

Constitutional Law:
The Separation of Powers and Governmental Institutions
Political Science 353
Fall 2009

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Office Hours: TU/TH 9:15-10:15 AM

353 Constitutional Law

3 hours. Selected constitutional provisions and principles as they developed through Supreme Court interpretation. Major attention given to powers and practices of, and interactions among governmental institutions. *Prerequisite(s)*: POLS 101 or consent of the instructor. **Meets TU/TH 8:00-9:15 AM**

I. Introductory Statement

The recent nomination of Justice Sotomayor to the U.S. Supreme Court has generated much discussion about the role of the judiciary in the American political system. Many pundits argue that the law is a discipline separate from politics and to intermix the two corrupts both the judiciary and the rule of law. In fact, from the birth of the Constitution to the present day, the courts have been firmly rooted in the American political process.

This course examines the role of the courts and the law in the American political system. The courts are, and always have been, major players within the *political* process. As Alexis de Tocqueville noted as early as the 1830s, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." With a central focus on the Supreme Court, this course explores the role the judiciary plays in resolving major problems and conflicts in constitutional law, particularly the nature and operation of separation of powers and the federal system.

The following content areas will be given special consideration: (1) the politics of Supreme Court nominations; (2) modes of constitutional interpretation; (3) the political, social, and economic impact of judicial policies and decisions; (4) the nature, function, capacity, and limitations of the courts and the legal system in dealing with and resolving policy issues and problems; (5) the role the judiciary plays in policy conflict management and resolution; and (6) the struggles for power between the three branches of government, Congress, the Presidency, and the judiciary.

II. Course Format

The course will be conducted in an *informal* lecture-discussion format that *strongly* encourages student input and critical analysis of issues. Class attendance and student participation in class discussion are absolutely essential to adequately digest and assimilate the course content to obtain functional literacy in matters relevant to the American judiciary and participatory citizenship. Unlike many countries, the United States holds fealty not to a royal lineage but to a set of ideas and principles. Without a general populace conversant in these historical traditions and constitutional principles there is a propensity for gradual erosion of these cherished ideals. Therefore, it is essential that students come to class prepared and ready to participate in the political discourse. It is only through meaningful participation that the intellectual assimilation and accommodation of concepts occurs. Because class participation is so important, 20 percent of your grade will be based on class attendance, participation, case briefs, and in-class quizzes.

III. Readings and Materials

1. *Constitutional Law and Politics: Struggles for Power and Governmental Accountability, Seventh Edition*, David M. O'Brien (Vol. I, W.W. Norton & Co., 2008)
2. Select One of the following: *Judicious Choices: The Politics of Supreme Court Confirmations*, Mark Silverstein (W.W. Norton & Co., 2007); or *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*, Artemus Ward and David L. Weiden (New York University Press, 2006); or *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court*, Edward Lazurus (Time Books, 1998); or *The Nine: Inside the Secret World of the Supreme Court*, Jeffrey Toobin (Doubleday, 2007)
3. The following web sites can be helpful in locating cases:
<http://www.supremecourtus.gov/>
<http://www.uscplus.com/>
<http://www.findlaw.com/>
<http://www.supct.law.cornell.edu/supct/index.php>

IV. Computation of Course Grade

Class Attendance/Participation/Briefs	20%
Exam I	20%
Exam II	20%
Exam III (Final)	20%
Book Review	20%

Note on cases and briefs: All cases to be briefed are to be done using O'Brien's format described on pp. 1083-1086. Briefed cases are marked in **bold type** and are due on the day they appear in the weekly course schedule (see below section). Cases that are marked by an asterisk (*) do not have to be briefed but will be discussed in class and may also be included in the exams.

V. Weekly Course Schedule

Week One:

08/25: Introduction to the course

Lecture: Structure of American court system, political ideology and make-up of the U.S. Supreme Court (USSC), courts as political actors and policy-making institutions

08/27: Fundamentals of Constitutional Law

Read: Declaration of Independence (online resource)

Read: Constitution, O'Brien, pp. 1-21

Lecture: jurisdiction, granting cert and rule of four, statutory interpretation, internal and external limits on the courts, judicial selection process, stare decisis, standing, and other relevant legal terms and concepts

Week Two:

09/01: Fundamentals of Constitutional Law.

Read: "How to Brief a Case," O'Brien, pp. 1083-1086

Lecture: Definition, types, and function of law, judges as policy-makers, role of USSC in American politics, Judicial activism vs. judicial restraint, strict constructionism vs. non-interpretism, mechanical vs. behavioral jurisprudence, politics of the nomination process

09/03: History of the Early United States Supreme Court

Film: PBS: *One Nation Under Law*

Discussion

Week Three:

09/08: Judicial Review and Constitutional Interpretation

Read: "Establishing and Contesting the Power of Judicial Review," and "The Politics of Constitutional Interpretation," O'Brien, pp. 23-101

* *Hylton v. U.S.* (1796)

Brief: *Marbury v. Madison* (1803) O'Brien p. 45

* *Eakin v. Raub* (1825) [Gibson's dissent]

09/10: Law and Politics in the USSC: Jurisdiction and Decision-Making Process

Read: "Jurisdiction and Justiciable Controversies," O'Brien, pp. 102-173

Jurisdiction

* *Ex Parte McCordle* (1869)

Adverseness and Advisory Opinions

Stare Decisis

Standing to sue

* *Frothingham v. Mellon* (1923)

* *Flast v. Cohen* (1968)

* *Lujan v. Defenders of Wildlife* (1992)

* *Hein v. Freedom from Religion Foundation, Inc.* (2007)

Ripeness and Mootness

Political Questions

* *Luther v. Borden* (1849)

* *Colegrove v. Green* (1946)

Brief: *Baker v. Carr* (1962), pp. 150-162

* *Goldwater v. Carter* (1979)

Stare Decisis

* *Roe v. Wade* (1973)

Summarily Decided Cases

Week Four:

09/15: Internal Workings of the USSC

Read: Chapter 2, Sections B through I, O'Brien, pp. 174-231

Stare Decisis

* *Roe v. Wade* (1973)

Summarily Decided Cases

Granting Cert. and the Rule of Four

Oral Argument

Conference Deliberations

Post-Conference Writing and Circulation of Opinions

Impact of USSC Opinions: Compliance and Implementation

* *Linkletter v. Walker* (1965)

09/17: Presidential Power, the Rule of Law, and Foreign Affairs

Read: "Office and Powers: The Two Presidencies," and "As Commander in Chief and in Foreign Affairs," O'Brien, pp. 232-248

As Commander in Chief and in Foreign Affairs

Brief: *United States v. Curtiss-Wright Corporation* (1936), pp. 241-243

* *Dames & Moore v. Regan* (1981)

Week Five:

09/22: Presidential Power, the Rule of Law, and Foreign Affairs

The Treaty-Making Power and Executive Independence

Read: "The Treaty-Making Power and Executive Independence," and "War-Making and Emergency Powers," O'Brien, pp. 249-337

Brief: *Missouri v. Holland* (1920), pp. 253-256

* *United States v. Belmont* (1937)

Brief: *United States v. Pink* (1942), pp. 256-258

Brief: *United States v. Alvarez-Machain* (1992), pp. 260-264

09/24: Presidential Power, the Rule of Law, and Foreign Affairs

War-Making and Emergency Powers

Read: War Powers Resolution, pp. 325-330

* *The Prize Cases* (1863)

Brief: *Ex parte Milligan* (1866), pp. 279-285

* *Korematsu v. United States* (1944)

Brief: *Rasul v. Bush* (2004), pp. 295-300

Brief: *Hamdi v. Rumsfeld* (2004), pp. 300-313

Week Six:

09/29: Review for Exam I

10/01: EXAM I

Week Seven:

10/06: The President as Chief Executive in Domestic Affairs

National Security and Inherent and Emergency Powers

Read: “National Security and Inherent and Emergency Powers,” and Appointment and Removal Powers,” O’Brien, pp. 338-415

Brief: *Youngstown Sheet and Tube Co. v. Sawyer* (1952), pp. 344-359

Brief: *New York Times Co. v. United States* (1971), pp. 359-368

Appointment and Removal Powers

* *Myers v. United States* (1926)

Brief: *Bowshar v. Synar* (1986), pp. 389-398

* *Morrison v. Olson* (1988)

10/08: The President as Chief Executive in Domestic Affairs

Legislative Powers in the Administrative State

Read: “Legislative Powers in the Administrative State,” O’Brien, pp. 416-453

Read: “Presidential Signing Statements and Legislative Powers,” pp. 423-424

* *Schechter Poultry Corporation v. United States* (1935)

* *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (1980)

* *Immigration and Naturalization Service v. Chadha* (1983)

Brief: *Clinton v. City of New York* (1998), pp. 442-452

Week Eight:

10/13: The President as Chief Executive in Domestic Affairs

Accountability and Immunities

Read: “Accountability and Immunities,” O’Brien, pp. 453-476

Read: Articles of Impeachment against Richard M. Nixon, pp. 468-472

Read: Articles of Impeachment against William Jefferson Clinton, pp. 477-480

Brief: *United States v. Nixon (1974)*, pp. 461-468

Brief: *Clinton v. Jones (1997)*, pp. 472-476

10/15: Congress: Membership, Immunities, and Investigatory Powers

Membership and Immunities

Read: “Membership and Immunities,” and “Investigatory, Contempt, and Impeachment Powers,” O’Brien, pp. 482-541

* *Powell v. McCormack (1969)*

Brief: *U.S. Term Limits, Inc. v. Thornton (1995)*, pp. 494-501

* *Gravel v. United States (1972)*

Investigatory, Contempt, and Impeachment Powers

Brief: *Watkins v. United States (1957)*, pp. 516-524

* *Barenblatt v. United States (1959)*

* *Gibson v. Florida Legislative Investigation Committee (1963)*

* *Walter L. Nixon v. United States (1993)*

Week Nine:

10/23: Congress: Legislative, Taxing, and Spending Powers

The Classic View of Congress’s Legislative Powers

Read: Chapter 6 Sections A and B, O’Brien, pp. 542-584

Brief: *McCulloch v. Maryland (1819)*, pp. 553-563

* *Gibbons v. Ogden (1824)*

From Legal Formalism to the New Deal Crisis

* *United States v E.C. Knight Company (1895)*

Brief: *Hammer v. Dagenhart (1918)*, pp. 581-585

10/25: Congress: Legislative, Taxing, and Spending Powers

Read: “From New Deal Crisis to the Administrative State,” O’Brien, pp. 585-666

From New Deal Crisis to the Administrative State

Brief: *National Labor Relations Board v. Jones & Laughlin Steel Corporation (1937)*, pp. 591-597

Brief: *United States v. Darby* (1941), pp. 598-601

* *Wickard v. Filburn* (1941)

* *Heart of Atlanta Motel, Inc. v. United States* (1964) and *Katzenbach v. McClung* (1964)

* *United States v. Lopez* (1995)

* *United States v. Morrison* (2000)

Week Ten:

10/20: Congress: Legislative, Taxing, and Spending Powers

Taxing and Spending Powers

Read: “Taxing and Spending Powers,” O’Brien, pp. 667-680

Brief: *Steward Machine Co. v. Davis* (1937), pp. 671- 675

* *United States v. Kahriger* (1953)

Brief: *South Dakota v. Dole* (1987), pp. 677-680

10/22: States and American Federalism

States’ Power over Commerce and Regulation

Read: “States’ Power over Commerce and Regulation,” O’Brien, pp. 689-727

* *Cooley v. Board of Wardens of the Port of Philadelphia* (1852)

Brief: *Southern Pacific Co. v. Arizona* (1945), pp. 703-706

* *Pennsylvania v. Nelson* (1956)

Brief: *Maine v. Taylor* (1986), pp. 709-711

Week Eleven:

10/27: States and American Federalism

The Tenth and Eleventh Amendments and the States

Read: Chapter 7 Sections B and C, O’Brien, pp. 728-820

Brief: *Garcia v. San Antonio Metropolitan Transit Authority* (1985), pp. 739-52

* *New York v. United States* (1992)

* *Printz v. United States* and *Mack v. United States* (1997)

* *Seminole Tribe of Florida v. Florida* (1996)

* *Nevada Department of Human Resources v. Hibbs* (2003)

10/29: States and American Federalism

Judicial Federalism

Read: “State Courts and State Constitutional Law,” O’Brien, pp. 820-832

Brief: *Martin v. Hunter’s Lessee* (1816), pp. 801-805

* *Cooper v. Aaron* (1958)

* *Younger v. Harris* (1971)

* *Withrow v. Williams* (1993)

State Courts and State Constitutional Law

* *Michigan v. Long* (1983)

* *People v. P.J. Video, Inc.* (1986)

Week Twelve:

11/03: Representative Government, Rights, and Electoral Politics

Read: “Representative Government and the Franchise,” O’Brien, pp. 833-855

Skim: Chapter 8 Section B and C, O’Brien, pp. 855-987

Brief: *South Carolina v. Katzenbach* (1966), pp. 844-850

* *Buckley v. Valeo* (1976)

* *Shaw v. Reno* (1993)

Brief: *Bush v. Gore* (2000), pp. 915-925

11/05: Economic Rights and American Capitalism

Read: “The Contract Clause and Vested Interests in Property,” O’Brien, pp. 988-1019

Brief: *Fletcher v. Peck* (1810), pp. 994-997

* *Trustees of Dartmouth College v. Woodward* (1819)

* *Charles River Co. v. Warren Bridge Co.* (1837)

* *Homebuilders & Loan Association v. Blaisdell* (1934)

Brief: *City of El Paso v. Simmons* (1965), pp. 1014-1016

* *United States Trust Co. of New York v. State of New Jersey* (1977)

Week Thirteen:

11/10: Economic Rights and American Capitalism

The Development and Demise of a “Liberty of Contract”

Read: “The Development and Demise of a ‘Liberty of Contract,’” O’Brien, pp. 1020-1054

* The Slaughter House Cases (1873)

* *Munn v. Illinois* (1877)

Brief: *Lochner v. New York* (1905), pp. 1040-1046

* *Muller v. Oregon* (1908)

* *West Coast Hotel Co. v. Parrish* (1937)

11/12: Economic Rights and American Capitalism

The “Takings Clause” and Just Compensation

Read: “The ‘Takings Clause’ and Just Compensation,” O’Brien, pp. 1054-1079

* *Hawaii Housing Authority v. Midkiff* (1984)

Brief: *Lucas v. South Carolina Coastal Council* (1992), pp. 1062-1068

Brief: *Kelo v. New London, Connecticut* (2005), pp. 1068-1077

Week Fourteen:

11/17: Review for Exam II

11/19: **EXAM II**

Week Fifteen:

11/24: Film: PBS: *The Rehnquist Revolution*

11/26: **NO CLASS: Thanksgiving**

Week Sixteen:

12/01: Book Review Lecture/Discussion

12/03: **EXAM III**