

LAW, JURISPRUDENCE & SOCIAL THOUGHT 3

Spring 2010

LEGAL INSTITUTIONS AND DEMOCRATIC PRACTICE

Professor Lawrence Douglas
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This course will examine the relationship between legal institutions and democratic practice. How do judicial decisions balance the preferences of the majority and the rights of minorities? Is it possible to reconcile the role that partisan dialogue and commitment play in a democracy with an interest in the neutral administration of law? How does the provisional nature of legislative choice square with the finality of judicial mandate? By focusing on the United States Supreme Court, we will consider the various attempts to justify that institution's power to offer binding interpretations of the Constitution that upset majoritarian preferences. We will examine the origins and historical development of the practice of judicial review and consider judicial responses to such critical issues as slavery, the New Deal, the internment of Japanese-Americans at the end of World War II, and abortion. The evolving contours of Supreme Court doctrine will be analyzed in the light of a continuing effort to articulate a compelling justification for the practice of judicial intervention in the normal operation of a constitutional democracy.

The following texts are for purchase at Amherst Books, 8 Main Street, (413)256-1547:

- Bruce Ackerman, We, the People
- Alexander Bickel, The Least Dangerous Branch
- Jeffrey Toobin, The Nine
- John Hart Ely, Democracy and Distrust
- John Locke, Two Treatises of Government
- James Madison, et. al., The Federalist Papers

THE MULTILITH COURSE READER FOR LJST 3 will be AVAILABLE FOR PURCHASE IN CLARK 208, EXT. 2380, BETWEEN 8:30 A.M. AND 3:00 P.M after Feb. 5.

Readings for the first two weeks will be posted on the E-Reserves.

KEY: m = multilith, e = e-reserves, b = book

1. THE PEOPLE, THE CONSTITUTION, AND THE COURT

1.1 Introduction

Bowers v. Hardwick m

1.2 The Creation of Judicial Review

Constitution of the United States, Article III m

Marbury v. Madison m

1.3 The Argument Against Judicial Review

Eakin v. Raub, pp. 11-20 m

Henry Steele Commager, *Majority Rule and Minority Rights* m

1.4 The Argument For Judicial Review

Alexander Bickel, The Least Dangerous Branch, Chapter 1 b

Charles Black, The People and the Court, Chapter 2 ("The Building Work of
Judicial Review") m

1.5 The People, the Constitution, and the Court

John Locke, Two Treatises on Government, Book Two: Chapters II,
VIII, IX-XI, XIII (pp. 406-416), XIX b

Constitution of the United States m

Gordon S. Wood, *The Creation of the American Republic*, pp 197-226;
593-615 m

James Madison, et al. The Federalist Papers, #10, 48-51, 78 b

2. MODALITIES OF REVIEW: INTERPRETING EQUALITY AND LIBERTY

2.1 An Introduction to Interpretation: Original Intent

The Federalist Papers, #37

Edwin Meese, III, "Address Before the D.C. Chapter of the Federalist Society
Lawyers Division" m

Leonard W. Levy, Original Intent and the Framers' Constitution, pp 1-29 m

2.2 Constitutional Equality: Beyond Original Intent

Scott v. Sandford m

Plessy v. Ferguson m

Brown v. Topeka Board of Education

Several Decisions per Curiam - *Gayle v. Browder*; *Baltimore City
v. Dawson*, and *Holmes v. Atlanta* m

Herbert Wechsler, "Toward Neutral Principles of Constitutional Law"
pp. 31-35 e

Alexander Bickel, The Least Dangerous Branch, Chapter 4 - "The Passive
Virtues," pp. 113-133 b

Missouri v. Jenkins m

Grutter v. Bollinger m

Parents v. Seattle School m

Craig v. Boren m

2.3 Constitutional Liberty: Fundamental Value Analysis and Public Morality

Lochner v. New York m

Adkins v. Children's Hospital m

"The Court Packing Plan" from Constitutional Law m

West Coast Hotel v. Parrish m

Griswold v. Connecticut m

Robert Bork, "Neutral Principles and Some First Amendment Problems,"
pp. ;1-18 e

