

POLITICAL SCIENCE 4350-991/9Z1
CONSTITUTIONAL LAW: GOVERNMENTAL POWERS
Fall Semester 2009: August 20 – December 7
Dr. Neil Snortland, Professor and Chair of Political Science
Office Phone: 569-3331. Office: Stabler Hall 603.

Required textbook: Lee Epstein and Thomas G. Walker,
CONSTITUTIONAL LAW FOR A CHANGING AMERICA:
INSTITUTIONAL POWERS & CONSTRAINTS (SIXTH EDITION, 2007).

Constitutional Law: Governmental Powers explores how the U.S. Supreme Court has interpreted the Constitution with respect to the powers of government.

General learning objectives: Course activities will help you develop your ability to (1) read and evaluate texts, ideas, and theories, (2) pose and answer questions effectively, (3) use logic and evidence to build persuasive arguments, and (4) communicate ideas clearly and effectively in writing. The variety of cases and other course materials will expose you to a wide range of substantive information about the world of law and politics, covering subjects such as the history and impact of political institutions and systems, the political behavior of individuals, especially at the elite level, the processes involved in creating government policy and the impact of those policies, and the debates over the normative foundations of the state and the scope of government powers.

This class is focused upon the law; however it is not a class designed to teach you "the law" in terms of rules. The political science approach is more concerned with how the law acquires meaning than with the actual content of the law at any given time. We seek to expand our knowledge of the federal court system and test our values by examining how justices and others have thought about the Constitution and where their thinking has led our political system.

Constitutional Law will help you develop your ability to analyze complex and controversial issues. You will learn how to read, analyze, and write about Supreme Court opinions. You will examine U.S. Supreme Court opinions and in the process you will learn how groups, institutions, processes, and personalities have converged to raise legal issues and influence public policy through court cases. You will become familiar with the ideas of those who wrote the Constitution and with the reasoning of justices who have interpreted the Constitution. You will learn how the law has developed, how judges and lawyers think, and how scholars

evaluate constitutional decisions. Most of the work involves reading, thinking, and writing.

Course Outline with Reading Assignments:

Essential Background Information:

Origin of U.S. Constitution; constitutionalism; separation of powers/checks and balances; Federalism: Read pages 3-11 and 55-60.

The Supreme Court of the United States (SCOTUS)

Process and decision making: Read chapter 1.

Jurisdiction and powers: Read chapter 2.

The Congress (House and Senate)

Power over internal affairs: Read pages 128-153.

Legislative powers: Read 153-191.

Powers under the Commerce Clause: Read pages 424-434; 451-489.

The power to tax and spend: Read pages 510-548.

The President and the Executive Branch

Election, term limits, removal, and succession: Read: pages 192-207.

Powers to faithfully execute the laws, to sign or veto legislation, to appoint and remove officials, to pardon, to protect confidentiality, and immunity from lawsuit: Read pages 207-263.

Foreign policy powers: Read pages 263-267; 289-336.

Federalism

Defined: Read pages 339-343.

National Supremacy: Read pages 346-350; 407-415.

States' rights: read pages 350-383.

Course Requirements and Course Grade:

Your course grade will be determined by three briefs (45%), two writing assignments (50%), and quality of comments and posts (5%).

Tentative Schedule for Reading the Assignments:

Background Information and SCOTUS: August 20-September 13

Congress: September 14-October 11

President and Executive Branch: October 12-November 2
Federalism: November 3-December 4

Tentative Schedule for Briefs and Assignments:

Brief One: Due September 13
Brief Two: Due September 27
Brief Three: Due October 11
Assignment One: Due November 2
Assignment Two: Due December 5

Briefs:

You will receive a list of cases to be briefed and each brief will have an assigned due date. Briefs will be graded in terms of use of proper briefing form and the accuracy of the brief's contents. You will be expected to read the full case for each briefing assignment. You must not do your brief from the edited case in your textbook.

The point of doing the briefs is to develop your ability to read, analyze, and explain Supreme Court cases within a defined format. All briefing formats are similar but you must follow the one I use for your briefs.

Law students, lawyers, and many others seeking to understand a case find it useful to "brief" it, using a fairly standard format. The discipline involved in doing a case brief sharpens our grasp of the case.

You may not find a brief for the case done by someone else and submit it as your brief; doing that will result in a failing grade for the course.

Do not skip reading the full case and use some source on the web such as Wikipedia to write your brief. Such shortcuts will result in a very bad grade.

I expect each assignment paper to be submitted in WORD or in PDF format. If I cannot open your assignment because it is in some other format such as that in Works or has other flaws that prevent me from reading it your paper will be counted as late and a significant late penalty will be given to your paper.

You are expected to write your own assignment papers. Failure to do your own work will result in a failing grade for the course. You may use brief quotations

from the cases we study or from the textbook as long as you clearly indicate the source and clearly indicate that it is a quotation.

In your assignments you may not copy material from any source. By “copy” I mean to cover every possible method: copy and paste, cut and paste, and even copy by typing.

The point of each assignment is to have you read and analyze course materials and write descriptive and analytical responses to the assignments.

How to brief a case for this course:

NAME OF THE PARTIES AND LEGAL CITATION: Someone is appealing a decision from a federal Court of Appeals or from a state high court. Who are the parties to the case: Somebody versus somebody? Each case also is referenced by its volume of United States Reports, the number of the first page, and the year that the case was handed down: For example **Nixon v. Fitzgerald, 457 U.S. 731 (1982)** may be found in volume 457 of United States Reports starting on page 731, and was published by SCOTUS in 1982.

FACTS: What led to this case? What is in dispute? What is this case about?

ISSUE(S): What fundamental question or questions does the case present to the Court? A properly written issue can be answered by a simple yes or no. If your issue cannot be answered yes or no then you need to rewrite the issue.

DECISION: Yes or no on the issue or issues.

JUDGMENT: What did the Court do with respect to the decision of the lower court? Possibilities: Affirm, reverse or vacate, and remand. The Court may affirm the lower court decision or reverse or vacate it. In cases where there are several issues, it may affirm part of the lower court decision and reverse another part. It also may remand the case back to the lower court for further action in accord with the opinion of the Court.

OPINION OF THE COURT (name of justice writing for the Court): In this section you explain the reasoning of the Court. How did the Court justify its decision? What techniques of argumentation or justification are used? How does the opinion writer move from the issue(s) or question(s) to the answer(s)? Usually one justice will write for the Court. Sometimes the opinion lists the author as “Per

Curiam,” which means “by the body” and thus does not identify the author. Sometimes there will be a plurality opinion announcing the judgment of the Court rather than the opinion of the Court. This is because less than a majority of justices are willing to join the plurality opinion even though there is a majority for the judgment.

VOTE: Here you give the vote breakdown. A decision can be unanimous (9-0 when all justices vote) or some other vote distribution such as 5-4.

CONCURRING OPINION(S): Sometimes justices will agree with the judgment and write separately to express certain views. Here you summarize the reasoning of the concurring opinion.

DISSENTING OPINION(S): Justices who voted with the minority give their reasons in dissenting opinions. Opinions also may concur in part and dissent in part.

LEGAL PRINCIPLE: What legal rule or principle does this case announce? What is the importance of this case for future cases?

Generally a brief should not be much longer than two single-spaced pages in 12 point font. Many briefs are only a single page of single-spaced type. If the brief is longer than two pages it really isn't that “brief,” is it? Of course some cases are so complex with several concurring and dissenting opinions that the brief may run longer than two pages, but the point of a brief is to be brief.

If your first draft is too long you should first look to be more efficient in the Facts section by eliminating facts not essential to understanding the case or rewriting the section to convey the same information more concisely. These same methods will also work if the Opinion of the Court or separate opinions need to be shortened.

Below is an example of a brief:

Wiener v. United States, 357 U.S. 349 (1958)

FACTS: In 1948 Congress created the War Claims Commission to “receive and adjudicate according the law” claims by prisoners of war, internees, and religious groups who had suffered injury or property damage from enemy actions during World War II. Under the law there were three commissioners appointed by the president with the advice and consent of the Senate. The terms of the

commissioners were to expire when the Commission went out of business. There was no provision in the law for the removal of a commissioner.

President Truman appointed Myron Wiener in 1950 and in 1953 President Eisenhower removed him and the other two commissioners after they refused Eisenhower's request to resign.

Eisenhower justified his action by stating that "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection."

Congress abolished the Commission in 1954, and Weiner sued in the Court of Claims for his back pay between his removal and the end of the Commission, claiming wrongful dismissal. The Court of Claims dismissed his claim and the Supreme Court accepted his appeal.

ISSUE: Does the Constitution or the War Claims Act give the president the power to remove a member of the War Claims Commission merely because he wants his own appointees on the Commission?

DECISION: No.

JUDGMENT: Reversed.

OPINION OF THE COURT (Justice Frankfurter): The history and language of the War Claims Act indicate that Congress created the Commission to fairly and independently adjudicate war claims. Congress did not intend to give the president any influence over the disposition of war claims. A commissioner who holds office at the pleasure of the president cannot be independent of the president's wishes.

Humphrey's Executor v. United States, 295 U.S. 602 (1935) closely matches this case. Humphrey's Executor narrowed the removal power of the president to cover "all purely executive officers" and rejected language in Meyers v. United States, 272 U.S. 52 (1926) suggesting that the president had the inherent constitutional power to remove members of quasi-judicial bodies such as the War Claims Commission.

Humphrey's Executor denied the president the power to fire officials with predominately quasi-judicial or quasi-legislative duties without just cause as defined in the law. Just cause includes inefficiency, neglect of duty or malfeasance.

The Constitution does not directly give the president the power to remove officials such as Weiner and the fact that the War Claims Act did provide a method of removal does not provide an implied power of removal to the president. The Court of Claims erred in its decision. Weiner was improperly dismissed by the president.

VOTE: 9-0

CONCURRING OPINIONS: None

DISSENTING OPINIONS: None

LEGAL PRINCIPLE: The president lacks the power to remove officers of independent bodies with quasi-judicial or quasi-legislative duties except where there is justifiable cause. *Humphrey's Executor v. United States* was reaffirmed.

Below is a brief of a more complex case:

Printz v. United States, 521 U.S. 898 (1997)

FACTS: The Brady Handgun Violence Protection Act of 1993 amended the Gun Control Act of 1968 to require the Attorney General to establish a national instant background check system by November 30, 1998.

During the period before the establishment of the instant check firearms dealers were required to send a copy of the "Brady Form" containing information on the proposed buyer to the "chief law enforcement officer" (CLEO) of their area and then wait five business days before completing the sale. The CLEO was directed to make a "reasonable effort" during those five days to determine if the proposed buyer was prohibited from making the purchase.

Sheriff Jay Printz of Ravalli County, Montana and Sheriff Richard Mack of Graham County, Arizona believed that under the U.S. Constitution the federal government could not require them to conduct background checks and two federal district judges agreed with them. Upon appeal the Ninth Circuit Court of Appeals reversed the lower courts and SCOTUS granted certiorari.

ISSUE: Do the interim provisions of the Brady Act commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks violate the Constitution.

DECISION: Yes.

JUDGMENT: Reversed.

OPINION OF THE COURT (Justice Scalia): Because the text of the Constitution does not speak directly to this issue our decision must rest on historical practice and understanding, the structure of the Constitution, and our prior cases.

Historical practice and historical understanding works against the law. The United States relies on early federal laws that imposed a variety of obligations on state courts; however, historically state courts are different from state executives and legislatures. Cases brought in state courts frequently required judges to apply the laws of other states and the federal government. Constitutional provisions give Congress authority to legislate in the area. The Supremacy Clause requires that "the Judges in every State shall be bound" by the Constitution and federal laws and the clause requiring states to give "full faith and credit" to the records, acts and judicial proceeding of other states also empowers Congress to legislate in the area.

The fact that until recently federal laws did not impose obligations on state executives implies that historically Congress felt it lacked the power to make such laws. Other laws cited by the United States in which state executive officials assisted in executing federal laws in fact rested on contractual arrangements or voluntary cooperation by state officials and not on federal directives or commands as in this case.

Retaining state sovereignty was the "price of union" when the Constitution was ratified. The Constitution recognizes a "dual sovereignty" in which states surrendered many of their powers to the federal government while retaining many residual elements of sovereignty. Under the Constitution the federal government and the state government exercise authority directly over the people. The states were not retained in order to administer federal laws and requiring them to do so violates state sovereignty.

The Constitution makes it clear that the president "shall take Care that the Laws be faithfully executed." The Brady Act effectively transfers this power to the many CLEOs in the various states in violation of the Framers' concept of a "unitary

executive” who provides accountability and vigor in the implementation of the laws.

In our prior cases we have approved federal regulatory programs only after concluding that they did not compel states to implement by legislative or executive action federal regulatory programs. In *New York v. United States*, 505 U.S. 144 (1992), we rejected a federal program that did compel states to implement a federal program and held that under the Constitution Congress “may not compel the States to enact or administer a federal regulatory program” (at 188).

Justice Steven’s argument that the Brady Act is supported by the power of Congress to “make all laws which shall be necessary and proper for carrying into Execution” its power to regulate interstate commerce is flawed because when a law violates state sovereignty it is not a “proper” law.

VOTE: 5-4

CONCURRENCE (Justice O’Connor): To the extent that the Brady Act forces state and local officials to perform background checks it violates the Tenth Amendment. Congress is free to amend the interim program to continue on a contractual basis and chief law enforcement officers are free to conduct background checks on a voluntary basis.

CONCURRENCE (Justice Thomas): I fully support the Court’s opinion but I write separately to emphasize that under our Constitution the federal government is one of enumerated and thus limited powers. Under my “revisionist” view of the Commerce Clause I believe we should hold that the Commerce Clause does not allow Congress to regulate intrastate transactions even under the claim that that these transactions “substantially affect” interstate commerce.

DISSENT (Justice Stevens joined by Justices Souter, Ginsburg, and Breyer): When the Constitution empowers Congress and the President to take action to combat an emergency such as the current “epidemic of gun violence” there is nothing in the Tenth Amendment, historical understanding and practice, and the structure of the Constitution that forbids Congress from requiring state and local officers to implement the resulting federal program.

Contrary to the view of Justice Thomas the Commerce Clause fully supports the regulation of handguns in the Brady Act. Moreover the Constitution says that Congress may pass laws “which shall be necessary and proper for carrying into

Execution” the powers delegated to Congress by the Constitution. The Constitution says that the Constitution and federal law is the supreme law of the land that will override contrary state and local law. It may be argued that state and local officials have an even greater duty to obey federal law than ordinary citizens because the Constitution requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”

DISSENT (Justice Souter): My reading of the Federalist Papers, specifically numbers 27, 36, 44, and 45 supports the idea that when the National Government exercises its legitimate power (the power to regulate interstate commerce in this case) it may require state executive officials to take appropriate actions.

DISSENT (Justice Breyer joined by Justice Stevens): The fact that direct federal assignment of duties to state and local officers is not common does not reflect that this is improper so much as that it is a better practice to assign federal duties by other means such as the provision of or the withholding of federal funds. There is no need to read the Brady Act as overwhelming CLEOs. The Brady Act merely requires that CLEOs use “reasonable efforts.”

LEGAL PRINCIPLE: The federal government may not require state and local executive officers to implement federal programs.

Students with Disabilities: It is the policy of the University of Arkansas at Little Rock to create inclusive learning environments. If there are aspects of the instruction or design of this course that result in barriers to your inclusion or to accurate assessment of achievement—such as time-limited exams, inaccessible web content, or the use of non-captioned videos—please notify the instructor as soon as possible. Students are also welcome to contact the Disability Resource Center, telephone 501-569-3143 (v/tty). For more information, visit the DRC website at <http://ualr.edu/disability/>.