
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 riff 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 much of 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. You may actually find it useful.

**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 a 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). Open book; internet secure. 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.

The principal (textbook) assignments are a bit of a headache. I like this textbook because it goes for depth rather than breadth: instead of cramming endless precedents into your heads, we will study a relative handful of big cases in detail, with a lot of background. (Case titles in the assignments include the surrounding text and case summaries. The listed page numbers reflect the full assignment.) The headache is that the editors are in the midst of revamping the book. For now, the revisions are available in pdf format. I have put the relevant portions on TWEN and identified as “Supp [page number].” Unless otherwise indicated the assignments in the syllabus consist of the entire corresponding Supplement.

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 (Supp 588)

M’Culloch is the most important case you will read. We’ll come back to it again and again. For starters, we’ll use the case to explore various forms of constitutional argument. Try to understand what Marshall is doing here, and how he does it (it helps to read the case itself before turning to the other materials). The editors comments starting on p. 42 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. What are the major differences? What exactly is the problem that the Constitution is meant to solve? (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; *Cooper v. Aaron, Ex Parte Merryman* (Supp 159)

*Marbury* is 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. Supp 159 contains (in addition to the cases) extensive excerpts from the Lincoln-Douglas debates. The rival theories ("departmentalism" versus "judicial supremacy") both find support in *Marbury*—no? How and why?

4. **Constitutional Supremacy (II)**

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

I’ve asked the editors why they left *Hunter’s Lessee* out of the textbook (and the existing Supplements). Answer: you’re not the first to ask. The case is difficult but crucial; 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)

*Youngstown* is instructive in many ways. It’s not all that easy to tell legislative from executive power—is it? Which of the opinions strikes you as most compelling, and why?

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

6. **Delegated Powers**

Post Roads Debate (210-216); *Mistretta* (216-224); *A.L.A. Schechter Poultry* (TWEN); Dept of Transportation v. Ass’n of Am. Railroads (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, or just pork? Does *Schechter* really stand for an “intelligible principle” rule of (non-)delegation, as *Mistretta* suggests? (Read the case carefully!!) What is Justice Scalia up to in his *Mistretta* dissent, and what do you make of Justice Thomas’s opinion in the Amtrak case?

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 (yes!) 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

The editors have completely revamped this Part, principally in response to heated controversies that have arisen under the Obama administration. Two requests: (1) stay calm (and carry on). (2) recognize that none of those controversies are really new.

9. Executive Power; Take Care Clause

Federalist (296-308); In Re Neagle (308-316); Supp 296, pp. 1-4 [up to Federalist 70]; U.S. v. Cox; Adams v. Richardson; Texas v. U.S. (Supp 316)

Read the extended Federalist excerpts carefully; they’ll help you think your way through this. 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? Is there an inherent “protective power” of the President?

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

10. Appointments

Federalist 76; Buckley v. Valeo; Noel Canning v. NLRB (Supp 296, pp. 7-33)

Noel Canning is a fun occasion to revisit some of our earlier themes, including Chadha.

11. Removal; Power to Direct; “Synthesis”

Myers; Humphrey’s Executor; Princess of Orange (Supp 348); Morrison v. Olson (Supp 370)

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?

Make a list of Morrison’s holdings. Which is worst?

12. Foreign Affairs

Neutrality Controversy (86-97); Curtiss-Wright, Dames & Moore, Goldwater v. Carter, (383-410); Zivotovsky v. Kerry (Supp 410)

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.
13. War Powers; Emergency

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

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

14. Article III; Standing

Map of Art. III, Hayburn’s Case (486-503); Ex Parte Levitt (505-508, Supp 508a); Summers v. Earth Island Inst (513-519); U.S. v. Windsor (Supp 508b); House v. Burwell (Supp 283, pp. 11-18); Mass. v. Mellon (504-512)

I pretty confident the editors will reorganize this stuff for the third edition. For now, make sure to read the pieces in the listed order. Get the basic “standing” test down before you turn to standing for Congress and for states.

15. More on Article III

Luther v. Borden, Nixon v. U.S. (519-537); Sheldon v. Sill, Ex parte McCardle (537-557)

The “political question” doctrine is intriguing but not terribly important in practice. Read the “Map” part and Sheldon 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 it’s a constitutional federalism case. And so long as you think it was rightly decided, you will never understand the U.S. Constitution. Ask yourself in preparing for class: why might I be saying this?

The author of Boyle later came to think that the case was wrongly decided. Which Justice Scalia was right, and why?

Part V: Federalism
18. Federal (Commerce) Power

Introduction, Federalist 10 (577-587); Garcia v. SAMTA (Supp 657); Gibbons v. Ogden, U.S. v. Darby, Wickard v. Filburn (588-612)

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. We’ll then start on the Commerce Clause. Follow the thread: are any of the distinctions drawn in Gibbons tenable?

19. Commerce Continued

Heart of Atlanta, U.S. v. Lopez, U.S. v. Morrison (612-637); Gonzales v. Raich (Supp 637a); Comstock (Supp 637b)

Jointly and severally, the powers to regulate interstate commerce 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 fit several big constitutional pieces together. Read the cases and opinions in light of Gibbons and the second holding in M’Culloch. And read Justice Thomas’s opinions in Camps Newfound and Wyeth in light of Erie: do 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

Hylton; South Dakota v. Dole (Supp 637); NFIB v. Sebelius (683-714)

In what ways, precisely, are the powers to tax and to spend different from the power to regulate (e.g. pursuant to the Commerce Clause)—textually, structurally, federalism-wise? NFIB involves all three powers (regulate, tax, spend). Does any of its holdings make sense?

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 (it’s actually pretty sloppy) but it may be his most important ever. Why?

23. Treaties

Missouri v. Holland; Reid v. Covert; Medellin v. Texas (Supp 736); Bond v. U.S. (TWEN)

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); Scott v. Emerson (Supp 755); re-read Prigg (759-766); Polar Tankers v. City of Valdez (TWEN)

We’ll spend the bulk of our time on Art IV but to get the full picture you need a map not just of Art IV but also of Art I Sec 10, which your editors have practically excised from the Constitution. We’ll discuss it briefly. 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 (Supp 1265); Lincoln, First Inaugural Address (800-811); Texas v. White (811-815)

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

26. Reconstruction

Supp 1267; Slaughter-House Cases (1265-1292); Hurtado; McDonald v. City of Chicago (Supp 1463)

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? Which of the various “incorporation” theories is right, and why?

27. Enforcement

Civil Rights Cases, U.S. v. Morrison, City of Boerne (1306-1337); Shelby County v. Holder (Supp 815)

Were the Civil Rights Cases rightly decided? How precisely would you articulate the line that separates permissible enforcement from, umh, making things up?