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## HIST 351-01, United States Constitutional History to 1865, Spring 2001

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**History 351**  
**United States Constitutional History to 1865 - Spring, 2001**

Timothy S. Huebner

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**Course Description and Objectives:**

This course examines the development of American constitutionalism from the seventeenth century through the Civil War era. We will pay particular attention to the revolutionary ideology of eighteenth century America, 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.

This course is a seminar. That means that each student must complete the assigned readings and come to class prepared to discuss them. This is not a lecture class, and class participation is key to the seminar's (and your) survival.

After completing this course, students should have a broad understanding of the history of American constitutionalism to 1865, as well as improved oral, written, and critical thinking skills.

**Readings:**

Kelly, Harbison, and Belz, The American Constitution: Its Origins and Development, vol. I, 7<sup>th</sup> ed., 1991. (general textbook)

Akhil Amar, The Bill of Rights: Creation and Reconstruction, 1998.

Edward Countryman, ed., What Did the Constitution Mean to Early Americans? 1999.

Stanley I. Kutler, Privilege and Creative Destruction: The Charles River Bridge Case, 1971.

Paul Finkelman, Dred Scott v. Sandford: A Brief History with Documents, 1997.

Supplementary Course Packet, available from Professor Huebner, 305 Clough Hall.

**Assignments and Grading Policies:**

Attendance is mandatory; if you must miss class because of illness, please notify me immediately, either by phone or by e-mail. Final grades will reflect attendance. You may

assume that your final grade in this class will be no higher than the percentage of classes you attend. Final grades will be determined as follows:

Constitution quiz – 5%  
Article review/Oral presentation - 15%  
Mid-term examination - 20%  
Final examination -20%  
Research paper - 20%  
Seminar participation -20%

Detailed explanations of all these assignments will follow. Copies of this syllabus, as well as all handouts and assignment sheets, will be available on the Academic Volume in the file marked "Huebner."

Make-up examinations will not be given without a verifiable medical excuse. All excuses are subject to the approval of the instructor. There will be no make-ups of the quiz. Late papers will be accepted one **day** (not one class period) after the due date, with a one letter-grade penalty. Papers will not be accepted more than one day after the due date. All work, unless otherwise indicated, is pledged under the Rhodes College Honor Code.

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

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

(KHB text, 12-64)

Jan. 11 - Introduction to course

Jan. 16 - Constitutionalism in England and the Colonies  
("Magna Carta," "Mayflower Compact," "Fundamental Orders of Connecticut," "English Bill of Rights")

Jan. 18 - Revolutionary Ideology and State Constitutions  
("Against the Writs of Assistance," "Resolutions of the Stamp Act Congress," "Common Sense," "Declaration of Independence," "Pennsylvania Bill of Rights")

#### **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**

(KHB, 65-116)

\*Jan. 23 - The Critical Period  
("Articles of Confederation")

Jan. 25 - Creating a Republican Government  
("Virginia Plan," "New Jersey Plan," "Hamilton's Plan"; Countryman, 17-67)

Jan. 30 - Debate over Ratification  
(Countryman, 3-14; "Objections to the Proposed Constitution," "The Federalist No. 10," "The Federalist No. 78," Amar, xi-19)

Feb. 1 - The Bill of Rights  
(Amar, 20-133)

\*\*Feb. 6 - The Framers and their Intentions  
(Countryman, 113-163; Marshall, "The Constitution's Bicentennial")

### **Report Reading:**

Stephen E. Patterson, "The Federalist Reaction to Shays's Rebellion," in Countryman, 69-88.  
Charles A. Beard, "An Economic Interpretation of the Constitution," in Leonard W. Levy, ed.,  
Essays on the Making of the Constitution, (New York, 1969), 3-32.  
Edmund S. Morgan, "Inventing an American People," in Inventing the People: The Rise of  
Popular Sovereignty in England and America, (New York, 1988), 263-287.

### **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?" What are we to make of the Framers' achievement? Was this merely a document written by a few elite white males? Were the Founders' economic interests the real basis for this Constitution, or were ideological factors at work? Should we celebrate the birth of the Constitution, or as Thurgood Marshall argues, its "life?" How far reaching did the Founders intend this government to be? Did they foresee today's modern state, or was their vision a conservative one that emphasized limiting the powers of government? Should the intentions of the Framers matter to us today?

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

(KHB, 117-155)

\*Feb. 8 – Jefferson, Hamilton, and the Constitution

(“Opinions on the Constitutionality of the National Bank,” “Virginia and Kentucky Resolutions,” “Memorandum on Louisiana Purchase”)

\*Feb. 13 - The Early Supreme Court  
(“Judiciary Act of 1789,” Chisholm v. Georgia, Hylton v. United States)

**Report Reading:**

John J. Turner, “The Twelfth Amendment and the First American Party System,” Historian 35 (1973), 221-237.

Sandra Frances VanBurkleo, “‘Honour, Justice, and Interest’: John Jay’s Republican Politics and Statesmanship on the Federal Bench,” in Scott Douglas Gerber, Seriatim: The Supreme Court Before John Marshall, (New York, 1998), 26-69.

**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**

(KHB, 156-199)

\*Feb. 15 - Judicial Review  
(Marbury v. Madison, Eakin v. Raub, Fletcher v. Peck)

\*Feb. 20 - Nationalism and Sovereignty  
(Hunter v. Martin, Martin v. Hunter's Lessee)

\*Feb. 22 - Economic Nationalism  
(Dartmouth College v. Woodward, Sturges v. Crowninshield, McCulloch v. Maryland)

Feb. 27 – The Marshall Court and the Specter of Sectionalism  
(Cohens v. Virginia, Gibbons v. Ogden; Huebner, “Spencer Roane, Virginia Legal Culture, and the Rise of a Southern Judiciary”)

**Mar. 1 - MID-TERM EXAMINATION**

**(Spring Break: March 5-9)**

**Report Reading:**

William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," Michigan Law Review 76 (1978), 893-

Donald M. Roper, "Judicial Unanimity and the Marshall Court—A Road to Reappraisal," American Journal of Legal History (1965), 118-134.

Bruce A. Campbell, "John Marshall, the Virginia Political Economy, and the Dartmouth College Decision," American Journal of Legal History (1975), 40-65.

**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 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 in the Age of Jackson**

(KHB, 200-240)

\*\*Mar. 13 - Nullification

("South Carolina Exposition and Protest," "South Carolina Ordinance of Nullification")

Mar. 15 - Indian Removal and the Cherokee Cases

(Worcester v. Georgia, State v. Foreman)

\*Mar. 20 - The Bank War

("Veto of Bank Bill," "Veto of Maysville Road Bill," "Daniel Webster Defends the BUS")

Mar. 22 - The Taney Court and Economic Development, I

(City of New York v. Miln, Charles River Bridge v. Warren Bridge.; Kutler, ix-53)

\*Mar. 27 - The Taney Court and Economic Development, II – **First Draft of Paper Due**

(Kutler, 54-179; Cooley v. Board of Wardens)

**Report Reading:**

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.

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.

Carlton Jackson, "The Internal Improvement Vetoes of Andrew Jackson," Tennessee Historical Quarterly 25 (1966), 261-279.

R. Kent Newmyer, "Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism," American Journal of Legal History (1973), 232-245.

### **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 do the Cherokee Cases tell us about the Marshall Court's understanding of federalism, the rule of law, and the rights of Native Americans? 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? How compelling were Webster's arguments on these issues? If Jackson did not favor a national role in economic regulation, what was his view of such issues? What was the significance of the Charles River Bridge decision? Did the Taney Court promote economic development, or did it undermine the rights of property owners?

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

(KHB, 241-290)

\*Mar. 29 - Slavery in the Constitutional Order

(Garrison, "On the Constitution and the Union," Prigg v. Pennsylvania, Fugitive Slave Act of 1850)

\*Apr. 3 - Antislavery Constitutionalism

(Somerset v. Stewart, Massachusetts Personal Liberty Act of 1855)

\*Apr. 5 - Dred Scott and its Aftermath

(Finkelman, 1-77, 108-126, 169-182; Ableman v. Booth)

### **Report Reading:**

William Freehling, "The Founding Fathers and Slavery," American Historical Review, 77 (1972), 81-93.

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.

Paul Finkelman, "'Hooted Down the Page of History': Reconsidering the Greatness of Chief Justice Taney," Journal of Supreme Court History (1994) 83-102.

### **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 Chief Justice Taney and his Court?

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

(KHB, 291-335)

\*\*Apr. 10 - Secession and the Confederacy

(“Mississippi Secession Resolutions,” “Sections of the Confederate Constitution”)

### **Apr. 12 – Easter Recess**

\*Apr. 17 - War and the Constitution

(Ex parte Merryman, Prize Cases, Ex parte Milligan)

Apr. 19 – Reconstruction and Civil Rights

(“Emancipation Proclamation,” “Black Code of Alabama,” “Civil Rights Acts of 1866,” “Veto of Civil Rights Act,” “Articles of Impeachment”)

Apr. 24 – Reconstruction and the Bill of Rights

(Amar, 163-294)

Apr. 26 - Summary and Conclusions – **Final Draft of Research Paper Due**

### **Report Reading:**

Paul Finkelman, “States’ Rights North and South in Antebellum America,” in Kermit L. Hall and James Ely, eds., An Uncertain Tradition: Constitutionalism and the History of the South, 125-158.

Kenneth M. Stampp, “The Concept of a Perpetual Union,” Journal of American History 65 (1978), 5-33.

Ludwell H. Johnson, III, “Abraham Lincoln and the Development of Presidential War Making Powers: Prize Cases (1863) Revisited,” Civil War History, 35 (1989).

### **Discussion Questions:**

How was the American Civil War a “constitutional crisis?” What was the constitutional basis of the secessionist argument? What were the distinguishing features of the Confederate Constitution? Was it an American document or a “Southern” document? 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? How did Lincoln conceive of Reconstruction? What were his primarily goals for the post-war nation? What about the impeachment of Andrew Johnson? Was it merely politically motivated, or did substantive constitutional 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 civil rights and civil liberties during the wartime period? Was the Bill of Rights "reconstructed?"

**FINAL EXAMINATION: Friday, May 4, 2001, 1:00-3:30 p.m.**