

G. J. Jacobsohn
Mezes 3.110
Office Hours: T, 10-11, Th. 10-12
Teaching Assistant: Benjamin Cook

Fall 2011
Ph: 232-1444
email: gjacobsohn@austin.utexas.edu
email: Benjamin.l.Cook@gmail.com
T, 11-12:30, Th, 2-3:30

Government 357M
Unique 38760

CONSTITUTIONAL 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 Bill Clinton, Kenneth Starr, the disputed election of 2000, the challenge of terrorism in the 21st century, and the Obama policy agenda. Some of the topics to be considered include: 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, the power to establish an office of independent counsel, the power to overturn a judicial decision through congressional action, the power to deprive citizens of rights during wartime, and the power to define the terms of impeachment. And lest we forget, our class will coincide with the likely arrival before the Supreme Court of the controversial Affordable Care Act (Obamacare to its detractors).

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:

Two written assignments (the details of which will be discussed in class) will be due on October 13 and November 15. There will also be a final exam on December 9, 9-12 AM. Each paper will count for 30% of the final grade, and the final will be worth 40%. Noteworthy classroom participation can affect grades positively or negatively. I expect informed classroom participation. 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, I do not view this as a purely lecture course. While there will be times when I will be lecturing, much of the class time will involve discussion among students and between student and professor.

Texts:

Donald P. Kommers, John E. Finn, and Gary J. Jacobsohn, American Constitutional Law: Governmental Powers and Democracy (Vol. 1, 3rd ed.)
Robert G. McCloskey, The American Supreme Court (5th ed.)

(Xeroxed materials are included in a packet to be purchased at Paradigm Books located at 407 W. 24th Street. 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.

Aug. 25 Introduction: what this class is about

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

- Aug. 30 KFJ, 1-52, 467-469
Cornyn/Kagan confirmation hearings exchange (packet)
- Sep. 1 Calder v. Bull (packet)
Kelo v. City of New London, Connecticut (packet)
Deshaney v. Winnebago County (packet)
- Sep. 6 KFJ, 61-79
McCloskey, 1-34
Marbury v. Madison (80)
Federalist #78 (KFJ, 483)
- Sep. 8 Abraham Lincoln, First Inaugural Address (461)
Andrew Jackson, Veto of the Bank Bill (handout)
Cooper v. Aaron (90)
United States v. Nixon (151)
- Sep. 13 Luther v. Borden (93)
Baker v. Carr (96)
Reynolds v. Sims (416)
Davis v. Bandemer (419)
- Sep. 15 William Rehnquist, "The Notion of a Living Constitution"
(packet)
Thurgood Marshall, Bicentennial speech (packet)
David Souter, Harvard Commencement Address (packet)
Dred Scott v. Sandford (87)
Brown v. Board of Education (read on the internet)
- Sep. 20 Mann Act cases (packet)
- Sep. 22 KFJ, 385-411
Bush v. Gore (444)
Cass Sunstein "Order Without Law" (packet)
John Yoo, "In Defense of the Court's Legitimacy" (packet)
Crawford v. Marion County Election Board (413)

- Wickard v. Filburn (359)
- Heart of Atlanta Motel, Inc. v. United States (361)
- Nov. 3 United States v. Lopez (364)
- U.S. v. Morrison (368)
- Gonzales v. Raich (372)
- Nov. 8 Excerpts from Appellate Court decisions on the Affordable Care Act (handout)
- Alden v. Maine (303)
- Federal Maritime Commission v. SC Ports Authority (307)
- Nov. 11 Palko v. Connecticut (packet)
- Rochin v. California (packet)

IV. Reconsidering the Role of the Supreme Court

- Nov. 15 Moot court
- 2nd paper due
- Nov. 17 Shaw v. Reno ((422)
- Buckley v. Valeo (431)
- McConnell v. Federal Election Commission (438)
- Nov. 22 McCloskey, 121-194
- Thanksgiving
- Nov. 29 McCloskey, 195-264
- Dec. 1 Summary and review

