

**Incorporating a Sophisticated Supreme Court Simulation  
into an Undergraduate Constitutional Law Class**

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Role playing activities and Supreme Court simulations have been a popular teaching tool in constitutional law courses for many years. These projects can range from a short judicial decision making scenario to a full-semester Supreme Court simulation involving lawyers, interest groups, and justices (Claude and Parker, 1984; Hensley, 1993; Baker, 1994). Textbooks are now available to assist an instructor in developing a Supreme Court simulation project for a course (Bowers and Daniels, 1998; Dolan and Ezra, 2002) and numerous online resources make it easier to prepare role playing or simulation assignments.

This paper explains how to incorporate a sophisticated Supreme Court simulation into an undergraduate constitutional law course. Instead of having students play the role of a generic justice who must decide a case, the simulation described below requires students to assume the roles of current Supreme Court justices and they must decide cases and write an opinion from the perspective of the justice they are playing. This type of role playing assignment requires higher-order thinking because students must apply their substantive knowledge of constitutional law and the jurisprudence of their justice in deciding important constitutional issues.<sup>1</sup> Research has demonstrated that role playing activities and simulations are an effective pedagogical tool (Walcott, 1980; McKeachie and Hofer, 2001). Although the simulation places extra demands on the instructor and students, this kind of class project creates a learning environment that is challenging, interesting, and fun. The Supreme Court simulations are the most popular aspects of my constitutional law courses and they consistently receive positive comments on my teaching evaluations.

Before I turn to a detailed explanation of the simulation, it is important to say a few things about the nature of my constitutional law classes and our academic calendar. The simulation described below will work in either a one or two semester constitutional law curriculum. I teach a two-semester constitutional law offering at a large state university. Both courses are stand-alone and students are not required to take one before the other. The only overlap between the courses is a week spent on legally-relevant methods of constitutional interpretation and political explanations for Supreme Court decision making. Institutional powers, federalism, the Commerce Clause, the Contract Clause, and property rights are covered during the fall semester and civil rights and liberties are studied during the spring semester.

At a minimum, eleven students are needed to run the simulation effectively but my courses go well beyond that number. My course enrollment averages 32-48 students. During the fall semester, when enrollment is at the high end, I have to prepare four different cases and assign students to the four courts. I don't recommend going beyond four cases because it would be difficult to keep the workload manageable. For the fall course, I usually schedule the simulation in mid November, just before semester break. That gives the student justices about two-three weeks to write their opinions when they return from break. For my spring course on civil rights and liberties, I run simulations twice during the semester. The first simulation takes place about six weeks into the semester and it covers cases on free exercise, no establishment, and freedom of speech. Because the students have not completed their analysis paper at this point, they are allowed to play themselves in the simulation. For example, the student justices decide cases according to their personal values using legally-relevant criteria such as the text of

the Constitution, intent of the framers, precedents, and any other arguments. The unpredictable outcome of these cases often leads to some exciting simulations as the students anticipate how each justice will vote. In the second simulation held after spring break, the students play their roles as described in this paper.

My constitutional law courses meet three times a week for fifty minute periods. The prerequisites are either a course on U.S. politics, U.S. history, or junior standing. Most of my students are juniors and seniors, but I usually have a couple of graduate students each semester. Many of my students are pre-law but the class is not restricted to those interested in law school. Less than half of those enrolled are political science majors. The diverse academic background and legal skills of the students is usually not an issue but to avoid problems, I provide a detailed explanation of the simulation project in my course syllabus and supplemental materials are distributed in class.

### **The Analysis Paper**

Each student playing either the role of a justice or a lawyer in the Supreme Court simulation is required to write a paper analyzing the personal and professional background, judicial philosophy and methods of interpretation of their assigned justice. Students are expected to use primary (opinions and speeches) and secondary (journal articles, books, websites) sources in preparing their papers. Justice assignments are made about one week into the semester, once the class roster has settled. I do not consider gender or politics when making the role assignments. For example, male students may be assigned Justice Ruth Bader Ginsburg or a liberal student might have the task of researching Justice Clarence Thomas. Years ago, I photocopied pictures of the justices and taped the pictures on small index cards. I would then shuffle the cards in class and

randomly distribute them. There was always some tension and excitement among the students as they waited to see which justice they would be researching. After the pictures were distributed I would ask the students if they knew anything about the person on the card. Typically, the students were not well-informed about the justices and some were not even sure who the person was on their card. This presented a “teachable moment” and I would often say something noteworthy about each justice. Although this method for assigning the justices is fun it takes up valuable class time. More recently, I make the assignments by going down the roster alphabetically and matching the students with the list of justices in order of seniority. The list is then distributed in class with the pictures of all nine justices on a separate page.

The syllabus describes the paper assignment in detail (see Appendix A). To assist the students with their research I provide a list of references for each justice (Appendix B). If there is time in the semester calendar I also will schedule a “library day” to introduce the students to print and electronic legal resources available on campus. On this day the social science librarian leads a tour of the library and identifies where the students can find general reference works on the Supreme Court justices, the Index to Legal Periodicals, the Supreme Court reports, and the book stacks for law and courts. The librarian also conducts a short tutorial on Lexis-Nexis and other online databases. With the judicial bibliographies listed in the syllabus and the library tour of legal resources the students should have the skills needed to research and write an excellent analysis paper.

The analysis papers cover three substantive areas: background, methods, and opinions. Students should begin the paper with a paragraph that introduces the justice to

the reader. I encourage the students to say something interesting about their justice in this opening paragraph in order to grab the reader's attention.<sup>2</sup> The introduction should be followed by several pages on the personal and professional background of the justice. All of the justices have compelling life stories so this section does not present too much difficulty. Next, students must discuss the role orientation and general approach to constitutional interpretation of their justice. For example, the paper should discuss whether the justice favors judicial restraint or whether the justice is known as an activist. Does a justice prefer deference to majoritarian political institutions or is she more inclined to protect minority rights? Does the justice adhere to the original intent of the Framers or does he or she view the Constitution as a living document that must change with the times? How closely does the justice follow precedent? All of these methods of interpretation and role orientations are covered in our text and class lectures so the student has the background to critically evaluate their justice.<sup>3</sup> This section of the paper is followed by an analysis of opinions in at least two substantive areas discussed in class. For my fall constitutional law course, the subject areas are: judicial power, congressional power, executive power, federalism, the Commerce Clause, or eminent domain. For my spring semester class, the subjects are: religious exercise/establishment, free speech (traditional and online), abortion/privacy, the rights of criminal defendants/prisoners, or discrimination (racial, gender, sexual orientation, disability, or economic status). Many justices have written hundreds of opinions during their tenure on the bench. I do not expect my students to research all of the opinions of their justice but they must analyze at least two or three opinions in *each* of two issue areas of their choice.<sup>4</sup> The opinion

analysis should be followed by a closing paragraph that summarizes the justice's constitutional philosophy and ideological position on the Court.

The analysis papers are due about a week or two before oral arguments begin in the simulation. It is important to grade and return the papers to the students on the day of the simulation so that the students have feedback from the instructor. With as many as 48 papers some semesters, this is usually an intense period of grading. To make the workload manageable, I grade the analysis papers of students who are on the first court and I return those papers on the day of oral arguments. The remaining papers are graded and returned in a piecemeal fashion, over the course of several class periods during the simulation.

### **Preparing the Case Descriptions**

Case descriptions are distributed to the students about three weeks before oral arguments. These handouts are 2-4 pages long and they contain the case title, summary of the facts, the important legal issues raised in the case, case disposition in the lower courts, and a list of five or six precedents that will help the student lawyers prepare their briefs. Attached to the case description are the role assignments for the justices on the Court and the counsel for the litigants in each case. Cases require 11 students (9 justices and 2 lawyers). If I am a little short on students to play the role of a justice I will ask a few students to sit on two cases and participate in both arguments. The student pulling double duty is asked to vote in both cases but he or she has the option of deciding which case to write an opinion. If I have a few extra students, I simply assign them to one of the courts and we operate the simulation with a larger court than the normal nine justices.

Those cases can get interesting because there might be two Justice Souters or two Justice Kennedys on the Court.

Cases for the simulation are selected from a variety of sources, including cases pending before the real Supreme Court, cases decided by the federal circuit courts, state supreme court decisions, and hypotheticals. I am constantly searching the news and law-related websites for descriptions of cases that would be good candidates for my simulation. The first place that I look for potential cases is the Supreme Court docket for the current term. If I am teaching my civil rights and liberties course I will try to find cases on the docket that involve civil liberties or discrimination claims. For example, over the last couple of years my students decided *Rumsfeld v. FAIR* (2006), *Cutter v. Wilkinson* (2005), and *Van Orden v. Perry* (2005), before the real Supreme Court handed down decisions in those cases. The use of active Supreme Court cases allows students to grapple with some of the most current and controversial constitutional issues. It is also fun to compare how the student court resolved a case with the opinion of the real Court. The major drawback to using cases that are on the docket is that the Supreme Court might announce an opinion before my students have a chance to decide the case. Surprisingly, this has happened only twice in the thirteen years that I have been teaching my constitutional law courses. This situation can be avoided by selecting cases that are scheduled for oral argument (by the real Court) later in the term. Decisions in those cases are usually announced in May or June, well after the students have submitted their written opinions. A good resource for cases on the current docket is the Medill News Service at Northwestern University. The journalism school maintains an excellent

website that lists cases on the Court's docket and it includes case descriptions, supplementary articles, amicus briefs, and links relating to each case.<sup>5</sup>

One of the best places to find cases for the simulation are the published opinions of the circuit courts and state supreme courts. The federal circuit courts of appeals and the state supreme courts are the courts of last resort for most of the litigation within our judicial system. Use Lexis-Nexis to conduct a search of circuit court opinions by key words such as free exercise, free speech, abortion, or eminent domain. It is best to search back only a year or two to find the most recent decisions. Once the search has returned a number of case citations, read the facts and opinions of the cases to see if they can be used in the simulation. Some cases are too complicated or narrowly focused to make good candidates for an undergraduate simulation. I try to find cases that raise interesting issues and those that cover doctrines and precedents discussed in class. Some cases are filled with technical or jurisdictional issues such as standing or exhaustion of remedies. Although doctrines of access are an important part of constitutional law, I prefer to edit cases so my students can focus on the merits of a constitutional claim. Last semester, however, my students had to decide *Massachusetts v. Environmental Protection Agency*. This case is on the Court's docket for the 2006-07 term. One issue in the case is whether the state of Massachusetts has standing to sue the EPA to take action on emissions that contribute to greenhouse gases and global warming. The issue is so important that it was included in the simulation.

I also like to select cases where the circuit court was divided or those where the appellate court overturned the decision of a lower court. These cases provide arguments on both sides of the issue so the student lawyers who are researching the cases for their

briefs have a variety of arguments to address. Because these circuit court or state supreme court decisions have not been granted review by the Supreme Court, the class “pretends” that the Court has granted the cases certiorari in order for the students to decide the case. One of the advantages of using appellate court decisions that have not been accepted for review is that the case can often be used in the simulation for two or three semesters. If an instructor desires, the simulation can be altered to have the student court consider petitions for review but I have found that this consumes too much class time.

Finally, there are many interest groups actively involved in constitutional litigation and their websites are excellent sources for cases. I regularly check the sites of liberal and conservative groups such as the American Civil Liberties Union ([www.aclu.org](http://www.aclu.org)), Americans United for Separation of Church and State ([www.au.org](http://www.au.org)), Lambda Legal ([www.lambdalegal.org](http://www.lambdalegal.org)), the American Center for Law and Justice ([www.aclj.org](http://www.aclj.org)), the Center for Individual Rights ([www.cir-usa.org](http://www.cir-usa.org)), and the First Amendment Center ([www.firstamendment.org](http://www.firstamendment.org)). Although these organizations have an agenda, the websites contain information about active federal and state cases that might work well in the simulation.

### **Preparing for Oral Argument**

The students who volunteer or are selected to play the role of counsel have a great responsibility. The lawyers must prepare briefs on the merits of the case and they have to be submitted on time in order for the simulation to work effectively. Most of my student lawyers have been very reliable and only a few have failed to complete their briefs on time. In addition to the responsibilities outlined in the course syllabus, I assist the

lawyers by providing sample briefs. These are usually copies of outstanding briefs that students have submitted in previous courses, with the student names deleted. I also provide the student lawyers with a short essay written by former Associate Justice John Harlan, Jr. on “The Role of Oral Argument.” The article provides the lawyers some advice and how to make effective arguments before the Court. All students who are not serving as counsel for the litigants in a case will sit as justices to hear and decide the case. These students will apply the knowledge obtained from the analysis papers in deciding the case according to how they perceive Justice Scalia or Thomas might address the issues.

The briefs from the lawyers are due on the class before the scheduled oral arguments in each case. I ask the students to make ten copies, one copy for each justice, one for the opposing lawyer, and the original for the instructor. If copying costs are an issue for a student, I offer to make copies in our departmental office. The briefs are then distributed to the justices and opposing lawyers. At this point the justices are responsible for reading both briefs and preparing for oral arguments by developing questions about the case.

### **Oral Argument and Conference on the Merits**

Early in the semester I make reservations for a comfortable room in our campus library that is used for guest speakers and special presentations. The room resembles a real courtroom. It has wood paneling, a nice podium, and tables and chairs that can be used for the justices. Atmosphere is important and I have found that the students are more engaged and enthusiastic when we conduct oral arguments in this special room

rather than our regular classroom. If you have such a room on your campus try to reserve it for the court simulation.

As much as possible, the oral argument follows the procedures of the real Supreme Court. The student justices sit in the same seating arrangement as the Court and name placards are prepared for each justice and placed on the table where they are seated. The placards help the student lawyers keep track of which justice is asking questions during oral argument. I also prepare docket sheets for each student justice. These sheets are similar to the real docket sheets used by the Supreme Court and they include the case title, a small space for taking notes, and a list of the justices with a voting matrix (affirm, reverse, absent). A sample docket sheet is found in Appendix C.

Because class time is limited, each side is given seventeen minutes to present oral arguments. Although I don't require it, the student lawyers often get into their roles by dressing up and looking professional for their presentation. Some student justices are also creative in playing their roles. For example, the student playing Justice Stevens might wear a bow tie or Justice Scalia will be a bit gregarious and he will ask lots of questions. The effort and creativity of each student in playing their roles is part of the evaluation.

Oral argument starts with the proper introductions. Beginning with the petitioner, the lawyers take turns making their presentations but like the real Court, they often find themselves bombarded with questions within minutes of starting their arguments. The Chief Justice keeps time and gives the lawyers a one-minute warning when their allotted time is about to expire. The remaining time is used for the conference on the merits. The simulation diverges from real Supreme Court procedure at this point. Instead of meeting

in a separate room behind closed doors several days after arguments, the student Court “meets in conference” immediately following oral argument. The Chief Justice begins the conference by briefly discussing his or her views of the case and announcing a vote on the merits. The associate justices follow, in order of seniority, each providing a short explanation and vote. All the votes are recorded on the docket sheet but like the real Court, the votes are tentative and a justice can switch votes once he or she begins writing the opinion.

Unlike the real Supreme Court, each student justice is expected to write an opinion. If the justice is in the majority, the paper should be written as if it is the opinion of the Court. If a justice is in the minority, the student will write a dissent. Students are encouraged to find and read several real Supreme Court opinions in order to get a sense of the structure and style of Court opinions.

### **Discussing the Opinions**

Opinions from the justices in all of the cases are due during the last week of class, usually on the last or second-last day of the semester. The entire class period is set aside to discuss the cases and the arguments made by the justices in their majority and dissenting opinions. Occasionally, a student will switch his or her vote from the one recorded during the conference. I encourage students to let me know if they have decided to change their vote because if the original vote was 5-4 it will change the outcome in the case and I will notify the other justices. The lawyers in each case usually have a desire to respond to some of the arguments as well. After discussing the case outcomes, I often ask the student justices to step outside their personas and comment on whether they would have decided the case differently. Some students are surprised to find that they

agree with the jurisprudence of their justice while others would have approached the case differently than their justice. This exercise helps students come to a better understanding of their own views on constitutional issues.

### **Simulation Assessment**

From the instructor's perspective there are a couple of disadvantages to incorporating this type of Supreme Court simulation in a constitutional law class. First, the simulation is obviously labor-intensive. The project requires a lot of planning, mentoring, and extra grading. Students have to be assigned roles, analysis papers have to be graded, cases have to be identified, case descriptions need to be prepared, oral arguments must be monitored, and briefs and opinions must be evaluated. Also, class time must be set aside for oral arguments and opinion discussion and that means that there is less time to cover material in the casebook.

The benefits of the simulation, however, far outweigh the costs. At a minimum, the students will gain extensive knowledge about one of the justices on the Supreme Court and they will become familiar with all of the sitting justices. They will learn about important precedents, tests, and doctrines used by the Court to decide constitutional questions and they will apply that knowledge to solve cutting-edge constitutional issues. They will develop an understanding of the process and politics of Supreme Court decision making and an appreciation for the role of the Court within our political system. Along the way, the students will improve their research, writing, public speaking, and critical thinking skills. The skills that the students develop in the sophisticated Supreme Court simulation will serve them well in other classes, in law school, and in their future careers.

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<sup>1</sup> There are two types of simulations: the interpersonal, which focuses on individual decision making, and the large system, which emphasizes institutional processes. The type of simulation described here more closely resembles the interpersonal because students assume specific personas in the decision making process. See Baker, Nancy V. "Oyez, Oyez, Oyez: The Trials of Teaching the Supreme Court." *Political Science and Politics*, Vol. 27, No. 2, (June 1994), pp. 253-255.

<sup>2</sup> Students have a tendency to begin their papers with the date of birth, such as Justice Anthony Kennedy was born on July 23, 1936. I encourage students to be more creative with their opening paragraph.

<sup>3</sup> The textbook used in the course is *Constitutional Law for a Changing America*, by Lee Epstein and Thomas Walker. Washington, D.C.: Congressional Quarterly Press (2007). I have used the textbook for thirteen years and I believe that it is the best text on the market for an undergraduate constitutional law course.

<sup>4</sup> Opinions can be identified using secondary sources. The Cornell Law School website also lists every case where a justice has written a majority, concurring, or dissenting opinion. Unfortunately, the site does not separate the opinions into categories so it may be necessary to read some of the opinions to determine the issues. <http://www.law.cornell.edu>

<sup>5</sup> See Northwestern University, The Medill School of Journalism, On the Docket. <http://docket.medill.northwestern.edu/>