

Good morning! This is the first course of a two course sequence on American Constitutional Law, the second, 403h Supreme Court and Public Policy, will be offered in the Spring, 2010. This course focuses of the evolution of the judicial, executive and legislative power, and federalism, as found in cases decided by the United States Supreme Court. The course also blends American history, philosophy, and politics; the development of these powers, by the United States Supreme Court, cannot be divorced from the times, politics and thinking in which they were decided. During this term we will look, in some detail, at the role of the courts, the powers of the national government separately and in comparison to the states (Federalism), state powers over taxation and commercial regulation, and of course, national supremacy. Through these cases we will deal with the two models of Constitutional authority that are and will continue to be in competition. It is through these cases that an appreciation of the "proper" role of the government in the affairs (private, public, economic and political) of the public can be gained.

There are two prerequisites for this course. First, you will be supplied with a list of cases which will be discussed in class *by you*. *You must be prepared on a daily basis to participate in discussion* --it can be embarrassing if you are not. Second, you must be prepared, ready, willing and eager to think, frequently on your feet, so to speak (you'll actually be sitting, I don't make people stand). We are dealing with a model of government and the assumptions underlying that model. To determine the implications of the premises of the model you must think logically and analytically. This is not a lecture class; it is conducted Socratically. That is to say, I ask you questions about the cases and you answer them; there are never any final answers, and there are always more questions. You will need to remember in November and December cases discussed and answers arrived at in say September and October, and use them together.

Your talents, skills and abilities will be evaluated in several ways. You will be asked to brief several (roughly 10) cases. Briefs *cannot* exceed 500 words (about two (2) double-spaced typed pages) and are worth four (4) points each (see example attached). You may be asked to synthesize several cases into a coherent statement of law; the value of such exercises will fluctuate, length to be determined. Occasionally I'll ask you to respond to a set of hypothetical facts and develop an argument using what you've learned; they must not exceed one thousand (1,000) words, and I'll figure out what they're worth when I assign them.

There will be two take home exams of *one week duration*, with no limit on length and worth 40 points each. The exams will consist of three or four (3 or 4) hypothetical fact situations, and you'll respond to the one (1) of your choice. In all instances you will be evaluated by your ability to think logically, develop and defend a constitutional position, breadth and usage of the assigned materials and the clarity of presentation. It's really quite subjective, folks. If more or less than 10 briefs are assigned, the total points for these (40 or 1/3rd of the course grade) will be adjusted to equal 40. You will not be tested over student conduct, or guides to proper behavior.

The total number of points for the term is 120, and I don't grade on the curve: 120-105 = A; 104-75 = B; 74-45 = C; 44-15 = D; less than 15 = F, and it does happen. Your performance, energy, attendance, etc. *will* be taken into account in determining the class grade, when that grade is at the margin. Plus and minuses may be added as adjectives to the grade.

*All assignments, except the exams, will be made once, in class and orally UNDER NO CIRCUMSTANCES WILL A LATE ASSIGNMENT BE ACCEPTED—NO EXCEPTION. Incompletes will not be awarded. All assignments are due in class, not by email attachment.*

Your reading assignments will come from the following sources. Some of the materials may be a bit late due to shipping. I'm not worried about this, so you need not be. Adjustments will be made as needed. When inquiring about this at the bookstore, please be polite. Since this is the first of a two semester sequence, I have ordered all of the materials for both semesters; those going on will not need to purchase materials in the winter/spring semester.

Komers, Finn and Jacobsohn (2 vols.) American Constitutional Law  
Varat & Cohen: Constitutional Law, 2009 Supplement (not here yet)  
Sullivan and Gunther, Constitutional Law 2009 Supplement  
Levi: An Introduction to Legal Reasoning  
Chemerinsky: Constitutional Law: Principles & Policies 3<sup>rd</sup> ed.(rec)  
Reserve:  
From time to time I will hand out other cases & materials to be read. .

Unless otherwise noted, all cases come from Kommers Finn & Jacobsohn, volume 1. The following abbreviations are used: CV, Cohen & Varat; SG Sullivan and Gunther; R, UNR Electronic Reserve; C, Chemerinsky.

Supplemental cases are from two sources: Those that I have edited, and placed on electronic reserve through the Library Electronic Reserves; those from a website, at the University of Missouri, Kansas City. The links to the cases can be found the library electronic reserve link. Or they may be found on my syllabus posted on the departmental webpage <http://www.unr.edu/cla/polisci/> . If the Supreme Court reaches a significant decision during the semester, I may send that case.

Ordinarily courses such as this are devoted exclusively to reading cases from the Supreme Court of the United States and it's construction of the meaning of the Constitution. While these opinions are considered to be authoritative, there are other sources to look to. One can begin with Madison, J. Notes on the Federal Convention in Philadelphia. 1787, The Federalist Papers (many editions), collection's of the Anti-Federalist papers, I use Robert Ketcham's, but Storings is complete, and in the library, and at the Avalon project, below. A word of warning; beyond a statement of very basic principles, there is no original intent. There are instead original intents .

(for a use of original intent see, e.g. Tawney, C.J.'s opinion in Dred Scott's Case.) And you might want to start with Levy. L.W., Original Intent and the Framers Constitution. On amending the Constitution, you might want to start with Bernstein, R.B. Amending the Constitution. Kelly, Belz and Harbison's American Constitutional Development (2 vols.) is very helpful for those of you out of touch with basic American History.

#### Web Sites

There are several sites you may find helpful/useful. United State Supreme Court's site is: <http://www.supremecourtus.gov/> . Findlaw, a website for professionals provides access to the Supreme Court from 1791 to present, and other Federal and state courts. That link is: <http://www.findlaw.com/> The Avalon Project at Yale, contains primary documents from roughly the 800's to the present, e.g. the original colonial charters. You may wish to look up this material when necessary, e.g. the charter creating Dartmouth College. That link is: <http://www.yale.edu/lawweb/avalon/avalon.htm> . The UMKC link is: <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/home.html> . It has many cool things to read, including "famous trials".

#### Email.

I am going to set up a file to email the class, receive and answer questions, and send additional material. I will use *only* your UNR Email Addresses. If you don't know yours find out.

Finally, I've reluctantly decided this notice needs to be posted.

*Under absolutely no circumstances will plagiarism be tolerated. If you are going to use the words or ideas of someone else then this material needs to be properly cited. If you do not know how to do this, I will send you in the right direction, such as the graduate schools manual of style (or you get the new Chicago Manual of Style or Turiabin) As well, I will not tolerate any kind of behavior toward each other that is not professionally courteous and respectful. The class is competitive, contentious and frequently adversarial but it will be professionally carried out. And do not bring into the classroom, notebook or laptop computers, cell phones, pagers, PDAs, walkie-talkies, cd's, DVD's or cassette players or head/ear phone or Oakley sunglasses. Nor may skateboards, bikes, roller-blades, scooters or sports equipment (baseball bats, hockey or lacrosse sticks, soccer, base, rugby, basket or other balls) be stored in the class. These constitute a hazard in case of an emergency. Leave all of these things outside the class room.*

### An Assignment for You

First, Please read and be prepared to discuss Levi by the next class period, Wednesday the 26<sup>th</sup>. . Next, read the following assignment. Then we will follow the appended case outline.

Second, Please read and be prepared to discuss Levi on Wednesday the 26<sup>th</sup>; I am particularly interested in the fate of the Mortison's and their employees. On Friday the 31<sup>st</sup> the following cases: Martin v. Hunters Lessee, Van Horne's Lessee v. Dorrance, and Marbury v. Madison.

Brief Martin and Marbury **separately**. Each is due the 5th, in class, at the beginning of class, and may not be more than 500 words, as noted on the class outline. Include the pertinent facts, the law or principle construed, what the Court decided and most importantly why it did so. Please see the attached example.

For Friday the 4<sup>th</sup> of September consider the Court's contention in Cooper v. Aaron as stated below, and write a 500 word opinion supporting or opposing that contention. This is to be a reasoned opinion, based on materials in the assignments and not some off-the-wall statement, or expression of personal or political belief, or critical thinking.

#### Cooper v. Aaron 358 US (1954)

"[W]e should answer the premise of the actions of the Governor and legislature that they are not bound by our holding in the Brown (v. the Board of Education) case. It is necessary only to recall some basic constitutional propositions which are settled doctrine. Article VI of the Constitution makes the Constitution the 'supreme law of the land'. In 1803 Chief Justice Marshall speaking for a unanimous Court, referring to the Constitution as the 'fundamental and paramount Law of the nation,' declared in the notable case of Marbury v. Madison 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our Constitutional system. *It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land* (my emphasis) and Art. VI of the Constitution makes it of binding effect on the States 'anything in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI [Sec.3] 'to support this constitution'."

Tentative Case Readings  
I have not yet seen the supplements

## Case Readings

The following is a tentative list of cases. As of this writing I have not yet seen the Sullivan and Gunther Supplement, so I don't know what is in it. These will change, some what. If I'm not worried, and I'm not, then you're not worried. I'm not worried.

Those supplemental cases in *Italic* are not yet on reserve. I have to edit them. Patience these will get there.

### Judicial Review

*Van Hornes's Lessee v. Dorrance*, 2 US (2 Dallas) 304, 1795, UNR ER  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Marbury v. Madison  
Martin v. Hunter's Lessee, KFJ & R  
Dred Scot's Case  
Fletcher v. Peck, Vol 2  
Cooper v. Aaron  
*Northwest Austin Utility District v Holder* (Supplement or R)  
C:1.1-1.5; 2.1-2.2.2

### Justicability: Jurisdiction, Case and Controversy

*Muskrat v. U.S. R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
ex parte McCardle  
*De Funis v. Odegaard, R*,  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/defunis.html>  
C: 2.3, 2.4, 2.6-2.7

### Standing

*Frothingham v. Mellon*, R (for this case each of you must bring to class a penny, a nickel, a dime and a quarter, and an Uncle Scrooge Mc Duck comic book, which you must have read)  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
*Warth v. Seldin*, ER,  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/warth.html>  
*Flast v. Cohen* ER  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/flast.html>  
*Roe v. Wade* Vol 2 & R,  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/roemoot.html>  
*Baker v. Carr*  
C: 2.5-2.5.6

### Political Questions

*Luther v. Borden*,  
*Baker v. Carr*  
*Powell v. McCormack*

Nixon v U.S. (1993) and *R*  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/nixonvus.html>  
Davis v. Bandemer,  
*Vieth v Jubelirer, R*  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/vieth.html>  
C: 2.8- 2.8.8

The Court and Congress  
ex parte McCardle  
*City of Boerne v. Flores R,*  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/boerne.html>  
C: 2.9-2.9.3

The Executive: Powers and Limitations  
Youngstown Sheet & Tube v. Sawyer  
U.S. v. Nixon  
Cheney v. US  
*U.S. v. U.S. District Court, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Ex parte Milligan  
New York Times v. U.S.  
Clinton v. Jones,  
Clinton v. City of New York,  
C: 4.1, 4.3, 4.4, 4.5

The Executive, Foreign Affairs, the Military and the Dogs of War<sup>1</sup>  
The Prize Cases, R 1863  
U.S. v. Curtis Wright  
*Rasul v Bush, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Hamdin v Rumsfeld  
Boumediene v. Bush  
New York Times v. U.S.  
C: 4.6-4.6.3

Appointments, Delegations, Commissions & Administration  
Schlechter v. U.S.  
Buckley v. Valeo  
Morrison v. Olson  
C: 4.2- 4.2.2, 3.9-3.9.3

Treaties & foreign affairs  
State of Missouri v. Holland  
Crosby v Foreign Trade Council, R

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<sup>1</sup> And Caesar's spirit, ranging for revenge/ With Ate by his side come hot from Hell/ Shall in these confines with a monarch's voice/ Cry 'Havoc' and slip the dogs of war Julius Caesar III (1)

*Oakland Cannibus Buyers Cooperative v Gonzales R*  
*American Insurance Association v Garamendi*

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/amerinsurinst.html>

C: 3.5--3.5.2, 4.6-4.6.4

Congress: Powers and Limitations

McCulloch v. Maryland

Garcia v. San Antonio Metropolitan Transit Authority

INS v. Chadda

C: 3.1-3.2

Preemption

*Pennsylvania v. Nelson, R*

<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>

*US v Locke, R*

<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>

*Gonzales v Oregon, R*

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/amerinsurinst.html>

C: 5.2-5.2.6

Membership and Immunities, Investigations & Treaties

Powell v. McCormick

Gravel v US

US Term Limits v. Thornton

*William Jefferson dc circuit decision. R*

The Commerce Clause: National Scope & Congressional Power

McCulloch v Maryland

Gibbons v. Ogden

U.S. v. E.C. Knight

*The Shreveport Case (Houston, East & West Texas Ry v US 234 US 342 (1914)) R*

<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>

Hammer v. Dagenhart

US v Butler

Champion v. Ames

Schlechter Poultry v. U.S.

NLRB v. Jones Laughlin

Wickard v. Filburn

Heart of Atlanta Motel v. U.S.

Gonzales v. Raich

*Gonzales v Cahart Supplement or R*

U.S. v Lopez

US v Morrison,

New York v United States

*Northwest Austin Utility District v Holder Supplement or R*

C: 3.1- 3.3.5, 3.10-3.10.3

Commerce: State Regulation & Conflict with National Interest

Cooley v. Board of Wardens, KFJ. & R  
Southern Pacific v. Arizona  
*Kassel v. Consolidated Freightways, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
*Complete Auto Transit v. Brady, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
*White v. Massachusetts Council, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Maine v. Taylor, R,  
South Dakota v. Dole,  
*Reno v Condon, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
City of Philadelphia v New Jersey  
Printz v. US,  
Grandholm v Heald , KFJ, SG, VC  
C: 5.3-5.3.7

Federalism: Principles

Martin v. Hunter's Lessee (again)  
*Texas v. White* 74 US (7 Wallace) 700, 1868 R  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Printz v. U.S.,  
*Coyle v. Smith,, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
*Williams v. North Carolina, R*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Garcia v. San Antonio Metropolitan Transit  
5.5-5.5.3

Federalism: Sovereign Immunity & the 11<sup>th</sup> Amendment

Seminole Tribe v. Florida R  
Alden v. Maine  
*Nevada Dept of Human Resources v Hibbs R?*  
<http://0-reserves.library.unr.edu.innopac.library.unr.edu/course.aspx?id=1379>  
Federal Maritime Commission v South Carolina  
C: 2.10-2.10.6

Federalism: Congress & Elections & Districting

*Northwest Austin Utility District v Holder.* Supplement or R  
Baker v. Carr,  
Reynolds v. Sims,  
US Term Limits , Inc v Thornton  
Davis v. Bandemer  
*Veith v Jubelirer*  
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/vieth.html>  
Shaw v. Reno,  
Hunt v. Cromartie

California Democratic Party v Jones  
Buckley v Valeo  
FEC v Colorado Republican Federal Campaign Committee  
Bush v Gore

Federalism, Rights and Enforcement: A look ahead (to next semester)

Barron v. Baltimore, Vol. 2

The Civil Rights Cases, Vol 2

The Slaughter House Cases, Vol 2

*Saenz v Roe R, 523 US 844, R*

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/vieth.html>

C: Chapter 6