

**CONSTITUTIONAL STRUCTURE AND RIGHTS**  
**PSC 223**  
Mr. Jackson  
Fall 2011

## **COURSE SYLLABUS**

Required text: KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (Foundation Press 17<sup>th</sup> edition 2010).\*

In addition to the Sullivan & Gunther book, there are a number of additional or replacement readings that are posted on Blackboard as .pdf files.

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 state governments); and “Individual” (rights of individuals vis-à-vis the government). 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 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 it is the foundation of everything we will do in the course. The Constitution is reprinted in Sullivan & Gunther following p. 1395. I am also posting a .pdf file containing the Constitution, as I find it useful to have it open alongside any particular opinion, without needing to flip back and forth in the Sullivan & Gunther book.

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\* The 16<sup>th</sup> edition (2007) is a workable alternative, with the “page translation” sheet; earlier editions are not.

## Week 1 (September 6): Course Introduction & The Nature of Judicial Review

### Introduction

Orin Kerr, “How to Read a Legal Opinion” (.pdf file)

LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000) pp. 18 – 29 & 302 – 311 (.pdf file)

David Law, *A Theory of Judicial Power and Judicial Review*,

<http://ssrn.com=1112613> (2008), pp. 3 – 13 & 76 – 85 (.pdf file)

### The Foundations of Judicial Review

pp. 1 - 15 (to Section 2) [in lieu of Sullivan & Gunther’s edited version of *Marbury v. Madison* (pp. 2 - 9), please read the unedited version (.pdf file)]

Sections 13 & 14 of the Judiciary Act of 1789 (.pdf file)

*Hayburn’s Case* (.pdf file) [read in light of *Marbury v. Madison*]

*Stuart v. Laird* (.pdf file) [read in light of *Marbury v. Madison*]

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

### “Horizontal” Structure: Judicial Review and its Limits

pp. 30 (starting with Section 4) - 59 [in conjunction with “6. Generalized Grievances” on p. 44, please read “Note on Taxpayer Standing” (.pdf file)]

### “Horizontal” Structure: Separation of Powers

pp. 248 – 264 (to Section 2) [in lieu of Sullivan & Gunther’s edited version of *Youngstown Sheet & Tube Co. v. Sawyer* (pp. 249 - 256), please read the version I edited (.pdf file)]

*Goldwater v. Carter* (.pdf file)

pp. 264 (starting with Section 2) – 270 (to “Executive Detention”)

pp. 300 (starting with Section 3) - 329 (to Section 4)

Note on *Free Enterprise Fund v. PCAOB* (.pdf file)

pp. 333 (starting with “3” at bottom) - 347

pp. 329 (starting with Section 4) - 333 (to “3” at bottom)

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

*Ex Parte Milligan* (.pdf file)

Applicable Provisions as an Aid from *Quirin* to *Boumediene* (.pdf file)

pp. 272 (starting with the second full paragraph) - 300 (to Section 3)  
[(where Sullivan & Gunther (p. 275) briefly discuss *Johnson v. Eisentrager*, please read the version I edited (.pdf file) & in lieu of Sullivan & Gunther's edited version, please read *Boumediene v. Bush* (.pdf file) & Note on *Al-Maqaleh v. Gates* (.pdf file)]

**Weeks 7 - 8** (October 25; November 1): Federal & State

"Vertical" Structure: Judicial Review

pp. 15 (starting with Section 2) - 19 (to Section 3)

"Vertical" Structure: The Nature of the Relationship of the States to the Nation

pp. 60 - 81

"Vertical" Structure: Constitutional Limits on the Reach of the Federal Government vis-à-vis States

pp. 102 (starting with *Wickard v. Filburn*) - 143 (to "State Sovereign Immunity and the Eleventh Amendment")

p. 151 (starting with Section 2) – 167 (to Section 3)

Note on the Constitutionality of the "Individual Mandate"

"Vertical" Structure: Implied Constitutional Limits on State Regulation

p. 175 (to Section 1)

pp. 184 (starting with "4") – 195 (to "Home Processing Requirements")

pp. 197 (starting with *C&A Carbone, Inc. v. Clarkstown*) – 202 (to "The Dean Milk")

pp. 216 (starting with "Facially Neutral Laws") – 241 (to "Congressional Consent")

**Week 9** (November 9)

Mid-Term

**Weeks 10 - 15** (November 15, 22 & 29; December 6 & 13): Government & Individual

Individual Rights: Privileges or Immunities & Due Process

pp. 348 - 357 (to “3”)  
*U.S. v. Cruikshank* (.pdf file)  
pp. 357 - 495 (to Section 4) [In conjunction with p. 391, please read  
*United States v. Carolene Products Co.* (.pdf file)]

### Individual Rights: Equal Protection

pp. 500 - 576 (to “Race Preferences in Electoral Districting”)  
pp. 661 (starting with “Vote ‘Dilution’: Reapportionment and  
Gerrymandering”) - 670 (to “Fundamental Rights to Access to  
Courts”)  
pp. 576 (starting with “Race Preferences in Electoral Districting”) - 641 (to  
Section 3)  
*Gill v. Office of Personnel Management* (D. Mass. 2010) (.pdf file)  
*Perry v. Schwarzenegger* (N.D. Cal. 2010) (.pdf file)  
pp. 641 (starting with Section 3) – 654 (to Section 4)

### Course Wrap-Up