

POLITICAL SCIENCE 300: THE AMERICAN CONSTITUTION

Washington State University Vancouver
Department of Political Science
Program in Public Affairs
Fall, 2010

Class: Monday/Wednesday: 1:25-2:40
Location: Vancouver Library Building 201

Instructor: Dr. C.N. Long
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Office Hours: Monday/Wednesday 3:00-4:30, or by appointment.
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Please contact the Liberal Arts main desk (546-9441) for information regarding official school closures.

University Disability Accommodation Policy: Reasonable accommodations are available for students who have a documented disability which must be accommodated in order to fully participate in class. Please notify me during the first week of class of any accommodation needed for the course. All accommodations must be approved through Disability Services located in Student Services (360) 546-9155. Because accommodations may take time to implement, it is critical that you contact Disability Services as soon as possible. Late notification may mean that the requested accommodation(s) may not be available.

COURSE DESCRIPTION:

This course is designed to introduce students to the American Constitution through an examination of Supreme Court decisions and the political, historical, and social environment that influences the shaping of constitutional values. This is not solely a course about the Supreme Court and its interpretation of the Constitution; rather, it is a study of how the meaning of the Constitution develops and evolves through a dynamic, interactive conversation between the three political branches, the states, social and political organizations and the people.

The focus of this course will be on the complex and pervasive interactions among the government and the public in the shaping of constitutional doctrine. The course is divided into five main parts. In part one you are introduced to constitutional politics. We will discuss the historical circumstances that led to ratification of the Constitution, major constitutional principles and methods of constitutional interpretation. You will also learn about the Supreme Court's power of judicial review, the mechanics of Supreme Court decision making, and the compliance, implementation and impact of Supreme Court decisions. In part two we move to a detailed examination of the second distributive article of the Constitution, the executive branch. In this section we examine the constitutional and legal structure of presidential power, including the power of the president as commander-in-chief, diplomat-in-chief and chief executive. We will pay particular attention to the growth of presidential authority in the 21st century as part of the country's "War on Terror" and the inability of Congress to check this authority. Part three details the second distributive article, the legislative branch. We begin with a discussion of Congress members' constitutional authority under the speech and debate clause, their power to investigate,

and their impeachment and removal authority, and then move to a historical analysis of sections of the Constitution that have led to an expansion of congressional authority; in particular, the necessary and proper clause and the commerce clause. In part four we examine federalism, one of the most dynamic areas of constitutional law today. After an introduction to the basic principles of federalism, we review the resurrection of the Tenth and Eleventh Amendments and critically analyze the role of the federal courts vis a vis state courts. This section ends with a discussion of “new judicial federalism” which illustrates how state courts are working to protect individual rights and liberties under state constitutions. We end with part five, which focuses upon property rights, including the evolution of contract clause jurisprudence and economic and substantive due process and government taking of private property.

The U.S. Constitution is the oldest written constitution, and it has provided the structure and ground rules for our politics for over two centuries. Federal, state and local governments and their various branches, as well as government employees, must conform their actions, policies and laws to the requirements provided in the Constitution. In this sense, it ‘constitutes’ the American political system. And, its lasting legacy is that it grants, defines, divides, and limits government’s power, while allowing the flexibility necessary for government to reflect the needs of a growing nation.

As a blueprint for our government, the constitutional text is at times precise, but more frequently, its provisions are vague and ambiguous. This ambiguity inevitably leads to disputes over the “true” meaning of the document. When this occurs, it is our tendency to look to the U.S. Supreme Court for direction. This is because the judiciary, and in particular, justices on the Supreme Court, play a leading role in constitutional interpretation through the power of judicial review. Therefore, a significant portion of this course involves an examination of Supreme Court decisions.

However, to merely study constitutional law in a doctrinal fashion gives a misleading impression, as judicial scholar Martin Shapiro once noted, of a “judicial Goliath marching through American history waving the huge club of judicial review.” This power of the Supreme Court, in reality, is much more subtle and fragile, and often influences, and is influenced by, the broader historical and political context within which it takes place. In order to capture the effect of these various influences, this course looks beyond the traditional case law approach to place the Supreme Court within the larger historical context out of which cases and controversies arise. The Supreme Court does not operate in a vacuum, and politics both within and outside of the Court significantly impact the individual justices and the Court as an institution when it takes on a particular constitutional issue.

I have two goals for students in this course. First, I hope you will learn to analyze and assess how constitutional doctrine develops through the discussion that takes place between the three political branches, the states, and the people. Second, I hope that as students of Supreme Court decision making, you will, through an active engagement with these materials, learn to interpret the Constitution yourself. By understanding the environment that shapes constitutional values, and the manner in which the Court addresses cases and controversies, you will hone your analytical and critical thinking skills and learn to engage in legal reasoning and constitutional interpretation. You will articulate these skills each day we meet in class. Because the focus will be classroom discussion, you should spend the appropriate amount of time preparing for class, and should also pay close attention to the comments and observations of your colleagues. As citizens of the United States we all have a *responsibility*, along with our elected representatives, to engage in the interpretation of the Constitution.

The main text for the class is *American Constitutional Law and Politics: Struggles for Power and Governmental Accountability* by David M. O'Brien. This book provides carefully edited excerpts of major Supreme Court decisions. It also includes commentary by academics and others as well as reading selections on activity by the legislative and executive branches of government and the states which frames these constitutional questions. Each chapter begins with an introductory essay which places the Supreme Court decisions in historical, political, and legal context, thus helping students more fully understand how this environment refines the meaning of the Constitution.

Additionally, I have assigned *The Slaughterhouse Cases: Regulation, Reconstruction and the 14th Amendment* by Ronald Labbie and Jonathan Lurie. This book is a detailed case study of a landmark Supreme Court decision. Students will write a critical thinking paper on this book at the end of the class.

This is the first half of a year-long course on constitutional analysis, and can be taken along with, or even after PS 402: Civil Liberties. Although it is not required, it is assumed that students enrolled in the course have a basic understanding of American politics (e.g. an American Government course or the equivalent). If you do not, please see me and I can recommend additional reading that will assist you in your preparation for this course.

COURSE TEXTBOOKS:

The following two texts are required course readings and are on sale at the Student Bookstore located on campus. You can also purchase both books via common sites on the web. However, be sure to get the latest edition of the O'Brien book, which contains important updates from previous editions. Other updates may be handed out in class.

As you will notice, there isn't a significant amount of reading for this class in terms of pages. However, the complexity of this material cannot be underestimated. Supreme Court decisions include legalistic language that may be unfamiliar, and the rulings are often written in a confusing fashion. Moreover, you will be reading edited cases, which require even greater attention. You may have to go over the reading several times before you fully understand it. Consequently, you should factor this into the time allocated for class preparation.

You are expected to complete the assigned readings prior to class, and to come to class prepared to discuss the material.

There are two main texts for this course:

O'Brien, David M. *Constitutional Law and Politics: Struggles for Power and Government Accountability Vol. I, 7th Edition* (W.W. Norton and Co., 2008).

Labbie, Ronald M. and Jonathan Lurie. *The Slaughterhouse Cases: Regulation, Reconstruction and the 14th Amendment* (Lawrence, KS: University Press of Kansas, 2005).

Highly Recommended: O'Brien, David. *Storm Center: The Supreme Court in American Politics, 7th ed.* (New York, NY: W.W. Norton & Co., 2008).

Additional reading may be placed on reserve in the library or will be handed out in class. You will be notified in advance when these readings are assigned.

COURSE REQUIREMENTS:

All students taking the course for credit are responsible for completing the following **five** assignments in order to successfully pass the class.

1. Class Participation (10 percent)

Students are expected to attend regularly and contribute to class discussions. You should not register for the course unless you are prepared to participate.

The success of this class will, to a certain degree, be dependent on class discussions. I fully expect students to carefully examine the assigned readings and to come to class prepared. This class is taught in a lecture and discussion format. At times, I use the Socratic method, where I call on students to specifically answer questions about the assigned readings. Merely showing up for class is not enough; you should be prepared to engage in a conversation about the course material. Your level of preparation will factor significantly into your grade. *Quality, not quantity of participation is key.*

Class participation will be evaluated by students' overall attendance (taken randomly) and their responses to specific "cold call" questions posed by the instructor during the course of the term.

2. Legal Briefs (15 percent)

Students will be responsible for writing two legal briefs on two Supreme Court cases throughout the term. (A legal brief is a short summary of a Court decision organized in terms of the facts, procedural history, opinion, etc.) In addition to its contribution to your overall grade in the course, learning to brief a Supreme Court case will significantly aid you in your preparation for class discussion and the exams. Although you will only be graded on two written briefs, it is strongly suggested that each student take the time to brief each of the cases studied this term. The briefs allow you to focus on the most important aspects of the assigned case and will assist you in mapping the doctrinal developments in constitutional law. They will also provide you with useful study guides for the midterm and final exam. More extensive instructions will be forthcoming.

3. Midterm Examination (20 percent)

There will be a in-class midterm examination early into the course. The midterm will address the material covered in Part I, Constitutional Politics and Part II, The Executive Branch.

Exam Format: The midterm exam will be divided into two sections; key terms & identifications and essay questions. Exam questions will draw equally from material from lectures, readings and class discussions. You cannot use your text or notes during the exam. You will be provided with an extensive study guide at least one week prior to the exam to assist you in your preparation.

4. Short Critical Thinking Essay (20 percent)

Each student will write a 6-8 page critical thinking essay on Ronald Labbie and Jonathan Lurie's book, *The Slaughterhouse Cases: Regulation, Reconstruction and the 14th Amendment*. Your critique should identify the author's major themes and arguments, as well as analyze the overall persuasiveness and clarity of the book. This is neither a research paper nor a detailed summary of the book. Instead, I hope you will read your chosen book with a critical eye, and reflect upon the

author's thesis and how it relates to what we have learned in class. More extensive instructions will be forthcoming.

5. Final Exam (35 percent)

There will be a take-home final examination at the end of the course. The exam will be handed out on the final day of class. You will have five days to complete the exam.

Exam Format: The purpose of the exam is to provide you with the opportunity to engage in legal reasoning and constitutional interpretation. The exam will include, but will not be limited to, hypothetical fact situations. You may be required to write brief majority and dissenting Supreme Court opinions in response to hypothetical cases or controversies that result from these fact situations. Several of the questions may also direct you to compose possible "responses" to these Court decisions by the political branches of government, or ask you to write up the case or controversy which led to the constitutional challenge. In order to perform successfully on this exam, you must have a good understanding of the Supreme Court decisions discussed in class, including how the Court framed and answered the constitutional question(s), what definitions and tests were used by the Court to aid it in its decision, and the Court's justification or reasoning for the ruling. You must also have a keen understanding of how political, social and historical forces shape the formation of constitutional values, and in particular, how the executive and legislative branches of government respond to Supreme Court decisions.

Assignment Protocol:

Students must complete each of the five assignments for this course. Failure to complete any assignment will result in a failing course grade.

Assignments must be typed, spell-checked, and use proper grammar. You are encouraged to utilize the WSUV writing lab for assistance with your legal briefs and critical thinking essay. You cannot use the writing lab for assistance on the final exam.

Another option is to hand in a rough draft to the Instructor. Rough drafts are encouraged. If you select this option, you must hand in the assignment at least one week before the due date for legal briefs and at least ten days in advance for the critical thinking paper. It will be returned with extensive comments and recommendations for improvement.

All assignments are due at the beginning of class on the due date assigned in the syllabus. I know email submissions are convenient for some, but you must hand in the assignment to me personally. This ensures I not only receive it, but that I receive it free of viruses or the "I sent it to you as an attachment, didn't you get it" malady so common on due dates.

There will not be extra credit in this course.

Grades are not negotiable unless there is a mathematical error on my part.

A note about absences from exams, and late assignments: My policy on this issue is strict and unyielding. No excuse without documentation that your absence has been excused, or that there are exigent circumstances that make your presence impossible. You must contact me directly within 24 hours after the scheduled due date, otherwise you will forfeit all opportunity to make up the assignment. Incomplete grades and the acceptance of late assignments (which will carry a

substantial penalty) are given at the discretion of the Instructor and are not automatic. Please take note of the due dates of the written assignments and exams to ensure that you have not inadvertently fallen into a situation where you have several assignments due at one time.

A note about academic integrity: When a student enrolls in Washington State University, the student assumes an obligation to pursue academic endeavors in a manner consistent with the standards of academic integrity adopted by the University. To maintain the academic integrity of the community, the University cannot tolerate acts of academic dishonesty. Academic dishonesty includes cheating, falsification, fabrication, multiple submission, plagiarism, abuse of academic materials, complicity or misconduct in research.

I have a zero tolerance policy regarding academic integrity violations. The penalty for any offense, at any stage in the course, on any assignment, is an F grade for the course. Additionally, you will be reported to the Office of Student Services as dictated by University policy. Consult the WSU Student Handbook for further details.

The following breakdown is used for computation of final grades:

100-98 = A+	88-89 = B+	78--79 = C+	68--69 = D+
93--97 = A	83-87 = B	73--77 = C	63--67 = D
90--92 = A –	80-82 = B-	70--72 = C-	62--60 = D-

Student Protocol:

This course syllabus should be considered a “contract” between the student and the Professor. If you choose to continue with this course, this assumes that you understand my expectations and the course requirements. You are responsible for your own education.

Because this course involves a significant amount of class discussion in both the small group and lecture format, you will be interacting a great deal with your peers. I fully expect students to behave in a professional manner -- you should be willing to engage in thoughtful discussions, you should welcome participation from your peers, and you should take care to respect other students’ contributions in class. Common courtesy and professionalism are expected.

In order to facilitate a safe and positive learning environment, this passage addresses classroom management:

Membership in the academic community places a special obligation on all members to preserve an atmosphere conducive to a safe and positive learning environment. Part of that obligation implies the responsibility of each member of the WSUV community to maintain an environment in which the behavior of any individual is not disruptive. It is the responsibility of each student to behave in a manner that does not interrupt or disrupt the delivery of education by faculty members or the receipt of education by students, within or outside the classroom. *The determination of whether such interruption or disruption has occurred will be made by the faculty member at the time the behavior occurs.* It is the responsibility of each faculty member to maintain and enforce the standards of behavior acceptable to preserving an atmosphere for teaching and learning in accordance with University regulations and the course syllabus.

At a minimum, students will be warned if their behavior is evaluated by the faculty member as disruptive. Serious disruptions, as determined by the faculty member, may result in immediate removal of the student from the instructional environment. Significant and/or continued

violations may result in an administrative withdrawal from the class. Additional responses by the faculty member to disruptive behavior may include a range of actions, from discussing the behavior with the student, to referral to the appropriate academic unit and/or the Office of Student Services for administrative review, with a view to implement corrective action up to and including suspension or expulsion.

A note about recent technological developments in the 21st century: Make sure your cell phone is turned OFF during class. Even phones on “vibrate” are distracting. If there is an impending emergency which requires you to have your phone on, please discuss this with me prior to class. Otherwise, if your phone rings or vibrates, I will assume the call is for me and will answer it. If you use a lap top, do so judiciously. They are not to be used for answering email, playing games or web surfing. The purpose of class is to listen and participate in a 75 minute class twice a week. The rest can wait.

COURSE OUTLINE AND READING ASSIGNMENTS

PART ONE: AN INTRODUCTION TO CONSTITUTIONAL POLITICS

August 23: Course Overview and Introductory Lecture
*Review of Syllabi and Expectations
*The Setting: The Revolutionary Background
*The Problems with the Articles of Confederation
*An Introduction to the Constitution

Reading: O’Brien, chapter 1, 1-23

August 25: The Supreme Court and Judicial Review
**Marbury v. Madison* (1803)
*Judicial Review in a Constitutional Democracy
*Coordinate Construction of the Constitution

Reading: O’Brien, chapter 1, pp. 23-66

August 30: The Politics of Constitutional Interpretation
*Schools of Jurisprudence
*Methods of Constitutional Interpretation
*Comparative Constitutional Interpretation

Reading: O’Brien, chapter 1, pp. 66-101

September 1: Film (to be announced)

September 6: **Labor Day (No Classes)**

September 8: Law and Politics: Jurisdiction and Justiciable Controversies
*Federal Court Jurisdiction
*Justiciability Rules
*Rules of Self-Restraint as a Judicial Strategy

Reading: O’Brien, chapter 2, pp. 102-174

- September 13: The Court's Power to Decide
 *The Rule of Four and Agenda Setting
 *Oral Arguments and Conference Deliberations
 *The Circulation of Opinions
 Reading: O'Brien, chapter 2, pp. 175-190
- September 15: Compliance, Implementation and Impact
 *Compliance and Noncompliance of Decisions
 *Legislative and Executive Responses to Court Decisions
 *New Judicial Federalism as a Tool to Circumvent the Court
 Reading: O'Brien, chapter 2, pp. 191-231
- September 17: **Happy Constitution Day!** Celebrate by rereading chapter 1, pp. 1-23
- PART TWO: THE EXECUTIVE BRANCH: PRESIDENTIAL POWER**
- September 20: Foreign Affairs: The President as Commander in Chief
 *The Two Presidencies
 *Constitutional Theories of Presidential Power
 *The President and Treaty-Making
 Reading: O'Brien, chapter 3, pp. 232-264
- September 22: Foreign Affairs: The President in Times of Emergency and War
 *The Vagueness of Article II and Framers' Intent
 *Congressional Failure to Check the Executive
 **Korematsu v. United States*: A Retrospective
 Reading: O'Brien, chapter 3, pp. 264-295
- Optional Rough Draft of Brief #1 Due**
- September 27: Foreign Affairs: Executive Power and The War on Terrorism
 *Recent Court Cases
 *The USA Patriot Act
 *Congressional Resurgence?
 Reading: O'Brien, chapter 3, pp. 295-337
- September 29: Domestic Affairs: The President as Chief Executive
 *Emergency Powers and Domestic Policy
 *Inherent Emergency Powers and the Unitary Executive Theory
 *Recent Developments: Bush Administration and War on Terror
 Reading: O'Brien, chapter 4, pp. 338-370
- October 4: Domestic Affairs: Appointment and Removal Powers
 *Appointment and Removal in Historical Perspective
 *Congress and Confirmation of Appointments

*Executive Branch Nominations to the Supreme Court

Reading: O'Brien, chapter 4, pp. 370-415

Brief #1 Due at the Beginning of Class

October 6: Domestic Affairs: Legislative Powers and the Administrative State
*The Non Delegation Doctrine
*The Growth of the Administrative State
*The Chevron Doctrine and Judicial Deference

Reading: O'Brien, chapter 4, pp. 416-453

Study Guide for Midterm Exam Handed Out

October 11: Domestic Affairs: Accountability and Immunities
*Congressional Impeachment and Removal
*The Nixon and Clinton Administrations
*Presidential Accountability and the Supreme Court

Reading: O'Brien, chapter 4, pp. 453-480

October 13: **In-Class Midterm Exam**

PART THREE: THE LEGISLATIVE BRANCH: CONGRESSIONAL POWER

October 18: Congressional Power: Membership and Immunities
*Internal Affairs
*Congressional Immunity
*The Speech and Debate Clause

Reading: O'Brien, chapter 5, pp. 481-515

October 20: Congressional Power: Investigatory Authority
*The Power to Investigate
*Congress and the Red Scare
*Impeachment Authority

Reading: O'Brien, chapter 5, pp. 516-541

October 25: Congressional Power: Early Constitutional Development
*Chief Justice John Marshall and the Federalist Perspective
*Congressional Commerce Power
*Legal Formalism and Early Commerce Clause Theories

Reading: O'Brien, chapter 6, pp. 542-585

Optional Rough Draft of Brief #2 Due

October 27: Congressional Power: Legal Formalism
*The Interstate-Intrastate Distinction

- *The Direct and Indirect Effects Theory
- *Cumulative Effect and Substantial Economic Effect Theories

Reading: O'Brien, chapter 6, pp. 585-614

November 1: Congressional Power: Current Perspectives on Congressional Authority

- *The Rehnquist Court Counter-Revolution
- *Curbing the Administrative State
- *Current Perspectives on Congressional Power

Reading: O'Brien, chapter 6, pp. 614-667

Brief #2 Due at the Beginning of Class

November 3: Congressional Power: The Power to Tax and Spend

- *Taxing Authority as an Instrument of Social Reform
- *The Power to Tax and Coercive Federalism
- *Taxing and Spending Power and the Tenth Amendment

Reading: O'Brien, chapter 6, pp. 667-680

PART FOUR: THE STATES AND AMERICAN FEDERALISM

November 8: Federalism: Powers Reserved to the States

- *States' Power over Commerce
- *Federal Preemption
- *Current Controversies: Arizona

Reading: O'Brien, chapter 7, pp. 681-727

November 10: Federalism: The Tenth and Eleventh Amendments

- *The Resurgence of the Tenth Amendment
- *The Resurrection of the Eleventh Amendment
- *Rehnquist and Roberts Courts

Reading: O'Brien, chapter 7, pp. 728-795

November 15: Federalism: The Power of the Federal Courts vis a vis State Courts

- *Federal Court Review of State Decisions
- *State Nullification
- *Injunctive Relief and Habeas Corpus Review

Reading: O'Brien, chapter 7, pp. 796-820

November 17: Federalism: State Courts and State Constitutional Law

- *New Judicial Federalism
- *Avoiding Review by the Federal Courts
- *Protection Against Unreasonable Searches and Seizures and State Constitutional Law

Reading: O'Brien, chapter 7, pp. 820-832

Rough Draft of Critical Thinking Paper Due

November 22 and 24 **Thanksgiving Holiday (No Classes)**

PART FIVE: ECONOMIC RIGHTS AND AMERICAN CAPITALISM

November 29: The Contract Clause: Theoretical Foundation
*The Framers and Property Rights
*Marshall and Nationalism; Taney and States Rights
*The Modern View of the Contract Clause

Reading: O'Brien, chapter 9, pp. 988-1019
Begin Reading *Slaughterhouse Cases*

December 1: The Rise and Fall of Liberty of Contract
*Due Process Clause's Substantive Protection for Econ. Liberty
*Judicial Activism and Economic Protectionism
*The New Deal Crisis and the Switch in Time

Reading: O'Brien, chapter 9, pp. 1020-1054
Finish Reading *Slaughterhouse Cases*

Critical Thinking Paper Due at Beginning of Class

December 6: The Takings Clause and Just Compensation
*The Government and Private Property as a Fundamental Right
*Takings and Public Use
*A Local Example

Reading: O'Brien, chapter 9, pp. 1054--1080

December 8: Make Up Day (for weather, if we get behind, etc.)

December 13-17: **Final Examination Week**

