

Constitutional Structure of Power

GOV 357F | Spring 2023

MW 10:00 – 11:30 | UTC 3.102

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Office Hours: MW 3:00 – 4:30 or by appointment

Welcome and Course Overview

Welcome to GOV 357F. This course is about the way the U.S. Constitution frames and structures American politics and the exercise of government power. We will analyze the design of our national political institutions and the contested boundaries between them; ask who gets to decide big questions of public policy, and why; and look at the interplay of democratic politics and constitutional government.

In his 2009 retirement letter, Supreme Court Justice David Souter numbered these issues among “those things that matter to decent people in a civil society.” Using the Supreme Court’s published opinions as our entry point into this conversation, we will explore foundational questions and debates that continue to shape the project of constitutional government 236 years after the drafting of our basic law.

Course Format

During the semester you will be expected to read thematic essays, Supreme Court cases, and primary source documents; analyze and discuss class material in our regular meetings; demonstrate your understanding of the major themes of the course through a quiz and two exams; and communicate your ideas in two short writing assignments. The main objectives of the course are for you to become knowledgeable about the U.S. Constitution, familiar with some of the major debates about its interpretation, attuned to the way it affects the operation of America’s political institutions and structures American politics, and better equipped to think critically and communicate your ideas with others.

Teaching for the course will come through a combination of short lectures and Socratic discussions. Class discussions are an important part of the course. You are expected to come to class prepared to discuss the material with other students and with the professor. Consistent and repeated absence and lack of preparation will negatively affect your final grade.

Electronic Devices

Please leave phones, laptops, tablets and other electronic devices put away during class. You won’t need them, and they are inconsistent with the course format. Bring a notepad and pen, and come prepared to participate in class discussions.

Textbook

Donald P. Kommers, et al, *American Constitutional Law: Essays, Cases, and Comparative Notes, Vol. I: Governmental Powers and Democracy*, 4th edition (West Academic Publishing, 2018)

Course Assessment

- Constitutional Structures Quiz (10%) – January 25

- Short Writing Assignment 1 (10%) – February 8
- Exam 1 (30%) – February 22
- Short Writing Assignment 2 (10%) – March 29
- Exam 2 (30%) – April 24
- Attendance and participation (10%). Consistent absence and/or repeated lack of preparation will negatively affect one's final grade.
- Plus and minus grades will be used

See the course schedule below for more details on each of these assignments, including due dates. Final course grades will be calculated as follows:

93.5-100 = A	86.5-89.4 = B+	76.5-79.4 = C+	66.5-69.4 = D+	0-59.4 = F
89.5-93.4 = A-	83.5-86.4 = B	73.5-76.4 = C	63.5-66.4 = D	
	79.5-83.4 = B-	69.5-72.4 = C-	59.5-62.4 = D-	

Course Website and Communications

I will post the course syllabus, grades, and miscellaneous readings on the Canvas page for this class (<https://utexas.instructure.com/courses/1355585>). I will also use Canvas to make announcements and send general communications to the class.

Accommodations and Accessibility

If you have a disability and need accommodations for this course, please contact Disability and Access (D&A). You may refer to D&A's website for contact and more information: <http://diversity.utexas.edu/disability/>. If you are already registered with D&A, please deliver your Accommodation Letter to me as early as possible in the semester so we can discuss your approved accommodations.

Course Outline

Unless otherwise noted, all readings come from Donald P. Kommers, et al, *American Constitutional Law: Essays, Cases, and Comparative Notes, Vol. I: Governmental Powers and Democracy*, 4th edition (West Academic Publishing, 2018).

Week 1 (January 9 & 11): The Case for the Constitution

Assigned Readings

- George Thomas, "Constitutional Law as Civic Education," *National Affairs* (Spring 2020) [posted on Canvas].
- US Constitution (1787) [<https://www.archives.gov/founding-docs/constitution-transcript>]
- Federalist no. 10 (1787) [https://avalon.law.yale.edu/18th_century/fed10.asp]
- Federalist no. 39 (1788) [https://avalon.law.yale.edu/18th_century/fed39.asp]
- Federalist no. 51 (1788) [https://avalon.law.yale.edu/18th_century/fed51.asp]

Lectures/Discussions

- What *is* the Constitution?
- The Federalist Case for the Constitution

Week 2 (January 18): Fidelity to the Constitution

No class on January 16 (MLK Day)

Assigned Readings

- Federalist no. 78 (1788) [https://avalon.law.yale.edu/18th_century/fed78.asp]
- Abraham Lincoln, First Inaugural Address (1860) [https://avalon.law.yale.edu/19th_century/lincoln1.asp]

Lecture/Discussion

- The Least Dangerous Branch

Week 3 (January 23 & 25): The Supreme Court in the Constitutional Order

Assigned Readings

- Jonathan Sternberg, “Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court,” *Journal of Supreme Court History* (2008) [<https://www.martindale.com/matter/asr-1628380.pdf>]
- Chapter 1, “The Supreme Court,” pp. 3-32.
- Chapter 2, “The Constitution and Interpretation,” pp. 33-67.

Lectures/Discussions

- Deciding to Decide
- Deciding What to Decide

Quiz

- January 25 (in class): Constitutional Structures Quiz

Week 4 (January 30 & February 1): Judicial Review and Judicial Supremacy

Assigned Readings

- Chapter 3, “Judicial Power,” pp. 79-106.
- *Marbury v. Madison* (1803), pp. 110-118.
- *Dred Scott v. Sandford* (1857), pp. 123-132.
- *Cooper v. Aaron* (1958), pp. 133-137.
- *Ex Parte McCordle* (1868), pp. 137-139.
- *Baker v. Carr* (1962), pp. 145-151.
- *Nixon v. United States* (1993), pp. 152-161.

Lectures/Discussions

- Judicial Review
- Judicial Supremacy

Week 5 (February 6 & 8): The Judiciary and the Separation of Powers

Assigned Readings

- Chapter 4, “The Separation of Powers,” pp. 163-200.
- Schechter Poultry Corporation v. United States (1935), pp. 203-209.
- West Virginia v. EPA (2022) [https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf]
- Youngstown Sheet & Tube Co. v. Sawyer (1952), pp. 210-218.
- Powell v. McCormack (1969), pp. 219-228.
- Immigration and Naturalization Service v. Chadha (1983), pp. 228-236.
- Morrison v. Olsen (1988), pp. 237-247.

Lectures/Discussions

- Giving Away Power
- Contested Boundaries

Essay

- February 8: Short Writing Assignment 1 due

Week 6 (February 13 & 15): Separation of Powers Continued

Assigned Readings

- United States v. Nixon (1974), pp. 248-252.
- Clinton v. Jones (1997)
[<https://supreme.justia.com/cases/federal/us/520/681/case.pdf>]
- Articles of Impeachment Against President William Jefferson Clinton, pp. 254-258.
- Trump v. Mazars (2020)
[https://www.supremecourt.gov/opinions/19pdf/19-715_febh.pdf]
- Trump v. Vance (2020)
[https://www.supremecourt.gov/opinions/19pdf/19-635_o7jq.pdf]
- Chapter 5, “Foreign Affairs and Constitutional Crisis,” pp. 277-318.
- State of Missouri v. Holland (1920), pp. 323-327.

Lectures/Discussions

- When Can You Sue the President?
- Legislative Power and the Treaty Power

Week 7 (February 20 & 22): Foreign Affairs and the Presidency

Assigned Readings

- Youngstown Sheet & Tube Co. v. Sawyer (1952), pp. 330-332.
- The Prize Cases (1862), pp. 333-337.
- War Powers Resolution (1973), pp. 337-342.
- John Yoo, “U.S. Presidents Don’t Need Congress’s Approval to go to War,” *Governance* (2016) [posted on Canvas]

- Alberto Coll, “The U.S. Must Authorize Major Wars,” *Governance* (2016) [posted on Canvas]

Lectures/Discussion

- The Power of the Pen
- War Powers

Exam

- February 22 (in class): Exam I

Week 8 (February 27 & March 1): Wartime Decisions

Assigned Readings

- United States v. Curtiss-Wright Export Corp. (1936), pp. 344-348.
- Korematsu v. United States (1944), 350-359.
- Zivotofsky v. Kerry (2015), pp. 419-436.
- Ex Parte Milligan (1866), pp. 360-370.
- Hamdan v. Rumsfeld (2006), pp. 370-392.
- Boumediene v. Bush (2008), pp. 393-418.

Lectures/Discussions

- Which Powers are Inherently Executive?
- Lawful Detentions and Executive Power

Week 9 (March 6 & 8): State and Federal Authority

Assigned Readings

- Chapter 6, “Federalism and State Regulation,” pp. 439-471.
- McCulloch v. State of Maryland (1819), pp. 474-487.
- Prigg v. Pennsylvania (1842), pp. 488-500.
- New York v. United States (1992), pp. 501-512.
- Printz v. United States (1997), 513-523.
- U.S. Term Limits v. Thornton (1995), pp. 524-536.

Lectures/Discussions

- Tax = Destroy?
- The Rehnquist Revolution

Week 10 (Spring Break)

No class / No assignments

Week 11 (March 20 & 22): Federalism in the Roberts Court

Assigned Readings

- NFIB v. Sebelius (2012), pp. 536-548.
- Arizona v. United States (2012), pp. 572-583.
- Granholm v. Heald (2005), pp. 565-571.

Cases to Watch

- United States v. Texas (OT22 - oral argument was November 29, 2022)
- National Pork Producers Council v. Ross (OT22 - not yet set for oral argument)

Lectures/Discussions

- Federalism, Medicaid Expansion, and Immigration
- The Dormant Commerce Clause

Week 12 (March 27 & 29): Legislative Powers

Assigned Readings

- Chapter 7, “Congressional Powers,” pp. 585-615.
- Gibbons v. Ogden (1824), pp. 619-628.
- United States v. E.C. Knight Co. et al. (1895), pp. 628-633.
- Champion v. Ames (1903), pp. 634-638.
- Hammer v. Dagenhart (1918), pp. 639-644.

Lectures/Discussions

- What is Commerce?
- Commerce, Manufacturing, and Child Labor

Essay

- March 29: Short Writing Assignment 2 due in class

Week 13 (April 3 & 5): The Commerce Clause after 1937

Assigned Readings

- National Labor Relations Board v. Jones & Laughlin Steel Corporation (1937), pp. 645-650.
- Wickard v. Filburn (1942), pp. 651-654.
- Heart of Atlanta Motel, Inc. v. United States (1964), pp. 654-658.

Lectures/Discussions

- The Constitutional Revolution of 1937
- What Does the Civil Rights Act Have to do with Commerce?

Week 14 (April 10 & 12): The Commerce Clause after 1995 + the VRA

Assigned Readings

- United States v. Lopez (1995), pp. 659-666.
- United State v. Morrison (2000), pp. 667-674.
- Gonzales v. Raich (2005), pp. 675-682.
- NFIB v. Sebelius (2012), pp. 684-703.
- Chapter 8, “Voting and Political Representation,” pp. 725-765.
- Shelby County v. Holder (2013), pp. 775-783.

Lectures/Discussions

- What Isn’t Commerce?
- What Happened to the Voting Rights Act?

Week 15 (April 17 & 19): Policing the Political Process

Assigned Readings

- Reynolds v. Sims (1964), pp. 783-788.
- Shaw v. Reno (1993), pp. 795-802.
- Rucho v. Common Cause (2019) [https://www.supremecourt.gov/opinions/18pdf/18-422_9o11.pdf]
- Bush v. Gore (2000), pp. 858-867.
- Chiafalo v. Washington (2020) [https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf]

Case to Watch

- Moore v. Harper (OT22 – oral argument was December 7, 2022)

Lectures/Discussions

- When Gerrymandering is Unconstitutional
- Who Chooses the President?

Week 16 (April 24): The Judiciary and American Democracy

Exam

- April 24 (in class): Exam II