

## **An Introduction to Constitutional Law**

The Casebook book for this course will be the Second Edition of: **Paulsen, Calabresi, McConnell, and Bray, The Constitution of the United States (2<sup>nd</sup> ed. Foundation Press 2013)**. You really will need to buy the Second Edition of the book. It is available for purchase at the Brown Bookstore on Thayer Street. The course is open to all Brown undergraduates, including freshmen, who have not previously taken the introductory course in structural constitutional law.

There will be a ten page maximum take home mid-term exam, which I will hand out in class on Thursday, October 31 and which must be returned by 1pm on Friday, November 1st. There will also be a take home final exam which will be handed out on Thursday, December 12<sup>th</sup>, after the last class, and which will be due back by 5pm on Friday, December 13th. The final exam will contain a first half that tests you on your knowledge of the material covered in class from the November 1<sup>st</sup> midterm until December 12<sup>th</sup>, while the second half will ask you to answer an essay question that will relate to all the materials covered over the course of the semester. Class participation in the lecture-discussion is encouraged but will not affect your grade. The midterm exam will count for one third of your grade, the first half of the final exam will count for another third of your final grade, and the final exam essay question will count for the rest of your final grade. The essay is limited to no more than 2000 words.

The outline of assigned readings below is both aspirational and provisional. We may and probably will get behind from time to time.

### **I. INTRODUCTORY HISTORICAL AND TEXTUAL MATERIALS**

#### Week 1

Please read the Constitution, the Preface to the casebook, and the material labeled “Assignment 1” on pages 19 to 31.

- Overview of the Course
- The Nature of a Written Constitution
- Historical Background to the U.S. Constitution
- The American Innovation of Written Constitutionalism

#### **The Preamble**

#### Week 2

Please read the Articles of Confederation pp. 1633-1638 and the Constitution pp. 1-15, if you have not already done so. Please also read the material labeled “Assignment 2” and “Assignment 3” on pages 32 to 53.

- The Significance of the Declaration of Independence
- The Articles of Confederation
- Difference Between the Articles of Confederation and the Constitution
- Key Decisions Made at the Philadelphia Convention
- Was the Constitution Legally Adopted?
- The Addition of the Bill of Rights, and its Significance
- Incorporation of the Bill of Rights and *Barron v. Baltimore*
- The Modalities of Constitutional Interpretation
- A Panoramic Overview of the Constitution

### Week 3

Please read “Assignment 4” and also part of “Assignment 5” on pages 53 to 86.

- The Early Controversy Over the First Bank of the United States
- The Modalities of Constitutional Interpretation Continued
- The Early Controversy Over Slavery

### Week 4

Please read the rest of “Assignment 5” and “Assignment 6” on pages 86 to 121. Please attend Constitution Day debate sponsored by the Janus Forum at 4:30pm in Saloman 101 between Harvard Law Professor Randall Kennedy and Mr. Stuart Taylor.

- The Foreign Affairs Power and the Controversy Over the Neutrality Proclamation
- The Alien and Sedition Acts
- The Virginia and Kentucky Resolutions
- Constitutionality of Nullification and/or Secession
- Jefferson’s Pardons, and Departmental Review

## **II. THE POWER OF CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW**

### Week 5

Please read “Assignment 7” and “Assignment 8” on pages 123 to 158 on “The Power of Constitutional Interpretation”

Excerpts from The Federalist Nos. 47, 48, 49, and 51  
Essay of Brutus No. XI  
Excerpts from The Federalist No. 78, 81  
Excerpt from Democracy in America  
Judicial Review and the Political Branches of the Government  
*Marbury v. Madison*  
*Stuart v. Laird*

Week 6

Please read “Assignment 9” on pages 159 to 171.

Thomas Jefferson, Letter to Abigail Adams  
Thomas Jefferson, Letter to William Charles Jarvis  
James Madison, Letter to Unknown Addressee  
Abraham Lincoln, Speech at Sixth Lincoln-Douglas Debate  
Abraham Lincoln, First Inaugural Address  
*Cooper v. Aaron*  
*Ex Parte Merryman*

### **III. THE DISTRIBUTION AND SEPARATION OF POWERS OF THE NATIONAL GOVERNMENT**

#### **Article I: Defining the Legislative Power**

**Section 1: “All legislative Powers herein granted shall be vested in a Congress ...”**

Week 7

Please read “Assignment 10” and “Assignment 11” on pages 173-209.

The Three Vesting Clauses Looked at as a Whole: A Separation of Powers Clause?  
An Introduction to Article I

What is the Legislative Power?  
What is the Boundary Line Between Legislative and Executive Power?  
The Steel Seizure Case  
The Limits of the Doctrine of Limited and Enumerated Federal Power  
The Controversy Over the Bank finally reaches the Supreme Court  
Judicial Review of Acts of Congress  
The Legitimizing Function of the Supreme Court  
The Scope of National Power Under the Necessary and Proper Clause

## Week 8

Please read “Assignment 12” and “Assignment 13” on pages 210 to 247

Legislation and Delegation  
The Post Roads Debate  
*Field v. Clark*  
*Mistretta v. United States*  
Is the Non-Delegation Doctrine Viable?  
**Sections 2, 3, and 5 “The Qualifications Clauses” and Exclusions/Expulsions**  
*Powell v. McCormack*  
*U.S. Term Limits v. Thornton*  
Composition and Selection of Congress  
Discuss the Qualifications and Expulsion Clauses

**Section 5: “Each house may determine the Rules of its Proceedings ...”**

## Week 9

Please read “Assignment 14” and “Assignment 15” on pages 247 to 283.

The Rulemaking Power  
The Senate Filibuster  
Congress’s Powers of Investigation  
The Speech or Debate Clause  
*Gravel v. United States*  
**Section 7: Congress Can Act Only Through Bicameralism and Presentment**  
*INS v. Chadha*  
*Clinton v. City of New York*

## Article I, Sections 9 and 10

Week 10

Please read Assignment 16 on pages 283 to 295 and “Assignment 67” at pages 1443 to 1463:  
**“No ... ex post facto Law shall be passed;” “No State shall pass any Bill of Attainder; ex post facto Law; or any Law impairing the Obligation of Contracts...”; “No Person shall be deprived of life, liberty, or property without due process of law”**

What is a Bill of Attainder?

*U.S. v. Brown*

The Boundary Line Between the Legislative and the Judicial Power

What is an Ex Post Facto Law

*Calder v. Bull*

The Contract Clause

Due Process of Law

*Murray’s Lessee v, Hoboken Land & Improvement Co.*

*Matthews v. Eldridge*

## Article II: The Executive Power

**Section 1: “The executive Power shall be vested in a President of the United States of America.”**

Week 11

Please read “Assignment 17” on pages 296 to 310.

The Vesting Clause: Power Grant or Designation of Office

Overview of the Structure of Article II and of the Nature of the American Presidency

The Federalist Nos. 67 to 77

Inherent Executive Power

*In re Neagle*

Week 12

Please read “Assignment 18” and “Assignment 19” from pages 310 to 348 on The Law-Executing Power and the Appointment Power.

The Law Execution Power and the Theory of the Unitary Executive  
The Powers of Direction and Control  
The Accounting Officer Case  
The Jewels of the Princess of Orange  
*United States v. Cox*  
The Federalist No. 76  
*Buckley v. Valeo*  
*Morrison v. Olsen*

Week 13

Please read “Assignment 20” on the Removal Power from pages 348 to 382

*Myers v. United States*  
*Humphrey’s Executor*  
*Morrison v. Olsen*

### **Section 1 (Foreign Affairs Power) and Section 2 (The Commander in Chief Clause)**

Week 14

Please read “Assignment 21” from pages 383 to 411 on Executive Power and Foreign Affairs

*United States v. Curtis Wright*  
*Dames and Moore v. Regan*  
Is there a Free Floating Foreign Affairs Power of the President?  
*Goldwater v. Carter*  
Which Institution has the Power to Abrogate Treaties?

Week 15

Please read “Assignment 22” on pages 411 to 439 on the War Power: Executive, Congressional, or Mixed?

Materials on Declarations of War and on the War Powers Resolution  
Who Has the War Power: The President or Congress?  
What Does the War Power Consist Of?  
The *Prize* Cases  
The Emancipation Proclamation  
The War Powers Resolution  
The Authorization for Use of Military Force  
On Terminating War

Week 16

Please read “Assignment 23” on pages 439 to 486 on Military Commissions and Emergency Powers and “Assignment 24” on Impeachment

*Ex Parte Milligan*

*Ex parte Quirin*

*Korematsu v. United States*

*Hamdi v. Rumsfeld*

**Section 4: “ ... Treason, Bribery, or other high Crimes and Misdemeanors ...”**

Law Professors’ Letter on the Clinton Impeachment

Michael Stokes Paulsen: Impeachment

Op-ed by Cass Sunstein: Impeachment? The Framers Wouldn’t Buy It

Statement of Representative Charles Canady

Note 6 on Presidential Privileges and Immunities

## **Article III: The Judicial Power**

### **Section 1**

Week 17

Please read “Assignment 25” on pages 486 to 519 on the Judicial Power and Standing Doctrine

The Vesting Clause of Article III as a Power Grant

The Federalist No. 80

James Wilson on the Judicial Power

Hayburn’s Case

The Correspondence of the Justices

*Ex parte Levitt*  
*Massachusetts v. Mellon & Frothingham v. Mellon*  
*Summers v. Earth Island Institute*

**The Mid Term Exam will be handed out in class on Oct. 31 and is due back at 5pm Nov. 1**

Week 18

Please read “Assignment 27” and “Assignment 28” on pages 519 to 557 on the Political Question Doctrine and on the Structure and Jurisdiction of the Federal Courts

*Luther v. Borden*  
*(Walter) Nixon v. United States*  
The Federalist No. 81  
*Sheldon v. Sill*  
*Ex parte McCardle*

Week 19

Please read “Assignment 29” on pages 557 to 576 on Sovereign Immunity and Federal Common Law

*Chisholm v. Georgia*  
*Hans v. Louisiana*  
*Swift v. Tyson*  
*Erie Railroad Co. v. Tompkins*

#### **IV. FEDERALISM**

##### **Article I, Section 8 (the Scope of National Power)**

Week 20



Please read “Assignment 30” and “Assignment 31” on pages 577 to 612 on American Federalism Generally

An Introduction to American Federalism  
A Map of the Constitution’s Federalism Provisions  
The Federalist No. 10  
*Gibbons v. Ogden*  
The Commerce and Necessary and Proper Clauses  
*United States v. Darby*  
*Wickard v. Filburn*

Week 21

Please read “Assignment 32” and the first part of “Assignment 33” on pages 612 to 656 providing the background to the Modern Debate on the Commerce and Necessary and Proper Clauses and discussing the Taxing Power and the Spending Power

*Heart of Atlanta Motel v. United States*  
*United States v. Lopez*  
The Taxing Power  
The Spending Power  
A Note on *United States v. Butler*  
*South Dakota v. Dole*

Week 22

Please finish “Assignment 33” and read “Assignments 34-35” on pages 683 to 715 on the recent healthcare decision

*NFIB v. Sebelius* [The Health Care Cases]

Week 23

Please read “Assignment 36” on pages 715 to 741 on other major national powers enumerated or inherent:

*Knox v. Lee and the Power to Print Paper Money*  
*Fong Yue Ting v. United States and the Power to Expel Resident Aliens*  
President Lincoln, Unpublished Opinion on the Constitutionality of the Draft

Selective Draft Law cases and the power to enact a National Draft  
The Treaty-Executing Power  
*Missouri v. Holland*  
*Reid v. Covert*

#### Week 24

Please skim and finish “Assignment 33” and read carefully “Assignment 37” on pages 657 to 683 (skim) and on pages 741 to 768 (read carefully)

*New York v. United States* (skim)  
*Printz v. United States* (skim)  
**Article IV Federalism: The Relationship of the States to Each Other and to the Nation as a Whole**  
The Full Faith and Credit Clause  
The Privileges and Immunities Clause  
*Sommersett’s Case*  
*Lemmon v. the People*  
*Prigg v. Pennsylvania*

#### Week 25

Please read “Assignment 38” from pages 768 to 800 on the Territories Clause, the New States Admission Clause, and Citizenship

*Dred Scott v. Sandford*

#### Week 26

Please read “Assignment 39” and “Assignment 61” on pages 800 to 815 and on pages 1306 to 1337 on Congress’s powers under the Guarantee Clause of Article IV, Section 4 and under Section 5 of the Fourteenth Amendment.

President Lincoln, First Inaugural Address  
*Texas v. White*  
*The Civil Rights Cases*  
*United States v. Morrison*  
*City of Boerne v. Flores*

Week 27

Please read “Assignment 73” and “Assignment 74” on pages 1573 to 1611 on Representation, Voting, and Republicanism

*Harper v. Virginia*

*Baker v. Carr*

*Reynolds v. Sims*

*Shaw v. Reno*

*Vieth v. Jubelirer*

Week 28

Please read “Assignment 75” and “Assignment 40” and the first two sections of “Assignment 41” on pages 1611 to 1631 and on pages 817 to 823 and pages 827 to 831 on: 1) a case study of the presidential election system; 2) on the constitutional amendment process; and 3) on the history of the U.S. Bill of Rights

*Bush v. Palm Beach County Canvassing Board*

*Bush v. Gore*

**The Constitutional Amendment Process: Article V**

A Short History of the Bill of Rights

**I will hand out a take home final exam at the end of the last class on Thursday, December 12th, and it will be due back to me by 5pm the next day, Friday, December 13<sup>th</sup>. The first half of the exam will test you on your knowledge of the materials covered between the midterm exam and the end of classes, while the second half of the exam will ask for your thoughts about constitutional law more generally in light of all of the material we will have covered over the course of the whole semester.**

**END OF CLASS**