

CONSTITUTIONAL STRUCTURE AND RIGHTS
PSC 223
Mr. Jackson
Fall 2017

COURSE SYLLABUS

Assigned reading has been posted on Blackboard as .pdf files under “Course Materials.” There is no assigned textbook.

This course concerns how the Constitution of the United States sets up the structure of government in three distinct ways: “Horizontal” (among the three branches of the federal government); “Vertical” (allocation of power between the federal government and states); and “Individual” (rights of individuals vis-à-vis the federal and state governments). In addition to the Constitution itself, the principal vehicle for our examination will be more than 200 years of Supreme Court opinions, starting with *Marbury v. Madison* in 1803. As a result, for most of the course, the issue is less an underlying normative one of whether the Constitution has set up the “right” structure, but, rather, the positive one of filling out the implications of the structure that the Constitution has, indeed, set up. But in that examination, it is essential to develop a sense of how well the Supreme Court is doing in explaining its outcomes in terms of the Constitution.

In the cases we will read, the Court is invariably construing the Constitution of the United States, either specific provisions or authority and limitations arising out of what the Court perceives to be the underlying structure embodied in the Constitution. In *every* case, you should make the effort to determine which constitutional provision is (or provisions are) involved and read the provision(s) carefully for yourself—the syllabus that follows does not “assign” specific provisions of the Constitution, but those provisions are the foundation of everything we will do in the course.

Week 1 (August 30): Course Introduction & The Nature of Judicial Review

Introduction

Orin Kerr, “How to Read a Legal Opinion”
LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000) pp. 18 –
29 & 302 – 311

David Law, *A Theory of Judicial Power and Judicial Review*,
<http://ssrn.com=1112613> (2008), pp. 3 – 13 & 76 – 85

Weeks 2 - 7 (September 6, 11, 13, 18, 20, 25 & 27; October 2, 4, 11 & 16):
Legislative, Executive, & Judicial

The Foundations of Judicial Review

Marbury v. Madison
Sections 13 & 14 of the Judiciary Act of 1789

“Horizontal” Structure: Judicial Review and its Limits

Lujan v. Defenders of Wildlife
Note on *Massachusetts v. EPA*
Note on Taxpayer Standing
Note on *Clapper v. Amnesty Int’l USA*
United States v. Windsor
Hollingsworth v. Perry
Powell v. McCormack
Note on *Walter Nixon v. United States*

“Horizontal” Structure: Separation of Powers

Youngstown Sheet & Tube Co. v. Sawyer
Zivotofsky v. Kerry
Goldwater v. Carter
Note on *INS v. Chadha* and *Clinton v. City of New York*
NLRB v. Noel Canning
Note on Congressional “Control” Over the Removal of “Officers”
United States v. Nixon
Note on Presidential Immunity from Civil Actions
Impeachment: (Read Art. I, §2, cl. 5 and § 3, cl.6 & 7; Art. II, § 4)

Issues Involving “Horizontal” Structure That Also Implicate Individual Rights:
Enemy Combatants, Executive Detention, and Habeas Corpus

Ex Parte Milligan
Applicable Provisions as an Aid from *Quirin* to *Boumediene*
Ex Parte Quirin
Hamdi v. Rumsfeld
Note on *Hamdan v. Rumsfeld*
Johnson v. Eisentrager
Boumediene v. Bush
Note on *Al-Maqaleh v. Gates*

Week 7 (October 18)

Mid-Term

Orin Kerr on How to Answer an Exam

Weeks 8 - 10 (October 23, 25 & 30; November 1 & 6): Federal & State

“Vertical” Structure: Judicial Review

Martin v. Hunter’s Lessee

“Vertical” Structure: The Nature of the Relationship of the States to the Nation

McCulloch v. Maryland

U.S. Term Limits, Inc. v. Thornton

“Vertical” Structure: Constitutional Limits on the Reach of the Federal Government: Enumerated Powers

National Federation of Independent Business v. Sebelius

[Note “break-out” readings in the areas that follow]

Background

Roberts, pp. 1 – 15 (to “III”); 58 (from “****”) – 59

Scalia, pp. 1-4 (to “I”); 64 (from “****”) – 65

Taxing Power

United States v. Butler

Bailey v. Drexel Furniture Co.

Note on *Helvering v. Davis*

Roberts, pp. 31 – 45 (to “IV”)

Scalia, pp. 16 (from “II”) – 28 (to “IV”)

Commerce Clause

Wickard v. Filburn

United States v. Lopez

Note on *United States v. Morrison* and *Gonzales v.*

Raich

Roberts, pp. 15 (from “III”) – 27 (to “2”)

Ginsburg, pp. 1 – 31 (to “III”)

Scalia, pp. 4 (from “I”) – 16 (to “II”)

Thomas, pp. 1 - 2

Necessary and Proper Clause

United States v. Comstock

Roberts, pp. 27 (from “2”) – 30

Ginsburg, pp. 31 (from “III”) – 37
Scalia pp. 5 (“A”) – 10 (“B”) [again]
Spending Power & State Autonomy as a Limit on Federal Powers
South Dakota v. Dole
New York v. United States
Roberts, pp. 45 (from “IV”) – 58 (to “****”)
Ginsburg, pp. 38 – 61
Scalia, pp. 28 (from “IV”) - 49

“Vertical” Structure: Original Constitutional Limits on State Regulation

Philadelphia v. New Jersey
Note on *C & A Carbone, Inc. v. Clarkstown* and *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*
Corfield v. Coryell
Note on *United Building & Construction Trades Council v. Mayor and Council of Camden*
Note on *McBurney v. Young*

Weeks 10 - 15 (November 6, 8, 13, 15, 20, 27 & 29; December 4, 6, 11 & 13):
Government & Individual

Individual Rights: Privileges or Immunities & Due Process

14th Amendment Privileges or Immunities
Barron v. Mayor and City Council of Baltimore
Note on the 14th Amendment’s “Privileges or Immunities” Clause
Note on 20th Century Efforts to Revisit the 14th Amendment’s Privileges or Immunities Clause
14th Amendment: Due Process & “Incorporation”
Note on “Incorporation” of the Bill of Rights to Apply to States via the 14th Amendment’s Due Process Clause
14th Amendment: Due Process and Economic Protection
Lochner v. New York
United States v. Carolene Products Co.
Williamson v. Lee Optical of Oklahoma
The “Takings” Clause and Economic Protection
Kelo v. City of New London
Nollan v. California Coastal Comm’n
Note on *Arkansas Game & Fish Comm. v. US* and *Koontz v. St. Johns River Water*
The “Contracts Clause” and Economic Protection
Note on the “Contracts Clause” of Article I, Section 10

Home Building & Loan Ass'n v. Blaisdell

Note on *Allied Structural Steel Co. v. Spannaus*

The 14th Amendment: Due Process and the Protection of Fundamental Rights

Griswold v. Connecticut

Roe v. Wade

Note on the Aftermath of *Roe v. Wade*

Washington v. Glucksberg

Obergefell v. Hodges

Note on *Pavan v. Smith*

Individual Rights: Equal Protection

The 14th Amendment: Equal Protection and Race

Brown v. Board of Education

Note on *Bolling v. Sharpe*

Loving v. Virginia

Washington v. Davis

The 14th Amendment: Equal Protection and Race-Based Affirmative Action

Regents of University of California v. Bakke

Note on *Grutter v. Bollinger* and *Gratz v. Bollinger*

Note on *Fisher v. University of Texas (I & II)*

Schuetz v. Coalition to Defend Affirmative Action

Parents Involved in Community Schools v. Seattle School District No. 1

Note on Minority "Set-Aside" Programs

The 14th Amendment and Redistricting

Note on Political Redistricting and Equal Protection

Bethune-Hill v. Virginia State Bd. of Elections

The 14th Amendment: Equal Protection and Other Classifications

Craig v. Boren

United States v. Virginia

Note on Sex-Based Legislation and the Equal Protection Clause

Cleburne v. Cleburne Living Center, Inc.

Note on Alienage as a Suspect Class

Romer v. Evans

Course Wrap-Up