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## HIST 351-01, United States Constitutional History to 1865, Spring 2009

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**History 351**  
**United States Constitutional History to 1865 - Spring 2009**  
**TR, 11:00-12:15**

Timothy S. Huebner

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**Course Description and Objectives:**

This course examines American constitutionalism from the seventeenth century to the Civil War era. We will pay particular attention to revolutionary ideology, the creation of a constitution and a republic, and the new nation's attempts to deal with the issues of federalism, the separation of powers, the government's role in the national economy, and the future of slavery in the expanding republic. In contrast to a constitutional law course, this class is more concerned with how American constitutionalism both shaped and responded to larger political and social developments, and less concerned with the evolution of constitutional doctrine in and of itself.

Because this course is a seminar, it is vital that students attend class, complete the assigned readings, and come prepared to discuss them. This is not a lecture course, and class participation is essential to the seminar's survival. By the end of the semester, students should have a broad understanding of the history of American constitutionalism to 1865, as well as improved oral, written, and critical thinking skills.

**Required Readings:**

Melvin I. Urofsky and Paul Finkelman, eds., A March of Liberty: A Constitutional History of the United States, vol. 1, From the Founding to 1890. (Text)

Melvin I. Urofsky and Paul Finkelman, eds., Documents of American Constitutional and Legal History, vol. 1, From the Founding through the Age of Industrialization, 3<sup>rd</sup> ed. (Documents)

Edward Countryman, ed., What Did the Constitution Mean to Early Americans?

Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law.

Paul Finkelman, Dred Scott v. Sandford: A Brief History with Documents.

Herman Belz, Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era.

Supplementary readings available in my Academic Volume folder (AV) or as handouts.

**Assignments and Grading Policies:**

Final grades will be determined as follows:

- Constitution quiz – 5%
- Case note – 15% (2500-3000 words)

- Critical reviews – 20% (2 @ 1000-1250 words each)
- Seminar participation/Quizzes – 20%
- Mid-term examination – 20%
- Final examination – 20%

Attendance is mandatory at all class meetings. More than two absences will adversely affect your grade in this course.

All reading assignments indicated below with a regular bullet point are required of all students. These readings will serve as the basis for discussions, and you will be responsible for these readings on quizzes, your mid-term examination, and your final examination.

All readings indicated with an asterisk (\*) are recommended. Each student must read and submit a critical review of *one* of these recommended assignments. This review must be distributed electronically to the class and submitted to Prof. Huebner by 5 p.m. of the day before the seminar. Reviews should be read by all students prior to class. You will be responsible for the information in these student critiques on your mid-term and final examinations.

You will also write a critique of one of the essays in the Belz book, which will be due on April 23, and you will write a short summary and analysis of a case—a case note—which will be due on April 2.

Make-up examinations will not be given without a verifiable medical excuse. All excuses are subject to the approval of the instructor. Quizzes will be unscheduled and cannot be made up under any circumstances. There will be no make-ups of the Constitution Quiz. No late reviews or case notes will be accepted. All work, unless otherwise indicated, is pledged under the Rhodes College Honor Code.

### **Topics and Reading Assignments:**

#### **1. The Origins of American Constitutionalism**

(Text, chapters 1, 3, 4)

Jan. 15 - Introduction to course

**Jan. 20 – No class [Your assignment is to watch the presidential inauguration.]**

Jan. 22 - Constitutionalism in England and the Colonies

- “Magna Carta,” (Documents, 1-2)
- “Mayflower Compact” (Documents, 8-10)
- “Fundamental Orders of Connecticut” (Documents, 10-12)
- “English Bill of Rights” (Documents, 22-26)

Jan. 27 - Revolutionary Ideology and State Constitutions

- “Against the Writs of Assistance,” (Documents, 38-40)
- “Resolutions of the Stamp Act Congress” (Documents, 44-46)

- “Common Sense” (Documents, 53-58)
- “Declaration of Independence” (Documents, 62-66)

**Discussion Questions:** What was going on in England during the seventeenth century, and what did that have to do with the development of constitutionalism in America? What sorts of precedents regarding government and constitutionalism were set during the colonial era? What were the key components of revolutionary ideology? How did writers like Paine and Jefferson justify separation from England and repudiation of the monarchy? What do state constitutions written during the revolutionary period reveal about the aims of the war for independence?

## 2. Creating a Nation

(Text, chapters 5-7)

### Jan. 29 – The Critical Period– Constitution Quiz

- “Articles of Confederation” (Documents, 73-79)
- \* Stephen E. Patterson, “The Federalist Reaction to Shays’s Rebellion,” (Countryman, 69-88).

### Feb. 3 – Creating a Republican Government

- “Constitutional Convention, Proposals for Government” (Documents, 91-97)
- Isaac Kramnick, “The ‘Great National Discussion.’ The Discourse of Politics in 1787” (Countryman, 17-67)
- Constitution of the United States of America (Countryman, 3-14)

### Feb. 5 – Ratification

- “Objections to the Proposed Constitution” (Documents, 115-117)
- “The Federalist No. 10” (Documents, 118-122)
- “The Federalist No. 78” (Documents, 122-124)
- Jack N. Rakove, “The Perils of Originalism,” (Countryman, What Did the Constitution Mean, 141-163)
- \* Edmund S. Morgan, “Inventing an American People,” in Inventing the People: The Rise of Popular Sovereignty in England and America, 263-287.

### Feb. 10 – Slavery and the Founders

- Finkelman, “Making a Covenant with Death: Slavery and the Constitutional Convention” (AV)
- Don E Fehrenbacher, “Slavery and the Founding of the Republic,” in The Slaveholding Republic, 15-48. (AV)
- Thurgood Marshall, “The Constitution’s Bicentennial: Commemorating the Wrong Document,” Vanderbilt Law Review, (1987). (AV)
- \* William Freehling, “The Founding Fathers and Slavery,” American Historical Review, 77(1972), 81-93.

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**Discussion Questions:** Why was the period under which the U.S. government served under the Articles of Confederation known as the "critical period?" What was so critical about it? Were the Articles really beyond repair, or was that just a clever argument made by those who had wanted a stronger national government all along? What about the notion of popular sovereignty? How important was it during the Founding? Were the Founders really concerned about "the people?" They wrote slavery into the Constitution, didn't they? What are we to make of the Framers' achievement? Was this merely a document written by a few elite white males? Should the intentions of the Framers matter to us today? Weren't the founders just a bunch of racists?

### 3. Politics and Constitutionalism in the Early Republic

(Text, chapters 8 and 10)

Feb. 12 – Jefferson, Hamilton, and the Constitution

- "Opinions on the Constitutionality of the National Bank" (Documents, 129-136)
- "Alien and Sedition Acts," (Documents, 151-156)
- "Kentucky and Virginia Resolutions" (Documents, 156-163)
- "Memorandum on Louisiana Purchase" (Documents, 178-181)

Feb. 17 – The Early Supreme Court

- "Judiciary Act of 1789" (Documents, 126-128)
- "Reply to Washington on Advisory Opinions" (Documents, 136-138)
- Chisholm v. Georgia (Documents, 144-147)
- Hylton v. United States (Documents, 147-151)

**Discussion Questions:** In what ways did Hamilton and Jefferson represent competing visions for the new nation and of the new Constitution? Could their differences best be understood as simply "loose constructionism v. broad constructionism?" Why was the constitutionality of the National Bank in particular such a hotly contested question? How did Jefferson's view of the Constitution change from the 1790s to the 1800s? Did he remain in favor of strict construction? What about his view of federalism? In the final analysis, was Jefferson a champion of state sovereignty or not? Was he a principled strict constructionist or a political pragmatist? What was the role of the early Supreme Court—before the days of John Marshall? What types of issues did it confront? Did the early Court claim the power of judicial review? Was the Court more inclined to side with the national government, or the states?

### 4. The Marshall Court and Judicial Nationalism

(Text, chapters 11 and 12)

Feb. 19 – Judicial Review

- Marbury v. Madison (Documents, 170-176)
- Hobson, The Great Chief Justice, ix-71

Feb. 24 – Nationalism and Sovereignty

- Fletcher v. Peck (Documents, 194-198)
- Martin v. Hunter's Lessee (Documents, 203-206)
- Hobson, The Great Chief Justice, 72-110

Feb. 26 – Economic Nationalism

- Dartmouth College v. Woodward (Documents, 207-213)
- McCulloch v. Maryland (Documents, 217-225)
- Hobson, The Great Chief Justice, 111-149

Mar. 3 – The Marshall Court and the Specter of Sectionalism

- Cohens v. Virginia (Documents, 232-237)
- Gibbons v. Ogden (Documents, 245-249)
- \* Timothy S. Huebner, “Spencer Roane, Virginia Legal Culture, and the Rise of a Southern Judiciary,” in Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890, 10-39.

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**Mar. 5– MID-TERM EXAMINATION**

**Discussion Questions:** What kind of a chief justice was John Marshall? Was Marbury v. Madison really important, or has its significance been exaggerated? What about some of Marshall's lesser known pronouncements—Fletcher, McCulloch, Dartmouth College, Gibbons—weren't they much more important than Marbury? What was at the core of Marshall's jurisprudence—crass capitalism? Commitment to the rule of law? A strong national government? What about the other justices on the Court? Did they do anything? Was Justice Story's attempt to use "popular sovereignty" in Martin v. Hunter's Lessee a sleight of the hand—a trick by a clever constitutional theorist to expand national power? What of the opposition to Marshall and Story? Were opponents like Spencer Roane merely attempting to protect slaveholding interests, or did their arguments have constitutional validity? Why was the Missouri Crisis so significant in American constitutional history?

**5. The Constitution and the Court in the Age of Jackson**

(Text chapters 14-16)

Mar. 10 – Calhoun and Nullification

- “South Carolina Exposition and Protest” (Documents, 262-265)
- “South Carolina Ordinance of Nullification” (Documents, 271-274)
- \* James Brewer Stewart, “A Great Talking and Eating Machine: Patriarchy, Mobilization, and the Dynamics of Nullification in South Carolina,” Civil War History 37 (1981), 197-220.
- \* Timothy S. Huebner, “Divided Loyalties: Justice William Johnson and the Rise of Disunion in South Carolina, 1822-1834,” Journal of Supreme Court History, (1995), 19-30.

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Mar. 12 – The Twilight of the Marshall Era

- Worcester v. Georgia (Documents, 281-286)
- Barron v. Baltimore (Documents, 287-290)
- Hobson, The Great Chief Justice, 150-214

**(Spring Break: March 17 & 19)**

Mar. 24 – Jackson and the Bank War

- “Veto of Maysville Road Bill” (Documents, 269-271)
- “Veto of Bank Bill” (Documents, 250-257)
- \* Richard Hofstadter, “Andrew Jackson and the Rise of Liberal Capitalism,” in The American Political Tradition and the Men Who Made It, 56-85.

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**Mar. 26 – No class – Prof. Huebner out of town**

Mar. 31 - The Taney Court and Commerce

- Mayor of New York v. Miln (Documents, 283-288)
- Cooley v. Board of Wardens (Documents, 274-281)
- Passenger Cases (handout)

Apr. 2 - The Taney Court and Contracts – **Case Note Due**

- Charles River Bridge v. Warren Bridge (Documents, 312-316)

**Discussion Questions:** What was the doctrine of nullification? Was it a constitutional theory, or simply a mechanism for protecting the interests of slaveholders? Why didn't the other southern states join South Carolina in its crusade against the national government? What was going on with the Marshall Court by the early 1830s? Was it losing its influence? Why did the National Bank continue to be such a pressing question during the 1830s? Why was Jackson so fiercely opposed to the Bank? Was it really unconstitutional? Should the president have the power to determine an act's constitutionality? What about Jackson's arguments regarding internal improvements? What kind of a record did the Taney Court amass in the area of economic development and regulation? Was Taney a great chief justice and worthy successor to Marshall? Did his decision in Charles River Bridge promote economic development, or did it undermine the rights of property owners?

## **6. Slavery, Sectionalism, and the Constitution**

(Text chapters 17 and 18)

Apr. 7 – Slavery and the Constitution in the Early National Era

- Garrison, “On the Constitution and the Union” (handout)
- Prigg v. Pennsylvania (Documents, 328-333)

### **Apr. 9 – Easter Recess**

Apr. 14 – Slavery and the Constitution in the 1850s

- Jones v. Van Zandt, (Documents, 342-344)
  - Fugitive Slave Act of 1850, (Documents, 367-370)
  - Douglass, “What to the Slave is the Fourth of July?” (387-391)
  - \* Eric Foner, “Salmon P. Chase: The Constitution and the Slave Power,” in Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War, 73-102.
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Apr. 16 - Dred Scott and its Aftermath

- Finkelman, Dred Scott v. Sandford, v-77, 108-126.
  - \* Paul Finkelman, “‘Hooted Down the Page of History’: Reconsidering the Greatness of Chief Justice Taney,” Journal of Supreme Court History (1994) 83-102.
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**Discussion Questions:** What did the Constitution say about slavery? Did the Framers look favorably upon the “peculiar institution,” or did they have their doubts about its morality? What about antislavery constitutionalism? Was there any basis for an antislavery position in the U.S. constitutional tradition? What was the relationship between slavery and federalism? Were pro-slavery theorists nationalists or sectionalists? Why was the Dred Scott decision so important? What effects did it have on the political system in the years before the Civil War? What were the implications of Dred Scott for judicial power? Should the Dred Scott decision forever be regarded as a stain upon the record of Chief Justice Taney and his Court?

## **7. The Civil War as a Constitutional Crisis**

(Text chapters 19 and 20)

Apr. 21 – Secession and the Confederacy

- “South Carolina Ordinance of Secession” (Documents, 431-432)
- “Mississippi Secession Resolutions” (AV)
- “Constitution of the Confederate States of America” (Documents, 438-446)

Apr. 23 – Lincoln and the War – **Belz Review Due**

- Lincoln, “First Inaugural Address” (Documents, 446-452)
- Ex parte Merryman (Documents, 453-458)
- Prize Cases (Documents, 463-467)
- Belz, Abraham Lincoln, Constitutionalism, and Equal Rights, ix-43, 72-100

Apr. 28 – Emancipation and Civil Rights

- “Emancipation Proclamation” (Documents, 460-462)
- “Gettysburg Address” (471-472)
- Thirteenth Amendment
- “Black Codes of Alabama and Mississippi” (Documents, 488-495)
- “Civil Rights Acts of 1866” (Documents, 495-499)
- “Veto of Civil Rights Act” (Documents, 499-504)
- Belz, Abraham Lincoln, Constitutionalism, and Equal Rights, 101-118, 138-161

Apr. 30 – Civil Rights, Reconstruction, and Federalism

- “Articles of Impeachment” (Documents, 509-513)
- Fourteenth Amendment
- Belz, Abraham Lincoln, Constitutionalism, and Equal Rights, 170-246
- \* James M. McPherson, “Lincoln and Liberty,” in Abraham Lincoln and the Second American Revolution, 43-64.

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**Discussion Questions:** How was the American Civil War a constitutional crisis? What was the constitutional basis of the secessionist argument? What constitutional pressures emerged during wartime? How did Lincoln handle these various constitutional issues? Was he a dictator, or did he exercise his power in accordance with the Constitution? What about emancipation as a constitutional issue? Was there any constitutional basis for Lincoln's Emancipation Proclamation? What about the impeachment of Andrew Johnson? Was it merely politically motivated, or did substantive issues demand his impeachment? What happened to federalism through all of this? Was the position of the national government stronger after the war? What happened to the notion of “liberty” during the Civil War era?

**FINAL EXAMINATION: Wednesday, May 6, 8:30 a.m.**