

## **Seminar on Judicial Power Final Syllabus**

Law 7293 2 credits

This course satisfies the upper level writing requirement

Professor Clark D. Cunningham, Office 210

Phone: (404) 413-9168 Email: [cdcunningham@gsu.edu](mailto:cdcunningham@gsu.edu)

Home page: [www.ClarkCunningham.org](http://www.ClarkCunningham.org)

Administrative Specialist: Karen Butler, Office 202, [kpbutler@gsu.edu](mailto:kpbutler@gsu.edu)

Class: Wednesday 4:10pm - 5:50 pm Room 244

Office Hours: Wednesday 3:00 pm - 3:45 pm in Room 210 and by appointment

Anonymous suggestion or complaints are welcome: [Anonymous Suggestion Box](#)  
(operated by Survey Monkey – IP addresses are not recorded)

The course is administered through a Westlaw TWEN website.

There is no textbook to purchase at bookstore. All required readings handed out in class, distributed by email, and/or linked to the on-line syllabus

### **COURSE INFORMATION**

Prerequisites: Constitutional Law I and II, Criminal Procedure: Investigations, or permission of the instructor. The course may be used to satisfy the writing requirement. Enrollment may be limited.

This course addresses the use of doctrine to constrain judicial power, especially in the Supreme Court. The course will be of particular value to students interested in a judicial clerkship after graduation.

The most well-known and controversial doctrine for interpreting statutes and constitutional provisions is “originalism”: the idea that judges should be constrained by the specific words of the text as understood in the original historical context in which they were written. Justice Antonin Scalia was the most famous proponent on the Supreme Court of originalism (which he preferred to call “original meaning”) and Justice Neil Gorsuch, who replaced Scalia this year, is on record as equally committed to this approach. Students will learn in this seminar how to meet the standards of “original meaning” interpretation by constructing persuasive arguments using the tools of textual analysis and historical research. For example, a student may write a paper about the best interpretation of “establishment of religion” or “free expression” in the 1st Amendment; “Militia” or “right to keep and bear arms” in the 2nd Amendment; “due process of law” in the 5th Amendment”; or “cruel and unusual” in the 8th Amendment. Distinguished Atlanta area judges with a particular interest in “original meaning” doctrine and methodology may be invited to participate in the course, including the possibility that some will read and provide feedback on student papers.

### **COURSE GRADE:**

The course grade will be calculated as follows:

20%: Class participation

40%: Paper: First Draft

Minimum page length: 15 pages including footnotes or 25 pages for co-authored papers

**Due: Thursday, 3/1/18, at 5pm**

40%: Paper: Final Draft

Minimum page length: 25 pages including footnotes or 35 pages for co-authored papers plus one paragraph abstract

**Due: Thursday, 3/29/18, at noon**

The grade for either the first draft or final draft will be reduced by the equivalent of a full letter grade (e.g. A to B, D to F) if submitted late without good cause. Further grade reduction is possible depending on how late the paper is submitted. A failing grade for the paper may be entered if submission is very late without good cause.

With the permission of the instructor, students may work in teams of two or three to write their paper. Each student will need to carefully document his or her contribution to the research underlying the paper and the writing of the paper itself, including submission of a detailed research log.

There will not be a final exam.

#### LEARNING OBJECTIVES:

In addition to meeting the upper level writing requirements (which are expected of all students even if a student does not need this course to satisfy the requirement), students will learn how to apply sophisticated textual analysis and historical research to develop an explanation of the meaning of a federal statute or provision of the U.S. Constitution that meets the standards of the “original meaning” approach to the interpretation and application of legal texts.

#### ATTENDANCE:

Students are expected to attend every class absent good cause for absence. A student may be required to withdraw from the course without credit based upon repeated absence and/or a pattern of being tardy or leaving early without good cause. If a student believes he or she has good cause for being absent, arriving late, or leaving early, it is the student’s responsibility to email the instructor with the explanation of good cause. Students will be evaluated on their attendance, preparation, and contribution to class discussion for the class participation component of the course grade.

### SYLLABUS

To access most of the assigned readings, students will need to be logged into the course TWEN website.

**One short assignment to complete BEFORE Class One:**

Student Questionnaire and Learning Contract: **please complete by 10am on Wednesday, January 10** to give the instructor time to review before the first class. Preview the entire questionnaire by clicking [here](#) and then complete the questionnaire [on-line](#).

**CLASS ONE (1/10/18)****Introduction to Court**

1. Introduction to Course (4 pp) [view on line](#) or [download pdf](#)
2. Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, in A MATTER OF INTERPRETATION 3-47 (1997) (not linked to syllabus; sent separately by email, printed copies available in Room 202)
3. Neil M. Gorsuch, [2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia](#), 66 CASE WESTERN L. REV. 905-920 (2016) (also sent separately by email; printed copies available in Room 202)
4. Alan M. Dershowitz, [Original Intent](#), N.Y. TIMES BR 10 (Nov. 5, 2017) (reviewing SCALIA SPEAKS (2017), edited by Christopher J. Scalia & Edward Whelan) (5 pp)
5. R. Robin McDonald, [Georgia Appellate Judge Lisa Branch Questioned over 'Originalist' Judicial Philosophy](#), FULTON COUNTY DAILY REPORT (Dec. 13, 2017) (3 pp)
6. *Smith v United States*. View on Westlaw 508 U.S. 223, 113 S.Ct. 2050 (1993) or [download pdf](#)
7. *United States v Bailey*, *United States v Robinson*, (D.C.Cir. 1994) (*en banc*) ([edited](#))
8. Full decision on Westlaw: 36 F.3d 106

**Class Cancelled (1/17/18) (inclement weather)****CLASS TWO (1/24/18)****Textual Analysis: Semantics, Syntax, Pragmatics and Corpus-Based Linguistics**

**Guest Speaker: Dr. [Eric Friginal](#), associate professor of applied linguistics, co-author, *Corpus-Based Sociolinguistics: A Guide for Students* (2014)**

9. Cunningham, Green, Kaplan & Levi, [Plain Meaning and Hard Cases](#), read pp. 1561 - 69 (what is linguistics) copy of full article handed out in Class 1
10. *Bailey v United States* (U.S.)
  1. Reply Brief for Petitioners ([discussion of linguistic analysis](#))
  2. Linda Greenhouse, [Justices Explore the Elusive Meaning of a Simple Word](#), NEW YORK TIMES C 20 (Oct. 31, 1995)
  3. [Oral Argument](#) (excerpts)
  4. Decision on Westlaw: 516 U.S. 137, 116 S. Ct. 501 (1995) or [download pdf](#)
11. *Muscarello v United States*, 524 U.S. 125, 118 S. Ct. 1911 (1998) (5-4 split over meaning of "carry a firearm") [download pdf](#)
12. Current version of 18 USC 924 ([just section c\(1\)\(A\)](#)), possession element added by [112 Stat 3469](#), Nov. 13, 1998)
13. *United States v Costello*, 666 F.3d 1040 (7<sup>th</sup> Cir. 2012) (Judge Posner uses Google search to find ordinary meaning of "harboring") [download pdf](#)
14. Ben Zimmer, [The Corpus in the Court: 'Like Lexis on Steroid'](#), THE ATLANTIC (March 4, 2011) ("Say goodbye to the dictionary definitions. Courts, long dependent on the vagaries of language, have new quantitative tools they can use to precisely pin down how words are used")
15. James C. Phillips, Daniel M. Ortner, & Thomas R. Lee, [Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical](#), 126 Yale L.J. F. 21

- (2016) [download pdf](#)
16. [United States v. Corpuz](#), 953 F.2d 526 (9<sup>th</sup> Cir. 1992) ([excerpts](#))
  17. [United States v. Staples](#), 971 F.2d 608 (10<sup>th</sup> Cir. 1992) ([excerpts](#))

### **Class Three (1/31/18)**

Combining textual analysis with historical research

4<sup>th</sup> Amendment case study

Guest speaker, [Professor Pamela Brannon](#)

18. Randy E. Barnett, [New Evidence of the Original Meaning of the Commerce Clause](#), 55 ARK. L. REV. 847, 847-867 (2002) (appendix optional at 868-99)
19. US Const., [Amendment IV](#)
20. [Prior drafts of 4<sup>th</sup> Amendment](#)
21. Clark D. Cunningham, [Pre-Revolution Roots of the Fourth Amendment](#) (working draft)
22. John Adams, [Petition of Lechmere](#) (Suffolk Superior Court, Boston, Massachusetts Bay Colony 1761) (writs of assistance case, notes and summary of arguments of counsel by eyewitness John Adams, later 2<sup>nd</sup> President of the United States)
23. [Wilkes v Woods](#) 98 English Reports 489 (Court of King's Bench 1763) (jury trial) (report of arguments of counsel, testimony and charge to the jury from Lord Chief Justice Pratt)
24. [Entick v Carrington: The Case of Seizure of Papers, being an Action of Trespass by John Entick against Nathan Carrington and Three Other Messengers in Ordinary to the King](#) Howell State Trials 1029 (appeal to Court of Common Pleas 1765) (Chief Justice Pratt, Lord Camden)
25. [Father of Candor, A Letter to the Public Advertiser Concerning Libels, Warrants, Seizure of Papers and Security for the Peace](#) (anonymous pamphlet 1765) (note "f" is used for both "f" and "s")

### **Monday (2/5/18) or earlier**

Email one paragraph proposal for paper (and proposed team)

### **Class Four (2/7/18)**

Combining textual analysis with historical research

4<sup>th</sup> Amendment case study (continued)

26. Review Instructions for First Draft due March 1 (also posted under "Paper" on the TWEN site) – [revised as of February 18](#)
27. Review [course research guide](#) prepared by Prof. Pamela Brannon: <http://libguides.law.gsu.edu/constitutionalhistory>
28. Thomas R. Lee & James C. Phillips, [Data-Driven Originalism](#) (working paper January 2018 draft) (skim pp 1-30 which repeat much of reading #15, read 30-60)
29. [Olmstead v. United States](#), 277 U.S. 438 (1928) (the dissenting opinion by Justice Brandeis is one of the most famous dissents in American constitutional law)
30. [Katz v. United States](#), 389 U.S. 347 (1967) (read Harlan concurrence and Black dissent closely)
31. Adam Liptak, [Pulled Over in a Rental Car, With Heroin in the Trunk](#), NY TIMES, Jan 1, 2018 (reporting on U.S. v Byrd) [pdf](#)

32. [United States v Byrd](#), 679 Fed.Appx. 146 (3rd Cir. 2017) (unpublished)
33. [United States v Kennedy](#), 638 F.3d 159 (3rd Cir. 2011) (cited by Byrd)
34. Adam Liptak, *Justices Seem Ready to Back Driver of Rental Car in Privacy Case*, NY TIMES, Jan 8, 2018 (reporting on U.S. v Byrd) [pdf](#)
35. Clark D. Cunningham, [Feds: We can read all your email, and you'll never know](#), [The Conversation](#) (Sep. 21, 2016)
36. Clark D. Cunningham, [In getting 'new' Clinton emails, did the FBI violate the Constitution?](#), [The Conversation](#) (Oct. 29, 2016)
37. Clark D. Cunningham, [Apple and the American Revolution: Remembering Why We Have the Fourth Amendment](#), 126 [Yale Law Journal Forum](#) 218 (Oct. 26, 2016) (optional reading)

**Class Five (2/14/18)**

Group workshops and individual conferences

**Class Six (2/21/18)**

Group workshops and individual conferences

**Class Seven (2/28/18)**

Group workshops and individual conferences

**Thursday (3/1/18)**

**First draft due at 5pm**

**Minimum page length: 15 pages including footnotes or 25 pages for co-authored papers**

**Tuesday (3/6/18)**

**Instructor returns first draft with grade and comments**

**Class Eight (3/7/18)**

Presentations and group discussion of first drafts

**No Class (3/14/18) (Spring Break)****Class Nine (3/21/18)**

No meeting as a full class.

Individual meetings in Room 244

**Class Ten (3/28/18)**

**4:10 – 5:10** Guest Speaker, Georgia Supreme Court Justice [David E. Nahmias](#). Justice Nahmias was a Supreme Court clerk to Justice Scalia when he dissented in *Smith v U.S.* He is the former United States Attorney for the Northern District of Georgia, and served as Deputy Assistant Attorney General for the Criminal Division at the U.S. Department of Justice. (He also was on the editorial board of the Harvard Law Review with President Barack Obama.)

**5:10 – 5:50** Planning for Judicial Panel presentations

38. Review [Justice Scalia's dissent](#) in *Smith v United States*, 508 U.S. 223, 113 S.Ct. 2050 2060-63 (1993)

**Thursday (3/29/18)**

**Final papers due at noon**

Minimum page length: 25 pages including footnotes or 35 pages for co-authored papers plus abstract

**Monday (4/2/18)**

**Research log(s) due by 5:00pm**

**Class Eleven (4/4/18)**

Presentations and group discussion of final papers

**Class Twelve (4/11/18) Last Class**

[Webcast](#) (you may need to log into iCollege to view)

3:15 – 4:15 pm Judicial Panel 1

Eleanor Miller & Heather Obelgoner: Article II, Section 1 – “executive power”

Pearson Cunningham and William Lasker: 1st Amendment – “right to petition”

4:30 – 5:30 pm Judicial Panel 2

Cece Howard & Aaron Smothers: 8th Amendment – “cruel and unusual punishments”

Isaac L. Godfrey: 8th Amendment - “excessive bail”