

CONSTITUTIONAL LAW – POLS 3320
Department of Political Science
University of Texas at El Paso
M/W 12:00-1:20pm; UGLC 342
Syllabus – Fall 2021

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Land Acknowledgement

We, the UTEP Department of Political Science, acknowledge that we are in the unceded territories of the Indigenous Peoples who, along with countless generations of ancestors, are the guardians and keepers of this land, both throughout history and more contemporary times: the Tigua, Mansos, Sumas, Ndé, the Piros, Mescalero Apache, Chiricahua Apache, Tarahumara, Yaqui, Jumano, Comanche, Kiowa, Rarámuri, Tohono O’odham, Yaqui, Kickapoo, Diné, Hopi, Zapotec, Mixtec, Aztec-Nahua-Mexica, Huichol, Tepehuan, Coahuilteco, Chichimeca, and the other Native communities who comprise our multinational region. As scholars and people who reside and work in these lands, we respect and honor the millennia-long history of Native peoples on this land and their ongoing presence today.

COVID-19 Precaution Statement

Please stay home if you have been diagnosed with COVID-19 or are experiencing COVID-19 symptoms. If you are feeling unwell, please let me know as soon as possible, so that we can work on appropriate accommodations. If you have tested positive for COVID-19, you are encouraged to report your results to covidaction@utep.edu, so that the Dean of Students Office can provide you with support and help with communication with your professors. The Student Health Center is equipped to provide COVID-19 testing.

The Center for Disease Control and Prevention recommends that people in areas of substantial or high COVID-19 transmission wear face masks when indoors in groups of people. The best way that Miners can take care of Miners is to get the vaccine. If you still need the vaccine, it is widely available in the El Paso area, and will be available at no charge on campus during the first week of classes. For more information about the current rates, testing, and vaccinations, please visit epstrong.org.

Course Description (from Undergraduate Catalog):

A study through the use of court cases of the allocation of governmental powers with emphasis on the national government, and an introduction to the judicial function and the American legal system.

Course Overview and Objectives:

This course focuses on constitutional law concerning the structure of governmental institutions and their powers, from both a legal and nonlegal perspective. We will utilize a case book approach commonly used in a constitutional law class in law school, although we will make use of additional readings as well. This portion of the class will use the Socratic Method. In addition to learning about constitutional law in general, this approach is designed to expose students to judicial cases in order to understand the legal analyses employed by the Supreme Court within different political contexts.

Course Learning Objectives:

This course is hard, as it is taught fairly similarly to law school. However, with appropriate levels of effort and willingness, students can excel. If you do so, by the end of this course you will be able to:

- discuss the broader political climate of the Supreme Court's decision-making, past and present
- explain important legal concepts utilized by the Supreme Court
- discuss current trends in Constitutional case
- understand the legal foundations and parameters of the Constitution
- brief court decisions
- engage in appellate research
- present appellate court oral arguments
- argue legal principles involved in Constitutional cases

UTEP Edge

The UTEP Edge is our philosophy that acknowledges the many assets our students bring to the University. We provide a variety of high-impact experiences both in and out of the classroom through work of our faculty, staff, alumni, and community partners that build on these assets and talents. Many of the assignments and discussions in this class will further develop the talents you bring to this class such as developing your communication skills, teamwork, critical thinking, and problem solving.

- Communicate information clearly and effectively (Oral and Written)
- Demonstrate strategic and on-the-fly thinking patterns while learning
- Apply analysis and synthesis through legal reasoning

Texts:

1. Louis Fisher and Katy J. Harriger, *American Constitutional Law, Volume One, Twelfth Edition* (Carolina Academic Press 2019, ISBN 978-1-5310-0952-6) **OPTIONAL**

Grading:

Student's highest exam grade: 20%
Student's next-highest exam grade: 20%
Student's lowest exam grade: 15%
Socratic Method/Class Participation: 15%
Case Brief: 10%
Moot Court: 20%

Policies:

The student who chooses not to attend class does so at their own peril. While attendance will not be formally recorded, your grade will most certainly drop if you do not attend. If you are not in attendance when I call on you in class, you will receive a zero for the day. This will be explained in depth in class.

Information for the students will be communicated in two ways 1. In class; 2. Through email. The only email address I will use to contact you is your official "utep.edu" account. This means as a requirement of this course you will need to regularly check this account if you do not already. "I did not receive notification," is not a valid excuse.

For this class I will be banning laptops in the classroom. Recent studies have shown that students who use laptops in the classroom have lower grades (on average) than their peers who do not. While laptops can facilitate good note taking, I have found their use, not unlike cell phones, to be distracting to the student using them. Furthermore, computers can also prove distracting to other students.

Grading Scale:

The following numerical averages translate into final course grades:

90: A (4.0)
80-89: B (3.0)
70-79: C (2.0)
60-69: D (1.0)
-60: F (0.0)

Exams:

The three exams will consist of 15 multiple choice questions (worth 30% of the exam) and two of three LONG essays (worth 70% of the exam). The essays will involve large themes covered in class and will be apparent if you are in attendance and pay attention. Much of the material on the exams is delivered in class; however, some material from the readings *not* covered in class is tested on the exams as well. **YOU MUST BRING A BLUE BOOK TO EACH EXAM OR I WILL NOT ALLOW YOU TO TAKE IT. ALSO, IF YOU ARRIVE 15 MINUTES AFTER**

THE EXAM START TIME YOU WILL NOT BE ABLE TO TAKE THE EXAM AND WILLO RECEIVE A 0.

Test 1: September 15th

Test 2: October 25th

Test 3: December 10th at 1:00pm (Final Exam Week)

Make-Up Exams:

It is completely the student's responsibility to take the exams when they are scheduled. As a general rule, make-up exams ***will not be*** allowed; thus, a missed exam counts as a zero (0) toward the final course grade. Notwithstanding, at the instructor's sole discretion make-ups will be permitted, but only the gravest of reasons will be accepted, ***if*** documented in writing by the proper authority. Even if there is an acceptable reason for missing the regularly scheduled exam, permission to take a make-up will be granted ***only*** if the student provides the professor with prompt and proper notification; that is, the student ***must inform*** the professor of the reason for missing the exam with proper documentation ***before*** the exam takes place, ***and*** the reason must be acceptable to the instructor. If a make-up is permitted, both the format and questions can, and likely will, be different from the regularly scheduled exam.

Classroom Allies:

You will find that your best allies are your classmates in this course. If you are interested in studying with other members, I can help to facilitate this process by passing around a signup sheet for names/phone numbers/email addresses. Experience has shown in this course that students with similar energy levels, who have similar study habits, and whom live close to each other make the best study partners. It is, however, entirely up to you to make these events happen.

Case Briefs:

Each student is responsible for writing 1 case brief. When your case is discussed in class, you must answer questions about the case you have briefed (and this will also count for class participation). Case briefs not submitted in a timely manner and not discussed in class will be assigned a grade of zero (which will count double considering the discussion will be graded twice). A list of cases available for briefing, instructions and requirements for the briefs, due dates, and a sample case brief, follow this Syllabus.

Moot Court:

The last portion of your grade (worth as much as an exam) is a simulation of a Supreme Court oral argument, hence a moot court. The assignment features a team of student attorneys presenting an oral argument before a panel of student justices. The topic (which will be forthcoming) will be drawn from a current case scheduled for oral argument before the United States Supreme Court. This assignment is designed to facilitate many different skills that are

important for professions (especially attorneys), but, at the end of the day, I want you all to enjoy this assignment.

Student Attorneys: You will be required to write and deliver an oral argument before the moot court. The argument will last approximately 10 minutes, including questions from the panel of justices. The case will be separated into two sections: you will speak for 10 minutes on one issue, while your partner speaks for 10 on their issue. You will grade on the thoroughness (knowledge) of your presentation (10 percent), and the ability with which you answer questions posed to you by the panel of justices and your general demeanor during oral arguments (10 percent). Please remember, your job is not to finish all of your prepared remarks (trust me, you won't), but to persuade your fellow student justices that your client's position is the one which is correct.

Student Justices: Your assignment will be different from the attorneys for obvious reasons. You will be required to write a minimum five-page biography of the real justice whom you are portraying (5 percent). The purpose of this requirement is so that you will become familiar with not only whom you are portraying as an individual, but also (indeed, more importantly) their case history and approach to deciding cases. This will be quite important for the next assignments. **Sources:** There is a wealth of information written on each of these individuals. Finding sources should not be difficult. I do not like giving students a minimum number of sources for obvious reasons, but I will state more is always better. Newspapers and magazine articles are not the appropriate sources to be used for this type of paper. Any website which has "pedia" at the end is not acceptable in any type of paper including this one. Use multiple SCHOLARLY sources. If you have questions as to the validity of a source, ask me before using it, as I will deduct points for inappropriate sources. I expect in-text citation using MLA style guidelines.

In addition, justices will be graded based upon the quality of questions they pose to counsel during the oral arguments (10 percent). These questions should be topical, of general interest to your justice, and to the core of the issues at hand. Finally, justices will be graded upon their deliberations with the other members of the Court as ultimately demonstrated with the written Opinion of the Court's ruling as well as any other dissents and concurrences (5 percent).

University Writing Center:

The University Writing Center is a useful tool each of you should take advantage of in the course of writing this paper. While I do not require you to go, I can say definitively that your paper will be improved following a consultation with the staff. The staff sees students through appointments or walk-ins, though appointments are preferred. For more information and the registration form go to <https://www.utep.edu/uwc/>

Counseling and Psychological Services

The center, located at 202 Union West, offers confidential counseling services in English or in Spanish. They also provide group and individual counseling for currently enrolled UTEP students. For more information, go to: <https://www.utep.edu/student-affairs/counsel/>.

Adelante Child Development Center

Child care is available for children of all students of the University. The Adelante Child Development Center is located at 314 W. Schuster and is managed and operated by Adelante Childcare, Inc. Children aged three months to 12 years are accepted, depending on space availability (Hourly, daily and weekly care are available and the Center offers a Summer Camp for school-age children). Age-appropriate early childhood developmental programs are offered in the curriculum. The Adelante Child Development Center is licensed by the Texas Department of Protective and Regulatory Services. Financial assistance is available for qualifying parents through Child Care Services. For more information, please call: **915-532-1114** or contact: studentaffairs.utep.edu/childcare. If, for any reason, you cannot find a care-taker for your child(ren), you are welcome to bring them to class.

Academic Honesty and Integrity:

Per UTEP policy: The University of Texas at El Paso prides itself on its standards of academic excellence. In all matters of intellectual pursuit, UTEP faculty and students must strive to achieve excellence based on the quality of work produced by the individual. In the classroom and in all other academic activities, students are expected to uphold the highest standards of academic integrity. Any form of scholastic dishonesty is an affront to the pursuit of knowledge and jeopardizes the quality of the degree awarded to all graduates of UTEP. It is imperative, therefore, that the members of this academic community understand the regulations pertaining to academic integrity and that all faculty insist on adherence to these standards.

Any student who commits an act of scholastic dishonesty is subject to discipline. Scholastic dishonesty includes, but is not limited to, cheating, plagiarism, collusion, the submission for credit of any work or materials that are attributable in whole or in part to another person, taking an examination for another person, and any act designed to give unfair advantage to a student or the attempt to commit such acts. Proven violations of the detailed regulations, as printed in the Handbook of Operating Procedures (HOP) and available in the Office of the Dean of Students and the homepage of The Dean of Students at www.utep.edu/dos, may result in sanctions ranging from disciplinary probation, to failing a grade on the work in question, to a failing grade in the course, to suspension or dismissal, among others.

Special Needs:

If you have a disability and need classroom accommodations, please contact The Center for Accommodations and Support Services (CASS) at 747-5148, or by email to cass@utep.edu, or visit their office located in UTEP Union East, Room 106. For additional information, please visit the CASS website at www.sa.utep.edu/cass. *CASS' Staff are the only individuals who can validate and if need be, authorize accommodations for students with disabilities.*

Schedule of Assignments:

All references are to the Fisher casebook, unless provided otherwise. A case or reading denoted by *signifies that it is not found in any of the assigned books, and alternate references are supplied; a reading denoted by ** signifies that it can be found on my website.

I. Judicial Review and the Role of the Supreme Court (Aug 23 – Sept 13)

No class September 6th

The Constitution of the United States of America, pp. 481

*The Constitution of the Confederate States of America

http://www.constitution.org/csa/csa_cons.htm

Constitutional Politics, pp. 1-3

Judge as Lawmaker, pp. 16-18

Independent State Action, pp. 19-20

Who Has the “Last Word”?, pp. 20-22

Who Shall Interpret?, pp. 27-31

Decision Making: Process and Strategy, p. 135

Jurisdiction: Original and Appellate, pp. 136-137

Writ of Certiorari, pp. 137-141

From Oral Argument to Decision, pp. 141-148

Unanimity and Dissent, pp. 149-153

Douglas, The Dissent: A Safeguard of Democracy, pp. 153-154

Jackson: The Limitation of Dissent, pp. 154-155

Caseload Burdens, pp. 155-157

Threshold Requirements, p. 71

Cases and Controversies, pp. 71-76

Standing to Sue, pp. 77-81

Mootness, pp. 89-91

Ripeness, pp. 93-95

Political Questions, pp. 96-100

The Doctrine of Judicial Review, p. 31

Sources of Judicial Review Authority, pp. 31-34

Framers’ Intent, pp. 34-36

Federalist No. 78, p. 36-37

**Chisholm v. Georgia*, 2 U.S. 419 (1793)

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZO.html

Calder v. Bull (1798), pp. 404

The Road to Marbury, pp. 37-42

Marbury v. Madison (1803), pp. 42

Van Alstyne, “A Critical Guide to *Marbury v. Madison*” pp. 44-46

*The Judiciary Act of 1789, 1 Statutes at Large 73,

http://www.constitution.org/uslaw/judiciary_1789.htm

Ex Parte McCordle (1869), pp. 465

Fletcher v. Peck (1810), pp. 406

Martin v. Hunter’s Lessee (1816), pp. 46

Cohens v. Virginia (1821), pp. 48

Constraints on Judicial Review, pp. 50-54

Eakin v. Raub (Pa. 1825) – Gibson’s Dissent, pp. 54

Raftery, Bill. (Gavel to Gavel, January 4, 2012): “New Hampshire: Constitutional amendment would prohibit all judicial review of legislation”

The Boundaries of Judicial Review: Interview with Justice Powell, pp. 56-58

Ashwander v. TVA (The “Brandeis Rules”) – Justice Brandeis’ Concurrence, p. 75-76

Methods of Constitutional Interpretation, pp. 58-65

The Doctrine of Original Intent: Attorney General Meese vs. Justice Brennan, pp. 65-67

Exam 1 September 15

II. Separation of Powers (Sept 20 – October 20)

Separation of Powers Doctrine, pp. 159-164

Presidential Signing Statements, pp. 165-166

Madison’s Analysis of the Separation Doctrine (Federalist No. 47, 48, and 51), pp. 166-168

A. Foreign Affairs

Separation of Powers: Emergencies and Foreign Affairs, p. 249-253

United States v. Curtiss-Wright Corp. (1936), pp. 255

Iran-Contra Report (1987), pp. 255-256

Zivotofsky v. Kerry (2015) pp. 256

Haig v. Agee (1981), pp. 259

Executive Prerogative? pp. 261-265

The Prize Cases (1863), pp. 265

Korematsu v. United States (1944), pp. 268

New York Times Co. v. United States (1971) pp. 273

Griswold, “How Sensitive Were the Pentagon Papers’,” pp. 275-276

War Power, pp. 285-296

War Powers Resolution, pp. 303-304

Hamdi v. Rumsfeld (2004), pp. 296

Hamdan v. Rumsfeld (2006), pp. 298

Boumediene v. Bush (2008), pp. 300

Conclusions, p. 310

B. Domestic Affairs

Youngstown Co. v. Sawyer (1952), pp. 271

Dames and Moore v. Regan (1981), pp. 282

Creating the Executive Departments, pp. 171-176

Morrison v. Olson (1988), pp. 179

Congressional Oversight, pp. 208-212

Clinton v. New York (1998), pp. 212

INS v. Chadha (1983), pp. 214

Fisher, “Legislative Vetoes After *Chadha*,” pp. 217-219

Investigations and Executive Privilege, pp. 219-225

Watkins v. United States (1957), pp. 225

Barenblatt v. United States (1959), pp. 228

United States v. Nixon (1974), pp. 230

Clinton v. Jones (1997), pp. 235

Political Questions, pp. 96-100

Walter Nixon v. U.S. (1993), pp. 1002

**Todd A. Curry “The Adjudication of Presidential Power in the U.S. Supreme Court.”
Conclusions, p. 245

Exam 2 – October 25

III. Federalism (October 27 – November 8)

Federal-State Relations, p. 313

Principle of Federalism, pp. 313-320

McCulloch v. Maryland (1819), 320

Missouri v. Holland (1920), pp. 323

Commerce Clause, pp. 325-327

Gibbons v. Ogden (1824), pp. 327

**Willson v. Black Bird Creek Marsh Company*, 27 U.S. 245 (1829)

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0027_0245_ZO.html

Cooley v. Board of Wardens (1852), pp. 326

**South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=303&invol=177>

**Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945)

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0325_0761_ZO.html

**Philadelphia v. New Jersey*, 437 U.S. 617 (1978)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=437&invol=617>

**Granholm v. Heald* (2005), 544 U.S. 460 (2005)

<http://www.law.cornell.edu/supct/html/03-1116.ZS.html>

IV. National Power – Commerce, Taxing and Spending (November 10 – 24)

Nationalization of the Economy, pp. 331-333

**U.S. v. E.C. Knight Co.*, 156 U.S. 1 (1895)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=156&invol=1>

The Lottery Case (Champion v. Ames) (1903), pp. 333

**Shreveport Rate Case (Houston, E. & W.T.R. Co v. U.S.)*, 234 U.S. 342 (1914)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=234&invol=342>

**Stockyards Case (Stafford v. Wallace)*, 258 U.S. 495 (1922)

<http://supreme.justia.com/cases/federal/us/258/495/case.html>

Hammer v. Dagenhart (1918), pp. 335

The New Deal Watershed, pp. 337-340

Schechter Corp. v. United States (1935), pp. 206

Carter v. Carter Coal Co. (1936), pp. 340

Court Packing, pp. 452-457

NLRB v. Jones & Laughlin (1937), pp. 342

United States v. Darby (1941), pp. 345

Wickard v. Filburn (1942), pp. 346

Civil Rights Cases (1883)

<https://supreme.justia.com/cases/federal/us/109/3/>

Heart of Atlanta Motel v. U.S. (1964)

<https://supreme.justia.com/cases/federal/us/379/241/>

From National League to Garcia, p. 349-350

National League of Cities v. Usery (1976), pp. 350

State Powers Revived, pp. 354-359

United States v. Lopez (1995), pp. 359

The Spending and Taxing Powers, pp. 366-370

**Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895),

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0157_0429_ZO.html

**U.S. v. Butler*, 297 U.S. 1 (1936),

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0297_0001_ZO.html

Steward Machine Co. v. Davis (1937), pp. 371

South Dakota v. Dole (1987), pp. 373

National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al., 567 U.S. ____ (2012). Pp. 375

Conclusions, p. 395

Week of November 29th is Moot Court Week.

Case Brief Information

As mentioned earlier, each student is responsible to brief a case during the semester. The assignment in its entirety entails writing said brief, turning it in on the day the case is discussed, and leading the discussion of the case, as well as answering questions based upon the brief. Do **NOT** use any additional sources for your case brief. All the information you need is in the Fisher case book. I have included a sample brief at the end of this document and that format should be adopted without modification. Your case brief is due in class when it is discussed. Since this class is fluid, I cannot put a hard date on when it is due. The only way to know is to come to class daily and rely upon friends in the course.

You will have until Thursday the 6th of September to email me your top three choices for cases to brief. You may choose no more than one case from any section. I will then assign the cases formally. If you do not email me preferences I will assign you a case. It will be unchangeable.

Cases:

Judicial Review and the Role of the Supreme Court

Ex Parte McCardle (1869)
Fletcher v. Peck (1810)
Martin v. Hunter's Lessee (1816)
Cohens v. Virginia (1821)
Bush v. Gore (2000)

Separations of Power

United States v. Curtiss-Wright Corp. (1936)
The Prize Cases (1863)
Ex Parte Milligan (1866)
Korematsu v. United States (1944)
New York Times Co. v. United States (1971)
Dellums v. Bush (D.D.C. 1990)
Campbell v. Clinton (DC Cir., 2000)
Hamdi v. Rumsfeld (2004)
Hamdan v. Rumsfeld (2006)
Boumediene v. Bush (2008)
Youngstown Co. v. Sawyer (1952)
Dames and Moore v. Regan (1981)
Morrison v. Olson (1988)
Clinton v. New York (1998)
INS v. Chadha (1983)
Watkins v. United States (1957)
Barenblatt v. United States (1959)
United States v. Nixon (1974)
Clinton v. Jones (1997)
Walter Nixon v. U.S. (1993)

Federalism

McCulloch v. Maryland (1819)

Missouri v. Holland (1920)

Gibbons v. Ogden (1824)

Cooley v. Board of Wardens (1852)

Grainholme v. Heald (2005)

National Power – Commerce, Taxing, and Spending

The Lottery Case (Champion v. Ames) (1903)

Hammer v. Dagenhart (1918)

Schechter Corp. v. U.S. (1935)

Carter v. Carter Coal Co. (1936)

NLRB v. Jones & Laughlin (1937)

U.S. v. Darby (1941)

Wickard v. Filburn (1942)

Civil Rights Cases (1883)

Heart of Atlanta Motel v. U.S. (1964)

National League of Cities v. Usery (1976)

Garcia v. San Antonio Metropolitan Transit Authority (1985)

U.S. v. Lopez (1995)

U.S. v. Morrison (2000)

Gonzales v. Raich (2005)

Gonzales v. Oregon (2006)

Steward Machine Co. v. Davis (1937)

South Dakota v. Dole (1987)

Marbury v. Madison
5 U.S. 137 (1803)
CJ Marshall, majority opinion

Facts: President Adams, following an electoral loss, appointed Marbury, among other, to a federal judicial post called the DC Justice of the Peace. The appointments were approved by the lame duck Senate, signed by the President, sealed, but failed to be delivered, which was the duty of then Sec. of State, John Marshall. After taking office and being sworn in, President Jefferson refused to deliver the appointments. Marbury, whom was denied his appointment, filed suit in the Supreme Court of the United States requesting a writ of mandamus, which would order President Jefferson to deliver the appointments.

Issues: Is Marbury entitled to his appointment? If Marbury is entitled to his post, is there a legal remedy available? If so, is a writ of mandamus from the Supreme Court proper?

Holding: Yes. Yes. No.

Rationale: The judicial office Marbury seeks was correctly appointed, approved, signed and sealed. The neglect of its delivery is simple a ministerial failure, and should not prevent Marbury from his appointment which was conducted as required by law. Furthermore, Marbury does have a legal means to secure his appointment by law, and that is a writ of mandamus. However, the act which gave the Supreme Court the authority to issue writs of mandamus with original jurisdiction (The Judiciary Act of 1789) runs afoul of the US Constitution. The Constitution spells out specifically in what types of case the Supreme Court has original jurisdiction in, and to augment this list, the Constitution would have to be amended. Therefore, Marshall develops a syllogism: 1) The Constitution is the supreme law of the land, 2) § 13 of the Judiciary Act contradicts the Constitution, 3) Thus, § 13 is unconstitutional. Therefore, the method by which Marbury attempted to use is ruled null and void. The important portion of this decision does not concern Marbury and his appointment, but instead that the Supreme Court asserted their power to engage in judicial review over the other branches of government.

Other

Opinions: None

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