

POLITICAL SCIENCE 272
AMERICAN CONSTITUTIONAL LAW II:
RECONSTRUCTION TO THE MODERN ERA

Fall 2021

Prof. Kimberly Smith

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Class meets at 3a, in Willis 114

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This course covers the development of constitutional law from Reconstruction to the contemporary era. Constitutional Law I is not a prerequisite, but a good background in American history is strongly recommended. We will focus on the development of modern civil liberties doctrine and the emergence of the federal courts as the primary guarantor of civil rights, examining not only constitutional doctrine but also the broader intellectual and political context in which it evolved. Topics will include adoption of the Reconstruction amendments, the struggle over economic regulation and the doctrine of substantive due process, FDR's battle with the Supreme Court and the expansion of civil liberties under the Warren Court.

Texts: Finkelman & Urofsky, *A March of Liberty*, Vol. II, 3rd ed.

Additional readings in coursepack [CP] and posted on moodle

Course requirements: This course requires a great deal of participation. Each student should be prepared to answer searching questions about the assigned case every day. Students should be able to summarize the facts of the assigned case(s), explain the Court's reasoning and the holding, explain the reasoning of the dissenting opinions, if any, and critique the Court's decision.

Your participation grade will reflect the quality and quantity of your contribution to class discussion. Because this in-class discussion is a critical part of learning to read and analyze cases, attendance is mandatory. Absences will substantially lower your grade.

Your grade will be computed as follows:

Moot Court:	20%
Midterm:	20%
Final:	25%
Case Note:	25%
Participation	10%

Course Outline

Part I: Foundings

Class 1: Introduction: Introduce the Mille Lacs project

Class 2: Judicial Review

CP: *Marbury v. Madison*

CP: *Barron v Baltimore*

Complete legal research tutorial by end of the week

Class 3: Post-War Foundings

Urofsky & Finkelman Ch. 22 [posted on moodle]
13th and 14th Amendments
CP: Black's Appendix to Adamson v. California
CP: Civil Rights Act of 1866

Class 4: Continued

CP: US v Kagama
CP: Ward v Race Horse [overruled in 2019, Herrera v Wyoming]

Class 5: The State Action Doctrine

CP: Civil Rights Cases

***Topic of case note due in class Fri. Sept. 24**

Class 6: The Privileges and Immunities Clause

Urofsky & Finkelman Ch. 23 [posted on moodle]
CP: Slaughterhouse Cases

Class 7: The Equal Protection Clause

CP: Plessy v Ferguson
Epstein, "Standing Firm, on Forbidden Grounds," 31 San Diego Law Review 1, 1994 (part VI)

Class 8: The Due Process Clause

CP: Hurtado v. California
CP: Palko v. Connecticut
CP: Rochin v. California

*Group meetings with Kim

Part II: Building the Regulatory State

Class 9: Expansion of State Power: Regulating business

Urofsky & Finkelman, Ch. 24, 25
CP: Munn v. Illinois

*First peer evaluations due Monday Oct 4 at 9 am

Class 10: Cont.

CP: Lochner v. New York
CP: Muller v. Oregon

Class 11: Expansion of Federal Power: Conservation

Urofsky & Finkelman, Ch. 26, 28
CP: Geer v. Connecticut
CP: Missouri v. Holland

***Case Note: Background section due, *properly documented* and with preliminary bibliography, in class. (Fri. Oct. 8)**

Class 12: Managing Public lands

CP: Light v. U.S.

CP: U.S. v. Grimaud

Class 13: The Conservative Critique of the Administrative State

Lawson, The Rise and Rise of the Administrative State, 107 HLR 1231 (1994), pp. 1231-1249;

Vermeule, The Administrative State and the Optimal Abuse of Power, Regulatory Review (Jun. 2, 2014) [posted on moodle]

Class 14: Midterm exam

Part III: The Rights Revolution

BREAK

Class 15: The New Deal

Urofsky & Finkelman, Ch. 30, 31

CP: Adkins v. Children's Hospital

CP: W. Coast Hotel v. Parrish

Class 16: Warren court jurisprudence

Urofsky & Finkelman, Ch. 32

CP: Carolene Products Footnote 4

CP: W. Virginia Bd. of Ed. v. Barnette

***Analysis and revised background sections of case note due in class, both sections properly documented (Fri. Oct. 22)**

Class 17: Minn v Mille Lacs Project: Teams present preliminary arguments

Class 18: Equal Protection

Urofsky & Finkelman, Ch. 35, 36

CP: Brown v. Bd. of Ed. I & II

*Second peer evaluations due Wednesday Oct. 27 at 9:00 am

Class 19: Equal Protection and State Action Doctrine

CP: Heart of Atlanta Motel v. U.S.

CP: Katzenbach v. McClung

Class 20: Affirmative Action

CP: Grutter v. Bollinger

Class 21: Abortion and Right to Privacy

Urofsky & Finkelman, Ch. 37, 40

CP: Griswold v. Connecticut

CP: Roe v. Wade

CP: Casey v. Planned Parenthood

Class 22: Rights of sexual minorities

CP: Bowers v. Hardwick

CP: Lawrence v. Texas

CP: Obergefell v. Hodges

Class 23: Limiting national civil rights authority

Urofsky & Finkelman, Ch. 42, 43

CP: Oregon v Smith

CP: Boerne v Flores

Class 24: Cont.

CP: U.S. v. Morrison

Class 25: The originalism debate

Scalia, A Matter of Interpretation, pp. 37-47 & Amar's Introduction to the New Edition pp. xv-xxiv [posted on moodle]

Part IV: Minnesota v Mille Lacs Band of Chippewa

Class 26: Debate prep

Tuesday Nov. 16, 7:00-9:00 pm: Minnesota v Mille Lacs Band moot court

***No class on Wed. Nov. 17

Class 28: Conclusion

***Final draft of case note due in class Friday Nov. 19**

***Final peer evaluation due at 9:00 am on Friday Nov. 19**

FINAL EXAM: Self-scheduled

Moot Court Assignment

The Case: In 1999, the U.S. Supreme Court decided *Minnesota v. Mille Lacs Band of Chippewa* (526 US 172). The decision was a major vindication of Chippewa treaty rights, enforcing the provisions of an 1837 treaty promising the Mille Lacs Band (among others) the right to fish, hunt, and gather in the Mille Lacs region. We will be re-arguing this case.

Specifically, the question to be debated is: Given what we know now about managing natural resources in the Mille Lacs region, social and political changes in the country, and the evolution of the law concerning treaty rights, was the *Mille Lacs* decision correct?

Each team will represent one of the major parties to the lawsuit:

1. The Mille Lacs Band
2. The Minnesota DNR
3. The Federal government
4. The Minnesota Counties
5. Thompson et al (private landowners)
6. Save Mille Lacs (group of private landowners, sportsmen, etc). They filed an amicus brief.

In addition, one party, the Conveners, will introduce the case to the audience and lead discussion after the debate.

The moot court will take place on Wednesday Nov. 17 at [time, place]. There will be a brief introduction by the Conveners, and then each party (beginning with the Mille Lacs Band) will have 10 minutes to make its case. The Mille Lacs Band will also have ten minutes at the end to rebut the five(!) parties aligned against it. The Conveners will then lead a discussion of the case with the audience. The moot court will take two hours.

Process: Please note that this is a complex, term-long group project that will require your careful management.

- Wednesday Sept 15: I will introduce the case on the first day of class and organize you into teams in the first week.
- Thurs Sept 30-Sat. Oct. 2: team meetings with Kim to discuss research plans and strategy. I'll create a scheduler on moodle for groups to sign up for a 30 min. slot
- Monday Oct. 25: In class, each team will present its key arguments
- Monday Nov. 15: We will rehearse the moot court in class
- Tuesday Nov. 16: We will hold the moot court at 7:00-9:00 pm [place]
- Wednesday Nov. 17: No class. We'll debrief on Friday, Nov. 19.

Assessment: Each team will receive a group grade based on its performance over the course of the term, modified by each person's peer evaluation score (as explained below). I am looking in particular for sustained, careful work carried out over the course of the entire term, not just a spectacular performance at the end.

These are the criteria I will use to evaluate each team's work:

	Poor	Adequate	Spectacular
Project Management	Little planning, few meetings, poor communication, failure to meet deadlines. Group dynamics are bad and no one sought help from Kim.	Rough plan developed, some regular meetings, team members are on the same page, team meets deadlines. Group dynamics may be rocky, but the group tried at some point to address them, by asking Kim for help or through some other avenue.	Detailed plan developed and revisited throughout term, regular scheduled meetings, notes taken and shared to ensure everyone is on the same page, deadlines are met easily with time to spare. Group identified problems with group dynamics early on and resolved them or sought help from Kim and implemented her advice.
Depth of Research	Team uses only resources posted on moodle and fails to develop new arguments or find new information	Team uses resources on moodle and also finds new case law and new information to incorporate into the argument.	Team not only updates the case law and facts, but draws on recent scholarship and other sources to delve more deeply about the values and assumptions at work in the case.
Responsible Use of Evidence	Team focuses on evidence (facts and testimony) that supports its argument and downplays or ignores anything that undermines its case.	Team develops a solid body of evidence drawing on conventional sources to support its argument and also carefully addresses evidence offered against its argument.	Team develops a solid body of evidence to support its position and carefully addresses counter-evidence. Team may also draw on new, innovative sources of evidence, showing the ability to think critically about what counts as "truth."
Quality of Legal Arguments	Team offers essentially the same arguments made in the original case, does not show a good understanding of those arguments or how they might be affected by new precedents or different facts, and is unable to respond to counterarguments.	Team shows good understanding of legal arguments made in original case, is able to show how new precedents and different facts affect those arguments, and is able to respond to counterarguments.	In addition to understanding and updating the original legal arguments and responding well to counterarguments, the team comes up with innovative arguments and counterarguments.
Professionalism in Moot Court Debate	The team is unprepared and doesn't make a strong effort to help the audience understand its arguments. It shows disrespect to one another, to the other teams, and/or to the audience.	The team is well-prepared and makes sure its arguments are easy for the audience to follow. Team is respectful of each other, the other teams and the audience.	The team is not only well-prepared and respectful, but makes sure everyone involved is heard and their point of view is taken seriously. This may involve thinking critically and imaginatively about the performance experience: can everyone access the venue? Can they hear and see the debate? Is anyone being silenced?

Peer Evaluation:

Your grade for the group project will be based in part on peer evaluation. I'll calculate it thus: (Project grade * your peer evaluation score)/100.

For example, if your project grade is B (or 3 on a 4-point scale) and your peer evaluation score is 110, your grade is $3 \times 110/100 = 3.3$ (or B+)

Peer Evaluation Process: I will send you a google form to evaluate your group members. You'll do this 3 times over the term, as indicated on the syllabus. The first two evaluations will not affect anyone's grade; only the final evaluation will be used to calculate grades.

Everyone in the group will be given 100 points to distribute among the other group members (e.g. 30-34-36). You may not give everyone the same number of points! You must make some discriminations among them. I'll add up the number of points you get, and that will be your peer evaluation score. You will also be asked what each group member does well and how they could improve. I will give this feedback (anonymized!!) to the relevant group member.

Appeals: You may appeal your peer evaluation to me. I'll listen to your complaint and ask each group member to explain their reasoning. I'll affirm reasonable scores and modify scores that don't seem to be supported by good reasons.

Case Note Assignment

Your assignment is to research a significant constitutional case from the list below and explain why it's important to the development of constitutional law, to constitutional politics, and to the development of the Court as a political institution. To help you prepare for the moot court, the list of cases you can choose are all relevant to *Minnesota v Mille Lacs*.

Your paper may be **no more than 15 pages** (12-pt font, 1 inch margins). Case notes are designed to explain the facts, reasoning and holding in a case in a concise and simple fashion. They are usually read by legal professionals, but they should be easily understood by an intelligent layperson. They follow a standard format:

I. Introduction: This should be brief and to the point. It should state your thesis.

II. Background: This section will discuss the specific facts of the case as well as any political, social, legal, or cultural contextual factors that you think will help to illuminate the case. It should conclude by telling us how the case got to the Supreme Court and what the major legal issues were.

III. Analysis of the Decision: This section will take us carefully, in a step-by-step analysis, through the reasoning in the Court's opinion and the concurring and dissenting opinions. You may ignore or only touch on the minor or technical issues; focus on the important ones.

IV. Significance: This section should discuss the important impacts of the decision, which may be social, economic, political or legal. Your research should alert you to a range of important consequences; this section should demonstrate your deep engagement with the scholarly literature.

V. Conclusion: A separate conclusion is optional.

You will turn in sections of the case note for me to comment on as indicated on the syllabus. You will then revise these sections and turn in a complete, polished case note in class on Friday Nov. 19.

Documenting sources: I expect you to do a significant amount of research on your case, which means at least 15 scholarly sources. A thoroughly researched paper will rely on many sources, drawing on both books and periodicals. Your bibliography should demonstrate that you've explored the best scholarship on the subject (which will typically mean that you should not rely on Internet sources, unless you can make the case that they're reliable and respected.) You should cite your sources; the conventions of legal scholarship demand that you carefully document your factual assertions. *PLEASE NOTE:* You should carefully document your sources on all drafts that you turn in.

Cases:

County of Yakima v. Confederated Tribes and Bands of Yakima Nation, [502 U. S. 251](#) (1992).

Geer v Connecticut, 161 US 519 (1895)

Georgia v Tennessee Copper Co., 206 U.S. 230 (1907)

Kleppe v. New Mexico, 426 U. S. 529 (1976)

Light v. U.S., 220 U.S. 523 (1911)

Lone Wolf v Hitchcock, 187 U.S. 583 (1903)

McGirt v Oklahoma, 591 U.S. ____ (2020)

Missouri v Holland, 251 US 416 (1920)

Oregon Dept of Fish & Wildlife v Klamath, 473 US 753 (1985)

United States v. Midwest Oil Co., [236 U. S. 459](#) (1915)

Ward v Race Horse, 163 U.S. 504 (1896)

Wyoming v Herrera, 587 U.S. ____ (2019)

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 585 (1952)