

G. J. Jacobsohn

Mezes 3.110

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Government 357F (38685)

## CONSTITUTIONAL LAW: STRUCTURES OF POWER

This is a course in political science concerned with law; it is not a course in law offered by a political science department. The focus of the course is one of the most vital aspects of politics: interpreting and applying the nation's fundamental rules. This interpretive activity is critical in regard to the Constitution for the simple reason that the document defines us as a people. Constitutional law is thus best viewed as an extended commentary on the meaning of America. As such it lies at the heart of a liberal arts education.

In this class we examine the structures of power in a constitutional democracy, exploring contests over authority from John Marshall and Thomas Jefferson to Donald Trump, the disputed election of 2000, the challenge of terrorism in the 21<sup>st</sup> century, the Affordable Care Act ("Obamacare") and oversight of the Trump administration. Among the topics to be considered: the powers of the federal and state governments, the executive's emergency powers, and the Supreme Court's authority to nullify the acts of other branches. Under these general headings are to be found such issues as the power to regulate firearms, recognize foreign governments, overturn a judicial decision through congressional action, deprive citizens of rights during wartime, regulate immigration, and protect voting rights.

Constitutional interpretation has largely become the prerogative of the judiciary. As we shall see early in the course, there are sound, perhaps compelling, reasons for other public officials to immerse themselves deeply into constitutional interpretation. But the plain fact is that they often do not, and, even when they do, they frequently defer to past and anticipated judicial rulings. Whether right or wrong, good or bad, a judicial quasi-monopoly in constitutional interpretation means that to give a realistic picture of what happens in the United States, a course on constitutional authority must concentrate on the judiciary. Thus, one of our objectives is to explore how courts and judges function within the American political process. A recurring question is the role of judicial review in a constitutional democracy, how one justifies the possession of this extraordinary power by an essentially undemocratic institution in a regime committed to accountability in policy-making.

Another feature of this course and its main text is its attention to the comparative dimension of the American constitutional experience. One of the consequences of having the world's oldest written Constitution is that the United States has become a notable exporter of constitutional ideas. Other nations have borrowed freely from our arrangements for formally constituting power. But in recent years American judges and scholars have turned their attention to the ways in which foreign constitutional experience might contain lessons for how we operate in this country. So, while our focus in this course is on American constitutional configurations, we will occasionally cast our eyes abroad for insights that might help us better understand ourselves through the prism of the other.

The division of the immense field of constitutional law into two courses customarily involves a separation between institutions (part 1) and rights (part 2). That custom is followed here with one major caution: the distinction is largely artificial. By constitutional design institutions in the United States were constructed to ensure the protection of certain rights. Indeed, a bill of rights was not even part of the original Constitution; its eventual inclusion should be viewed as a supplement to the protections implicit in the original constitutional architecture. The adequacy of these protections -- substance and coverage -- is another matter, about which there has always been intense disagreement. By the end of the course students should have an informed judgment on these questions, which is to say, on the desirability of constitutional reform and renewal.

#### Requirements:

One written assignment (the details of which will be discussed in class) will be due on April 13. There will also be an exam on March 19 and a final exam. The paper and first exam will each count for 30% of the final grade, and the final will be worth 40%. Final grades will use +/- grading. Noteworthy classroom participation can affect grades positively or negatively. Inasmuch as participation is impossible if you are not present, attendance matters. To that end, students will be permitted *five* absences during the semester. Additional absences will result in an automatic loss of one grade level per absence (i.e., A to A- to B+ and so on). During most classes students will be called upon to discuss the assigned materials. These will be occasions for dialogue between student and professor, but in each instance when this occurs students other than the individual called upon will be invited into the discussion. In other words, this will not be a purely lecture course. While there are times when there will be some lecturing, much of the class time will involve discussion among students and between student and professor. Needless to say, doing all this in an online pandemic-induced format will be a challenge, but one that surely can be met.

#### Texts:

Donald P. Kommers, John E. Finn, Gary J. Jacobsohn, George Thomas, and Justin Dyer,  
American Constitutional Law: Governmental Powers and Democracy (Vol. 1, 4th  
ed.)

Robert G. McCloskey, The American Supreme Court (6<sup>th</sup> ed.)

(Xeroxed materials are included in a packet to be purchased on-line at Paradigm Books. You can  
get it at this site: [Paradigmbooks.square.site](http://Paradigmbooks.square.site)

This should be done without delay as early assignments will draw from these materials.)

All students are responsible for upholding requirements for academic honesty. For the  
UT Honor Code, go to : <http://registrar.utexas.edu/catalogs/gi09-10/ch01/index.html>)

By UT Austin policy, you must notify me of your pending absence at least fourteen days  
prior to the date of observance of a religious holy day. If you must miss a class, an  
examination, a work assignment, or a project in order to observe a religious holy day,  
you will be given an opportunity to complete the missed work within a reasonable  
time after the absence.

Students with disabilities may request appropriate academic accommodations from the  
Division of Diversity and Community Engagement, Services for Students with  
Disabilities, 471-6259, <http://www.utexas.edu/diversity/ddce/ssd/>

### Assignments:

Students are urged to prepare "briefs" of the assigned cases and to be prepared  
to examine critically the opinions of the Court.

Jan.19            Introduction: what this class is about

### I. Judicial Review: The What, Who, and How of Constitutional Interpretation

Jan. 21            KFJTD, 3-67, 913-918  
Cornyn/Kagan confirmation hearings exchange (packet)

Jan. 26            Calder v. Bull (packet)  
Kelo v. City of New London, Connecticut (packet)  
Deshaney v. Winnebago County (packet)

Jan. 28            KFJTD, 79-106  
McCloskey, 1-34

- Marbury v. Madison (110)  
Federalist #78 (KFJTD, 895)
- Feb. 2      Abraham Lincoln, First Inaugural Address (903)  
Andrew Jackson, Veto of the Bank Bill (handout)  
Cooper v. Aaron (133)  
United States v. Nixon (248)
- Feb. 4      Luther v. Borden (140)  
Baker v. Carr (145)  
Reynolds v. Sims (783)  
Rucho v. Common Cause (handout)
- Feb. 9      William Rehnquist, "The Notion of a Living Constitution" (packet)  
Thurgood Marshall, Bicentennial speech (packet)  
David Souter, Harvard Commencement Address (packet)  
Dred Scott v. Sandford (123)  
Brown v. Board of Education (read on the internet)
- Feb. 11     Mann Act cases (packet)  
King v. Burwell (705)
- Feb. 16     KFJTD, 725-765  
Bush v. Gore (858)  
Cass Sunstein "Order Without Law" (packet)  
John Yoo, "In Defense of the Court's Legitimacy" (packet)  
Crawford v. Marion County Election Board (768)

## II. Vertical Structures

- Feb. 18     KFJTD, 163-200  
Schechter Poultry Corporation v. United States (203)  
Powell v. McCormack (219)
- Feb. 23     Immigration and Naturalization Service v. Chadha (141)  
Morrison v. Olson (237)  
United States v. Nixon (248)  
Trump v. Mazars (handout)  
Trump v. Vance (handout)

Feb. 25	KFJTD, 277-318 Youngstown Sheet & Tube v. Sawyer (330, 210) United States v. Curtiss-Wright Export Corp. (344)
Mar. 2	Korematsu v. United States (350) Ex Parte Milligan (360) Zivotovsky v. Kerry (419)
Mar. 4	Hamdan v. Rumsfeld (370) Samuel Issacharoff and Richard Pildes, "Between Civil Libertarianism and Executive Unilateralism"
Mar. 9	Exam

### III. Horizontal Structures

Mar. 11	McCloskey, 35-66 KFJTD, 439-471 McCulloch v. Maryland (474) Prigg v. Pennsylvania (487)
Spring Break	
Mar. 23	New York v. United States (501) Printz v. U.S. (513) U.S. Term Limits, Inc. v. Thornton (524)
Mar. 25	KFJTD, 585-615 Gibbons v. Ogden (619) United States v. E.C. Knight Co. (628) Champion v. Ames (634) Hammer v. Dagenhart (639)
Mar. 30	Cooley v. Board of Wardens (556) Southern Pacific Company v. State of Arizona (560) Granholm v. Heald (565)
Apr. 1	McCloskey, 67-120 Wickard v. Filburn (651) Heart of Atlanta Motel, Inc. v. United States (654)

Apr. 6            United States v. Lopez (659)  
                     U.S. v. Morrison (667)  
                     Gonzales v. Raich (675)

Apr. 8            NFIB v. Sebelius (684)

Apr. 13 Moot court  
                 Paper due

Apr. 15 Alden v. Maine (548)  
                 Arizona v. United States (572)

Apr. 20 Palko v. Connecticut (packet)  
                 Rochin v. California (packet)

Apr. 22 Chiafalo v. Washington (handout)

#### IV. Reconsidering the Role of the Supreme Court

Apr. 27 Shelby County v. Holder (775)

Apr. 29 McCloskey, 195-264

May 4            TBA

May 6            Summary and review

