

PSCI 471

American Constitutional Law

Fall 2017

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Office Hours:
M 12:00 – 2:00
WF 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' both written and oral communication skills, 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, *Storm Center: The Supreme Court in American Politics*, 11th ed. (Norton, 2017). Paperback

David O'Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability*, 10th ed. Vol. I (Norton, 2017). Paperback

The *Storm Center* is a well written, readable outline of the Supreme Court, its operation, and its place in American politics. It is an introduction to the Supreme Court and those students who have only a passing familiarity with the Court should read this during the first two weeks of the semester. This book is available at the University Bookstore and should be purchased at the outset of the semester.

This *Constitutional Law and Politics* casebook is also available at the University Bookstore and you should purchase a copy right away. Assignments from this will occur later than the first week of class or sometime during the second week. However, students could (should) begin working through chapter 1 at the outset in order to become familiar with the casebook materials. Stay tuned.

These course materials are required for this course and 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 as they are assigned.

Other (Recommended) Materials These include a variety of readings that provide additional (extensive) material 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 each period of our history. The two volumes that are "boxed" are presumably 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% |
| Total | 100% |

Grades for this course will be assigned using the traditional letter grading system which ranges from grades of A down to F. The final, 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 certain practices on the part of students:

- (1) continual, advanced preparation of all the assignments (both reading and writing assignments),
- (2) regular and sustained attendance in class, 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 requires 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, "reading" 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) earlier in the course, throughout the semester. Students are expected to recall these materials when they are relevant to class discussion. Students who cannot remember what they have already learned, have not learned that material adequately. 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 Absences are NOT

excused, with the exception of the bereavement exception outlined below. 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 get any 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 and out-of-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 during 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 cases closely just before class each day, means virtually that the student is not prepared for class and cannot discuss a case.)

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.**

It is strongly recommended that students form study groups early in the semester, and use those regularly and frequently throughout the term. In such a group, students should expect to discuss the assigned material, raise questions about what they do not understand, and explain their understanding of the materials to each other. Functioning study groups can be invaluable for students. While many students prefer to study alone, that is not conducive to mastering these kinds of materials. Such a study group can involve two students or more. The more students in a group, the more views and broader discussion there will be.

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 session. The form of these is indicated on the Writing Assignment handout for this class. These assignments have several purposes:

- (1) to develop student ability of to write succinctly, directly, and clearly.
- (2) to insure student preparation for class each day.
- (3) to develop efficient writing skills on the part of 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.

The value of these writing assignments for learning course material involves the **timely** preparation of materials for class discussion. As a result, **LATE (or early) SUBMISSIONS WILL NOT BE ACCEPTED**. Writing assignments will only be accepted and graded when they are appropriate to that day's 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.

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(s) and the citation to each case. As assigned, you may put more than one case assignment on a page.

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. These will be based on the **STORM CENTER** by O'Brien. After that 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 sometime before the Final Examination period. The completed examination will be due no later than the time the Registrar has scheduled for the Final Examination. The Final Examination in this course is set for Wednesday December 20th at 8:00 AM.

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| The following items are important for you to know about and to understand. These are statements provided by the University or the |
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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. 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 website: (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. Some evidence for the absence is required. I am not sympathetic to repeated family emergencies that "require" students to be absent from class.

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, we must all respect and value diverse perspectives and backgrounds in order to promote the exchange of ideas, and enrich campus life.

N. B. doing legal research and findings court cases using legal citations is outlined systematically in the O'Brien casebook on pp. 1035-36. 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.

| Class and Learning |
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| <p>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 AND DIFFCULTIES MAY BE EASILY RESOLVED WHEN 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.</p> |
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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 may be out of the ordinary given prior experience with classes. However, in this course, early work is very likely to be well short of good or very good. 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. That is material they DO NOT know 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. Learning requires a substantial commitment on the part of the student, and students must be prepared to invest time and effort in this process.
