Welcome
to ConLaw I. We will use the following textbook: Michael Stokes Paulsen et al., *The Constitution of the United States* (NY: Foundation Press, 2d ed. 2013; ISBN 978-1-60930-271-9; and the 2015 Supplement. All readings/page references (unless otherwise indicated) from this book and Supplement; additional readings will be posted on TWEN.

No further readings are required. However, you may want to purchase, peruse, and even think about *The Federalist*. (Paulsen *et al.* are pretty good at excerpting relevant passages; but there’s plenty more, and I’ll revert to Publius’s teaching on the Constitution throughout.) If you want to look at a broad-sweep history of the Supreme Court and the major themes of constitutional law, check out Robert McCloskey, *The American Supreme Court* (Chicago Press 2004).

**On Teaching, and Learning, ConLaw**

Students entering ConLaw tend to entertain certain preconceptions, to wit: (1) my private opinion about liberty, truth, and justice matters greatly. Wrong: I don’t care about it. Or: (2) Law should be formalistic and rule-like, like CivPro. ConLaw isn’t; therefore, it’s all politics. Also wrong, for the most part. It’s totally true, for *n* reasons, that ConLaw can’t be like CivPro or statutory interpretation. And, “it’s all politics” *may* well be true with respect to ConLaw II (which I refuse to teach, for that reason). But I continue to believe, albeit with increased diffidence, that there is a form of (non-formalistic) constitutional law that is actually law. The tension between law and politics is crucial; you’ll learn a lot about it.

It means, *inter alia*, that there are at least two sides to the cases we will study, and I’ll do my best to present them. For my true (and correct) views on many of the cases and ConLaw in general see Greve, *The Upside-Down Constitution* (Harvard UP 2012). I do not recommend this book as an introductory text: it’s tough sledding. If you absolutely insist on probing you instructor’s mind prior to the course, check out Greve, *The Constitution* (2013). It’s short, accessible, cheap, and available on Amazon.

Candor further compels the admission that I’ve had a modest hand in a few of the cases you will be studying, including *U.S. v. Morrison* and *Free Enterprise Fund v. PCAOB*. Unsurprisingly, I believe those two cases to be rightly decided. However, Paulsen *et al.* do not agree, and neither need you.
Class Discussion

I strongly encourage active class participation, and I will consider it for purposes of your grade. (Active, constructive participation means an upgrade from, say, B+ to A-.) In particular, assuming you are prepared for class, I welcome questions of the “I just didn’t get this” variety: very likely, it’s the question your classmates are afraid to ask.

I’ll cold-call now and then, to keep you on your feet. If for some reason you have been unable to prepare for a class, send me an email to that effect. No harm if you do this once or twice; just don’t make a habit of it.

Exam

Four hours; essay question(s). You may bring the book, supplement, and TWEN materials; nothing else, including your notes. It pays to mark up your book etc. as we go along. I’ll supply additional information prior to exam time.

SYLLABUS

Check the syllabus periodically: it is subject to change, depending on our progress. I will also add reading instructions as we move along, and I may occasionally change my mind on how to arrange this particular set of deck chairs. The operative version of the Syllabus is the one on TWEN.

Consistent with your textbook, I have sacrificed breadth for depth: instead of cramming precedents into your heads, we will study a relative handful of big cases in detail. However, case titles in the assignments are meant to include the surrounding text and case summaries. The listed page numbers show the full assignment.

We may not always be able to cover the assigned materials in a single session. When that happens, you are still expected to do the readings for the next class.

Part I: Constitutional Structure

1. Reading the Constitution

Bank Controversy; M’Culloch v. Maryland (66-73; 193-209)

M’Culloch is the most important case you will read. We’ll come back to it again and again. Try to understand what Marshall is doing here, and how he does it. The editors’ questions on pp. 208-09 are helpful.

2. Constitutional Structure

Articles of Confederation (1633-38); U.S. Constitution (1-15); pp. 19-53
Foundational stuff. You won’t be able to understand any constitutional clause without understanding why it’s in the document; and you won’t be able to figure that out without some sense of the overall architecture. Useful exercises: (1) Put the Constitution next to the Articles, and cross-reference the clauses. (2) Read Federalist 51. (3) Take copious notes in this session.

3. **Constitutional Supremacy (I)**

   *Marbury v. Madison, Stuart v. Laird* (143-156); pp. 123-143; pp. 159-171

   The most famous case you’ll ever read; read it before you turn to the background materials. I’ll teach it in a very FedCourts'-ish fashion. Historically and for purposes of your performance in the class, the bloviate about judicial review isn’t all that important; what matters is the Court’s jurisdiction and its relation to the executive. I’ll lecture on the stuff on pp. 159-171 (either in this session or the next) but make sure to read it and to think about the authors’ notes/questions, pp. 162-163, 170-171.

4. **Constitutional Supremacy (II)**

   Alien & Sedition Act Controversies (97-121); *Martin v. Hunter’s Lessee* (TWEN)

   One of these days I’ll ask the editors why they left *Hunter’s Lessee* out of this textbook. The case is crucial and we’ll spend a fair bit of time on it.

**Part II: Separation of Powers; Legislative Power**

5. **Legislative/Enumerated/Inherent Powers**

   *Youngstown Sheet & Tube Co.* (173-190); *Legal Tender Cases* (715-722); *Chinese Exclusion and Selective Draft Cases* (722-736) (recommended—I’ll summarize and lecture)

   Having yanked *M’Culloch* to the first session, I’ve substituted the *Legal Tender Cases* here. But all the best arguments here come from *M’Culloch*—no?

6. **Delegated Powers**

   Post Roads Debate (210-216); *Mistretta* (216-224); *A.L.A. Schechter Poultry* (TWEN)

   Delegation is important—and, in the current ConLaw debate, the stuff of creedal passions. What is the hilarious Post Roads debate actually about—the Constitution?? Does *Schechter* really stand for an “intelligible principle” rule of (non-)delegation, as *Mistretta* suggests? And what is Justice Scalia up to in his *Mistretta* dissent?

7. **Legislative Qualifications**

   *Powell v. McCormack, U.S. Term Limits* (225-247)
Term Limits is the more important and difficult case; read carefully in light of M’Culloch.

8. Bicameralism, Presentment, Veto

INS v. Chadha, Clinton v. New York (260-281)

Contrast the hyper-formalism in these decisions with the Court’s anything-goes approach in delegation cases: what explains the difference? Does this make any sense?

Part III: Executive Power

9. Executive Power

Federalist (296-308); In Re Neagle (308-316)

Read the extended Federalist excerpts carefully; you’ll need this stuff. In Re Neagle shows that Supreme Court Justices should stay out of divorce proceedings—but what else? Which of the Steel Seizure boxes does this fit into?

10. Take Care Clause


Let’s say the President can always direct non-prosecution. Can he exercise his discretion by declining to enforce statutes against entire classes of people—say, certain groups of undocumented and deportable aliens?

11. Appointments

Federalist, Buckley v. Valeo (334-341); Morrison v. Olson (341-348); Noel Canning v. NLRB

If you think this part of Morrison is bad wait til you see the removal jazz, up next.

12. Removal

Myers (348-366); Humphrey’s Executor (366-370); Morrison v. Olson (370-382); Notes/Free Enterprise Fund v. PCAOB (381-382)

President Obama entered office with a full-scale financial crisis on his hands—and with a bunch of effectively non-removable high-level officials at the Fed, the SEC, the Federal Reserve in New York, and other agencies. Does that makes sense?
13. **Foreign Affairs**

Neutral Controversy (86-97); *Curtiss-Wright, Dames & Moore, Goldwater v. Carter, Missouri v. Holland* (383-411)

This session and the next involve a ton of very difficult questions; they’re the stuff of entire courses on foreign relations law. We’ll try to get a general lay of the land—more lecturing than usual.

14. **War Powers; Emergency**

War Powers Act; *Prize Cases, Dellung v. Bush* (411-439); *Korematsu, Ex Party Quirin, Boumedienne, Hamdi* (439-475)

Yes, it’s a lot of stuff to digest and we’ll probably run over, time-wise. Dealing adequately with these matters would consume the entire semester, so I’ve compressed them as much as possible.

**Part IV: Judicial Power**

15. **Article III**

Map of Art. III (486-503); *Mass. v. Mellon* (504-512); *Lujan v. Defenders of Wildlife* (TWEN); *Luther v. Borden, Nixon v. U.S.* (519-537); *Shelton v. Sill, Ex parte McCadle* (537-557)

Note well: half of ConLaw is ninety percent jurisdiction. That’s what you’re looking at here. For practical purposes (i.e. your future career) the standing test of *Lujan*, curiously omitted from your textbook, is the most important piece; make sure to cram the test into your head. The “political question” doctrine is intriguing but not terribly important in practice. Read the “Map” part and *Shelton* together: if you look just at the text of the Constitution, the judiciary looks like a Mickey Mouse institution—no? Then how did it become so powerful?

16. **Sovereign Immunity**

*Chisholm v. Georgia, Hans v. Louisiana* (557-570); *Ex Parte Young* (TWEN); *Seminole Tribe* (TWEN)

Nasty problems here. But it’s important to get this right. The central question is the interplay between the judicial power, federalism, and private (constitutional) rights.

17. **Federal Common Law**

*Erie RR v. Tompkins* (571-576); *Boyle v. United Technologies* (TWEN)

Forget what you learned in CivPro. *Erie* is a Conflicts case, and a constitutional federalism case. And so long as you think it was rightly decided, you will never understand the U.S. Constitution. I’ll explain. But ask yourself in preparing for class: why might I be saying this?
The author of *Boyle* now thinks the case was wrongly decided. Which Justice Scalia is right, and why?

**Part V: Federalism**

18. **Federal (Commerce) Power**


Recommended: Greve, “Federalism” (TWEN)

Federalism pervades the Constitution, so it’s useful to have a general overview and a sense of the historical trajectory; hence, the recommended assignment.

As for the Commerce Clause, follow the thread: are any of the distinctions drawn in *Gibbons* tenable?

19. **Commerce Continued; Power to Tax**

*Heart of Atlanta*, *U.S. v. Lopez*, *U.S. v. Morrison* (612-637); *NFIB v. Sebelius* (Commerce/“individual mandate” parts only) (683-714)

Jointly and severally, the powers to regulate interstate commerce, to tax, and to do “necessary and proper” things seem rather broad, don’t they? Is this fight still worth the candle?

20. **Dormant Commerce; Preemption**

*Cooley v. Board of Wardens* (TWEN); *Camps Newfound* (TWEN); *Rice v. Santa Fe Elevator* (TWEN); *Wyeth v. Levine* (TWEN)

The textbook leaves this out but it’s too important. Among other things, the “dormant” Commerce Clause and preemption help you to see how the constitutional pieces fit (or don’t fit) together. Read cases and opinions in light of *Gibbons* and the second holding in *McCulloch*. And read Justice Thomas’s opinions in *Camps Newfound* and *Wyeth* in light of *Erie*: you see the connections?

Let’s say you’re a free-market guy or gal. Would you want a broad Commerce Clause (as in, say, *Wickard*) or a narrow one (as in, say, *Hammer v. Dagenhart*)? Why?

21. **Taxing & Spending**

The Taxing Power, The Spending Power (637-648); *South Dakota v. Dole* (648-656); *NFIB v. Sebelius* (Spending/Medicaid parts only) (683-714)

Make sure to re-read *Mass v. Mellon*, *Frothingham v. Mellon* (504-512). Does the Medicaid holding in *NFIB* make any sense at all?
22. Commandeering


Disentangle the various holdings in the complicated *Prigg* case; make sure to identify the “commandeering” piece. *Printz* isn’t Justice Scalia’s best opinion ever (it’s actually pretty sloppy) but it may be his most important ever. I’ll explain.

23. Naturalization; Treaties

*Fue Yue Ting v. U.S.* (722-729); *Arizona v. U.S.*; *Missouri v. Holland*, *Reid v. Covert* (736-741); *Bond v. U.S.*

We’ll deal briefly with naturalization, basically to rehearse some now-familiar themes. The treaty question is a very big deal, and *Bond* is a disaster—no?

24. Horizontal Federalism (Full Faith and Credit; Privileges & Immunities; Art. I Sec. 10)

Map of Article IV; *Sommersett’s Case*, *Lemmon* (741-758); re-read *Prigg* (759-766); *Polar Tankers v. City of Valdez* (TWEN)

To get the full picture you need a map not just of Art IV but also of Art I Sec 10. Make one. All those clauses prohibit states from doing things that Congress could easily prohibit under its copious powers, right? Then what is this stuff doing in the Constitution? The otherwise unremarkable *Polar Tankers* case is a good vehicle to think through the structural issues, not least because the Court accidentally got it right.

Part VI: Civil War Amendments

25. Slavery

“Slavery” (73-86); *Dred Scott* (768-800); Lincoln, First Inaugural Address (800-810, n. 5)

The editors’ extensive comments and questions are excellent; think through them.

26. Reconstruction

*Slaughter-House Cases* (1265-1292)

Yale professor Akhil Amar has famously insisted on reading “The Bill of Rights as a Constitution”—as a structure that’s continuous with the unamended Constitution. True of the Civil War Amendments? In what respects? Did the *Slaughter-House Cases* get the “synthesis” right, or obviously wrong?
27. *Enforcement*

*Civil Rights Cases, U.S. v. Morrison, City of Boerne* (1306-1337)

And so it all ends with sovereign immunity argle-bargle. How fitting.