

# PSCI 471

## American Constitutional Law

Fall 2016

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Office Hours:  
MWF 1:00 – 3:00  
or by appointment

The purposes of this class are to:

- (1) acquaint students with several substantive areas of American Constitutional Law that deal with constitutional issues relating to the powers of the federal government and the specific operation of each of the three branches of the federal government.
- (2) teach students analytic skills focusing on logical and other legal modes of reasoning,
- (3) develop students' communication skills, both written and oral, and
- (4) provide students with a perspective on the roles played by the United States Supreme Court in American politics.

The required book for this course are:

David O'Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability*, 9th ed. Vol. I (Norton, 2014). Paperback

This casebook has been ordered from the University Bookstore and you should purchase a copy when it arrives. That may be later the first week of class or sometime during the second week. Stay tuned.

These course materials are required for this course and these texts are available at various sources. They should be purchased at the outset of the semester.

Each student is responsible for:

- 1) reading the appropriate materials **before** EACH class meeting,
- 2) attending each class, prepared to discuss the cases and the other assigned materials, and
- 3) preparing the appropriate written materials for submission at each class meeting.

**Other (Recommended) Materials** These include a variety of readings that provide additional views on various aspects of constitutional law and development. Students should consider consulting one or more of these volumes with regard to the sets of case materials treated in this course.

N.B. David Currie was a leading, contemporary constitutional scholar. The multiple volumes listed immediately below reflect an incredible, detailed, and comprehensive examination of the history of Constitutional Law in this country. The work is the

penultimate work in Constitutional history.

David Currie, **THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888**, (University of Chicago Press, 1985).

David Currie, **THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986**, (University of Chicago Press, 1990).

The following works, also by Currie, are quite esoteric, but very informative regarding how the Congress dealt with constitutional issues up until the Civil War.

David Currie, **THE CONSTITUTION AND CONGRESS: THE FEDERALIST PERIOD, 1789-1801**, (University of Chicago Press, 1997).

David Currie, **THE CONSTITUTION AND CONGRESS: THE JEFFERSONIANS, 1801-1829**, (University of Chicago Press, 2001).

David Currie, **THE CONSTITUTION AND CONGRESS: DEMOCRATS AND WHIGS, 1829-1861**, (University of Chicago Press, 2005).

David Currie, **THE CONSTITUTION AND CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861**, (University of Chicago Press, 2005).

When Justice Oliver Wendell Holmes, Jr. died in 1935, he gave the residual of his estate, some \$230,000 at the time, to the United States. This was unique since no one wills their estate to the government. It took a variety of government leaders several decades to determine that the "Oliver Wendell Holmes Devise" should result in a multi-volume History of the Supreme Court. The volumes listed below have been published over more than 40 years. These provide a detailed, if varied, perspective on the development of the Court and the events that shaped the Court during various periods of our history. The two volumes that are "boxed" are forthcoming, and not yet available.

Julius Goebels, Jr., **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, Vol. I** (Macmillan, 1971).

George Haskins & Herbert Johnson, **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER, JOHN MARSHALL 1801-1815, Vol. II** (Macmillan, 1981).

G. Edward White, **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHAL COURT AND CULTURAL CHANGE, 1815-1835, Vol III-IV** (Macmillan, 1988).

Carl Swisher, **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-1864, Vol V** (Macmillan, 1974).

Charles Fairman, **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, Part One Vol VI** (Macmillan, 1971).

Charles Fairman, **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, Part Two Vol VII** (Macmillan, 1987).

Charles Fairman, **HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877, Supplement to Vol VII** (Macmillan, 1988).

Owen Fiss, History of the Supreme Court of the United States: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, Vol VIII (Macmillan, 1999).

Alexander Bickel & Benno Schmidt, Jr., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, Vol IX (Macmillan, 1984).

Robert Post, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL RIGHTS AND THE REGULATORY STATE, 1921-1930, Vol X ().

Richard Friedman, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE CRUCIBLE OF THE MODERN CONSTITUTION, 1930-1941, Vol XI ().

William Wiecek, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION, 1941-1953, Vol XII (Cambridge University Press, 2006).

## GRADES

The grades for this course will be based on a variety of oral and written work. These include: (1) Oral Participation in class discussions, (2) the daily, Written Assignments, and (3) a Final Examination. The relative weights of these grades for the Final Grade are as follows:

Grade Component	Weight
Class Participation	35%
Written Assignments	35%
Final Examination	30%
<b>Total</b>	<b>100%</b>

Grades for this course will be assigned using the traditional letter grading system which ranges from grades of A down to F. The end letter grade will depend on the student's final score ranging from 100 down. That grade will be curved somewhat in order to reflect the comparative quality of the work each student submitted throughout the course.

**Class participation** will focus on daily, in-class discussions of the assigned materials (particularly the cases covered in the casebook and hypotheticals presented in class). Individual student's responses to questions posed in class will form the basis of this part of the Grade. The process involves the instructor "calling on," i.e., questioning, individual students a variety of times during (throughout) the semester. These discussions will be based on the assigned readings from the O'Brien casebook, plus hypotheticals that emerge from the cases or the discussion outlined in the casebook. The quality of each student's response to those questions will be graded. **Class attendance is required, and each student will be expected to be in class and prepared to discuss assigned class materials every day.** Voluntary questions and comments during class are always

welcome when the comments relate to the cases and the materials under discussion. However, these voluntary contributions WILL NOT be graded for purposes of this part of the Final Grade.

Students are expected to attend class, prepared to discuss the assigned reading materials. That requires several items: (1) continual, advanced preparation of all the assignments (both reading and writing assignments), (2) regular and sustained class attendance, and (3) bringing case notes and other course materials to each class in order to engage in class discussion. **Preparation** of assignments may involve using Lexis-Nexis or doing library research as well as reading the cases and other materials in the Casebook (O'Brien). Preparation will often require more effort and time than just going through the assigned materials. First, "reading" means understanding, not just looking at the words quickly, or using shortcuts to "get through" the assigned materials. Understanding the concepts, logical reasoning, and technical materials contained in court opinions, statutory provisions, constitutional provisions will require careful, slow reading. In addition, it requires **THINKING** about the materials both as they are read and later. Second, understanding requires **remembering** what you have mastered. Students will be expected to remember cases read (mastered) at earlier stages of the course, throughout the semester. Students are expected to recall these materials when they are relevant to class discussion. This level of mastering materials may be frustrating because it is labor intensive and time consuming. However, students will learn these techniques and skills to master the materials for this course successfully. It is important to begin gaining these skills at the very outset of the semester, so that one does not become "lost" or fall way behind at some later point during the term. The reading in this course becomes more complicated throughout the semester.

**Class attendance** is required for this course and absences from class, whatever the reason for the absence, are NOT excused, but with the bereavement exception outlined below. Such absences can be explained, but students remain responsible for all the material covered, presented, or due in class. That includes announcements and assignments that are made in class. It is not at all necessary for students to explain absences to the instructor. Students should pickup assignments, announcements, and the like from fellow students for those days when they are absent. The instructor will NOT repeat announcements or discussions for the benefit of students who do not attend class. Given the nature of classes in this course, it is not possible for students to "make-up" class meetings that they miss. It is not possible to learn how to think analytically and to write clearly and analytically unless students engage in those activities daily, in class! No electronic or in-absentia submissions of daily writing assignments will be accepted. In addition, all students will be randomly called on in class to discuss cases or other legal materials (See the discussion regarding Class Participation *supra*.). As noted clearly above, students are to be prepared on all the materials for all classes so that they can answer questions and follow the class discussion even if they are not called on for a particular question. Absences from class will be graded if the student is called on at that class session, just as students who are not prepared for class will be graded when called on to answer questions. That really means that students must attend class, prepared every day, and they are responsible for all the materials covered in the class throughout the

semester. The class participation grade can be seriously damaged by continual absences from class. (Attending class but not being able to discuss the cases for the day will also severely harm the class participation grade. Reading cases in advance is certainly required, but forgetting them or not reviewing those classes closely just before class each day, means virtually that the student is not prepared for class and cannot discuss the class.)

Class discussions are a vital part of this course. As a result, it is important to listen respectfully to what other students contribute when they are responding or commenting on the subject. Respect for your classmates is very important. Please remember to turn off all electronic devices before coming into class. Ringing devices are a terrible distraction and will result in the immediate end of class. If cell phone calls or texting is vital to your continued existence, then please do not attend class.

The **Written Assignments** will require students to complete a number of short, daily writing efforts throughout the semester. Students must complete and submit these at the outset of each, assigned class meeting. The form of these is indicated on the Writing Assignment handout for this class. These assignments have two purposes. These serve to develop the ability of students to write succinctly, directly, and clearly. In addition, the preparation of these assignments is to insure student preparation for class each day and to develop efficient writing skills on the part of all students. Students need to learn to write clearly, concisely, and quickly, as well as regularly. Students will prepare these written assignments as announced in class. The assignments will involve brief, typed documents. **LATE (or early) SUBMISSIONS WILL NOT BE ACCEPTED.** The value of these writing assignments for learning course material involves the **timely** preparation of materials for class discussion. Furthermore, these written briefs will form the basis of class notes, so it is important for students to make two copies of these materials, one which they can annotate and refer to during class, the other that they submit for evaluation at the beginning of class. It is important that students develop abilities to write clearly, concisely, directly, and analytically, throughout the semester. These assignments are to be submitted in **typed, single-spaced** form, with your name on each page of each assignment. Each submission should clearly include the name of the case and the citation to the case.

These written assignments should form the "notes" for this course. The class meetings will not provide a set of "lecture notes" in the traditional sense. Each case you read should be briefed, in writing, and those should be brought to class on the days they are scheduled to be discussed. Then they can be annotated in class with other items that develop during the class discussion. There should be no excuse for a student who cannot state the holding in a case or the reasoning the court used to reach and justify that holding. There is a separate handout on briefing cases for this course.

The first few days (say the first two weeks) of the course will be devoted to discussing general materials relating to the Supreme Court. After a brief discussion of the legal "context" in which the Supreme Court operates – these preliminary matters – the course will turn to the substantive

materials (the cases) in O'Brien.

The **Final Examination** in this course will be that, a “Final.” It is very unlikely to be an in-class or traditional Final Exam. Rather it will probably be a “take-home” requiring students to complete the work by the regular time and day of the scheduled Final Examination in December. Students should plan to receive the Exam during the last week of classes for the semester, and to submit the completed examination no later than the time the Registrar has scheduled for the Final Examination.

The following items are important for you to know about and to understand. These are statements provided by the University or the instructor. They relate to matters of general concern and that might affect you as a student generally or in this class during the term.

All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and students need to be aware of the Student Conduct Code. See [http://www.umt.edu/vpsa/policies/student\\_conduct.php](http://www.umt.edu/vpsa/policies/student_conduct.php). In connection with this course, the penalty for any student engaging in academic dishonesty, particularly plagiarism, will be a failing grade for the entire course.

Students with disabilities may request reasonable modifications by contacting me. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students. “Reasonable” means the University permits no fundamental alterations of academic standards or retroactive modifications. Contact Disability Services for further information and assistance. The [DSS](http://life.umt.edu/dss/Faculty/default.php) website: ([life.umt.edu/dss/Faculty/default.php](http://life.umt.edu/dss/Faculty/default.php)) or call 406.243.2243. You should inform the instructor at the outset of any needs for accommodation.

I recognize that a time of bereavement is very difficult for a student. As a result, students will be excused for funeral leave and given the opportunity to earn equivalent credit and to demonstrate evidence of meeting the learning outcomes for missed assignments or assessments in the event of the death of a member of the student’s family. I do not need any sort of “excuse” for this purpose. I will take your word for your need.

In the event of a major campus emergency, course requirements, deadlines and grading percentages are subject to changes that may be necessitated by a revised semester calendar or other circumstances beyond the instructor’s control.

I am committed to maintaining a community which recognizes and values the inherent worth and dignity of every person; fosters

tolerance, sensitivity, understanding, and mutual respect among its members; and encourages each individual to strive to reach his or her own potential. To achieve academic excellence, I will do everything I can to insure that we all respect and value diverse perspectives and backgrounds in order to promote the exchange of ideas, and enriches campus life.

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**N. B. doing legal research and findings court cases using legal citations is outlined systematically in O'Brien on pp. 1107-12. In addition, a separate document on reading and briefing cases will be distributed in class. You might find those materials helpful, at least at the beginning of the semester.**

**N.B. If a case is listed below in bold, with the citation, that means the case is NOT satisfactorily excerpted in the O'Brien case book and the student is expected to read the full opinion of the case in a law reporter.**

<b>Class and Learning</b>
<p><b>You are encouraged to discuss your course work and the subjects covered in class with the instructor outside of class. If you have difficulty understanding the readings or if you would like to talk about the cases, please talk with the instructor during the scheduled office hours or by appointment. If you have questions about your grade, please contact the instructor right away. DO NOT WAIT UNTIL THE END OF THE SEMESTER TO DISCUSS THE COURSE MATERIALS OR YOUR GRADE. PROBLEMS MAY BE EASILY RESOLVED IF THEY ARISE BUT OFTEN LATER IN THE TERM RESOLUTION MAY NOT BE POSSIBLE! DELAYING A DISCUSSION MAY PREVENT THE RESOLUTION OF THE QUESTION OR PROBLEM. That difficulty can be avoided by raising issues or problems when they arise, rather than waiting..</b></p>

Students should note that progress or improvement in the course throughout the semester is an important indicator of how much the student has learned and how well the student has learned the course material. Students should not be concerned if their early work (written and oral) is not “perfect.” This course involves a learning process that is labor-intensive, somewhat obscure with complicated and abstract materials, i.e., there is a steep “learning curve.” Students will learn a good deal during the semester, rather than to know a great deal at the beginning of the term. Learning this material is a cumulative process and immediate or complete understanding should not be expected. If students do not think they are “learning” during the semester, they should talk with the instructor about this concern. If students feel frustrated during the semester, it is quite all right to talk

about these concerns with the instructor. Students are encouraged to do that. “Frustration” can be expected in this course, because there are often NO CORRECT ANSWERS TO MANY OF THE QUESTIONS that are raised. That is rather abnormal for courses, but it is quite true of a course in Constitutional Law. Students should expect to engage in any number of informal discussions with the instructor **or with other class members** throughout the semester about the course material. Learning requires a substantial commitment on the part of the student, and students must be prepared to invest time and effort in this process.

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## Class Reading and Writing Assignments

These cases are the ones that will be read and discussed during the semester in PSCI 471. In addition to these as assigned readings, they are also the writing assignments for the term.

Students must complete and hand the written portion of these reading assignments at various class meetings as we progress through these cases. The likely pace for this involves three (3) cases per class period. However, the first weeks of the semester will involve no assigned reading or writing, and on other days, we will not get through three cases so you may only have to complete one or two assignments for the next class. The objective is for each student to be prepared with three cases ahead of where the discussion ended each day. Each writing assignment should be the student's own work, even if there are sources that provide such information. Please do not plagiarize another student's work or the material from any other source. However, discussions with others about the cases is encouraged before writing and submitting the assignments each class period. The purpose of these assignments is to insure student preparation for class each day **and** these will greatly help students develop efficient and better writing skills. It is essential that students develop the abilities to write clearly, concisely, directly, and analytically, throughout the semester and meet precise deadlines.

These assignments will be very brief documents. Please note that **EARLY** and **LATE** submissions **WILL NOT BE ACCEPTED**. Please do not submit electronic assignments either. Each case assignment should be submitted in typed, single-spaced form on a separate sheet of paper, with your name on each page, along with the name of the case and the case citation at the top of the page.

This list of cases may be supplemented on occasion Any additional readings will be announced in class.

### Federal/State Powers – O'Brien Ch. 7

The writing assignment for the following cases involve preparing a **HOLDING** for each of the cases listed below. [Remember a "holding" is a one-sentence statement that begins: "The case of xxx v. yyy, the Supreme Court held . . ."]

Note that these cases are not all in the O'Brien casebook Ch. 7. Those are indicated with a parenthetical indication of the chapter. So you may need to skip to another chapter of the casebook. You will need to read those cases that are bolded and contain the entire citation using another source. These are available on line using either Lexis-Nexis or another database source. You should find the textual discussion in O'Brien, Chapter 7 to be valuable as background for the cases that will be discussed here.

#### A. Judicial Federalism and Preemption

*Pennsylvania v. Nelson*, (Ch. 7)

***Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).**

[This is the first example of a case not included in the O'Brien casebook. You will need to read this from another source.]

*Martin v. Hunter's Lessee*, (Ch. 7)

*Cooper v. Aaron*, (Ch. 7)

## B. Commerce and State Regulation

*Cooley v. Bd. of Wardens of the Port of Philadelphia*, (Ch. 7)

*Southern Pacific Co. v. Arizona*, (Ch. 7)

***Philadelphia v. New Jersey*, 437 U.S. 617 (1978).**

*Maine v. Taylor*, (Ch. 7)

## C. Reserved and Not Reserved Powers

***National League of Cities v. Usery*, 426 U.S. 833 (1976).**

*Garcia v. San Antonio Metro. Transit Auth.* (Ch.7)

*Prinz v. United States*, (Ch. 7)

*Reno v. Condon*, (Ch. 6)

## The Judicial Power – O'Brien Ch. 1

The writing assignment for the following cases involve preparing a **Brief** for each of the cases listed below.

Although the Judiciary is outlined in the third article of the Constitution, this discussion of judicial power should precede the discussion of the powers of the Legislature and the Executive.

*Marbury v. Madison*, (Ch. 1)

*Baker v. Carr*, (Ch. 1)

***Nixon v. United States*, 506 U.S. 224 (1993)**

***Allen v. Wright*, 468 U.S. 737 (1984)**

***Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)**

***DeFunis v. Odegaard*, 416 U.S. 312 (1974)**

***United Public Workers v. Mitchell*, 330 U.S. 75 (1947)**

## The Legislative Power – O'Brien Ch. 5 & 6

These two chapters in O'Brien focus first on the structure and procedures of the Congress, and then on the substantive powers exercised by Congress under Article I of the Constitution. Some of those legislative powers were touched on above in connection with Commerce and state regulation.

*Powell v. McCormick*, (Ch. 5)

*United States Term Limits Inc. v. Thornton*, (Ch. 5)

***Gravel v. United States*, 408 U.S. 606 (1972)**

*Hutchinson v. Proxmire*, (Ch. 5)

***Watkins v. United States*, 354 U.S. 178 (1957)**

*Gibson v. Florida Legislative Investigation Committee*, (Ch. 5)

*Nixon v. United States*, (re-Read).

*McCulloch v. Maryland*, (Ch. 6)

*Gibbons v. Ogden*, (Ch. 6)

***Swift & Co. v. United States*, 196 U.S. 375 (1905)**

***The Shreveport Rate Case*, 234 U.S. 342 (1914)**

*United States v. E.C. Knight Co.*, (Ch. 6)

*Hammer v. Dagenhart*, (Ch. 6)

*NLRB v. Jones & Laughlin Steel Corp.* (Ch. 6)

*United States v. Darby Lumber Co.*, (Ch. 6)

*Wickard v. Filburn*, (Ch. 6)

*Heart of Atlanta Motel Inc. v. United States*, (Ch. 6)

*Katzenbach v. McClung*, (Ch. 6)

Note that these two opinions are combined even though they involve different cases and different factual settings. Prepare two holdings for these two cases.

*United States v. Lopez*, (Ch. 6)

*Reno v. Condon* (re-Read).

***National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012)** [Read

only Parts III-A, III-B, and III-C of Chief Justice Robert's opinion and all of Justice Ginsburg's opinion.] Note that this citation is to the Supreme Court Reporter since the opinion has not yet been placed in the U.S. reports.

### **The Executive Power – O'Brien Ch. 3 & 4**

The writing assignment for the following cases involve preparing a **PARAGRAPH** for each of the cases listed below. That should include the issue, the holding and the reasoning for the holding. Paragraphs should not be more than one-half page, single spaced.

These materials will be taken out of order. That is, the materials will not be treated in the same order as presented in the O'Brien casebook.

*Youngstown Sheet & Tube v. Sawyer*, (Ch. 4)

*Missouri v. Holland*, (Ch. 3)

*Medellin v. Texas*, (Ch. 3)

*Myers v. United States*, (Ch. 4)

*Humphreys Executor v. United States*, (Ch. 4)

*Morrison v. Olson*, (Ch. 4)

***New Process Steel v. NLRB*, 560 U.S. 674 (2010)**  
***NLRB v. Canning*, 134 S.Ct. 2550 (2014)**

*United States v. Curtiss-Wright Export Corp.*, (Ch. 3)  
*Dames & Moore v. Regan*, (Ch. 3)

*The Prize Cases*, (Ch. 3) [Read only]  
*Ex Parte Milligan*, (Ch. 3)  
*Korematsu v. University States*, (Ch. 3)  
*Rasul v. Bush*, (Ch. 3)  
*Boumediene v. Bush*, (Ch. 3)

*Schechter Poultry Corp. v. United States*, (Ch. 4)  
***Yakus v. United States*, 321 US 414 (1944)**  
*Industrial Union Dept. AFL-CIO v. American Petroleum Inst.*, (Ch. 4) [Read only,  
Justice Rehnquist's concurring opinion]  
***Whitman v. American Trucking Ass'n.*, 531 US 457 (2001)**

*Immigration and Naturalization Service v. Chadha*, (Ch. 4)  
*Clinton v. City of New York*, (Ch. 4)

*United States v. Nixon*, (Ch. 4)  
*Clinton v. Jones*, (Ch. 4)