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Office Hours:  
Tues: 4-5:30 pm  
Mon, Wed: 3-4 pm  
or by appointment  
Fall 2007

## **Political Science 5211: Constitutional Law**

*Mon, Wed: 1:25 -2:45 pm, OSH 238*

*I would not give a fig for the simplicity on this side of complexity, but I would give my life for the simplicity on the other side of complexity.*

*Oliver Wendell Holmes, Jr.*

### **Course Objectives**

Over the past 200 years, the Supreme Court has engaged in a continuing debate over the meaning of the U.S. Constitution. In this course, we will examine the Court's attempts to apply the Constitution to the modern state that has evolved to respond to the increasing complexity of American political, economic, and social life. In particular, we will examine the Court's expanding role in determining the powers and limitations of the nation's political institutions, the powers of the states, and the right to representation through the electoral process.

The course begins with a review of the powers of the federal judiciary, the limitations that are placed upon it by the constitutional system, and the Supreme Court's own self-imposed restrictions. We will then consider the distribution of power within the national government, especially the privileges and powers of Congress and the Presidency. A major portion of the course will involve an evaluation of the expansion of federal power in an increasingly interconnected national economy, the Court's new movement to limit, and possibly reverse, that expansion, and the states' continuing attempts to regulate commerce. We will conclude by examining the effect of constitutional requirements on representation and the regulation of elections and campaign finance.

As we read the Court's decisions, we will closely analyze the Court's reasoning as a process of argumentation, and note the continuities and inconsistencies of constitutional argument over time and across issues. Students will learn how to read legal cases, identify legal issues, and apply legal forms of reasoning, as well as gaining substantive knowledge of the Constitution and its interpretation. We will place the Court's decisions in their political and historical context, and examine their effect on American politics. This course is intended to teach students how to argue clearly and logically. Written assignments will place a premium on the ability to write both clearly and logically.

### **Course Requirements and Methods of Evaluation**

There will be a **midterm exam** and a **final exam**. The midterm will include multiple choice and short answer questions. In addition to the cases and doctrines we have covered, the multiple choice portion will include questions on the Court as an institution (the answers are found in CLP, Chap. 2 § B-I). The final exam will have the same format, but will cover doctrine and cases only. **Please bring a blue book to these exams.** There will be a **multiple choice test on the U.S. Constitution**. The questions on this test are quite detailed, and you should study the Constitution's text with an eye to detail. You should know the numbers of the Constitution's amendments.

During the course of the semester (after approximately the third week), I will provide you with a series of **hypothetical cases** for which you will be required to write three "**decision memoranda**." Each assignment will be made for a period of one week; at the end of the week, the assignment will "time out" and you may only submit the new assignment assigned for the next week. The purpose of these assignments is to improve your writing and analytical skills; I will

grade on the basis of writing and analysis as much as knowledge of the case law. Instructions for the memoranda are attached; please refer to Strunk and White, *Elements of Style* while writing your memoranda to improve your writing. While your memoranda must be submitted by the dates listed on the syllabus, the due date for each specific memorandum will be listed on the assignment. The assignments will be sent via the University email system. **I will include only the better two grades from your three papers in your final grade, but you must submit all three.**

**You are required to read the assigned cases and other readings before the class session for which they are assigned.** You are responsible for all readings; case names within assignments are only those which we will review in class. You should outline and "brief" (please see attachment) each of the cases before the class meeting so that we may begin our discussions where the judicial opinions conclude. Much of our work in class will involve the case method, and **I reserve the right to call upon any of you to explain the ruling in an assigned case at any time. Attendance is mandatory.** I will circulate a seating chart during our second meeting. Conformance with the seating chart is required. If you arrive late for class, you will be marked absent.

**Your grade will be computed as follows:**

|                         |     |  |
|-------------------------|-----|--|
| Classroom Participation | 20% | <b>Date or Date Due</b>                |
| Constitution Test       | 5%  | September 17                           |
| Memorandum 1            | 20% | <i>Must be received by October 24</i>  |
| Memorandum 2            | 20% | <i>Must be received by November 21</i> |
| Memorandum 3            | 0%  | <i>Must be received by December 5</i>  |
| Midterm                 | 15% | October 17                             |
| Final Exam              | 20% | Dec. 14 at 1 pm                        |

**Required Materials:** We will primarily use David O'Brien, *Constitutional Law and Politics* Vol. I (Norton, 6th Ed., 2005), hereafter *CLP*. **Please bring the casebook (and relevant web cases) to every class.** I have also placed William Strunk and E.B. White, *Elements of Style*, on sale at the bookstore; you should use this as a guide for your writing. We will be using WebCT. I will be distributing the hypothetical cases on WebCT, and will include links to several additional readings in the Web version of this syllabus posted there. I will also regularly post study guides and other supplementary materials on WebCT; please check this site every week.

**Non-negotiable Policy on Late Papers and Unsubmitted Work:** Papers will be accepted until 5 pm on the date due. I will lower a paper grade one full grade if you submit a paper due on a date for which you have an unexcused absence. Late papers will lose one full grade if submitted within a week of the due date; after a week, papers will not be accepted. **Failure to submit any assignment during the semester will result in failure of the entire course.**

**Submission of Papers to SafeAssign:** Memoranda must be submitted both in hard copy and through SafeAssign, part of WebCT.

**Academic Misconduct:** All quotes must be cited as such and include a clear reference to the work from which they were drawn; they will otherwise be treated as plagiarism. All use of materials other than course materials must be accompanied by full citations. All work in this course is assigned as individual work; working as groups or teams is strongly discouraged (and may be treated as

cheating), as is all but the most casual assistance from others, including friends and family members. If you intend to submit a paper which significantly draws upon work for another class, you must first receive explicit permission to do so from both myself and the other instructor. **Any form of academic dishonesty will result in a failing grade for the course and other disciplinary action, up to expulsion from the University.**

**Americans with Disabilities Act Notice:** Persons with disabilities requiring special accommodations to meet the expectations of this course should provide reasonable prior notice to the instructor and to the Center for Disability Services, 162 Olpin Union Building, 581-5020 to make arrangements. Written material in this course can be made available in alternative format with prior notification.

**Accommodation of Sincerely Held Beliefs:** I will work with students who require schedule changes due to religious or other significant obligations. I will not consider any requests based on course content. Because modern American politics includes many debates over sexuality, obscenity, religious practice and belief, and political ideology, any class that did not address such issues would be substantially limited. Students are required to attend all classes and to read all assignments. All assignments and lectures are related to our subject matter, and I do not include gratuitously salacious material. If you have any objection to the frank and open discussion of any of the topics above, including the use of adult language when appropriate to subject matter, please drop the class.

### **Schedule of Classes and Assignments**

*Please note that I may add additional materials and update study sheets throughout the semester.  
Please watch [WebCT](#) and the [Web Resource Page](#).*

#### **August 20 - Introduction to Course**

Study for Constitution Test, *CLP*, 1; familiarize yourself with terms in *CLP*, Glossary, 1049. Familiarize yourself with Supreme Court process in *CLP*, Chap. 2, § B-I.

#### **August 22- Judicial Review**

*CLP*, Chap. 1, § A - *Marbury v. Madison*, *Eakin v. Raub*

#### **Aug 27 - Theories of Constitutional Interpretation**

*CLP*, Chap. 1, § B

**WebCT:** Brennan, "[Contemporary Ratification](#)"; Scalia, "[Originalism: The Lesser Evil](#)"; Marshall, "[Reflections on the Bicentennial of the United States Constitution](#)"; Meese, "[The Law of the Constitution](#)"; Posner, "[What am I, a Potted Plant?](#)"

#### **Sept. 3 – Labor Day**

#### **Aug. 29, Sept. 5 - Judicial Federalism -**

*CLP*, Chap. 7, § C, D - *Martin v. Hunter's Lessee*, *Cooper v. Aaron*, *Younger v. Harris*, *Michigan v. Long*, *People v. PJ Video*; *Jaffree v. Bd of School Commissioners*, *CLP*, 206; *KY v. Wasson*, *CLP*, 210.

#### **Sept. 10, 12, 17- Jurisdiction, Standing, and Justiciability**

*CLP*, Chap. 2, § A

**Standing:** *Flast v. Cohen*, *Valley Forge Coll. v. Americans United*, *Lujan v. Defenders of Wildlife*, *Elk Grove Unified School Dist. v. Newdow*

**Justiciability and Political Questions:** *Baker v. Carr*, *Goldwater v. Carter*

**Web:** [Hein v. Freedom from Religion Foundation](#)

**Sept. 17 - Constitution Test – Happy Constitution Day – Its 220<sup>th</sup> Birthday**

**Sept. 19, 24- Presidential Power over Foreign Affairs**

CLP, Chap. 3, § B, C - *US v. Curtiss-Wright Export Corp.*, *Dames & Moore v. Regan*, *Sale v. Haitian Centers Council*, *Missouri v. Holland*, *U.S. v. Pink*, *U.S. v. Alvarez-Machain*; The War Powers Resolution, p. 302

Web: [Dellums v. Bush](#)

**Sept. 26, Oct. 1- Presidential Power in an Emergency**

CLP, Chap. 3, § D & Chap. 4, § A - *The Prize Cases*, *Ex Parte Milligan*, *Korematsu v. U.S.*, *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Youngstown Sheet & Tube v. Sawyer*, *New York Times v. US*

WebCT: [Hamdan v. Rumsfeld](#); [Hamdan Chart](#)

**Oct. 3 - Congressional Privilege and Executive Privilege**

CLP, Chap. 5, § A - *Gravel v. US*, *Eastland v. U.S. Serviceman's Fund*, *Hutchinson v. Proxmire*;  
CLP, Chap. 4, § D - *US v. Nixon*, *Clinton v. Jones*

WebCT: *Materials on Executive Privilege*

**October 8-13 – Fall Break**

**Oct. 15 - Legislative Investigations**

CLP, Chap. 5, § B - *Watkins v. US*, *Barenblatt v. US*, *Gibson v. Florida*

**Oct. 17 – Midterm Exam - Bring Blue Book - includes material from CLP, Ch. 2, § B-I.**

**Oct. 22- Congressional Power and Delegation**

CLP, Chap. 4, § C - *Chevron v. NRDC*, *Schechter Poultry v. US*, *Industrial Union Dept. v. American Petroleum Institute*, *INS v. Chadha*, *Clinton v. City of New York*; *McCulloch v. Maryland*, CLP, 527.

**PLEASE NOTE THAT DATES BELOW REFLECT CHANGES TO SCHEDULE  
BECAUSE OF OUR DELAYED PROGRESS THROUGH SYLLABUS**

**Nov. 5 - The Appointment Power**

CLP, Chap. 4, § B - *Myers v. US*, *Humphrey's Executor v. US*, *Bowsher v. Synar*, *Morrison v. Olson*

**Nov. 7 - The Early Commerce Clause**

CLP, Chap. 6, § A - *Gibbons v. Ogden*; CLP, Chap. 6, § B, *U.S. v. E.C. Knight*, *Swift & Co. v. U.S.*, *The Shreveport Rate Case*, *Hammer v. Dagenhart*, *Carter v. Carter Coal Co.*

**Nov. 12, 14 - The Modern Commerce Clause**

CLP, Chap. 6, § C - *NLRB v. Jones & Laughlin Steel Corp.*, *U.S. v. Darby*, *Wickard v. Filburn*, *Heart of Atlanta Motel v. US*, *Katzenbach v. McClung*, *U.S. v. Lopez*, *U.S. v. Morrison*

**Nov. 19 - Taxing and Spending Clause**

CLP, Chap. 6, § D - *Pollack v. Farmer's Loan*, *Steward Machine v. Davis*, *U.S. v. Kahriger*, *So. Dakota v. Dole*

**Nov. 21 - State Power over Commerce within the Federal System**

*CLP*, Chap. 7, § A - *Cooley v. Bd of Wardens*, *Southern Pacific v. Arizona*, *Bibb v. Navajo Freight*, *Maine v. Taylor*, *PA v. Nelson*

**Web:** [Granholt v. Heald](#)

*Nov. 21 - Second decision memorandum due if not already submitted.*

**Nov. 26, 28 - The Tenth Amendment and State Sovereignty**

*CLP*, Chap. 7, § B - *National League of Cities v. Usery*, *Garcia v. San Antonio Metro Transit Authority*, *New York v. U.S.*, *Printz v. U.S./Mack v. U.S.*; *Term Limits v. Thornton*, p. 468.

**Dec. 3 - The Takings Clause**

*CLP*, Chap. 9, § C - *Hawaii Housing Authority v. Midkiff*, *Nolan v. California Coastal Commission*, *Lucas v. South Carolina Coastal Council*

**Web:** [Kelo v. New London](#); [Article on Kelo impact](#)

**Dec. 5 - The Constitution and Representation**

*CLP*, Chap. 8, § B - *Wesberry v. Sanders*, *Reynolds v. Sims*, *Vieth v. Jubelirer*; *Baker v. Carr*, p. 145

*Dec. 5 - Third decision memorandum due if not already submitted.*

**Final Exam - Friday, Dec. 14 - 1-2:20 pm. Bring Blue Book.**

### Instructions on Memoranda

Over the course of the semester, you must write three memoranda concerning hypothetical cases which I will furnish to you with every topic, generally one a week. You must submit the memoranda before the dates given on the syllabus; late memoranda will be dropped one full grade. In writing the memoranda, you should follow these guidelines:

#### 1) Organization.

- a) Briefly (in one or two paragraphs) recount the significant facts.
- b) Describe the constitutional questions that the case presents. Use only two or three sentences for each question. You may wish to number these questions for easy reference later on. Even if you number the questions, please describe the questions when you answer them.
- c) Recommended answers for each of the constitutional questions, providing reasons for your recommendations and referring to relevant cases and other materials. Announce your decision first and then justify it. Divide your answers into sections which respond to the particular constitutional questions which you have noted. Arrange your answers so that they logically follow each other; in most cases, how you answer one question will determine how the others are properly answered.
- d) Justify your answers by first announcing your decision in regard to each question and providing the central point of your argument (“The President’s decision to disregard the War Powers Act is clearly unconstitutional because of Congress’s power to make laws governing the Armed Forces.”) Then review the history of precedents which back up your argument (“In *Smith v. Jones*, the Supreme Court found that Congress cannot delegate its law making responsibilities to the President. In that case, it said ‘blah, blah’”). Then demonstrate why this precedent provides the proper rule, or why another does not (“As in *Smith*, the President does not rely on a specific statute . . . Unlike *Johnson*, the act is not pursuant to a treaty obligation”).

#### 2) Approach.

- a) Assume that you are a law clerk, arguing before your judicial employer about how a case should turn out. Your reasoning justifying the decision is the most important part of your work. You are NOT the judge, and certainly are not the entire Supreme Court, so do not create new law previously unknown to the constitutional jurisprudence of the United States.
- b) While you are encouraged to have fun with the cases, please do not add facts or make up precedents. Cuteness is its own punishment.

#### 3) Format

- a) Papers must be typed, four to five pages, double-spaced, with one inch margin all around. Do NOT exceed five pages. Use black ink and a twelve point font in black ink. Violators will be forced to purchase new reading glasses for the instructor.

b) Your writing must be grammatically correct, with proper usage and attention to style. If you wish to argue persuasively, you must write in language that your reader will easily understand. Proofreading is expected; a poorly executed and careless paper displays the author's disrespect for the reader. Such disrespect will be noted.

#### 4) Notes on Proper Style

a) Avoid long quotes.

However, if you do have a quotation longer than two full lines, please block quote. Create a new paragraph that is indented and single spaced, like this. Do not place quotation marks at either end of a block quote. Include any citation in parentheses at the end.

b) Capitalize proper nouns, ie. Congress, First Amendment. Do not capitalize adjectives, ie. congressional, religious. The President has presidential powers.

c) Be aware of the differences between possessives and plurals. "It is" is properly abbreviated "it's," whereas "its" indicates the third person gender neutral possessive. Failure to follow this rule identifies one as less than fully literate. The use of an apostrophe to signal a plural noun is strictly *verboten*. The lack of an apostrophe in a possessive noun will be punished. There/their/they're and that/ which confusion will be disciplined appropriately.

d) Punctuation belonging to a quote belongs inside of the quotation marks. You do not need a comma before all quotations, although it may be appropriate in particular instances (see Strunk and White). The use of ellipses (...) to begin or end a quote is discouraged. If you are using parenthetical citation, end the quote, insert the parenthetical citation, and finish with a period. If you are using footnotes, use the period, end quotation marks, then footnote.

e) Simple writing is powerful writing. Avoid flowery prose and limit your use of adjectives. Thesaurus abusers and creative writers will be required to enter a twelve step program.

f) The ultimate authority for all rules of style is William Strunk, Jr. and E.B. White's *The Elements of Style* (MacMillan, any edition). Refer to it often while revising your own work. It will serve you well. *The MLA Handbook* and the *University of Chicago Manual of Style* are also excellent resources for grammatical and stylistic usage.

g) You should provide a citation when referring to or quoting from a case. If the case or the quote is in the assigned materials, you may simply indicate such, with the page number, in parentheses, e.g. (O'Brien, 286). Case names should be in either *italics* or underlined, with *italics* preferred. On second use, you may simply use the first party's name, unless it is the government of the United States or a state (there are too many cases involving these parties); use the second party's name in such cases. You will often see a series of numbers and initials following case names; these are references to legal reporters, the volumes which contain the opinions. The most important of these for our purposes is the U.S. Reports, issued by the government. In such citations, the first number indicates the volume, the initials in the middle indicate the reporter, the second number indicates the first page on which the case is found, and the year of the decision is included in parentheses. *Marbury v. Madison*, 5 U.S. 137 (1803) would be found on p. 137 of the fifth volume of the U.S. Reports.

## HOW TO BRIEF A CASE (Adapted from the Casenotes Publishing Website.)

**DECIDE ON A FORMAT AND STICK TO IT:** Structure is essential to a good brief. It enables you to arrange systematically the related arguments that are scattered throughout most cases, thus making them manageable and understandable. While there are an unlimited number of formats, it is best to find one that suits your needs and stick to it. It is important that a brief contain the following:

### TITLE AND VENUE

**CONCISE RULE OF LAW:** A statement of the general principle of law that the case illustrates. Determining the rule of law of a case is a procedure similar to determining the issue of the case. Avoid being fooled by red herrings; there may be a few rules of law mentioned in the case excerpt, but usually only one is the rule with which the casebook editor is concerned. The techniques used to locate the issue, described below, may also be utilized to find the rule of law. Generally, your best guide is the chapter heading. It is a clue to the point the casebook editor seeks to make and should be kept in mind when reading every case in the respective section.

**FACTS:** A synopsis of only the essential facts of the case which directly bear on to the issue. The facts entry should be a short statement of the events that led one party to initiate legal proceedings against another in the first place. While some cases conveniently state the salient facts at the beginning of the decision, in other instances they will have to be culled from hiding places throughout the text, even from concurring and dissenting opinions. Some of the "facts" will often be in dispute and should be so noted. Conflicting evidence may be briefly pointed up. It is impossible to tell what is relevant until the entire case is read, as the ultimate determination of the rights and liabilities of the parties may turn on something buried deep in the opinion. The facts entry should seldom be longer than five sentences.

**ISSUE:** A statement of the general legal question answered by or illustrated in the case. For clarity, the issue is best put in the form of a question capable of a yes or no answer. In reality, the issue is simply the Concise Rule of Law put in the form of a question. The major problem presented in discerning what is the issue in the case is that an opinion usually purports to raise and answer several questions. However, except for rare cases, only one such question is really the issue in the case. Collateral issues not necessary to the resolution of the matter in controversy are handled by the court by language known as *obiter dictum* or merely *dictum*. While *dicta* may be included later in the brief, it has no place under the issue heading.

To find the issue, the student again asks who wants what and then goes on to ask why did that party succeed or fail in getting it. Once this is determined, the "why" should be turned into a question. Since many issues are resolved by a court in coming to a final disposition of a case, the casebook editor will reproduce the portion of the opinion containing the issue or issues most relevant to the area of law under scrutiny.

**HOLDING AND DECISION:** This section should succinctly explain the rationale of the court in arriving at its decision. In summarizing the reasoning of the court, it should always include an application of the general rule or rules of law to the specific facts of the case. Hidden justifications come to light in this entry; the reasons for the state of the law, the public policies, the biases and prejudices, those considerations that influence the justices' thinking and, ultimately, the outcome of the case. At the end, there should be a short indication of the disposition or procedural resolution of the case. You may wish to put this portion of the brief in outline form.

**CONCURRING AND DISSENTING OPINIONS:** Note the major objections to, and qualifications placed on, the court's opinion. What are the key points of difference? Do you agree with the criticisms expressed? You should very briefly outline the reasoning in the dissents and concurrences.

**EFFECT ON PRECEDENTS AND LATER CASES:** You should relate how the rule of law discernible from this case compares with that derived from earlier and later cases. Where does this case fit in the series of cases which has shaped the relevant portion of the law?