Constitutional Law  
Professor Deborah Malamud  
Spring 2018

Meeting Times, Cancellations, and Makeup Classes:

Regular class time:   Tues Thurs 9-10:50  
                      Furman 212

Legislative Monday   Tuesday Feb. 20 (no class)

Professor Malamud's Contact Information and Office Hours:

Office:         310 Vanderbilt  
Phone:          212-992-8902  
Email:          deborah.malamud@nyu.edu  
Office hours:   Tues 2-4 and by appointment

I encourage you to sign up for office hours by using the “Office Hours” tab on Classes. You may drop in during office hours if there is no one in the office. My practice is for sessions to be private (meaning they belong to individuals or to groups who sign up to see me as a group).

Faculty Assistant:   Jerome Miller, 411 Vanderbilt (first desk)  
millerj@mercury.law.nyu.edu  
992-8821

Teaching Assistants:

Nicholas Gallagher (nmg382@nyu.edu) and Jacob Karr (jmk858@nyu.edu). They will be in touch with the class via email regarding their role and availability.

Learning Outcomes:

As a result of ABA accreditation standards, faculty members need to place, in the syllabus of their course, a specification of the “learning outcomes” for the course.

Constitutional Law serves as an introductory course that focuses on constitutional structure (federalism and separation of powers) and the Fourteenth Amendment (mostly Equal Protection and Substantive Due Process), and poses basic questions about how the constitution has developed and been interpreted in the course of its (and our) history. The course serves as a gateway to the advanced curriculum in public law.
Every course in Constitutional Law is colored by the passions and methodological commitments of the person teaching it. What gives this version of Constitutional Law its particular flavor is my commitment to helping you develop an historical understanding of the relationship between the Constitution and the American people, as reflected by constitutional debates both inside and outside the Supreme Court.

I do not see the Constitution as an abstract template of a government. The framers of the Constitution wrote and ratified the document with (sometimes conflicting) expectations (sometimes predictive, sometimes aspirational) that it would be governing a particular people, with particular characteristics (political, racial, religious, economic, and territorial). Those expectations shaped the Constitution. As the underlying real conditions of the country changed, or the framers’ aspirations came not to be met, the nation’s transformations were challenged or defended in the name of the Constitution. Battles over the inclusion or exclusion of peoples from the status of full national citizens took place in the name of the Constitution. In short, the Constitution and the American people came to constitute each other, and changed together over time.

In part to develop this theme, I organize the opening section of the course roughly chronologically (as does the casebook), from the Marshall Court through the Warren Court – ending in the late 1960s. The second section of the course (from the Burger Court to the present) is organized according to doctrinal categories (e.g., federalism, separation of powers, Equal Protection). Despite these differences from the typical course in organization, we are covering “all the basics.” But throughout, given the choice between adding extra cases and adding extra context, my choice will be the latter.

I am not “a-theoretical” – but constitutional theory, too, has developed historically. So (for example) despite the fact that our historically-oriented casebook does so, I choose not to introduce you at the start of the course to the current “isms” that dominate constitutional interpretation (e.g., the late Justice Scalia’s “originalism”). We will approach theories of constitutional interpretation in a more organic fashion, as the practice developed in concrete cases and in response to the crises of our constitutional history.

**Materials and Assignments:**

**Casebook:** Ernest A. Young, The Supreme Court and the Constitution (Foundation Press 2017)

**Other materials:** See below (Assignments)

**Course outline:** Attached.

**Assignments:** Each class session will have a Class Memo, which will start with an assignment (in a text box). (I’ll refer to that throughout as “the assignment box”). Some of the material listed in the assignment
box in the casebook (marked “CB”; some will be in documents to be found in Class Materials: Supplemental Readings; and some will be in the text of the Class Memo itself. The readings are ambitious, and I am “tying myself to the mast” by having laid out a full outline of the course. I intend not to fall behind between classes, even if it means less-than-full coverage of the assigned material. I’ll do my best to get us through it all.

For division of call-on responsibilities within and between assignments, and for some thoughts on how to approach the non-case-based materials in the Class Memos, see below.

**Participation, Attendance, Class Recording, Environment, Laptops:**

Participation: In a sense, I view this course as a combination of a “regular doctrinal class” and a seminar. For readings that are more seminar-like, our discussions will be (I hope) more seminar-like (and will generally use only volunteers). (We are essentially the size of a double seminar. Think of the class that way, if you can while still holding a casebook.)

I will divide the class in half for participation purposes (Groups A and B).

** Each assignment box contains some items that are in bold face introduced by double asterisks (as in **Marbury, CB x-y)

In Classes: Assignments, you will (with plenty of notice) find my assignment of the asterisked items to either “ALL”, “GROUP A,” or “GROUP B” for “eligibility to be called on purposes.” You are free to volunteer at any time, of course, so don’t be discouraged if your group isn’t assigned a case you care a lot about.

Those are the only items as to which I expect to call on students. Where those items are cases, you can expect that we will do the normal law school thing – which is, in my case, digging fairly deep into the reasoning of the decisions.

I hope to rely on volunteers for the rest. I very much hope that you will come into class having engaged deeply with some part of the non-asterisked readings and anxious say (or ask) something about them.
I will allow each of you two passes. To use a pass, you must inform me of your intent to do so by 8 AM the morning of class.

I reserve the right to raise your grade (by one increment) on the basis of particularly valuable class participation (with "value" being based more on quality than on quantity of participation), and to lower your grade (by one increment) on the basis of lack of good faith effort.

If you are still struggling with the pressure of being called on in class, please make an appointment to speak to me, and we will find a way to help move you towards resolving the problem.

Attendance: I will allow each of you two excused absences. To use an excused absence, you must inform me by 8 AM the morning of class.

If you are having personal or medical problems that interfere with your class attendance, I welcome the chance to discuss them with you and accommodate them as appropriate. If you prefer not to discuss them with me, please do discuss them with Academic Services. That is the way to get the help you need -- and to get me to respond appropriately. I reserve the right to lower grades (or in extreme circumstances, deny you the right to take the final exam) on the basis of persistent, unaccommodated absence.

Class recording: All classes will be recorded, and recordings posted on Panopto. If I am informed of any inappropriate use being made of recordings (see Environment, below), I will cease to record.

Environment: I take seriously my obligation to achieve the sometimes-difficult task of creating an inclusive atmosphere for vigorous discussion. I need your help in order to do so. Please treat each other with respect. If I have failed to treat you with respect (and that includes failing to treat seriously issues that are of importance to you), please find a way to let me know – whether directly, through my TAs, or otherwise – so that I can make amends.

Laptops: I permit laptops in class. Please do not distract your classmates (and yourselves) by using them for any purpose other than note-taking.

Examination:

Exam: Monday May 7, Four hour in-class exam, open book, open laptop.
Course Outline (Jan. 10)

(Subject to change: You will find the final version of the outline for each class on the first page of each class’s “Class Memo”, in Classes: Course Materials)
(Group on-call assignments will be posted in Classes: Course Assignments)

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<th>#</th>
<th>Date</th>
<th>Topic</th>
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<tbody>
<tr>
<td>1</td>
<td>Tu 1/16</td>
<td>PART ONE: INTRODUCTION</td>
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<td>I. Introduction to the Constitution</td>
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<td>A. Prelude to the Constitution</td>
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<td>B. The Constitution’s text</td>
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<td>C. Slavery and the Constitution</td>
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<td>D. Foundational theories from The Federalist</td>
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<td>E. The dilemmas of constitutional fidelity</td>
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<td>2</td>
<td>Th 1/18</td>
<td>II. Judicial review – weak and strong claims for the role of the courts</td>
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<td>A. Marbury v. Madison (1803)</td>
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<td>B. Political exigency and the Constitution outside the Courts</td>
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<td>C. Reversal by amendment when the Court gets it wrong</td>
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<td>D. Note: a brief look at Article III barriers to judicial review</td>
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<td>PART TWO: CANON AND ANTI-CANON: EXAMPLES OF THE AMERICAN CONSTITUTIONAL EXPERIENCE FROM THE MARSHALL COURT TO THE WARRANT COURT</td>
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<td>III. Setting the Scope of State and National Power in the Marshall (1801-1835) Court</td>
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<td>A. The Necessary and Proper Clause and the Bank of the United States:</td>
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<td>1. The controversy outside the Court prior to McCulloch</td>
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<td>Tu 1/23</td>
<td>2. McCulloch v. Maryland (1819)</td>
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<td>3. Note: McCulloch as (bad) corporate law</td>
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<td>4. Note: “Jacksonian Democracy”</td>
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<td>5. The political demise of the Second Bank</td>
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<td>B. The Commerce Power: Gibbons v. Ogden (1824)</td>
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<td>D. A note on Indian removal</td>
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<td>E. A note on nativism</td>
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<td>F. A note on the situation of free blacks</td>
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## IV. Slavery, Secession and Civil War

A. The slavery cases: an introduction
   1. Note: Early cases
   2. Note: Abolitionism(s)
   3. Note: Race and slavery in Jacksonian politics

4. Th 1/25
   4. Note: slave revolts
   5. Slavery and the Commerce Power: Groves v. Slaughter (1841)
   6. A timeline of state formation and slavery compromises

B. Fugitive slaves: Prigg v. Pennsylvania (1842)

C. The rise of the Republican Party and its “Free Labor” ideology

D. Black citizenship and slavery in the territories: Dred Scott v. Sandford (1857)
   1. the case
   2. the political response

E. Secession and Civil War
   1. Secession and the power to oppose it (optional)
   2. The Civil War

## V. Reconstruction, Its Abandonment, and the Emergence of Post-Civil War White Supremacy

A. The politics of Reconstruction, constitutional amendment, and resistance
   1. The black codes
   2. The Civil Rights Act of 1866
   3. “The unusual procedural history of the Fourteenth Amendment” (optional)
   4. Black suffrage
      a. the Fourteenth Amendment
      b. the Fifteenth Amendment
   5. Violent white resistance
   6. The romance of reunion
   7. The end of Reconstruction

B. Two early (and still foundational) Fourteenth Amendment cases
   1. limiting the Privileges and Immunities Clause: The Slaughterhouse Cases (1873)
   2. the state action requirement: the Civil Rights Cases (1883)

C. A note on gender and the Fourteenth Amendment

5. Tu 1/30

D. Some aspects of the Jim Crow South
   1. segregation: Plessy v. Ferguson (1896)
   2. political disenfranchisement: A note on Giles (1903)
   3. lynching as organized means of social control
   4. the Jim Crow labor economy
   5. racial trials

6. Th 2/1
E. Constituting American Identity: A Note on Immigration, Religion, and Empire
1. Chinese exclusion
2. Religion
3. Empire: the Insular Cases (1901)
4. A perspective on assimilability and the social prerequisites to inclusion
5. A note on Mexican immigration

VI. The “Progressive Era” -- “the Gilded Age” – “the Lochner Era”

A. Introduction
1. The Progressive Era
   a. The movement
   b. What it achieved: The Progressive Era, a summary infographic (Classes: Supplemental Materials)
2. The Gilded Age
B. Substantive Due Process under the Fifth and Fourteenth Amendments:
   1. Lochner v. New York (1905)
      a. the case
      b. notes
         i. Lochner and labor
         ii. The origins of 19th century liberalism
         iii. The concept of class legislation
         iv. Brandeis’ dynamic approach
         v. Do you even need a dynamic approach? A note on baselines
         vi. No heroes: the Holmes of Lochner (1905) and the Holmes of Giles (1903)
            vii. Lochner as symbol
      3. non-economic substantive due process (including more awful Holmes)

D. The Commerce Power
   1. monopolies in manufacture (E.C. Knight (1895)
   2. labor conditions (Hammer v. Dagenhart (1918))
E. Amendments, wartime, and the scope of federal power
   1. the Sixteenth Amendment (income tax) (1913)
   2. the Seventeenth Amendment (direct election of senators) (1913)
   3. World War I
      a. expansion of federal regulatory capacity
      b. the birth of modern civil-liberties law
      c. World War I and the situation of black Americans
   4. the Eighteenth Amendment (prohibition) (1919)
   5. the Nineteenth Amendment (women’s suffrage) (1920)
      a. the amendment and its effects (or lack thereof) beyond voting
         Classes: Supplemental Material, BLBAS 6th mid 544-547
      end of 1st full paragraph
      b. women as voters
## VII. The Great Depression (1929) and the New Deal (1933-194[2])

### A. Early state responses to the Depression, and early Court flexibility
1. Nebbia v. NY (1934) (14A Due Process), CB 282-291 note 1
2. Note on Blaisdell (Minnesota Mortgage Moratorium) (1934) (Contracts Clause)

### B. The Court cracks down on the First New Deal
1. Commerce: A.L.A. Schechter Poultry (1935) and the NRA, CB 308-top 314; 316-top 317 note 5-6; mid 412 note d (note, the non-delegation aspect of the case, not assigned here but part of your LRS reading, is in the casebook at 943 et seq.)
2. A short note on other cases striking down other, more important, Statutes, CB 318 first full paragraph – top 319

### C. Roosevelt emboldened (and chastened): the 1936 election, the court-packing plan, and the Second New Deal
1. the campaign against the Court and the election landslide
2. the court-packing plan
3. Roosevelt wins in the Court
   a. substantive Due Process: West Coast Hotel (1937) and Carolene Products (1938)
   b. the Commerce Power
      i. NLRB v. Jones & Laughlin Steel (1937)
      ii. Note: United States v. Darby (1941)
      iii. Wickard v. Filburn (1942) – the outer limits of the New Deal Commerce Power

### D. Some closing notes on the New Deal era
1. efficacy of the New Deal
2. race and the New Deal: a disturbing legacy
3. separation of powers: the New Deal and the emergence of the modern administrative state

## VIII. The Constitution and Three Wars: World War II (1939-1945), The Korean War (1950-1953), and the Cold War

### A. World War II and the 1940s
1. Japanese internment
   a. background
   b. Hirabayashi (1943)
   c. Korematsu (1944)
   d. Aftermath: coram nobis in the Ninth Circuit, apology, and reparations: Korematsu v. United States (1944)
2. the Court and black civil rights in the 1940s

### B. Korean War (1950-1953) and Cold War
1. The emergence of modern separation of powers law:
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<td>A. The emerging analytical toolkit: tiered scrutiny</td>
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<td>1. Carolene Products footnote 4 (1938) becomes law</td>
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<td>B. Educational desegregation: Brown and its aftermath</td>
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<td>1. Note: the lead-up to Brown</td>
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<td>a. the higher-education cases</td>
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<td>b. a note on the NAACP’s strategy (and what it left behind)</td>
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<td>2. the substantive cases</td>
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<td>b. Bolling v. Sharpe (1954): the (harder) Fifth Amendment case</td>
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<td>c. note on the application of Brown to desegregation beyond education</td>
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<td>3. the remedial and enforcement cases</td>
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<td>a. Brown II (1955)</td>
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<td>b. Cooper v. Aaron (1958): legitimate or illegitimate decentralized constitutionalism?</td>
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<td>c. Note: the enforcement struggle post-Cooper</td>
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<td>4. the debate over Brown and the theory of constitutional interpretation</td>
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<td>5. Brown, backlash, and the limited capacity of the Court to create social change</td>
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<td>C. Congress reawakens: The “Second Reconstruction”</td>
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<td>1. Note: mid-1960s civil rights legislation as a constitutional moment</td>
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<td>2. The Commerce Power cases</td>
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<td>a. the cases</td>
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<td>b. Note: Myrdal (again), race, and the Southern economy</td>
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<td>Th 2/22</td>
<td>3. The Remediation Amendment enforcement powers</td>
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<td>D. An emboldened Supreme Court takes on two taboos</td>
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<td>1. the Lochner taboo: protecting unenumerated rights</td>
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<td>b. a note on “fundamental rights/equal protection” jurisprudence and the effort (Michelman) to create heightened scrutiny for wealth-based classifications</td>
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<td>2. the great racial taboo: interracial marriage (and Korematsu as Affirmative precedent) (Loving v. Virginia 1967)</td>
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E. A note (somewhat ahistorical) on incorporation of the Bill of Rights against the States

F. Note: the turbulent late 1960s and early 1970s (and the slow transition from Warren to Burger Courts)


X. “Modern” Equal Protection Doctrine

A. The technology of equal protection doctrine
1. Note: the black-letter tiers of scrutiny and their discontents
   a. the black letter
   b. Marshall, Stevens and tier-resistance
   c. anti-classification versus anti-subordination
2. the intent requirement

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| 13 | Th 3/1 | b. mixed motives and proof of intent via impact: Arlington Heights and Feeney  
c. giving effect to private prejudice as intentional discrimination: Palmore v. Sidoti (1984)  
3. Note: the state action requirement after Shelley |

B. Strict scrutiny
1. racial classifications: the affirmative action debate
   a. Note: The political and administrative-agency origins of affirmative action
   b. a note on affirmative action and conservative public-interest lawyering

| 14 | Tu 3/6 | d. Student-body diversity in higher education settings  
ii. Note: Fisher v. University of Texas I and II (2013 and 2016)  
iii. Note: Current challenges  
e. the legality of anti-affirmative action initiatives:: Scheutte  
2. affirmative action meets Brown: voluntary race-conscious K-12 student assignment in de-facto-segregated school districts  
a. the de facto/de jure distinction and the concept of “unitary status”  

| 15 | Th 3/8 | 3. Note: strict scrutiny for alienage-based classifications (only |
4. More on fundamental rights/equal protection jurisprudence as route to strict scrutiny
   b. the education cases
      i. San Antonio Independent School District v. Rodriguez
      ii. Plyler v. Doe
5. A note on Procedural Due Process as gap-filler for the absence of positive rights

C. Intermediate scrutiny: gender
   1. Movement roots and a failed effort to gain strict scrutiny and an ERA
   2. The problem of recognition: what is (not) a gender-based classification?
      b. [fyi: the question of whether sexual orientation classifications should be seen as gender classifications will be discussed later in the course]
   3. The emergence of intermediate scrutiny: Craig v. Boren (1976)
   4. Note: some examples of intermediate scrutiny in application

5  T 3/20
   6. Sessions v. Morales-Santana: levelling up versus levelling down
   7. Note: gender-based affirmative action: strict or intermediate?
   8. Note: intermediate scrutiny for classifications based on illegitimacy

D. Rationality review
   2. Rationality review “with teeth”
      a. City of Cleburne v. Cleburne Living Center (1985)
      b. [fyi: an examination of rationality review as practiced in gay rights jurisprudence will be discussed later in the course]

17  Th 3/22
XI. “Modern” Substantive Due Process

A. Abortion
   1. From Griswold to Roe
   2. Roe v. Wade (1973)
   3. Between Roe and Casey
      a. Note: backlash and pro-life politics
      b. Note: funding, facilities-access, and the practical inequality of abortion availability

18  Tu 3/27

B. Recognizing additional substantive due process rights (or not)
   2. Footnote 6 of Michael H (1989): Justice Scalia’s major statement of
methodology

XII. Gay Rights: Justice Kennedy’s Synthesis of Equal Protection and Substantive Due Process

A. A note on the gay rights movement(s)

B. Romer (1996) (Equal Protection): gay rights in the political process


D. The marriage cases
   1. Windsor (2013) (mixed methods?): rejecting DOMA
   2. Obergefell (2015) (mixed methods?): the right to marry

| 20 | Tu 4/3 | Continued
   3. A note on Kennedy’s dignity jurisprudence, race, and aspirational history: “it must become the heritage of this Nation” (Pena Rodriguez 2017)
   4. A note on religious resistance to Obergefell and Kennedy’s jurisprudence of “tolerance” for religion

XIV. “Modern” Federalism Up to Obamacare

A. Re-introducing the values of federalism
   1. States and the national government
   2. Note: localism and “federalism all the way down”

B. Comity and the placing of limits on Congress’ exercise of its enumerated powers (via the Tenth Amendment)
   1. Comity loses: Garcia (1985) and the assertion of federalism’s political safeguards
      a. the case
      b. a call for revision

| 21 | Th 4/5 | Continued
   2. Comity wins: the anti-commandeering doctrine
      ii. Printz (1997)
      iii. Note on the NCAA cases

C. The Financial Powers
   1. The Spending Power
      b. Note: the Spending Power, anti-commandeering, and sanctuary cities
   2. A word about the taxing power

| 22 | Tu 4/19 | D. The Reconstruction-amendment enforcement powers
   3. The Voting Rights Act cases
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<td>Th 4/19 Continued</td>
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<td>27</td>
<td>Th 4/26 3. re the “war on terror”&lt;br&gt;C. <strong>Executive privilege and immunity</strong>&lt;br&gt;1. Nixon (1974)&lt;br&gt;2. Clinton (1997)&lt;br&gt;D. <strong>Impeachment and other means of removing a President</strong>&lt;br&gt;1. our history of assassination&lt;br&gt;2. our history of Presidential incapacity, and the unused 25th Amendment (1967)&lt;br&gt;3. the politics and law of impeachment</td>
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<td>Tu 5/1 XVII. <strong>Considering the Trump presidency (and the society that elected him) in historical/Constitutional context</strong>&lt;br&gt;Open Floor</td>
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PART ONE: INTRODUCTION

I. Introduction to the Constitution

A. Prelude to the Constitution (below 1-mid 12)
B. The Constitution’s text, CB 1-20
C. Slavery and the Constitution
   1. Provisions, CB 185
   2. Two perspectives
      a. Fehrenbacher (below mid 12-mid 13)
      b. Finkelman (Classes: Supplemental Reading)
   3. Slavery in the territories in the framing period (below mid 13)
D. Foundational theories from The Federalist
   1. judicial review, CB bottom 69-mid 77
   2. federalism, CB mid 537-mid 549, bottom 606-top 616
   3. separation of powers, CB 905-top 913 (end of note 2)
E. The dilemmas of constitutional fidelity
   1. fidelity and the “dead hand”, CB 49-55 (don’t read 56-57 yet, please)
   2. fidelity and the living Constitution (below 14-16)

PRELUDE TO THE CONSTITUTION

I. The American Revolution

A. The Declaration of Independence
   (If you are interested, you can read an annotated version in Course Materials: Optional Readings)

1. The Declaration of Independence is most famous now for its declaration that “we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness.” This is of course problematic.

   a. “….created equal…”

i. (Source: Paul Finkelman, The Centrality of the Peculiar Institution in American Legal Development, 68 Chi.-Kent L. Rev. 1009 (1993))

   “The man who wrote the Declaration, after all, owned some 175 slaves, and took no steps to liberate them during the contest with England, or at any other time in his long life….Moreover, with slave owners like Washington and Jefferson leading the struggle against Great Britain, there was little likelihood of any dramatic change in the status of human bondage
in the new Nation. These ironies were not lost on British opponents of American independence. The English Tory Samuel Johnson pointedly asked, ‘How is it that we hear the loudest yells for liberty among the drivers of negroes?’ Even some of America’s British friends were concerned by the hypocrisy of revolutionary slaveholders. Thomas Day, an English supporter of independence, thought it ‘truly ridiculous’ to see ‘an American patriot, signing resolutions of independency with the one hand, and with the other brandishing a whip over his affrighted slaves.’”

ii. (Source: Doris Kearnes Goodwin, Team of Rivals (2005) at 166-167)

“[Abraham Lincoln would consistently point to the Declaration of Independence as expressing the true spirit of the framing]: ‘the plain unmistakable spirit of that age, towards slavery, was hostility to the principle, and toleration, only by necessity.’ [In a speech condemning the further spread of slavery into the territories,] Lincoln “implored his audience to re-adopt the Declaration of Independence and ‘return [slavery] to the position our fathers gave it, and there let it rest in peace.’”

b. …all men….”

i. You have probably heard of Abigail Adams’ famous “Remember the Ladies” letter to her husband, future President John Adams of Massachusetts. Here are some observations from her letters – which serve as an interesting counter to the discourse on American civic virtue that so dominates the framing period. (John Adams respected his wife on political matters, so while there is a joking/flirtatious tone to some of the correspondence, there is also a strong element of seriousness. Note, too, that Abigail’s father (also in Massachusetts) owned slaves, and Abigail had written John on the subject: “I wish most sincerely there was not a slave in the province. It always seemed a most iniquitous scheme to me – [to] fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have.” (See David McCullough, John Adams 2001) at 104-105.

ii. (Source: https://founders.archives.gov/documents/Adams/).

November 27, 1775:

“I am more and more convinced that Man is a dangerous creature, and that power whether vested in many or few is ever grasping…The great fish swallow up the small, and he who is most strenuous for the Rights of the people, when vested with power, is as eager after the peregoatives of Government. You tell me of degrees of perfection to which Humane Nature is capable of arriving, and I believe it, but at the same time lament that our admirations should arise from the scarcity of the instances….I feel anxious for the fate of our Monarchy or Democracy or what ever is to take place.”

March 31, 1776:
“What sort of Defence [can] Virginia make against our common Enemy? .. I have sometimes been ready to think that the passion for Liberty cannot be Equally Strong in the Breasts of those who have been accustomed to deprive their fellow Creatures of theirs.”

I long to hear that you have declared an independency – and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Laidies we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute…Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity…”

April 27, 1776 (to Mercy Otis Warren)

“I ventured to speak a word in behalf of our Sex….In return he tells me he cannot but Laugh at my Extrodonary Code of Laws. That he had heard their Struggle had loosned the bands of Government, that children and apprentices were dissabedient, that Schools and Colledges were grown turbulent, that Indians slighted their Guardians, and Negroes grew insolent to their Masters. But my Letter was the first intimation that another Tribe more numerous and powerfull than all the rest were grown discontented. This is rather too coarse a complement, he adds, but that I am so sausy he wont blot it out. So I have help’d the Sex abundantly, but I will tell him I have only been making trial of the Disintrestedness of his Virtue, and when weigh’d in the balance have found it wanting.”

3.  The Declaration as an act of nation-building


“Joseph Story, one of the early nineteenth century’s most careful and insightful writers on constitutionalism, observed that the Declaration

‘was not an act done by the state governments then organized; nor by persons chosen by them. It was emphatically the act of the whole people of the united colonies, by the instrumentality of their representatives, chosen for that, among other purposes…It was an act of original, inherent sovereignty by the people themselves…’
Subsequent claims by states’ rights advocates that the United States and its constitutions were creations and creatures of sovereign and independent states wither when placed in this light. Abraham Lincoln understood the circumstances of the country’s founding when he declared [in his Gettysburg Address] that in 1776, not 1787, ‘four score and seven years ago,’ not three score and sixteen, ‘our fathers brought forth on this continent a new nation, conceived in liberty.’”

B. The American Revolution as a revolution in society and culture

(Source: Gordon S. Wood, The Creation of the American Republic 1776-1787 (U. N.C. Press 2d ed. 1998 (these passages are drawn chiefly from Ch. II.1. and Ch. III.))

“The Revolution was … meant to be a social revolution of the most profound sort. Everyone was intensely aware of the special character of republicanism and the social and moral demands it put upon a people. Even the essential question raised in the debates Americans had with themselves in 1776 over the wisdom of independence was social: were Americans the stuff republicans are made of? The question was not easily answered. On the one hand, they seemed to be a particularly virtuous people, and thus unusually suited for republican government; yet, on the other hand, amidst this prevalence of virtue were appearing dangerous signs of luxury and corruption that suggested their unpreparedness for republicanism. It was the kind of ambiguity and contradiction that should have led to a general bewilderment and hesitation rather than to the astonishingly rapid embrace of republicanism which actually occurred.

Yet curiously the Americans’ doubts about their social character were not set in opposition to their confidence and hopes, but in fact reinforced them. There was, the eighteenth century believed, a reciprocating relationship between the structure of government and the spirit of its people. Republicanism was therefore not only a response to the character of the American people but as well an instrument of reform. Only this faith in the regenerative effects of republican government itself on the character of the people can explain the idealistic fervor of the Revolutionary leaders of 1776.”

C. The lessons drawn from republicanism in practice at the state level during the Revolution

1. (Source: Gordon S. Wood, The Origins of American Democracy, Or how the People Became Judges in their Own Causes, 47 Clev. St. L. Rev. 309 (1999))

“By the eve of the Revolution many colonists had come to believe that their politics were poisoned by corruption. The colonists thought that most crown officials were not the natural leaders of their society and that too many of them using their offices and their powers of patronage for private gain.
The Revolutionary goal was to create republican polities where these sorts of abuses would no longer exist. The Revolutionaries sought to destroy the patronage that had permeated ancien régime politics and to create citizens who were equal, independent, and free from dependency on grandees and patrons. But the republican revolution aimed to do more: it sought to assert the primacy of the public good over all private interests, indeed, to separate the public from the private and to prevent the intrusion of private interests into the public realm. These goals compelled revolutionary Americans to conceive of state power in radically new ways.

2. (Source: Gordon S. Wood, The Creation of the American Republic, supra, at 138)

[Most of the creative energy of the Revolutionary War period went into the framing of state governments.]

“Overnight the state assemblies became sovereign embodiments of the people with responsibility for exercising an autonomous public authority. In republican America, government would no longer be merely private property and private interests writ large as it had been in the colonial period. The new republican states saw themselves promoting a unitary public interest that was to be clearly distinguishable from the many private interests of their societies.

The republican state governments sought to assert their newly enhanced public power in direct and unprecedented ways—doing for themselves what they had earlier commissioned private persons to do. They now drew up plans for improving everything from trade and commerce to roads and waterworks and helped to create a science of political economy for Americans. And they formed their own public organizations with paid professional staffs supported by tax money, not private labor.

Republicanism put a premium on having not only a virtuous population, but, more important, a special kind of virtuous or disinterested leadership, that is, leaders whose independence, education, and capacity to rise above their private interests would enable them to act impartially for the good of the public. This is the reason that good republicans like James Madison continued to believe that ordinary, middling sorts—artisans, traders, commercial farmers, businessmen—could not make good political leaders. The interests and occupations of such ordinary men were thought too strong for them to set aside or transcend. They could never act as disinterested umpires among the contending private interests in the society. If it turned out that America’s political leaders were to be largely drawn from the ranks of these middling sorts of interested men, who were incapable of disinterested leadership and who were not able to keep their private interests out of the public arena, then, of course, the grand republican experiment would fail.

It was the realization that this kind of disinterested leadership was not emerging in the new state legislatures that lay behind the crisis of the 1780s. Leaders like Madison came to believe that the state legislatures were too much dominated by illiberal, narrow-minded, localist politicians who had private and factional interests to promote at the expense of the public
interest. Each representative, grumbled Ezra Stiles, president of Yale College, was concerned only with the particular interests of his electors. Whenever a bill was read in the legislature, said Stiles, “every one instantly thinks how it will affect his constituents.”

To us today there is nothing remarkable about what these popular legislative representatives were doing; they were simply promoting modern democracy. [But the] spread of these characteristics alarmed many of the Revolutionary gentry in the 1780s, and created their fears of what they called an excess of democracy. By the 1780s, Madison and other gentry had come to realize that this kind of democratic interest-based politics was not going to go away.

Experience in the 1780s had shown that enlightened statesmen would not often be in charge in the small spheres of the states. Instead, Madison hoped that the extended republic created by the proposed federal Constitution might make for more enlightened leadership.

Finding gentlemen in America who were capable of transcending the marketplace and making disinterested judgments was not easy. Many thought that only in the South was the ideal image of the disinterested independent gentleman even partially realized, and there, of course, gentleman farmers like Jefferson had hundreds of slaves to keep them in leisure and wine. Alexander Hamilton tried to argue that members of the learned professions, by which he mainly meant lawyers, could best play the role of impartial umpires among the conflicting interests of the society.

Because the supporters of the Constitution, the Federalists, seemed to be perpetuating the classical republican tradition of virtuous patrician leadership in government, the opponents of the Constitution, or the Anti-Federalists, felt compelled to challenge that tradition. [The Anti-Federalists] said that liberally educated gentlemen were no more capable than ordinary people of classical republican disinterestedness and that consequently there was no one in the society equipped to promote an exclusive public interest that was distinguishable from the private interests of people.”

II. The Articles of Confederation vs. the Constitution: What were the problems to be solved?

A. A domestic focus (Source: SSSTK 7-11)

“The Declaration of Independence was signed in 1776. Hostilities with England substantially ceased in 1781…The American Revolution was formally completed in 1783 with the signing of a final peace treaty with England. In February of 1781, the thirteen colonies ratified the Articles of Confederation, under which they lived for seven years. The Constitution was written in 1787 and ratified in 1789. Two years later the bill of rights was added.

Why did the states find it necessary to adopt a new Constitution? To understand the Constitution and the surrounding debates on its purposes and effects, it is useful to have some
understanding of the Articles of Confederation, which the Constitution replaced…Two of the most important powers of the modern national government were missing altogether – the power to tax and the power to regulate commerce. Moreover, two of the three branches of the national government were absent. There was no executive authority. There was no general judicial authority….Of course, there was no bill of rights (though it should be noted that the absence of a bill of rights was not in any way the impetus behind the Constitution and indeed the federalists thought, at the time of ratification, that a bill of rights did not belong in the Constitution at all.)

As experience under the Articles of Confederation accumulated, some leading political figures became dissatisfied with the performance of the government it created…These grievances came in the context of economic decline.

In 1786, state representatives met in Annapolis to discuss problems that had arisen under the Articles; they adopted a resolution to hold a convention in Philadelphia to remedy those problems. But the nation’s charge to the framers was much narrower than the ultimate product would suggest. The framers, chosen by state legislatures, were instructed to ‘meet in Philadelphia [to] take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union.’ The limited character of this charge proved a serious embarrassment to the framers, whose product reflected their view that it was necessary to provide not ‘further provisions’ but an entirely new governing document whose character was not clearly proportionate to the weaknesses of the Articles.

There is therefore a sense in which the Constitution was itself an unlawful act….The Convention disregarded the amending procedure set out in the Articles, which required approval of all thirteen state legislatures. The Constitution was instead sent to Congress, with a request that it be sent in turn to state legislatures. The state legislatures would then send it to popularly elected state ratifying conventions.

…[T]he struggle for ratification produced an outpouring of justificatory political theory….

…[T]he Constitution’s opponents, referred to as ‘antifederalists,’ were especially hostile to a dramatic expansion in the powers of the national government. A decentralized society could achieve the sort of homogeneity and dedication to the public good that would prevent the government from degenerating into tyranny from the center or a mere clash of private interests…Closely connected to this view was the antifederalists’ desire to avoid extreme disparities in wealth, education, and power. The antifederalists were also skeptical of the emerging interest in commercial development….In the antifederalists’ view, commerce…gave rise to ambition and avarice and thus to the dissolution of communal bonds….

The antifederalist objections to the proposed Constitution provoked a theoretical justification that amounted in many respects to a new conception of politics … [that] attempted to synthesize elements of traditional republicanism with an emerging theory that welcomed rather than feared heterogeneity, and that understood the reality that self-interest would often be a motivating force for political actors.
Much of that reformulation can be found in the Federalist Papers... The Federalist Papers were published under the name ‘Publius,’ but were in fact written by James Madison, Alexander Hamilton, and John Jay. Although the papers are often consulted as a means of understanding the theory underlying the Constitution, and the ‘intentions’ of its drafters, it is important to keep in mind that the essays were in many respects propaganda pieces, designed to persuade the ambivalent. Nonetheless, The Federalist Papers count among the classic works in the theory of democracy and constitutionalism.”

B. An international focus


“According to the conventional account, the purpose of the Constitution was to establish a republican frame of government that would safeguard the American people from domestic tyranny, promote respect for individual rights, and avoid encroachments on the autonomy of the states. In short, the framers created the Constitution for internal purposes, and its intended audience was the American people. This understanding is profoundly incomplete.

Historians have long recognized that the weakness of the Articles of Confederation created complications for the new nation’s foreign relations and that the founders organized the Philadelphia Convention at least in part to remedy the difficulties that the new nation had encountered during the “critical period” immediately following the Revolution. Diplomatic frustrations resulting from state violations of the Treaty of Peace, in particular, helped create the atmosphere of crisis that motivated profederal forces to organize and write a constitution. On this account, international problems functioned as a catalyst for calling the Convention, but in the actual conception, drafting, ratification, and implementation of the Constitution, these concerns were merely a sideshow.

[The conventional view is wrong.] Foreign affairs did not merely contribute to American constitution-making; they were the main event. The fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a “civilized state” worthy of equal respect in the international community. For this reason, the framers sought an international audience for their handiwork. They hoped that the document, as a promise conveyed in a script for action, as well as their performance of that script through actual governance, would earn a favorable reception abroad and facilitate the new nation’s integration into the Atlantic world of commerce and civilization.

The European law of nations was not just an externally imposed demand, but also an important part of the Enlightenment project to which the founders were profoundly committed. For many of the leading founders, the full membership that recognition would confer meant entry- as individuals and as a nation--into what American jurists, echoing Sir William Blackstone and generations of European jurists, called ‘the civilized world.’ Membership in this larger civilization-
-linked across space by cultural ties of sympathy, benevolence, and commerce--was desirable in its own right, and served the psychological needs of the many founders who viewed themselves not just as members of a family, voluntary association, profession, town or city, state, and nation, but also as ‘citizens of the world.’ Moreover, the quest for recognition fed into many of the founders’ sense of destiny: the fame they wished to earn among posterity for themselves and their collective creation. This pursuit of fame reflected a complicated mixture of idealism and interest, but they could achieve it only if others saw the accomplishments of the republic as having been honorably attained. That too impelled them to embrace the principles of the law of nations.

The founders’ quest for recognition forced leading framers to confront the tension between two fundamental goals of the Revolution, international legitimacy and popular sovereignty, and to develop a systematic constitutional solution for reconciling the two.”

C. A word about Indians in the Articles vs. the Constitution

1. Some background


“Indians east of the Mississippi River had been in regular contact with European settlers for almost two hundred years when the United States adopted the Constitution. [Many Indians had either remained neutral or had supported the British during the Revolutionary War], and many in the Confederation Congress believed that Indians had forfeited their lands by refusing the help the patriot cause or by siding with the British. The Confederation was militarily weak, however, and could not act on those resentments. [Meanwhile, the virtually autonomous states of the Confederation tried to satisfy their impatient settlers by taking over even more Indian lands. State negotiators used a tactic that became a standard ploy: They bribed small Indian factions into relinquishing land on behalf of entire tries. When that approach failed, the states simply opened Indian lands to white settlement. Friction understandably resulted, and fighting often broke out on the frontier. The weak Confederation government was unable to control this emerging situation, let alone suppress the violence it sparked.

The Constitution created a stronger central government that brought a measure of coherence to U.S. Indian policy. One improvement was that federal instead of state agents began conducting all negotiations with Indians. Secretary of War Henry Knox, who was in charge of Indian affairs for the new government, [adopted an assimilationist “civilization program” – supported by Thomas Jefferson and others looking for some “enlightened” way of solving the Indian problem – that was aimed, in large part, at peaceful acquisition of Indian lands. Assimilationist programs were resisted both by Indian nativist movements and by white frontiersmen, who preferred to gain access to Indian lands more quickly, by force if necessary.]”

2. There is only one provision of the Constitution that deals explicitly with Indians: the grant to Congress of the power “to regulate Commerce with foreign nations, and among the several States, and with the Indian tribes”. Art. I. Section 8 clause 3. Also relevant was the Treaty
Power. [Art. II. Section 2 clause 2: “[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties].”

As we shall see, the status of Indians, and the struggle between the states and the federal government in relation to Indian affairs, remained a point of contention.

III. The Performance of the (Underspecified) Presidency

A. (Source: Joel Achenbach, George Washington’s Potomac and the Race to the West (Simon & Schuster 2004) at 22)

“Tremendous labor and calculation went into [George] Washington’s rise to greatness. A person didn’t become the ‘Father of his Country’ by accident or luck. From early in life, he craved distinction. Even before the Revolution, he carefully saved all his personal papers, as if he knew that someday the documentary historians would need them. [O]bserves the historian W.W. Abbot, ‘[m]ore than most, Washington’s biography is the story of a man constructing himself.’ Historian Gordon Wood writes, ‘He was obsessed with having things in fashion and was fastidious about his appearance to the world. It was as if he were always onstage, acting a part.’ His humility formed a thin crust on a deep lake of pride.”

B. It was a foregone conclusion that George Washington would be chosen as the first President of the United States, after his years of service as head of the revolutionary army and as President of the Constitutional Convention. Indeed, esteem for Washington was one reason for wide popular backing for the Constitution. (Kyvig, supra, at 87).

What was not a foregone conclusion was what the Presidency would be. There was no precedent for it: there had been no Executive in the Articles of Confederation. Washington understood that style and substance went hand in hand in defining and legitimating the office – a sensitivity that would be crucial to the design of the role.

C. (Source: http://www.mountvernon.org/george-washington/biography/washington-stories/a-president-by-any-other-name/)

“The first year of Washington’s presidency was spent making the presidency.

In 1789, the year of his inauguration as the first president of the United States, Washington knew that the stakes were high. The American people would be scrutinizing his every move, apprehensive that the newly-formed republic would dissolve into a monarchy – with Washington wearing the crown. Not only was he tasked to fill the hundreds of open spots in the new government and produce the funds to support it, he also was troubled with every other minutiae that came with the new post: how to dress, how to entertain, and how to construct
much-needed boundaries. ‘My political conduct,’ the new president wrote, ‘must be exceedingly circumspect and proof against just criticism…’

Even the Senate, led by Vice President John Adams, initially struggled with the nomenclature of the office. As they deliberated over appropriate designations for the new president, Vice President Adams suggested the following titles: “His Elective Majesty”, “His Mightiness”, and even “His Highness, the President of the United States of America and the Protector of their Liberties”. Washington knew that the name he answered to would not only set the tone for his position, but also establish and authenticate the security of the entire American government. Conscious of his conduct, Washington accepted the simple, no-frills title adopted by the House: “The President of the United States”.

IV. A note on the “legislative history” of the Constitution


“The sessions of the Convention were secret; before the final adjournment the secretary was directed to deposit “the Journals and other papers of the Convention in the hands of the President”, and in answer to an inquiry of Washington’s, the Convention resolved “that he retain the Journal and other papers subject to the order of Congress, if ever formed under the Constitution.” Accordingly the secretary, William Jackson, after destroying “all the loose scraps of paper”, which he evidently thought unimportant, formally delivered the papers to the president. Washington in turn deposited these papers with the Department of State in 1796, where they remained untouched until Congress by a joint resolution in 1818 ordered [xii] them to be printed. President Monroe requested the Secretary of State, John Quincy Adams, to take charge of the publication of the Journal. The task proved to be a difficult one. The papers were, according to Adams, “no better than the daily minutes from which the regular journal ought to have been, but never was, made out.” With the expenditure of considerable time and labor, and with the exercise of no little ingenuity, Adams was finally able to collate the whole to his satisfaction. The results of his labor were printed at Boston in 1819.

It was well known that James Madison had taken full and careful notes of the proceedings in the Convention, and he had often been urged to publish them. He had, however, decided that a posthumous publication was advisable. Madison died in 1836. His manuscripts were purchased by Congress, and shortly afterwards, in 1840, under the editorship of H. D. Gilpin, The Papers of James Madison were published in three volumes. More than half of this work was given over to his notes of the debates in the Federal Convention, and at once all other records paled into insignificance.”

V. A note on the absence of a Bill of Rights (Source: BLBAS 5th at 25)

“George Mason, one of the most respected members of the Philadelphia delegation, refused to sign the Constitution because it lacked what the Virginia constitution included, a
declaration of rights. This became one of the central arguments of those opposing ratification of the Constitution. In the 84th Federalist, Hamilton responded to such calls:

‘I affirm that the bills of rights…are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? [Men] might urge with a semblance of reason that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given….This may serve as a specimen of the numerous hurdles which would be given to the doctrine of constructive power, by the indulgence of an injudicious zeal for bills of rights.’

Hamilton was scarcely unique [among the framers] in making this argument. [Nonetheless, t]here was sufficient support for a bill of rights that it became a de facto condition of ratification by many of the delegates.”

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SLAVERY AND THE CONSTITUTION

PERSPECTIVES


“Because it substantially increased the power of the national government, the Constitution had greater proslavery potential and greater antislavery potential than the Articles of Confederation. Its meaning with respect to slavery would depend heavily upon how it was implemented.

In 1787, When Benjamin Franklin, at the age of eighty-one, served as a delegate to the Constitutional Convention, he was also elected president of the Pennsylvania Society for Promoting the Abolition of Slavery. Neither Franklin nor any of the other delegates gathering in Philadelphia conceived of slavery as a problem waiting to be addressed by national authority. Certainly they did not think of themselves as having been empowered and charged to settle the destiny of the institution. Yet slavery, though not on the Convention’s agenda, intruded frequently on its deliberations and profoundly affected several of its most important decisions.

Evaluation of the Constitution in relation to slavery, which began as soon as the document appeared in print, corresponded in ways one would expect to the partisanship of the
struggle over ratification. That is, advocates of ratification were likely to stress its proslavery features in the South and its antislavery potential in the North. Opponents of ratification tended to do the reverse.

The constitutional dispute was never resolved. It became especially intense in the decades preceding the Civil War, and not always as part of the controversy between North and South, for although antebellum southerners tended to see eye to eye on the subject, northerners continued to be divided. But the most remarkable debate on the constitutional status of slavery took place within the ranks of the abolitionist crusade.”

[nb – we will return to the debate, in the abolitionist context, in class 3]

C. Slavery in the territories in the framing period

“The American territorial system came into existence in the 1780s as states with claims to western lands began ceding them to the United States.” (Fehrenbacher, supra, at 26).

The Northwest Ordinance, adopted July 13, 1787, by the Second Continental Congress, chartered a government for the Northwest Territory, provided a method for admitting new states to the Union from the territory, and listed a bill of rights guaranteed in the territory. It included a prohibition of slavery, both pre- and post-statehood, for Northwest Territory lands.

The Northwest Ordinance predated the Constitution, but was reaffirmed by Congress in August 1789. Thus, from the start, Congress claimed the power to exclude slavery from territories held by the United States – including, here, territories that had once belonged to slave states (i.e., in this case, Virginia). Per Fehrenbacher (256), “no member of either house questioned its authority to do so.”

“Congress was able to pass the slavery prohibition in the Ordinance without heated and emotional debate because most of the delegates did not know that slavery already existed in the Old Northwest and most southerners did not think slavery was viable there.” Paul Finkelman, Slavery and the Founders: Race and Liberty in the Age of Jefferson (3d ed. 2014) at 167.

As we shall see, the asserted federal power to preclude slavery in the territories became far more controversial when the new territories were lands well-adapted to the southern model of slave agriculture. Keep in mind that many Northerners and anti-slavery Southerners were of the view, in the 1780s, that slavery was in a process of irreversible decline. But in 1793, Eli Whitney invented the cotton gin – which rapidly led to an explosion of slavery-based cotton production and a heightened interest in obtaining new territories in which that production could flourish.
FIDELITY AND THE LIVING CONSTITUTION


“1987 marks the 200th anniversary of the United States Constitution. A Commission has been established to coordinate the celebration. The official meetings, essay contests, and festivities have begun.

The planned commemoration will span three years, and I am told 1987 is ‘dedicated to the memory of the Founders and the document they drafted in Philadelphia.’1 We are to ‘recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities.’2

Like many anniversary celebrations, the plan for 1987 takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the Framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the ‘more perfect Union’ it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite ‘The Constitution,’ they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document’s preamble: ‘We the People.’ When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America’s citizens. ‘We the People’ included, in the words of the Framers, ‘the whole Number of free Persons.’3 On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.4

These omissions were intentional. The record of the Framers’ debates on the slave question is
especially clear: The Southern States acceded to the demands of the New England States for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the ‘carrying trade’ would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern States.

…Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths ‘that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.’

It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that Declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions. The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually consented to a document which laid a foundation for the tragic events that were to follow.

Pennsylvania’s Gouverneur Morris provides an example. He opposed slavery and the counting of slaves in determining the basis for representation in Congress. At the Convention he objected that

the inhabitant of Georgia [or] South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice.

And yet Gouverneur Morris eventually accepted the three-fifths accommodation. In fact, he wrote the final draft of the Constitution, the very document the Bicentennial will commemorate. ..

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this Bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the Framers’ compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes….
promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally. In the meantime, blacks joined America’s military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country’s magnificent wealth and waiting to share in its prosperity.

What is striking is the role legal principles have played throughout America’s history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave. ‘We the People’ no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality,’ and who strived to better them.

And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the Bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. If we seek, instead, a sensitive understanding of the Constitution’s inherent defects, and its promising evolution through 200 years of history, the celebration of the ‘Miracle at Philadelphia’ will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not...."
Slavery and the Founders

Race and Liberty in the Age of Jefferson

Third Edition

Paul Finkelman

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A careful reading of the Constitution reveals that the Garrisonians were correct: the national compact did favor slavery. A detailed examination of the Convention of 1787 explains how the Constitution evolved in this way. Both the text of the Constitution and the debates surrounding it help us understand that the “more perfect Union” created by this document was in fact fundamentally imperfect.

**Slavery in the Constitutional Structure**

The word “slavery” appears in only one place in the Constitution—in the Thirteenth Amendment, where the institution is abolished. Throughout the main body of the Constitution, slaves are referred to as “other persons,” “such persons,” or in the singular as a “person held to Service or Labour.” Why is this the case?

Throughout the debates, the delegates talked about “blacks,” “Negroes,” and “slaves.” But the final document avoided these terms. The change in language was clearly designed to make the Constitution more palatable to the North. In a debate over representation, William Paterson of New Jersey pointed out that under the Articles of Confederation Congress “had been ashamed to use the term ‘Slaves’ & had substituted a description.” This shame over the word “slave” came up at the Convention during the debate over the African slave trade. The delegates from the Carolinas and Georgia vigorously demanded that the African trade remain open under the new Constitution. Gouverneur Morris of Pennsylvania, furious at this immoral compromise, suggested that the proposed clause read: the “Importation of slaves into N. Carolina, S— Carolina & Georgia” shall not be prohibited. Connecticut’s Roger Sherman, who voted with the Deep South to allow the trade, objected, not only to the singling out of specific states, but also to the term “slave.” He declared he “liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people.” George Clymer of Pennsylvania “concurred” with Sherman. In the North Carolina ratifying convention, James Iredell, who had been a delegate in Philadelphia, explained that “the word slave is not mentioned” because “the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word slave to be mentioned.” Thus, southerners avoided the term because they did not want unnecessarily to antagonize their colleagues from the North. As long as they were assured of protection for their institution, the southerners at the Convention were willing to do without the word “slave.”

Despite the circumlocution, slavery was sanctioned throughout the Constitution. Five provisions dealt directly with slavery:
Article I, Section 2, Paragraph 3. The three-fifths clause provided for counting three-fifths of all slaves for purposes of representation in Congress. This clause also provided that, if any “direct tax” was levied on the states, it could be imposed only proportionately, according to population, and that only three-fifths of all slaves would be counted in assessing what each state’s contribution would be.

Article I, Section 9, Paragraph 1. Popularly known as the “slave trade clause,” this provision prohibited Congress from banning the “Migration or Importation of such Persons as any of the States now existing shall think proper to admit” before the year 1808. Awkwardly phrased and designed to confuse readers, this clause prevented Congress from ending the African slave trade before 1808, but did not require Congress to ban the trade after that date. The clause was a significant exception to the general power granted to Congress to regulate all commerce.

Article I, Section 9, Paragraph 4. This clause declared that any “capitation” or other “direct tax” had to take into account the three-fifths clause. It ensured that, if a head tax were ever levied, slaves would be taxed at three-fifths the rate of whites. The “direct tax” portion of this clause was redundant, because that was provided for in the three-fifths clause.

Article V, Section 2, Paragraph 3. The fugitive slave clause prohibited the states from emancipating fugitive slaves and required that runaways be returned to their owners “on demand.”

Article V. This article prohibited any amendment of the slave importation or capitation clauses before 1808.

Taken together, these five provisions gave the South a strong claim to “special treatment” for its peculiar institution. The three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the electoral college—to support that claim.

Numerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some provisions that indirectly guarded slavery, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to “suppress Insurrections” and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for reasons having nothing to do with slavery. The most prominent indirect protections of slavery were the following:

Article I, Section 8, Paragraph 15. The domestic insurrections clause empowered Congress to call “forth the Militia” to “suppress Insurrections,” including slave rebellions.10
Article I, Section 9, Paragraph 5. This clause prohibited federal taxes on exports and thus prevented an indirect tax on slavery by taxing the staple products of slave labor, such as tobacco, rice, and eventually cotton.

Article I, Section 10, Paragraph 2. This clause prohibited the states from taxing exports or imports, thus preventing an indirect tax on the products of slave labor by a nonslaveholding state. 11

Article II, Section 1, Paragraph 2. This clause provided for the indirect election of the president through an electoral college based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the president.

Article IV, Section 3, Paragraph 1. This clause allowed for the admission of new states. The delegates to the Convention anticipated the admission of new slave states to the Union.

Article IV, Section 4. The domestic violence provision guaranteed that the United States government would protect states from “domestic Violence,” including slave rebellions.

Article V. By requiring a three-fourths majority of the states to ratify any amendment to the Constitution, this Article ensured that the slaveholding states would have a perpetual veto over any constitutional changes. 12

Finally, some clauses did not inherently favor slavery, and were not necessarily considered to affect slavery when they were debated, but ultimately protected the institution when interpreted by the courts or implemented by Congress after the adoption of the Constitution. It would be wrong to argue that these illustrate the proslavery nature of the Constitutional Convention. However, these clauses do illustrate the way the Constitution set a proslavery tone, which enabled Congress and the courts to interpret seemingly neutral clauses in favor of slavery. Such clauses also directly challenge William W. Freehling’s argument that the Framers were inherently antislavery and that “the impact of the Founding Fathers on slavery . . . must be seen in the long run not in terms of what changed in the late eighteenth century but in terms of how the Revolutionary experience changed the whole American antebellum history.” 13 If we look at the “long run” impact of the Constitution on “American antebellum history,” we find that the following clauses were used to protect slavery, not to harm it.

Article I, Section 8, Paragraph 4. The naturalization clause allowed Congress to prohibit the naturalization of nonwhites, even though it is likely that some of the new states, especially those that granted suffrage to blacks, would have also allowed foreign-born blacks to become citizens.
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that the following clauses were used

Article I, Section 8, Paragraph 17. The federal district clause allowed Con-
gress to regulate institutions, including slavery, in what became the national
capital. Under this clause, Congress allowed slavery in Washington, D.C.
During the Convention, southerners expressed fear that the national capital
would be in the North.

Article III, Section 2, Paragraph 1. The diversity jurisdiction clause limited
the right to sue in federal courts to “Citizens of different States,” rather than
inhabitants. This clause allowed judges to deny slaves and free blacks access
to federal courts.14

Article IV, Section 1. The full faith and credit clause required each state to
grant legal recognition to the laws and judicial proceedings of other states,
thus obligating free states to recognize laws creating and protecting slavery.

Article IV, Section 2, Paragraph 1. The privileges and immunities clause
required that states grant equal privileges and immunities to “citizens” of
other states; however, in Dred Scott v. Sandford (1857), the Supreme Court
affirmed a long-standing position of the southern states that free blacks were
not “citizens” under the Constitution and thus the slave states were free to
deny privileges and immunities to them.15

Article IV, Section 3, Paragraph 2. This clause allowed Congress the power
to regulate the territories. In 1820, Congress used this clause to limit slavery
in the territories, but in Dred Scott v. Sandford the Supreme Court ruled that
the clause authorized Congress to protect slavery in the territories, but not to
ban the institution.16

Besides specific clauses of the Constitution, the structure of the entire
document ensured against emanicipation by the new federal government.
Because the Constitution created a government of limited powers, Congress
lacked the power to interfere in the domestic institutions of the states.17 Thus,
during the ratification debates only the most fearful southern anti-Federalists
opposed the Constitution on the grounds that it threatened slavery. Most
southerners, even those who opposed the Constitution for other reasons,
agreed with General Charles Cotesworth Pinckney of South Carolina, who
crowed to his state’s house of representatives:

We have a security that the general government can never emancipate them
[slaves], for no such authority is granted and it is admitted, on all hands,
that the general government has no powers but what are expressly granted
by the Constitution, and that all rights not expressed were reserved by the
several states.18

The Constitution was not “essentially open-ended with respect to slavery,”
as the late Don Fehreabacher argued. Nor is it true, as Earl Maltz has argued,
that “the Constitution took no position on the basic institution of slavery.” On the contrary, the Constitution provided enormous protections for the peculiar institution of the South at very little cost to that region. At the Virginia ratifying convention, Edmund Randolph denied that the Constitution posed any threat at all to slavery. He challenged opponents of the Constitution to show, “Where is the part that has a tendency to the abolition of slavery?” He answered his own question by asserting, “Were it right here to mention what passed in [the Philadelphia] convention . . . I might tell you that the Southern States, even South Carolina herself, conceived this property to be secure” and that “there was not a member of the Virginia delegation who had the smallest suspicion of the abolition of slavery.” South Carolinians, who had already ratified the Constitution, would have agreed with Randolph. In summing up the entire Constitution, General Charles Cotesworth Pinckney, who had been one of the ablest defenders of slavery at the Convention, proudly told the South Carolina House of Representatives: “In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad.”

Slavery and Congressional Representation

General Pinckney had good reason to be proud of his role in Philadelphia. Throughout the Convention, Pinckney and other delegates from the Deep South tenaciously fought to protect the interests of slaveholders. In these struggles they were usually successful.

When they arrived at the Convention, the delegates probably did not think slavery would be a pressing issue. Rivalries between large and small states appeared to pose the greatest obstacle to a stronger Union. The nature of representation in Congress; the power of the national government to levy taxes, regulate commerce, and pay off the nation’s debts; the role of the states under a new constitution; and the power of the executive were on the agenda. Yet, as the delegates debated these issues, the importance of slavery—and the sectional differences it caused—became clear. Throughout the summer of 1787, slavery emerged to complicate almost every debate. Most important by far was the way slavery figured in the lengthy debate over representation.

On May 29, Governor Edmund Randolph of Virginia proposed the series of resolutions known as the Virginia Plan. Randolph introduced these resolutions in response to the “crisis” of the nation “and the necessity of preventing the fulfillment of the prophecies of the American downfall.” This plan would create an entirely new form of government in the United States. The power
Class 2

II. Judicial review – weak and strong claims for the role of the courts

A. Marbury v. Madison (1803)
   1. *Case and notes, CB mid 77-93 end of note 5
   2. More notes:
      a. “Why I Don’t Teach Marbury” (below, 1-mid 5)
      b. Marbury, broad and narrow (below, bottom 5-top 6)

B. Political exigency and the Constitution outside the Courts
   1. CB 93-94 note 6; 95-97 end of note 1
   2. Note on the Virginia and Kentucky Resolutions (below, 6)
   3. Note on the Louisiana Purchase (below, bottom 7-mid 9)

C. Reversal by amendment when the Court gets it wrong (below, bottom 9)
D. Note: a brief look at Article III barriers to judicial review (below, 10-11)

PART TWO: CANON AND ANTI-CANON: EXAMPLES OF THE AMERICAN CONSTITUTIONAL EXPERIENCE FROM THE MARSHALL COURT TO THE WARRANT COURT

III. Setting the Scope of State and National Power in the Marshall (1801-1835) Court

A. The Necessary and Proper Clause and the Bank of the United States:
   1. The controversy outside the Court prior to McCulloch
      a. CB 145-148
      b. A note (below, bottom 11)

MARBURY NOTES

1. “Why I Don’t Teach Marbury”

(Source: Sanford Levinson, Why I Do Not Teach Marbury (Except to Eastern Europeans) And Why You Shouldn’t Either, 38 Wake Forest L. Rev. 553 (2003))

\[nb – Students, one year I was bold enough to follow Levinson’s advice. I have mended my ways: I believe in ritual, and Marbury is a ritual all law students are supposed to experience. Note that Levinson is one of the authors of the “BLBAS” casebook, which is the book I taught out of all of my previous years of teaching this course. I concluded the book was unworkable, but I continue to believe that the historical approach he defends in the course of this essay is correct – as does the author of our casebook (another “escapee” from BLBAS -- dm]
“Let me lay out my brief for why Marbury should lose its pride of place in the current conception of how to teach (and structure casebooks about) American constitutional law:

I. Understanding the importance of Marbury requires a depth of historical knowledge that almost none of our students possess and that we do not have time to teach.

The importance of the actual case of Marbury v. Madison, as distinguished from the icon taught in our courses, obviously derives from its place in the remarkable four-year drama surrounding the election of Thomas Jefferson and his displacement of the Federalist hegemons who had viewed national leadership as simply their prerogative. Those four years include, at the very least, the initial Electoral College fiasco that resulted in a tie vote between Jefferson and Aaron Burr; the deadlock in the House of Representatives that followed, as a result of the “one-state/one-vote” rule for breaking electoral college deadlocks; the linked threats both to deprive Jefferson of his de facto electoral victory and, should the Federalists succumb to those temptations, to call out the state militias in response; the repeal of the Federalist bill, passed by a lameduck Congress and signed by a lameduck President, establishing intermediate circuit courts of appeal (all of whose appointees turned out to be--surprise, surprise--Federalists appointed and confirmed by these very busy lameducks); [and] the congressional cancellation of the 1802 Term of Court.

If we were to treat this political drama as the equivalent of Hamlet, then we would recognize that Marbury (and John Marshall as of February 1803) is the equivalent of Rosencrantz and Guildenstern or, perhaps, to be slightly more generous, of Polonious: The case is full of portentous and quotable maxims-- such as the notion that every denial of a legal right entails the presence of an effective legal remedy--that are denied not only by the case at hand but also by much future constitutional history. As we know, though, the professional deformation of American law professors is that they are determined to make judges the stars of the constitutional drama, whether for good (e.g., Marshall and, for most of us, Earl Warren) or for ill (e.g., Roger Taney or, for many of us, William Rehnquist). Little, if any, note is taken of the picture of American constitutional development painted by [scholars] who displace the Court to playing the role, at most, of a supporting actor to Congress and the Executive (or, indeed, the People).

II. If one is going to spend class time teaching students about American history, do it about something that is truly important.

I take it that everyone agrees that the substantive legal topic of Marbury--i.e., the ability of Congress to add to the original jurisdiction of the Supreme Court--is of no real significance, especially if we apply the following test: Would any serious adult ever lie awake at night worrying about what the answer to this question is outside of a very particular context where, for example, the fortunes of one’s client depended on an answer? Many students look forward to taking constitutional law because of their belief that the subject actually involves important issues; it is nothing short of bizarre that most courses (and casebooks) begin with a case about a truly trivial subject (unless, of course, one embeds the case in its specific history). A course on constitutional law should be, first and foremost, about issues that truly matter, whether to our
students or to ourselves. Part of what we should be doing as teachers is educating our students as to the ways that issues of fundamental importance to ordinary human beings (and serious adults) are treated when they become legalized.

As I have already suggested, the fact that too many of our students are woefully ignorant of American history does not lead me to teach ahistorically or to give up and focus only on recent cases, however much they might prefer to spend their time poring over recent cases instead of the old cases that I tend to assign. Indeed, I spend significant time on such cases as Prigg v. Pennsylvania and Dred Scott, which are hardly less complicated than Marbury or take less time to place into context.

But the differences between these first two cases and Marbury should be obvious. It is difficult to think of any single issue that is more important to American constitutionalism, however defined, than chattel slavery. And, even more to the point, if we contribute to our students’ ignorance of chattel slavery and how it was completely enmeshed into the operating doctrines of constitutional law, we risk consequences that are completely different from the consequences of their being equally ignorant of the importance of the Election of 1800 and its aftermath.”

III. Why teach a case that is so shoddy in its reasoning unless one wants to discredit the enterprise of legal analysis? And even if one does want to discredit the enterprise of legal analysis, there are not better cases than Marbury to make the point?

I confess that one reason I stopped teaching Marbury is that I got angry, every single year, when reading Marshall’s mangling of section 13 of the Judiciary Act and then Article III of the Constitution. … I am confident that if a first-year student in a writing assignment quoted texts the way that Marshall quoted section 13 and Article III, we would patiently explain that this is not the way honest lawyering is really done.

Why should students’ first experience with constitutional analysis be a case that can be fully understood only if one applies a fairly vulgar version of Legal Realism demonstrating that a judge will do anything necessary to achieve his or her policy goals?

IV. Teaching Marbury reinforces the notion of judicial supremacy instead of constitutional supremacy.

Finally, I believe that emphasizing Marbury reinforces the single most pernicious aspect of American legal education, which is to instill in hapless students the most vulgar of all notions of Legal Realism, summarized in Charles Evans Hughes’ identification of “the Constitution” with what the “judges say it is.” This is unacceptable either as a normative or a descriptive view of American constitutionalism. Normatively, it turns the Constitution into the preserve of a remarkably narrow professional elite and obliterates the sense of what I have elsewhere called “constitutional protestantism” and what Larry Kramer has powerfully defended as “popular constitutionalism.” But I also object to Hughes when I wear my hat as a political scientist: A far
more plausible form of realism is the recognition that “the Constitution” is, at the very least—that is, even if one rejects “popular constitutionalism”—what a variety of institutional actors say it is, including legislators, presidents, bureaucrats, and local police.

I will happily concede that adherence to judicial— and not merely constitutional—supremacy may not be the result of intrinsic features of Marbury; a number of thoughtful analysts have convincingly described Marbury as far more modest in its claims … I ascribe Marbury’s baleful influence more to the fact that most persons who teach the case give it pride of place by presenting it at the very beginning of their courses, just as all too many casebooks continue to begin with it, or even if they wait a relatively few pages before introducing it, refer to it as providing “the basic framework” for constitutional analysis.

V. So why teach Marbury to Eastern Europeans?

Perhaps I should begin my answer to this question by saying that I am not at all sure it is worth the time to teach Marbury to anyone, including Eastern Europeans. But, if I ever teach it again as part of an introductory course, I could envision teaching it to such students for one simple reason: Even though they know even less American history than do our own students, they are far more immediately familiar with the problems that face “transitional” polities.

One way of conceiving American history between 1775 to 1803 is as follows: 1775 to 1783 is a classic national liberation struggle, in which a variety of political movements, all of whom, following Benedict Anderson’s memorable phrase, are able to “imagine” themselves as Americans instead of subjects of the King who happen to live in various North American colonies, coalesce in order to drive out what are now conceived of as colonial oppressors. Political differences between Jefferson, Adams, Hamilton, and many others are put aside as they attack the common enemy of British soldiers and their “loyalist” supporters, including “traitors” like Benedict Arnold. The newly created country establishes a constitution, called the Articles of Confederation, in 1781, though by 1787 there is sufficient agreement among political elites that it is no longer sufficient, especially if one is concerned to create a national government strong enough to protect the new United States against a number of potential (and likely) enemies, ranging from the British, who wish to reverse their humiliating defeat, to Indian tribes sharing space, but little else, with the United States. Obviously, there is vigorous dispute about the wisdom of this new constitution, but the “coalition of ’76” continues to hold as Madison and Hamilton join forces in propagandizing for the new document and Jefferson and Adams, from their vantage points abroad, agree in its overall desirability. The first President is, of course, the leader of the national liberation movement, the “Father of our Country,” and he is able to bring together Jefferson and Hamilton into his first Cabinet. Each, however, represents a distinctively different part of the political and social order. To adopt (Eastern) European terminology, Hamilton is the leader of the “nationalist” faction, dominated by the American equivalent of cosmopolitan business interested in becoming part of what we would today call the “global economy.” Thomas Jefferson, however, is the leader of the “country” or “liberal” movement, … suspicious of globalization.
By 1800, the earlier coalition between nationalists and localists, forged in the common goal of ousting the colonizing hegemon, bursts. The country’s symbolic “father” has died, and his children now are at each other’s throats about who should inherit the estate, including the right to claim the ultimate “title of nobility,” that of “true American.” The localist Jeffersonians obviously oust the nationalizers, to the utter dismay of the latter, who pledge to do whatever they can, short of armed revolution, to stop this triumph of the barbarians. That is, they view the Jeffersonian victors of 1800 precisely as (take your pick) the anti-Communists view the re-organized Communist parties that are being restored to power in a variety of Eastern European countries or as those sympathetic to at least some aspects of the old order (such as the welfare state) view Thatcherite “modernizers” who will leave the economically vulnerable with almost nothing in a rush toward conformity with IMF dictates. … So Marshall was faced with a real dilemma: How does he denounce the new barbarians without, at the same time, running the risk of his own exit from office via impeachment? The answer, as everyone knows, is Marbury.

So then the topic for discussion is whether Marbury in fact presents a desirable model for judicial behavior in transitional regimes. Should Marshall have behaved in a more “principled” way, even at the risk of his own political future or the institutional survival of the Supreme Court? Should he have kept his mouth shut about the Jeffersonian usurpers and simply said, “We have no jurisdiction, end of discussion?” Or did he do the right thing by first denouncing the usurpation and then rolling over and playing dead? Eastern European lawyers (and, no doubt, other similarly-situated students) can easily understand these dilemmas and offer vivid arguments. American students, on the other hand, are blessedly existentially unaware of the dilemmas facing transitional regimes and those who would purport to lead them.78 This lack of awareness, to be frank, makes most of their comments of little interest…”

2. Marbury: broad or narrow?


“In the course of debating repeal [of the Judiciary Act of 1802], the Supreme Court’s authority had been questioned and condemned, and the concept of judicial review had come under challenges of a type and temper not heard since before the Constitution was adopted. Suddenly, a practice that had seemed so uncontroversial throughout the 1790s no longer seemed immune to attack. At the same time, outright rejection of judicial review was not yet a position embraced officially by Republicans, most of whom shared Jefferson’s more moderate departmental theory and were willing to live with review on his theory’s limited terms. This was the moment to make a statement, Marshall apparently decided, before more extreme sentiments against judicial review spread or grew into something more threatening.

Many Federalists had, by the time of Marbury, begun to espouse a theory of judicial review broader and more ambitious than anything we have seen so far – a theory recognizable today as judicial supremacy, or the notion that judges have the last word when it comes to constitutional interpretation. A few had pushed this theory aggressively during the debates over
the Repeal Act, in turn prompting the most forceful Republican denunciations of judicial review. But judges were more circumspect than politicians in declaring the scope of their authority, and Marshall was doubly inclined to be cautious in *Marbury*. His opinion thus carefully and self-consciously avoided the language and arguments of his Federalist allies. Instead, it offered a straightforward application of principles that were widely accepted by most Republicans (including, significantly, President Jefferson), and fully consistent with the premises of popular constitutionalism.

To contemporary readers, Marshall was simply insisting – like every other judge and writer of the era – that courts had the same duty and the same obligation to enforce the Constitution as everyone else, both in and out of government.”

**NOTE ON THE VIRGINIA AND KENTUCKY RESOLUTIONS**

(Source: BLBAS 5th 52-53, 89-90)

*Marbury* was decided against a background of serious constitutional deliberation outside the Court on issues of fundamental importance. Take for example the question of the power of the States to resist legislation they deem unconstitutional.

As part of the efforts of the Federalist Party to hold on to power, Congress passed the Alien and Sedition Acts of 1798. “The Act was vehemently opposed by resolutions adopted by the legislatures of Kentucky and Virginia which had been written by Jefferson and Madison, respectively.” The substantive basis for the opposition was the First Amendment. It is a jurisdictional awkwardness of how we teach Constitutional Law that the First Amendment – so central to the history of American politics – is outside our scope. That said, I will leave the substance of the challenge aside, and concentrate here on the question of interpretive authority.

“Jefferson [wrote] in the Kentucky Resolution:

[T]he several states who formed [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction, and … a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy.

Jefferson suggested that the people of two-thirds of the states could, through resolutions of nullification, overrule unconstitutional Supreme Court decisions. Only in this way could the principle be vindicated that the Constitution ‘is a compact of many independent powers, every single one of which claims an equal right to understand it, and to require its observance.”
NOTE ON THE LOUISIANA PURCHASE

I. Hamilton’s view of the acquisition of territory

(Source: Luis Fuentes-Rohwer, The Land That Democratic Theory Forgot, 83 Ind. L. J. 1525 (2008))

“As a matter of sovereignty, or the inherent powers of states qua states, a nation possesses the right to acquire territories incident to its status as an independent state. While this might be true in theory, it is not so as a question of U.S. constitutional law. In that context, the question is whether the power to acquire territories is among those powers catalogued under Article I. Unsurprisingly, the question dates back to the early years of the Republic.

Alexander Hamilton wrote, ‘[i]t is not denied, that there are implied, as well as express powers, and that the former are as effectually delegated as the latter.’ To Hamilton, the power to acquire territories was neither express in the language of the Constitution nor implied from the same grant of power. Yet almost in passing, Hamilton offered ‘another class of powers,’ which he labeled ‘resulting powers.’ ‘It will not be doubted that if the United States should make a conquest on any of the territories of its neighbours, they would possess sovereign jurisdiction over the conquered territory.’ Recall that this was neither an express nor an implied power, but rather, a power inherent in sovereignty; or, in Hamilton's words, ‘This would rather be a result from the whole mass of the powers of the government & from the nature of political society, than a consequence of either of the powers especially enumerated.’

This position was not universally accepted at the time. In fact, President Jefferson argued against such a power the first time it came into question, during the process that led to the Louisiana Purchase…. Jefferson's own Attorney General, Levi Lincoln, conceded that the constitutional case for the acquisition of new territories was weak. He believed that the Constitution limited the physical territory of the United States to the boundaries of the states that had ratified the Constitution and the territories then in U.S. possession; new states could only be formed out of this land.”

II. Jefferson’s view, and Jefferson’s actions

(Source: BLBAS 6th pp. 152-154.)

“Arguably the single most important political and constitutional event between the ratification of the Constitution and the outbreak of civil war in 1861 was the purchase of the Louisiana Territory from France in 1803.

An October 1800 treaty between Spain and France returned the territory of Louisiana to France. The agreement had significant implications for the United States because of its effects on control of the Mississippi River and the city of New Orleans. [Congress appropriated funds to purchase the city of New Orleans; Napoleon surprised American diplomats by expressing
willingness to sell the entire territory, pursuant to a treaty under which the territory would be fully incorporated into the United States as soon as possible.]

President Jefferson was a champion of states’ rights and a strict construction of national powers under the Constitution... He had significant doubts about whether Congress had the power to add territory to the United States. He wrote [in a letter] that “The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory; and still less of incorporating it into this Union. An amendment to our Constitution seems necessary for this.” Jefferson also stressed that adding the Louisiana Territory, which stretched from the Gulf of Mexico to the interior of Montana, would double the size of the United States and fundamentally change the character of the Union. This, he argued, should require explicit ratification...through amendment. (Some Federalists, although committed to a strong national government, opposed the purchase on the grounds, among others, that it would serve as a de facto political windfall to slave interests that could readily expand.)

Nonetheless, Jefferson laid the treaty before Congress. [He wrote, in a letter that the proper procedure would be for Congress to ratify the treaty and then] “appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation has not previously authorized….The Executive, in seizing the fugitive occurrence which so much advances the good of our country, have done an act beyond the Constitution.”

Whatever Jefferson’s doubts, he did not press the constitutional point, not least, apparently, because Napoleon began giving signs of pulling back from his agreement, so time became of the essence. Presented with this possibility, Jefferson wrote one correspondent that “whatever Congress shall think it necessary to do, should be done with as little debate as possible, & particularly so far as respects the constitutional difficulty”; to another he emphasized that “the less that is said about the constitutional difficulties, the better.”

Several years later, writing another correspondent about the Purchase, Jefferson said that “[a] strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means.”

III. Supreme Court ratification after the fact
(Source: Fuentes-Rohwer)

“A generation later, the U.S. Supreme Court legitimated what politics had made expedient, in American Insurance Co. v. Canter. At issue in Canter was the power Congress to establish a territorial law for the territory of Florida prior to its admission as a state. In order to answer this question, the Court first had to determine ‘the relation in which Florida stands to the national government.’ This issue, which looked back to the Louisiana Purchase, is whether the U.S. government has the constitutional power to acquire territories. The Court answered this question affirmatively.
Speaking through the Chief Justice, the Court concluded that the treaty and war powers included an implicit power to acquire territories from other nations. Yet when looking through Chief Justice Marshall's opinion, and keeping in mind the larger question of constitutional authority, one is struck by the way in which the Chief Justice disposed of such an important question with so few words. The reasoning was nothing short of ipse dixit, for not once did he wrestle with the difficult question of constitutional authority to acquire foreign territories. By the time the Supreme Court addressed the issue in 1828, the constitutionality of the purchase had been long settled as a practical matter. Little was at stake when Chief Justice Marshall solemnized the transaction: “The Constitution confers absolutely on the Government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

In the century of Manifest Destiny, the ‘Louisiana Purchase served as the great precedent’ for all subsequent constitutional debates about expansion. What was contested in 1803 was, by the end of the century, fully settled by the fact that all institutional actors came to rely, as a settled fact, on the geographic expanse of the Republic. As constitutional historian Mark Graber argues, “[s]ettlements take place, not when official law is pronounced, but when persons opposed to that constitutional status quo abandon efforts to secure revision.”

REVERSAL BY AMENDMENT WHEN THE COURT GETS IT WRONG

One might argue that any claim of judicial supremacy in the capacity to interpret a written constitution was already suspect by the time the Court decided Marbury. In 1793, the Court (under Chief Justice John Jay -- co-author of The Federalist) decided Chisholm v. Georgia, 2 U.S. (2 Dall.) 419. The case involved a claim of “sovereign immunity” by the State of Georgia, raised in a suit before the Supreme Court by a private party to collect on a Revolutionary War debt. The Court read Article III, which provides that “The Judicial Power shall extend to … Controversies … between a State and Citizens of another State,” to empower it to take jurisdiction and award a full remedy.

The result was an outcry against the Court:

Source: BLBAS 6th at 92)

“Georgia … went on to pass a bill stating that anyone trying to enforce the decision should ‘suffer death, without benefit of clergy, by being hanged.’ Enough other states joined Georgia in its opposition to the Court’s decision to make possible the first addition to the Constitution following the first 10 amendments…. The Eleventh Amendment was proposed by Congress on March 4, 1794 and was ratified in February the following year.”
A BRIEF LOOK AT ARTICLE III BARRIERS TO JUDICIAL REVIEW

As noted (Kramer and Levinson, above), Marbury has been read both narrowly and broadly. In narrow terms, Marbury stands for the proposition that when a constitutional issue arises as part of a case that is properly before the Court, the Court must interpret and enforce the Constitution. In broad terms, Marbury claims a unique authority over the field of constitutional interpretation writ large – stemming from the Court’s superior expertise and capacity to interpret the document.

If we take Marbury’s broad claims to heart, it should be disconcerting that the Supreme Court has interpreted Article III as barring the federal courts from reaching questions (constitutional or otherwise) that parties have brought before them – either as a matter of law or as a matter of prudence. If there are constitutional claims the courts cannot or will not hear, that fact makes it all the more clear that the political branches and the people need to cultivate the capacity to interpret the constitution on their own, and enforce it through political means. (We will see that sometimes, the insistence that the people be left to do so is both unrealistic and truly tragic.)

Many basic Constitutional Law courses do not cover these Article III doctrines. They are more properly considered in Federal Courts. But I thought it best to give you a little taste of them – because, as I’ll explain, they are very much in the news (and in one instance, currently before the Court on an issue of great importance to our political future). (You can read more in the Casebook at 94-139.

“Case or controversy requirements”:

The Court has developed a set of doctrines governing the who and when of the bringing of lawsuits.

Standing is the “who” question. It turns most significantly on “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal court jurisdiction and to justify exercise of the court’s remedial powers on his behalf”’ (101). The stake may not be a “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens”’ (102). The plaintiffs must “personally have been injured” (103): generally (although there are exceptions) they cannot assert injuries suffered by others. The injury must be capable of being remedied by the Court. Note that it is no basis for standing to claim that no other party is better situated to bring the case. Stated otherwise, standing doctrine is capable of standing in the way of the federal courts deciding the issue at all.

Mootness and ripeness are the “when” questions. The Court requires that there be a live “case or controversy” (Article III language) throughout the course of the litigation. (There are exceptions, but we won’t deal with them here.) A case is not “ripe” if it is too early – i.e., if not all of the events necessary to constitute the cause of action have occurred. (See Casebook 115
A case is “moot” (or becomes moot) if the facts are such that there is no longer a situation a court can remedy. (See Casebook 116-117 note 10).

**The political question doctrine:**

The Court has also held that some matters are so quintessentially political in nature that it would be a usurpation of role of the political branches (Congress and the President) for a court to try to resolve them. We will see that the Court has stepped into many of the thorniest political issues in American history, and that when it does so, it “Marbury-izes” -- it proclaims, in the broad sense, that it is uniquely the job of the Supreme Court to say what the (constitutional) law is. That said, the “political question” doctrine is alive and well.

**Pending (optional) cases:**

The Trump presidency is raising many a novel constitutional issue – and courts are facing justiciability questions. So: you might wish to read Citizens for Responsibility & Ethics in Washington v. Trump (SDNY 12/21/17), a very recent district court decision dealing with President Trump and the Emoluments clause. The court essentially held that the plaintiffs lacked standing. But it went further: even if there existed a business that could do a better job than these plaintiffs did of proving that they were on the economically-losing end of competition with Trump because of the business advantages that flow from his role as President, the matter would be a political question. The opinion is in the Optional Readings folder.

Of greater long-term significance, I believe, is the question of judicial supervision of partisan (as opposed to racial) gerrymandering. A case raising that issue, Gill v. Whitford, is currently pending (it was argued on October 3, 2017), and raises both standing and political-question issues. You can follow it on Scotusblog here: [http://www.scotusblog.com/case-files/cases/gill-v-whitford/](http://www.scotusblog.com/case-files/cases/gill-v-whitford/). (FYI, 2Ls: the course to take to dig deeply into these issues is The Law of Democracy.)

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**THE BANK CONTROVERSY BEFORE McCULLOCH**

a. To get a sense of the quality of the constitutional analysis President Washington had before him when he signed the bill creating the First Bank, see BLBAS 6th 29-39. (The book is on reserve.) It is difficult to capture through the shorter paraphrase in our casebook. Suffice it to say that it was superb.

b. I cannot stress enough the fact (as noted in the casebook) that the bank controversy was a fight over both means and ends. The question wasn’t simply whether the nation could fulfill its economic destiny without a bank. The question – the far more important question -- was what that destiny was. We have seen that this was a fight that was central to the battle between Federalists and Anti-Federalists. We will see that it remained central to American constitutionalism.