

The Supreme Court in the Era of Holmes and Brandeis

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This seminar looks at one of the most fecund periods in American constitutional history, the first four decades of the twentieth century, a period when some of the most important jurisprudential ideas that guide the modern Court were first enunciated. Many of these thoughts were initially put forth by Oliver Wendell Holmes, Jr., and Louis D. Brandeis, often in dissent. Eventually, nearly all of their opinions became accepted by later courts as guiding law.

We will be looking at writings by and about these two men, as well as some of their more important opinions. While we will be focusing on the judicial views in the opinions, we will also discuss the history that was the backdrop to these constitutional quarrels.

In order to explore these cases and writings more fully, participants should have read prior to the seminar G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1993) and Melvin I. Urofsky, *Louis D. Brandeis: A Life* (2009). Please read the assignments for each session *before* the meeting.

1. Introduction (February 12)
 - Tom Grey, “Langdell’s Orthodoxy”
 - Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940”
 - Holmes, “The Path of the Law” (1897)
 - Brandeis, “The Living Law” (1916)

2. Labor and antitrust (February 19)
 - Holmes, The Common Law (pp. 144-45)
 - Brandeis, “Organized Labor and Efficiency” (1911)
 - *Vegelahn v. Guntner* (Mass. 1896) and *Plant v. Woods* (Mass. 1900)
 - *Coppage v. Kansas* (1915)
 - *Northern Securities v. United States* (1903)
 - *Standard Oil of New Jersey v. United States* (1911)
 - *Federal Trade Commission v. Gratz* (1920)

- *Labor conspiracies and the antitrust laws: some background*
 - *Duplex Printing Co. v. Deering* (1921)
 - *Liggett Company v. Lee* (1933)
3. Protective labor legislation (February 26)
- Urofsky, “The Case of the Stubborn Baker”
 - Brandeis, “The Constitution and the Minimum Wage”
 - *Holden v. Hardy* (1897)
 - *Lochner v. New York* (1905)
 - *Muller v. Oregon* (1908)
 - *Bunting v. Oregon* (1917)
 - *Adkins v. Children’s Hospital* (1923)
4. War & Speech I (March 5)
- Urofsky & Finkelman, *March of Liberty*, chap. 27
 - Brandeis, “An Essential of Lasting Peace”
 - Holmes, “An address delivered for Memorial Day, May 30, 1884, at Keene, New Hampshire”
 - Holmes, “The Soldier’s Faith” (1895)
 - David Rabban, *Free Speech in Its Forgotten Years*, chap. 3
 - *Patterson v. Colorado* (1907)
 - *Schenck v. United States* (1919)
 - *Frohwerk v. United States* (1919)
 - *Debs v. United States* (1919)
 - *Sugarman v. United States* (1919)
5. War & Speech II (March 12)
- Haskell, “The Curious Persistence of Rights Talk in the Age of Interpretation” (excerpt)
 - Witt, “Crystal Eastman and the Puzzle of American Civil Liberties” (excerpt)
 - Rabban, *Free Speech in Its Forgotten Years*, chapters 7 & 8
 - *Masses Publishing Co. v. Patten* (1917)
 - *Abrams v. United States* (1919)
 - *Whitney v. California* (1927)
 - *DeJonge v. Oregon* (1937)
 - *Dennis v. United States* (1951)
6. Legacies (March 19)
- Menand, *The Metaphysical Club* (excerpt)
 - Albert Alschuler, *Law Without Values* (excerpt)

- *Olmstead v. United States* (1928)
- *Griswold v. Connecticut* (1965)
- *Ashwander v. Tennessee Valley Authority* (1936)