competing theories of constitutional interpretation and the exercise of judicial review in the beginning of each course, students are acclimated to the general theme of what is "political" about the Supreme Court. Still, without further instruction students have no point of departure for grasping why (or how) political scientists choose to study constitutional law, something that is typically perceived by students as preeminently a "legal" topic. Nor can students comprehend what *may* be "scientific" about the political study of courts or law. Finally, and perhaps most importantly, students reading the casebook will only see one methodological viewpoint (i.e. the author's) when trying to appreciate what public law scholars do professionally.

Although most reputable scholars (including Professor O'Brien) do not purposefully try to indoctrinate students to a particular way of thinking about the Court, omitting material that gives undergraduates a glimpse of how social scientists study it *unintentionally* deprives them of the chance to achieve a more sophisticated understanding of judicial behavior.

A second issue concerns the extent to which a casebook should devote space regarding "how to" read case opinions, conduct legal research, or properly cite legal or nonlegal sources in a writing assignment. While every professor handles this aspect of teaching constitutional law differently, it would be helpful if the text assisted undergraduates in learning those topics. In both of my constitutional law courses, I require students to complete two "legal" research and writing assignments, or "bench memos" (4-6 pages each). The research papers, along with in-class participation through oral briefing of the cases, account for a considerable portion of the final grade. Because students have to read many cases, they must master the skill of learning how to read efficiently and effectively. This reading skill will enhance their academic performance on papers, examinations, and quizzes. Knowing how to read cases and how to conduct legal research, therefore, are integral parts of the course. Thus, it makes sense that a constitutional law casebook should inform students where to find legal reference material pertaining to the judicial process, how it is organized, and how it should be cited in a written paper. Moreover, because the Internet creates plenty of opportunities to appreciate the study of law and courts, the casebook ought to include extensive material on how to access and use it.

In summary, while the O'Brien casebooks are, on balance, excellent teaching tools and student references in learning about constitutional law from a traditional perspective, they ought to devote more preliminary discussion to acquainting students with the concept of how social scientists study public law generally and, in particular, the manner in which legal scholars conduct legal research. Adding this material might take constitutional law into areas typically reserved for undergraduate Judicial Process (or even a Scope and Methods course) or graduate legal study. Nevertheless, it still would help students to understand how judicial behavior is an admixture of scientific, political, and legal considerations. More significantly, adding this material would give undergraduates a better chance to learn about the Court and how political scientists uniquely play a role in teaching public law.

APPENDIX A: SAMPLE SYLLABUS FOR SUPREME COURT AND CONSTITUTIONAL LAW COURSE (ADAPTED FROM FALL 1997)

I. COURSE DESCRIPTION, CLASS FORMAT, REQUIRED BOOKS

This course examines the constitutional interpretation of the United States Supreme Court and the manner in which its politics affects the decision making of the High Court and its relationship to the more traditional "political" branches of government, like the Congress and the Presidency. In the process, the political role of the federal judiciary in American government is revealed, and the struggle for political power between institutions is exposed. The fluidity of judicial politics is studied in the context of understanding the nature of federal judicial, legislative, and executive power; the separation of powers principle; federalism; and electoral politics and representative government. The format of the class is lecture and discussion. Some video presentations and a visit to the law library are planned. In order to facilitate class discussion, on certain days two or three students will be asked (in advance) to prepare oral briefings of pertinent cases that will be under review for that particular day's discussion. Students giving oral briefs should be prepared to identify the case's holding and its reasoning, along with being prepared to answer questions from the professor or the students about the meaning and significance of the case(s) under review.

Text(s) Required for Purchase:

1. O'Brien, David M. *Constitutional Law and Politics.* Vol. 1, *Struggles for Power and Governmental Accountability.* 3d ed. New York: W.W. Norton, 1997.
2. O'Brien, David M. *Supreme Court Watch: 1997.* New York: W.W. Norton, 1997.
3. Fisher, Louis. *Constitutional Conflicts Between Congress and the President.* 4th ed. Lawrence, Kansas: University Press of Kansas, 1997.

Recommended Text(s):

1. An inexpensive paperback law dictionary (available from any general bookstore).

II. EVALUATION OF ACADEMIC PERFORMANCE

Undergraduate students will be evaluated on the basis of academic performance on quizzes, three examinations (inclusive of the final examination), two short research papers ("bench memos"), attendance, and class participation. Specifically:

(1) Quizzes	10%
(2) Two examinations (prior to final exam (15% each)	30%
(3) Two short research papers (4-6 pages each, 15% each)	30%
(4) Final examination (cumulative in part)	20%
(5) Class attendance and oral briefing	10%
Total	100%

In addition to performing the above class requirements applicable to undergraduate students, graduate students taking the class must also prepare a 10-15 page research paper on a topic selected by the student in consultation with the professor by the end of the second week of class. Completion of the paper is mandatory and constitutes 25% of the final grade. For graduate students only, quizzes are optional and do not have to be taken; if they are taken, they will not count towards the final grade. Accordingly, for graduate students only, the first two examinations are worth 10% each, for a total of 20%; the final examination is 20%; the bench memos are worth 10% each, for a total of 20%; the additional research paper is 25%; class participation is 10%; and attendance is 5%.

III. USING THE INTERNET TO STUDY THE U.S. SUPREME COURT AND CONSTITUTIONAL LAW

The Internet boasts a wide variety of sources for learning about the U.S. Supreme Court. A sampling of Internet references include:

1. http://www.legalonline.com/courts.htm
2. http://www.supct.law.cornell.edu/supct/index.html
3. http://www.lib.umich.edu/libhome/Documents.center/
4. http://www.ljextra.com/nlj/
5. http://www.usscplus.com/
6. http://www.findlaw.com/

See also "How to Locate Supreme Court Decisions and Other Law-Related Materials on the Internet," pp. 177-178, in the O'Brien casebook.

IV. SCHEDULE OF READINGS, TOPICS, AND COURSE REQUIREMENTS

Week One: *Introduction to the United States Supreme Court and Constitutional Struggles.*

CL & P, "The United States Constitution and Amendments," pp. 3-23.

CL & P, "Members of the Supreme Court of the United States," pp. 845-847.

CL & P, "Biographies of Current Justices," pp. 849-854, or consult/review (for present composition and biographical information on U.S. Supreme Court): http://supct.law.cornell.edu/supct/justices/fullcourt.html.

Fisher, Chapter 1, "Constitutional Struggles," pp. 1-21.

Week Two: *Researching and Studying Constitutional Law.*

CL & P, "Glossary," pp. 855-860 (skim only).

Handouts will be given out in class relating to this week's material.

Note: A tour of the University of Akron Law Library is scheduled.

Week Three: *Judicial Review and the Politics of Constitutional Interpretation.*

CL & P, Chapter 1, "The Supreme Court, Judicial Review, and Constitutional Politics," pp. 25-30; "Establishing and Contesting the Power of Judicial Review," pp. 30-41; "James Kent's Introductory Law School Lecture in 1794," pp. 41-44; "The Virginia and Kentucky Resolutions of 1798," pp. 44-48; "President Roosevelt's Radio Broadcast, March 9, 1937," pp. 65-71. "The Politics of Constitutional Interpretation," pp. 71-93.

Cases: *Marbury v. Madison*, pp. 48-58; *Eakin v. Raub*, pp. 59-65.

Reserve Reading: Hamilton, Federalist #78.

Quiz #1.

Week Four: *Access Policy-Making of the United States Supreme Court.*

CL & P, Chapter 2, "Law and Politics in the Supreme Court: Jurisdiction and Decision-Making Process," pp. 96; "Jurisdiction and Justiciable Controversies," pp. 97-121.

Cases: *Flast v. Cohen*, pp. 121-130; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, pp. 130-135; *Lujan v. Defenders of Wildlife*, pp. 135-139; *Baker v. Carr*, pp. 139-153; *Goldwater v. Carter*, pp. 153-156.

SCW: pp. 3-11.

Reserve Reading: Banks, "The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends."

Quiz #2.

Week Five: *Inside (and the Impact of) the U.S. Supreme Court.*

CL & P, "The Court's Docket and Screening Cases," pp. 159; "The Rule of Four and Agenda-Setting," pp. 160-162; "Summarily Decided Cases," pp. 162-163; "The Role of Oral Argument," pp. 163-165; "Conference Deliberations," pp. 165-167; Inside the Court box, p. 168; "Post Conference Writing and Circulation of Opinions," pp. 168-171; "Opinion Days and Communicating Decisions," pp. 171-172; "The Impact of Supreme Court Decisions: Compliance and Implementation," pp. 172-191.

Cases: *Linkletter v. Walker*, pp. 191-195; pp. 205-210; *Griffith v. Kentucky*, pp. 195-198; *Jaffree v. Board of School Commissioners*, pp. 199-201; *Commonwealth of Kentucky v. Jeffrey Wasson*, pp. 201-205.

SCW: pp. 11-18.

Quiz #3.

Week Six: *The Supreme Court and the President I: Article II and the Inherent Power of the President in Foreign Affairs.*

Fisher, Chapter 8, "Treaties and Executive Agreements," pp. 225-255; Chapter 9, "The War Power," pp. 256-294.

CL & P, Chapter 3, "Presidential Power, The Rule of Law, and Foreign Affairs," pp. 211; "Office and Powers: The Two Presidencies," pp. 211-215; "As Commander In Chief and In Foreign Affairs," pp. 215-219; "The Treaty-Making Power and Executive Independence," pp. 232-234; "Constitutional History" box, p. 234; "War-Making and Emergency Powers," pp. 246-250.

Cases: *United States v. Curtiss-Wright Corporation*, pp. 219-222; *Dames & Moore v. Regan*, pp. 222-228; *Sale v. Haitian Centers Council, Inc.*, pp. 228-232; *Missouri v. Holland*, pp. 235-240; *United States v. Alvarez-Machain*, pp. 241-246; *The Prize Cases*, pp. 250-254; *Ex Parte Milligan*, pp. 254-260; *Korematsu v. United States*, pp. 260-270.

FIRST EXAMINATION.

Week Seven: *The Supreme Court and the President II: The Chief Executive's Authority over Domestic Affairs and the Appointing Process.*

Fisher, Chapter 2, "Appointment Powers," pp. 22-48; Chapter 3, "Theory in a Crucible: The Removal Power," pp. 49-86.

CL & P, Chapter 4, "The President as Chief Executive in Domestic Affairs," pp. 276-281; "Inside the Court" box, p. 281; "National Security and Inherent and Emergency Powers," pp. 285-289; "Appointment and Removal Powers," pp. 308-312; "Constitutional History" box, p. 313.

Cases: *Youngstown Sheet & Tube Co. v. Sawyer*, pp. 282-298; *New York Times Co. v. U.S.*, pp. 299-308; *Myers v. United States*, pp. 314-326; *Humphrey's Executor v. United States*, pp. 326-329; *Bowsher v. Synar*, pp. 329-340; *Morrison v. Olson*, pp. 340-360.

SCW: pp. 19-24.

Quiz #4.

First bench memo paper is due.

Week Eight: *Legislative Powers and Political Accountability of the President.*

Fisher, Chapter 4, "Legislative Powers," pp. 87-118; Chapter 5, "Vetoes: Presidential and Legislative," pp. 119, 119-141 (skim), 141-159; Chapter 10, "Conclusions," pp. 295-303.

CL & P, Chapter 4, "Legislative Powers in the Administrative State," pp. 360-363; "Accountability and Immunities," pp. 385-390; "Constitutional History" box, pp. 390-391.

Cases: *Schecter Poultry Corporation v. United States*, pp. 363-370; *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, pp. 370-373; *Immigration and Naturalization Service v. Chadha*, pp. 373-385; *United States v. Nixon*, pp. 391-398.

SCW: pp. 25.

Quiz # 5.

Week Nine: *The Court and the Congress I: The Sources and Limitations of Congress's Legislative Authority Under Article I.*

Fisher, Chapter 6, "Power Over Knowledge: Seeking and Withholding Information," pp. 160-195.

CL & P, Chapter 5, "Congress: Membership, Immunities, and Investigatory Powers," pp. 402-409; "Membership and Immunities," pp. 420-425; "Investigatory, Contempt, and Impeachment Powers," pp. 435-439.

Cases: *Powell v. McCormack*, pp. 409-415; *U.S. Term Limits, Inc. v. Thornton*, pp. 415-423; *Gravel v. United States*, pp. 423-428; *Eastland v. U.S. Servicemen's Fund*, pp. 429-432; *Watkins v. U.S.*, pp. 439-448; *Barenblatt v. United States*, pp. 449-456; *Gibson v. Florida Legislative Investigation Committee*, pp. 456-464; "Constitutional History" box, pp. 470-471.

Quiz #6.

Week Ten: *The Court and Congress II: Legislative and Commerce Powers.*

CL & P, Chapter 6, "Congress: Legislative, Taxing, and Spending Powers," pp. 472-476; "Constitutional History" box, pp. 476-477; "The Classic View of Congress's Legislative Powers," pp. 478-482; "From Legal Formalism to the New Deal Crisis." pp. 503-509.

Cases: *McCulloch v. Maryland*, pp. 483-494; *Gibbons v. Ogden*, pp. 494-503; *U.S. v. E.C. Knight Co.*, pp. 510-515; *Hammer v. Dagenhart*, pp. 515-519.

Quiz # 7.

Week Eleven: *The Court and Congress III: The New Deal and the Rise of the Administrative State.*

CL & P, Chapter 6, "From the New Deal Crisis to the Administrative State," pp. 519-523.

Cases: *N.L.R.B. v. Jones & Laughlin Steel Corporation*, pp. 525-531; *United States v. Darby Lumber Company*, pp. 531-535; *Wickard v. Filburn*, pp. 535-538; *Heart of Atlanta Motel, Inc. v. United States*, pp. 539-547; *U.S. v. Lopez*, pp. 547-561; *Seminole Tribe of Florida v. Florida*, pp. 561-572.

SECOND EXAMINATION.

Week Twelve: *Federalism I: The Regulatory Role of the States in the Constitutional Democracy*

CL & P, Chapter 7, "The States and American Federalism," pp. 592-599; "In Comparative Perspective" box p. 599-600; "States' Power Over Commerce and Regulation," pp. 602-608.

Cases: *Cooley v. The Board of Wardens of the Port of Philadelphia*, pp. 609-614; *Southern Pacific Co. v. Arizona*, pp. 614-618; *Bibb v. Navajo Freight Lines, Inc.*; pp. 618-621; *Maine v. Taylor*, pp. 621-623; *Pennsylvania v. Nelson*, pp. 623-626, 637-638; "The Development of Law" boxes, pp. 627-637.

SCW: pp. 26.

Quiz #8.

Week Thirteen: *Federalism II: The Tenth Amendment and Judicial Federalism*

CL & P, Chapter 7, "The Tenth Amendment and the States," pp. 638-645; "Judicial Federalism," pp. 667-672.

Cases: *Garcia v. San Antonio Metropolitan Transit Authority*, pp. 645-660; *New York v. United States*, pp. 660-667; *Martin v. Hunter's Lessee*, pp. 673-678; *Cooper v. Aaron*, pp. 678-682; *Younger v. Harris*, pp. 682-687; *Stone v. Powell*, pp. 687-693; *Withrow v. Williams*, pp. 693-697.

Quiz # 9.

SCW: pp. 26-42.
Second bench memo paper is due.

Week Fourteen: *Representative Government and Electoral Politics I: Voting Rights and Reapportionment.*

CL & P, Chapter 8, "Representative Government, Voting Rights, and Electoral Politics," pp. 711-713; "Representative Government and The Franchise," pp. 714-723; "Voting Rights and The Reapportionment Revolution," pp. 734-741; "Development of Law" box, pp. 805-806.

Cases: *South Carolina v. Katzenbach*, pp. 723-730 (*skim*); "The Development of Law," pp. 730-733; *Gomillion v. Lightfoot*, pp. 742-744 (*skim*); *Wesberry v. Sanders*, pp. 744-752 (*skim*); *Reynolds v. Sims*, pp. 752-758; *Davis v. Bandemer*, pp. 759-772 (*skim*); *Shaw v. Reno*, pp. 772-778; *Miller v. Johnson*, pp. 778-787; *Bush v. Vera*, pp. 778-799; *Shaw v. Hunt*, pp. 799-805.

SCW: pp. 43-46.

Week Fifteen: *Representative Government and Electoral Politics II: Campaigns and Elections.*

CL & P, Chapter 8, "Campaigns and Elections," pp. 806-813.

Cases: *Buckley v. Valeo*, pp. 813-824; *FEC v. NCPAC*, pp. 825-828; *Colorado Republican Federal Campaign Committee v. FEC*, pp. 829-833, "Development of Law" box, pp. 833-834; *Rutan v. Republican Party of Illinois*, pp. 834-842; "The Development of Law," pp. 842-844.

SCW: pp. 47-48.

APPENDIX B: SAMPLE SYLLABUS FOR SUPREME COURT AND CIVIL LIBERTIES COURSE (ADAPTED FROM SPRING 1997)

I. COURSE DESCRIPTION, CLASS FORMAT, REQUIRED BOOKS

This course examines the United States Supreme Court and its political decision making with respect to civil rights and liberties. Subject areas include the substance of the U.S. Constitution, the various legal interpretations of the Bill of Rights, the exercise of judicial review, and the judicial politics of the Supreme Court. Specific emphasis will be placed upon analyzing the cases of the Supreme Court with regards to the protection of property rights; the freedom of speech, press, and religion; the scope of certain criminal rights and procedures; the nature of the right to privacy; and the meaning of "equal protection of the laws." The format of the class is lecture and discussion. A video presentation and a visit to the law library are planned for the purpose of introducing students to the U.S. Supreme Court and in order to acquaint students with the fundamentals of conducting legal research. Also, in order to facilitate class discussion, for most class meetings students will be asked to prepare oral briefings of pertinent cases that will be under review for that particular day's discussion. Students giving oral briefs should be prepared to identify the case's holding and its reasoning, along with being prepared to answer questions from the professor or the students about the meaning and significance of the case(s) under review.

Text(s) Required for Purchase:

1. O'Brien, David M. *Constitutional Law and Politics.* Vol. 2, *Civil Rights and Civil Liberties.* 2d ed. New York: W.W. Norton, 1994.
2. O'Brien, David M. *Supreme Court Watch: 1996.* New York: W.W. Norton 1996.

Recommended Text(s):

1. Abraham, Henry J., and Barbara A. Perry. *Freedom & The Court: Civil Rights & Liberties in the U.S.* 6th ed. New York: Oxford University Press, 1994.
2. An inexpensive paperback law dictionary and a style manual (available from any trade bookstore).

II. EVALUATION OF ACADEMIC PERFORMANCE

Undergraduate students will be evaluated on the basis of academic performance on quizzes, three examinations (inclusive of the final examination), two short research papers ("bench memos"), attendance, and class participation. Specifically:

(1) Quizzes	10%
(2) Two examinations (prior to final exam (15% each)	30%
(3) Two short research papers (4-6 pages each, 15% each)	30%
(4) Final examination (cumulative in part)	20%
(5) Class attendance and oral briefing	10%
Total	100%

In addition to performing the above class requirements applicable to undergraduate students, graduate students taking the class must also prepare a 10-15 page research paper on a topic selected by the student in consultation with the professor by the end of the second week of class. Completion of the paper is mandatory and constitutes 25% of the final grade. For graduate students only, quizzes are optional and do not have to be taken; if they are taken, they will not count towards the final grade. Accordingly, for graduate students only, the first two examination are worth 10% each, for a total of 20%; the final examination is 20%; the bench memos are worth 10% each, for a total of 20%; the additional research paper is 25%; class participation is 10%; and attendance is 5%.

III. USING THE INTERNET TO STUDY THE U.S. SUPREME COURT AND CIVIL LIBERTIES

The Internet boasts a wide variety of sources for learning about the U.S. Supreme Court. A sampling of Internet references include:

1. http://www.legalonline.com/courts.htm
2. http://www.supct.law.cornell.edu/supct/index.html
3. http://www.lib.umich.edu/libhome/Documents.center/
4. http://www.ljextra.com/nlj/
5. http://www.usscplus.com/
6. http://www.findlaw.com/

IV. SCHEDULE OF READINGS, TOPICS, AND COURSE REQUIREMENTS

Week One: *Introduction to the United States Supreme Court.*

CL & P, "The United States Constitution and Amendments," pps. 3-23.

CL & P, "Members of the Supreme Court of the United States," pps. 1521-1524.

Note: A videotape, entitled "This Honorable Court, Part I," will be shown.

Recommended: CL & P, Chapter 2, "Law and Politics in the Supreme Court: Jurisdiction and Decision-Making Process," pps. 97-215 (*skim* only; and do not read the cases).

Abraham, Chapter 1, "Introduction," pps. 3-8.

Week Two: *Researching and Studying Constitutional Law*

CL & P, "Glossary," pps. 1525-1530 (skim only).

Handouts will be given out in class relating to this week's material.

Note: A tour of the University of Akron Law Library is scheduled.

Week Three: *Judicial Review and the Politics of Constitutional Interpretation.*

CL & P, Chapter 1, "The Supreme Court, Judicial Review, and Constitutional Politics," pps. 24-29; "Establishing and Contesting the

Power of Judicial Review," pps. 29-48; "The Politics of Constitutional Interpretation," pps. 72-86; "In and Beyond the Text," pps. 87-93.

Cases: *Marbury v. Madison*, pps. 48-58; *Eakin v. Raub*, pps. 59-63.

Reserve Reading: Brennan, William, "The Ratification of the Fourteenth Amendment,"; Rehnquist, William, "The Notion of a Living Constitution,"; Scalia, Antonin, "Originalism,"; Bork, Robert, "Tradition and Morality in Constitutional Law."

Quiz # 1.

Week Four: *Economic Rights and the Problem of the 'Double Standard'*

CL & P, Chapter 3, "Economic Rights and American Capitalism," pps. 216-217; "The Contract Clause and Vested Interests in Property," pps. 218-221[including 'Constitutional History' box]; "The Development and Demise of a 'Liberty of Contract,'" pps. 252-264; "The 'Takings Clause' and Just Compensation," pps. 287-290; "The Development of Law," pps. 295-296.

Cases: *Skim* cases in Contract Clause section, from pps. 222-252); *The Slaughterhouse Cases*, pps. 266-271; *Munn v. Illinois*, pps. 271-274; *Lochner v. N.Y.*, pps. 274-281; *West Coast Hotel v. Parrish*, pps. 281-285; *Nollan v. California Coastal Commission*, pps. 290-294.

Reserve Reading: *U.S. vs. Carolene Products Co.* (1938).

SCW: pps. 31-45; 103-110.

Recommended: Abraham, Chapter 2, "The Double Standard," pps. 9-29.

Quiz # 2.

Week Five: *Nationalization ('Incorporation') of the Bill of Rights and the 'Due Process' Revolution.*

CL & P, Chapter 4, "The Nationalization of the Bill of Rights," pps. 297-302; "The Selective Nationalization of Guarantees of the Bill of Rights Plus Other Fundamental Rights," pps. 302-311 [including 'The Development of Law' and 'Constitutional History' boxes]; "The Rise and Fall of the 'Due Process' Revolution," pps. 350-360 [including 'The Development of Law' box].

Cases: *Barron v. Baltimore*, pps. 311-313; *Hurtado v. California*, pps. 314-318; *Palko v. Connecticut*, pps. 319-322; *Adamson v. California*, pps. 322-327; *Griswold v. Connecticut*, pps. 332-343.

SCW: pps. 111-122.

Recommended: Abraham, Chapter 3, "The Bill of Rights and Its Applicability to the States," pps. 30-91.

Quiz #3.

Week Six: *The First Amendment. General Principles of the Freedom of Expression and Association.*

CL & P, Chapter 5, "Freedom of Expression and Association," pps. 366-375; "Judicial Approaches to the First Amendment," pps. 376-383; pps. 408-412; "Freedom of Association," pps. 628-636.

Cases: *Schneck v. United States*, pps. 384-386; *Gitlow v. New York*, pps. 386-391; *Dennis v. United States*, pps. 391-405; *Brandenburg v. Ohio*, pps. 405-408; *NAACP v. Alabama*, pps. 637-640; *Roberts v. U.S. Jaycees*, pps. 640-643.

SCW, pps. 123-125.

Recommended: Abraham, Chapter 5, "The Precious Freedom of Expression," pps. 154-174; "Free Expression and Association and Subversive Activity: The National Security Syndrome," pps. 190-200.

FIRST EXAMINATION.

Week Seven: *Freedom of the Press.*

CL & P, Chapter 5, "Freedom of the Press," pps. 535-540; 557-560; "Fair Trial/Free Press Controversies," pps. 578-583.

Cases: *Near v. Minnesota*, pps. 541-544; *New York Times Co. v. U.S.*, pps. 544-553; *Branzburg v. Hayes*, pps. 560-567; *Houchins v. KQED, Inc.*, pps. 567-571; *Nebraska Press Association v. Stuart*, pps. 583-590; *Globe Newspaper Co. v. Superior Court*, pps. 590-593.

Recommended: Abraham, "Press Freedom and Fair Trial and Prior Restraint," pps. 174-186.

First bench memo due.

Week Eight: *Some Special Problems of Free Expression: Obscenity, Offensive Speech, and Symbolic Speech*

CL & P, Chapter 5, "Obscenity, Pornography, and Offensive Speech," pps. 418-424; "Fighting Words and Offensive Speech," pps. 454-459; "Symbolic Speech and Speech-Plus Conduct," pps. 593-597; "Speech-Plus Conduct," pps. 619- 623 [including 'The Development of Law' box].

Cases: *Miller v. California*, pps. 432-438; *N.Y. v. Ferber*, pps. 445-449; *Cohen v. California*, pps. 459-464; *Bethel School District No.*

403 v. Fraser, pps. 472-477; *West Virginia State Board of Education v. Barnette*, pps. 597-609; *Texas v. Johnson*, pps. 612-619.

SCW: xxx

Recommended: Abraham, Chapter 5, "What is Obscene and When Is It?," pps. 200-216; "Some Basic Concepts," pps. 164-174.

Quiz # 4.

Week Nine: *Freedom of Religion: Establishment and Free Exercise.*

CL & P, Chapter 6, "Freedom from and of Religion," pps. 644-651; "The (Dis)Establishment of Religion," pps. 652-665; "Free Exercise of Religion," pps. 746-755.

Cases: *Everson v. Board of Education*, pps. 665-673; *Lemon v. Kurtzman*, pps. 685-693; *Sherbert v. Verner*, pps. 755-762; *Oregon v. Smith*, pps. 767-777; *Church of Lukumi Babalu Aye v. City of Hialeah*, pps. 777-787.

SCW, pps. 163-189.

Recommended: Abraham, Chapter 6, "Religion," pps. 220-234; "Establishment: The Separation of Church and State," pps. 262-320; "The Free Exercise of Religion," pps. 234-262.

Quiz #5.

Week Ten: *The Rights of the Accused Under the Fourth Amendment: Search and Seizure and Exceptions to the Warrants Requirement*

CL & P, Chapter 7, "The Fourth Amendment Guarantee Against Unreasonable Searches and Seizures," pps. 787-789; "Requirements for a Warrant and Reasonable Searches and Seizures," pps. 790-794; "Exceptions to the Warrant Requirement," pps. 802-810; "The Special Problems of Automobiles in a Mobile Society," pps. 834-840; "Wiretapping, Bugging, and Police Surveillance," pps. 881-887; "The Exclusionary Rule," pps. 902-907.

Cases: *Chimel v. California*, pps. 795-798; *Terry v. Ohio*, pps. 813-818; *U.S. v. Sokolow*, pps. 819-824; *Minnesota v. Dickerson*, pps. 824-828; *California v. Acevedo*, pps. 852-858; *Katz v. U.S.*, pps. 893-897; *Mapp v. Ohio*, pps. 908-918; *Nix v. Williams*, pps. 918-924; *U.S. v. Leon*, pps. 924-941.

SCW., pp. 190-192; 198-201.

Recommended: Abraham, Chapter 4, "The Fascinating World of Due Process of Law," pps. 133-153.

SECOND EXAMINATION.

Week Eleven: *Other Substantive and Procedural Rights of the Accused: The Protection Against Self-Incrimination, the Right to Counsel, The Right of Confrontation, and Miscellaneous Constitutional Protections.*

CL & P, Chapter 8, The "Fifth Amendment Guarantee Against Self-Accusation," pps. 942-949; "Coerced Confessions and Police Interrogations," pps. 951-960; Chapter 9, "The Rights to Counsel and Other Procedural Guarantees," pps. 1019-1024; "Plea Bargaining and the Right to Effective Counsel," pps. 1036-1041; "Indictment by Grand Jury," pps. 1046-1047; "The Right to an Impartial Jury Trial," pps. 1047-1053; "Speedy and Public Trial," pps. 1073-1074; "The Rights to Be Informed of Charges and to Confront Accusers," pps. 1074-1077; "The Guarantee Against Double Jeopardy," pps. 1078-1081; "The Guarantee Against Excessive Bail and Fines," pps. 1082-1085.

Cases: *Miranda v. Arizona*, pps. 961-974; *Rhode Island v. Innis*, pps. 980-985; *Duckworth v. Eagan*, pps. 985-991; *McNeil v. Wisconsin*, pps. 992-995; *Arizona v. Fulminate*, pps. 995-999; *Withrow v. Williams*, pps. 999-1003; "The Development of Law," pps. 1004-1008; *Powell v. Alabama*, pps. 1024-1027; *Gideon v. Wainright*, pps. 1027-1032; *Argersinger v. Hamlin*, pps. 1032-1036.

SCW, pps. 202-205; 206-209.

Recommended: Abraham, Chapter 4, "The Fascinating World of Due Process of Law," pps. 92-133.

Week Twelve: *The Problem of 'Cruel and Unusual' Punishment in a 'Civilized' Society.*

CL & P, Chapter 10, "Cruel and Unusual Punishment," pps. 1089-1091; "Noncapital Punishment," pps. 1091-1095; "Capital Punishment," pps. 1100-1110; "The Development of the Law," pps. 1160-1167 (box).

Cases: *Rummel v. Estelle*, pps. 1095-1100; *Furman v. Georgia*, pps. 1110-1122; *Lockett v. Ohio*, pps. 1122-1129; *McCleskey v. Kemp*, pps. 1129-1144, *Penry v. Lynaugh*, pps. 1144-1152; *Payne v. Tennessee*, pps. 1152-1157; *Morgan v. Illinois*, pps. 1157-1160.

SCW, pps. 210-215.

Quiz # 6.

Week Thirteen: *The Right to Privacy, Abortion, Personal Autonomy, and the Right to Die*

CL & P, Chapter 11, "The Right to Privacy," pps. 1168-1172; "Privacy and Reproductive Freedom," pps. 1172-1183; "The Development of Law," pps. 1199-1203 (box); "Privacy and Personal Autonomy," pps. 1236-1244.

Cases: *Roe v. Wade*, pps. 1188-1199; *Webster v. Reproductive Health Services*, pps. 1208-1221; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, pps. 1221-1236; *Bowers v. Hardwick*, pps. 1244-1253; *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, pps. 1253-1264.

SCW, pps. 216-219.

Recommended: Abraham, Chapter 8, "The 1973 Abortion Decisions and Their Offspring," pps. 418-421.

Quiz # 7.

Second bench memo due.

Week Fourteen: *Equal Protection of the Laws and Racial Discrimination in Education.*

CL & P, Chapter 12, "The Equal Protection of the Laws," pps. 1265-1273; "Racial Discrimination and State Action," pps. 1275-1291; "Racial Discrimination in Education," pps. 1317-1327; "Inside the Court," pps. 1333-1338; (boxes); "The Development of Law," pps. 1371-1373 (box).

Cases: *Dred Scott v. Sanford*, pps. 1292-1299; *Civil Rights Cases*, pps. 1299-1309; *Brown v. Board of Education I*, pps. 1328-1333; *Bolling v. Sharpe*, pps. 1338-1340; *Brown v. Board of Education II*, pps. 1340-1345; *Cooper v. Aaron*, pps. 1344-1349; *Freeman v. Pitts*, pps. 1363-1367; *U.S. v. Fordice*, pps. 1367-1367.

SCW, pps. 220-221.

Recommended: Abraham, Chapter 7, "Race—The American Dilemma: The Evolving Equal Protection of the Laws," pps. 321-403.

Quiz # 8

Week Fifteen: *Affirmative Action and Non-Racial Classification Analysis*

CL & P, Chapter 12, "Affirmative Action and Reverse Discrimination," pps. 1373-1379; "The Development of Law," pps. 1401-1406 (box); "Inside the Court," pps. 1407-1409; "Nonracial Classifications

and the Equal Protection of the Laws," pps. 1445-1448 [including "Gender-Based Discrimination"]; "The Development of Law," pps. 1449-1451; "The Development of Law," pps. 1477-1478; "Wealth, Poverty, and Illegitimacy," pps. 1478-1479; "The Development of Law," pps. 1487-1488; "The Development of Law," pps. 1501-1503; "Alienage and Age," pps. 1503-1506 [including 'The Development of Law' boxes]; "Mental Illness and Retardation," p. 1516.

Cases: *Regents of the University of California v. Bakke*, pps. 1380-1401; *Michael M. v. Superior Court*, pps. 1464-1472; *San Antonio Independent School District v. Rodriquez*, pps. 1488-1501; *Plyer v. Doe*, pps. 1507-1516; *Heller v. Doe*, pps. 1516-1520.

SCW, pps. 221-235.

Recommended: Abraham, Chapter 8, "The Wrench of Affirmative Action and Reverse Discrimination," pps. 421-437; "Gender and Race Under the New Equal Protection," pps. 404-417.