Overview

This course has three purposes.

First, before you take further constitutional law courses specializing in particular doctrines, I hope to get you thinking about what a constitution is, how it is supposed to work, and how it is supposed to be read and interpreted.

Second, I hope to get you thinking about how a constitution relates to competing theories of rights. The U.S. Constitution and Founding Era state constitutions were written and ratified to secure one theory of rights. During the nineteenth century, the United States underwent the Civil War and ratified the Civil War amendments – because the antebellum Constitution and political order didn’t secure the rights as understood in that political tradition well enough to Americans of African descent. In the twentieth century, American opinion leaders and statesmen claimed that circumstances had changed so much that the country needed to use new constitutional methods to secure rights. Or, perhaps they rejected the theory of rights prevalent at the Founding and embraced a new theory of rights.

Last, I hope to give you general familiarity with this country’s early history with constitutionalism. I hope to give you enough of an independent knowledge base about the United States’ founding and the early efforts to implement the Constitution that you can judge for yourself later how lawyers and judges use history.

Office hours and whereabouts

My office is on the fourth floor, in the faculty suite, Room 420. My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu.

The course also has a TWEN site. I will post announcements, run a discussion board, and post reading updates on that site. Please get familiar with it.

This semester, I will hold office hours Mondays and Wednesdays, 1-2 p.m. These are “walk-by” hours, meaning that I do not have any other appointments during them and you are free to come in to my office without appointment. However, I am happy to schedule appointments if office hours will not be satisfactory for your questions.
Class times, cancellations, and make-up classes

We meet in Room 120, on Tuesdays, 10 a.m. to 11:50 a.m. We’ll break for 10 minutes as close as we can to the middle of class without disrupting the discussion.

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of 120, and I will send an email to the class.

Class reading

I will assign around 16 pages of reading per class hour (or 32 pages of reading per class). To help you read ahead, I post large blocs of class reading on the class TWEN page, significantly in advance. However, these postings are not promises, but projections. I reserve the right to change the projected reading schedule depending on how fast or slow we are going. If you read more than a class ahead, you assume the risk of reading material I decide to leave on the cutting room floor.

I expect you to be prepared for class. When the readings focus on constitutional provisions, I expect you to have read them and thought about what they mean and how they might work. When the readings provide speeches or letters like The Federalist Papers or Anti-Federalist responses, I expect you to be able to restate the main points of argument.

Class expectations

I expect you to attend class on a regular basis, and the ABA makes it a general condition of accreditation that students not miss more than 2 weeks of class. I keep attendance by having you sign in each day.

If you miss more than 4 class hours (the equivalent of 2 classes), I will not seat you for the examination and to give you a “forced withdraw” grade for the course. With two exceptions, this is a “strict liability” policy: I do not waive this requirement because you are sick, have a job interview, personal emergency, &c. Except as specified below, you do not need to let me know in advance that you will be absent (and I prefer not to be notified), but by the same token I will not excuse absences in general.

Exception 1: I do not enforce the attendance policy when I need to reschedule class because I am canceling class due to non-GMU commitments.

Exception 2: I also do not enforce the attendance policy if the GMU Provost’s office designates the day a day of observance for a religion and you certify to me that you are a member of that religion. Consistent with the GMU Provost’s Guidelines: “It is the obligation of students to provide faculty, within the first two weeks of the semester, with the dates of major religious holidays on which they will be absent, and the dates for which they are requesting an excused absence for participation in any university-
sponsored activity scheduled prior to the start of the semester, and as soon as possible otherwise.”

Otherwise, I expect you to self-regulate interviews, personal emergencies, illnesses, religious observances and other such commitments, so that you do not miss more than 2 classes or 4 hours of class time.

I expect you to prepare for class. I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. If I call on you and you are unprepared, that counts as an absence for that hour (i.e., 1 but not 2 of your not-to-exceed 4 hours). If you are unprepared and wish to avoid getting called on, please notify me before the beginning of class and I will mark you for a 1/2 absence for the 2-hour class.

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

Grading

The grade for this class will be based solely on an essay examination. Reserving the right to change the format, I expect I will assign you a take-home examination asking you to write 2 10-page essays on themes important to the class.

Class reading sources


“Supp.” refers to a course supplement I have assembled. You will need to purchase a copy from the print/copy center, located in the first floor of the library.
Projected reading schedule


Read the Declaration of Independence, in *The Federalist* pp. 528-32.


Read the Articles of Confederation in *The Federalist*, pp. 533-41.

Read *The Federalist* Nos. 15, 21, 22, pp. 100-08, 134-48.


Read *Madison’s Notes* pp. 29-35, 115-17, 117-29.

Read the U.S. Constitution (in the back of *The Federalist*). Specifically, read Art. I §§ 1, 2, 3, 7, 8; Art. II § 1; Art. III § 1.

5. February 7. Interstate Relations and the National Army.

*Interstate harmony*

U.S. Const. art. IV; art. I § 10; art. III § 2.

Read *The Federalist* No. 42, pp. 265-67

Read *The Federalist* No. 43, pp. 270 (start with point “4”) - 277.

Read *The Federalist* No. 44, pp. 277-80 (stop at “The sixth and last class”).
The national army

Read U.S. Const. art. I, § 8, clauses 10-16 and 18; and art. II, § 2, clause 1.


Read the first 2 paragraphs of *The Federalist* No. 25, pp. 158-59. Stop with p. 159, at “demolition of the national authority.”


Taxation

Read U.S. Const. art. I § 2 cl. 3; art. I § 8 cl. 1, art. I, § 9, cls. 5, 6, 7.


Read *The Federalist* Nos. 31, pp. 189-93, and No. 34, pp. 201-07.

The Necessary and Proper and Supremacy Clauses

Read U.S. Const. art. I § 8, cl. 18, Art. VI s 2.

Read selections from Brutus I, in *The Anti-Federalist*, pp. 110-11, ¶ 2.9.5, and pp. 112-13, ¶ 2.9.8 to -9.


7. State-Based Democracies Versus a National Republic

Read Centinel, in *The Anti-Federalist* pp. 13-16, ¶ 2.7.3-.9, pp. 19-20, ¶ 2.7.22-.27.
Read speeches of Patrick Henry, 4 June 1788, in the Anti-Federalist, pp. 295-97.

Read his speech of 5 June 1788, from 297- to 298, end of the sentence with footnote 2. Pick up p. 301, starting with ‘The way to amendment is, in my conception, shut.’ Stop on p. 303, about 12 lines down, at ‘one tenth of the people to any alteration, however judicious.’

Read Brutus I, in The Anti-Federalist pp. 113-17, ¶¶ paras. 2.9.10 to 2.9.21.


8. The Constitution’s Legislative Powers


Also review No. 51, pp. 319 (“But it is not possible to give to each department …”) to (“… without being too much detached from the rights of its own department?”).

9. The Constitution’s Executive Power

Read Supp. pp. 23-25. Stop at the end of the paragraph spilling over from p. 24 to p. 25. (Ends “…as the laws shall direct.”)

Patrick Henry, speech of 5 June 1788, in The Anti-Federalist, pp. 310-14. Read ¶¶ 5.16.7-8, stopping after the 2d line of 314. (Ends “… can know its real operation.”).


Read U.S. Const. Article II.

Read The Federalist No. 69, pp. 414-21, No. 70, pp. 421-29, No. 71, pp. 429-34, and No. 77, pp. 458-63.

10. The Constitution’s Judicial Power

Read U.S. Const. Article III.

For each of the grants of jurisdiction in article III section 2, how would the disputes in each have been decided under the Articles of Confederation? See Art. of Confederation Article IX, ¶¶ 2-3, in The Federalist pp. 538-39.
Read Brutus XI, in *The Anti-Federalist*, pp. 162-67;

Brutus XII, in *The Anti-Federalist*, pp. 167-70;

Brutus XIII, in *The Anti-Federalist*, p. 170, ¶ 2.9.153 only; and


11. **The Bill of Rights**

Read U.S. Const. amends. 1-10.

Read *Madison’s Notes* pp. 630, 652.


Read *The Federalist* No. 84, pp. 509-20.


12. **Slavery at the Founding.**

Read U.S. Const. art. I § 2 cl. 3; art. I § 9 cl. 1; art. IV § 2 cl. 3; art. V.

Read *Madison’s Notes* pp. 223-25, 259, 268-69, 277, 409-13, 502-08.

Read Supp. 36-52. Excerpts from debates about slavery during the ratification process.

13. **Slavery and the Civil War**

Read Supp. pp. 53-84. Materials on the debate over slavery from the 1830s until the eve of the Civil War.

Read U.S. Const. art. IV § 3 cl. 2, amends. 13-15.

14. **The New Deal Critique of the Founding**

Read Supp. 85-87. Excerpts from Franklin Delano Roosevelt’s “Commonwealth Club Address.”
After the Commonwealth Club Address in the supplement is chapter I from James Landis, *The Administrative Process*. We’ll read this as well.