

CONSTITUTIONAL STRUCTURE AND RIGHTS
PSC 223
Mr. Jackson
Fall 2018

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 invariably is 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.

A roadmap of what I expect we will cover each week is in an accompanying document, “Assigned Reading Schedule,” that you should consult in conjunction with this Course Syllabus.

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

Allocation of Powers: 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)

“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 Grants (and 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

Murphy v. NCAA

Roberts, pp. 45 (from “IV”) – 58 (to “****”)

Ginsburg, pp. 38 – 61

Scalia, pp. 28 (from “IV”) - 49

Mid-Term

Orin Kerr on How to Answer an Exam

“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*

An Introduction to Government Regulation of Individuals

Individual Rights and the “Original” Constitution: 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*

Individual Rights After the 14th Amendment: 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*

Svein v. Melin

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)*

Schuette 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

Gill v. Whitford

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

Constitutional Rights in the Context of Immigration

Note on *Trump v. Hawaii*

Course Wrap-Up