

Tufts University  
Spring 2018  
Mon/Wed, 3:00-4:15  
Anderson 212

Dennis Rasmussen  
dennis.rasmussen@tufts.edu  
Office hours: Mon/Wed, 4:15-5:15  
Packard Hall 109

Teaching Assistant: Alexander Trubowitz, alexander.trubowitz@tufts.edu

## **PS 105 – Constitutional Law**

The U.S. Constitution is the amazingly succinct document that forms the general framework for America's government and laws. For all of its brevity, the Constitution embodies a complex balance of conflicting interests and principles, which makes interpreting it a delicate legal-political endeavor. In this course we will critically examine the Supreme Court's ever-evolving interpretations of the Constitution. We will focus primarily – indeed, almost exclusively – on questions surrounding civil rights and liberties: religious freedom, freedom of speech and press, the right to bear arms, the right to privacy, voting and representation, and discrimination on the basis of race, sex, sexual orientation, and other characteristics. This focus requires that we leave out huge swaths of constitutional law – including such important areas as the separation of powers, federalism, economic liberties, and the rights of the criminally accused – but, alas, choices must be made. Civil rights and liberties are among the more controversial and fascinating areas of constitutional law and will provide us with more than enough fodder for a semester-long course.

### **Course Format and Requirements:**

Attendance is required; more than two absences will affect your participation grade, and absence from more than a third of the classes will automatically result in a failing grade. Students arriving late will generally be counted as absent.

The class will be conducted mostly in discussion format. I may have to lecture a bit on some days, but every class will involve a good deal of discussion, and you should plan on participating every day. High-level participation requires that you grapple with the readings ahead of time and bring to class any questions or confusions you might have. You should always bring the relevant text(s) to class.

The use of laptops/tablets in class is permitted but discouraged. If you do use one, you may not use it for any purpose other than to look at the readings (when they are on Trunk) and to take notes: absolutely no email, Facebook, ESPN, etc. These non-class-related activities are disrespectful to me and your classmates and distracting for those sitting near you. I recommend disconnecting your computer from the internet during class to help avoid the temptation. You may not use your phone for any purpose during class time; if an emergency arises and you need to do so, please step out of the room first. If I see you using your computer for a non-class-related activity or your phone for any reason, I will lower your participation grade by 10 percentage points (each time).

Beginning with the fifth class session, you will be required to brief between three and six court

cases for every set of readings. (A brief is a short, semi-formal summary of a case; I will hand out a sample brief to use as a model.) You must write a full brief (1-2 pages) for the cases marked with an asterisk (\*) in the schedule below and a mini-brief (3-5 sentences) for those without an asterisk. The purpose of the briefs is fourfold:

1. Briefing encourages you to read carefully and zero in on the important parts of the cases.
2. For those of you intending to go to law school, this will be a prominent activity in your future; law students are normally advised to brief all of the cases that they read for class.
3. The briefs will be invaluable study tools when preparing for the exams.
4. The briefs will also be invaluable *when you are cold-called in class to discuss a case*.

For most cases, I will randomly select a student to present the facts of the case, explain the Court's decision and any concurring or dissenting opinions, and answer questions about them before we move on to discuss the case as a class. This too is extremely common in law school. In addition, I will randomly select five students for each class session to hand in their briefs for that day's cases. I will announce who these students are at the end of class, and they will be required to either hand in hard copies of their briefs or email them to me *within 30 minutes of the end of class*. (This is a strict deadline; no credit will be given for briefs handed in more than a half hour after the end of class.)

The quality of both your briefs and your presentation/discussion of your cases will make up part of your participation grade. If you are absent – without a proper excuse, given to me in advance – on a day that I plan to call on you to present a case or to hand in your briefs, you will forfeit these points. I realize, of course, that occasionally you may be unable to prepare properly for class for reasons that are beyond your control. For that reason, you will also get two “free passes” that can be used at any point during the semester. If you notify me *before class* that you want to use a free pass for that day – no excuse/rationale needed – I will not call on you to present a case or to hand in your briefs that day.

In addition to your case presentations and your briefs, your participation grade will also incorporate your attendance, general contributions to class discussions, and a short quiz on the second day of class.

There will be three in-class exams: two midterms and a final. They will be closed-book, although I will give you an alphabetically-ordered list of the titles/dates of the cases from that section of the course. Each exam will include several short answer questions and one essay. The essay will be in a format typical of law school exams: you will be given a hypothetical set of facts and apply what you have learned about the law to it. Essentially, you will be take on the role of a justice writing a decision, or a clerk advising a justice on a case. This requires you not just to know the law but also to critically analyze it and apply it to new situations.

Note that while lawyers, and even Supreme Court justices, often write in “legalese” (e.g. frequently using terms such as aforementioned, hereinafter, heretofore, inter alia), you should not do so in either your case briefs or your exams. In everything that you write for this class, strive for clarity and simplicity rather than obfuscation.

Exams will be given a numerical grade on the following scale:

A	93-100	B-	80-82	D+	67-69
A-	90-92	C+	77-79	D	63-66
B+	87-89	C	73-76	D-	60-62
B	83-86	C-	70-72	F	59 and below

Grades will be determined as follows:

Class participation (including class presentations and case briefs)	20 %
Two midterm exams	25 % each
Final exam	30 %

*The university's policy on academic honesty will be strictly adhered to. For more information on plagiarism and the proper citing of sources, see:*

<http://students.tufts.edu/academic-advice-and-support/academic-resource-center/what-we-offer/writing-support/avoiding>

### **Required Text:**

Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, ninth edition (CQ Press, 2016). ISBN: 9781483384016.

This text, which is abbreviated as “EW” in the course schedule below, is available at the bookstore. *It is crucial to buy this most recent edition of the text.* All other required readings will be made available on Trunk.

### **Recommended Reading (and Listening):**

Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford University Press, 2016). An excellent overview of the context, drafting, and ratification of the Constitution and the Bill of Rights.

The “Interactive Constitution” on the National Constitution Center’s website: <http://constitutioncenter.org/interactive-constitution>. Bipartisan commentary on virtually every clause of the Constitution.

Two podcasts: *We the People* (National Constitution Center) and *Amicus* (Slate). Both provide regular commentary on cases currently before the Court. *We the People* is self-consciously bipartisan, while *Amicus* tends to have a liberal slant.

## **Course Schedule and Readings:**

1/22 Introduction

1/24 Overview of the Constitution and the Court

U.S. Constitution (EW, pp. 773-84)

EW, pp. 10-22

Adam Liptak, "A Cautious Supreme Court Sets a Modern Record for Consensus" (*New York Times*, 6/27/2017)

Wikipedia page on each sitting Supreme Court Justice

### **Quiz on current SC Justices**

1/29 The Founding Debate Over the Court

Alexander Hamilton, *Federalist* #78 (Trunk, pp. 401-8)

Letter of Brutus, 20 March 1788 (Trunk, pp. 182-87)

EW, pp. 45-56

1/31 Constitutional Interpretation

EW, pp. 22-41

Antonin Scalia, "Constitutional Interpretation the Old-Fashioned Way" (Trunk, pp. 1-6)

Jack Balkin, "Alive and Kicking" (Trunk, pp. 1-4)

2/5 The Right to Bear Arms

EW, pp. 379-88

Justice Breyer's dissent in *Heller* (Trunk, pp. 225-29)

Briefs: *United States v. Miller* (1939)

*District of Columbia v. Heller* (2008)\*

*McDonald v. Chicago* (2010)

2/7 Religious Freedom: The Free Exercise Clause

EW, pp. 95-99, 105-15

Briefs: *Reynolds v. United States* (1879)

*Braunfeld v. Brown* (1961)

*Sherbert v. Verner* (1963)\*

*Wisconsin v. Yoder* (1972)\*

*Bob Jones University v. United States* (1983)

2/12 The Free Exercise Clause, continued

EW, pp. 115-31

Briefs: *Goldman v. Weinberger* (1986)  
*Employment Division v. Smith* (1990)\*  
*Boerne v. Flores* (1997)\*  
*Burwell v. Hobby Lobby* (2014)

2/14 Religious Freedom: The Establishment Clause

EW, pp. 131-38, 145-54, 159

[no need to read the entire *Zelman* case; just write a mini-brief based on EW's summary]

Briefs: *Everson v. Board of Education* (1947)\*  
*Board of Education v. Allen* (1968)  
*Lemon v. Kurtzman* (1971)\*  
*Zelman v. Simmons-Harris* (2002)

2/19 No class – Presidents Day

2/21 The Establishment Clause, continued

EW, pp. 138-45, 162-69

Briefs: *Engel v. Vitale* (1962)  
*Abington School District v. Schempp* (1963)\*  
*Epperson v. Arkansas* (1968)  
*Edwards v. Aguillard* (1987)\*  
*Santa Fe School District v. Doe* (2000)

2/22 The Establishment Clause, continued  
(Thursday)

EW, pp. 169-83

Briefs: *Town of Greece v. Galloway* (2014)\*  
*Lynch v. Donnelly* (1984)  
*County of Allegheny v. ACLU* (1989)  
*Van Orden v. Perry* (2005)\*

2/26 **First Midterm Exam**

2/28 Freedom of Speech: Introduction

EW, pp. 191-99, 207-8, 217-19, 228-33

Briefs: *Schenck v. United States* (1919)  
*Abrams v. United States* (1919)\*  
*United States v. Carolene Products*, Footnote Four (1938)  
*Brandenburg v. Ohio* (1969)  
*Texas v. Johnson* (1989)\*

3/5 Libel and Obscenity

EW, pp. 321-30, 335, 341-48

Briefs: *New York Times v. Sullivan* (1964)\*  
*Curtis Publishing Company v. Butts* (1967)  
*Miller v. California* (1973)\*

3/7 Hate Speech and Freedom of Association

EW, pp. 247-53, 284-91

Briefs: *Snyder v. Phelps* (2011)\*  
*Roberts v. United States Jaycees* (1984)  
*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995)  
*Boy Scouts v. Dale* (2000)\*

3/12 Freedom of the Press

EW, pp. 293-97, 309-13, 363-68

Briefs: *Near v. Minnesota* (1931)\*  
*Cox Broadcasting Corporation v. Cohn* (1975)  
*Miami Herald v. Tornillo* (1974)  
*Red Lion Broadcasting v. FCC* (1969)  
*FCC v. Pacifica Foundation* (1978)  
*Reno v. ACLU* (1997)\*

3/14 The Right to Privacy: Private Sexual Activity and Same Sex Marriage

EW, pp. 390, 394-400, 428-48

Briefs: *Griswold v. Connecticut* (1965)\*  
*Bowers v. Hardwick* (1986)  
*Lawrence v. Texas* (2003)\*  
*Obergefell v. Hodges* (2015)\*

Spring break

3/26 The Right to Privacy: Abortion

EW, pp. 401-27

Excerpt from *Whole Women's Health v. Hellerstedt* (Trunk, pp. 1-8)

Briefs: *Roe v. Wade* (1973)\*

*Planned Parenthood v. Casey* (1992)\*

*Gonzales v. Carhart* (2007)

*Whole Women's Health v. Hellerstedt* (2016)\*

3/28 **Second Midterm Exam**

4/2 Civil Rights and Race Discrimination

EW, pp. 609-14, 618-26, 631-40

Briefs: *Plessy v. Ferguson* (1896)\*

*Brown v. Board of Education (I)* (1954)\*

*Brown v. Board of Education (II)* (1955)

*Parents Involved v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* (2007)\*

4/4 Affirmative Action

EW, pp. 648-69

Excerpt from *Fisher v. University of Texas* (Trunk, pp. 1-8)

Briefs: *Regents of the University of California v. Bakke* (1978)\*

*Grutter v. Bollinger* (2003)\*

*Fisher v. University of Texas* (2016)\*

4/9 Sex Discrimination

EW, pp. 669-88

Briefs: *Reed v. Reed* (1971)

*Craig v. Boren* (1976)\*

*United States v. Virginia* (1996)\*

*Michael M. v. Superior Court of Sonoma County* (1981)

*Rostker v. Goldberg* (1981)

4/11 Other Areas of Discrimination Law

EW, pp. 688-706

Briefs: *Romer v. Evans* (1996)\*

*San Antonio School District v. Rodriguez* (1973)\*

*Plyler v. Doe* (1982)\*

4/16 No class – Patriots Day

4/18 Voting Rights

EW, pp. 723-41

Briefs: *South Carolina v. Katzenbach* (1966)\*

*Shelby County v. Holder* (2013)\*

*Crawford v. Marion County Election Board* (2008)\*

4/23 Campaign Finance

EW, pp. 741-55

Briefs: *Buckley v. Valeo* (1976)

*Citizens United v. Federal Election Commission* (2010)\*

*McCutcheon v. Federal Election Commission* (2014)\*

4/25 Political Representation

EW, pp. 755-68

Briefs: *Wesberry v. Sanders* (1964)

*Reynolds v. Sims* (1964)\*

*Miller v. Johnson* (1995)\*

4/30 Topic and readings TBA

5/4 **Final Exam, 3:30-5:30**

(Friday)