

ORIGINS OF THE FEDERAL CONSTITUTION
Fall 2012

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COURSE DESCRIPTION

Origins of the Federal Constitution presents an intensive introduction to the historical sources of the Constitution. By reference to original source documents, the class considers the common law and other influences on early American government and justice, such as Locke, Montesquieu, and Blackstone's Commentaries; the colonial experience leading to and immediately following the American Revolution; documents and debate directly relevant to formation of individual constitutional provisions and amendments; and the initial experience and understanding of the Constitution, through to Story's Commentaries, in addition to later amendments. The class will also consider the influence and use of this material on modern interpretation of the Constitution.

REQUIRED READING

The primary source of material is original documents from *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner (University of Chicago Press 1987). *The Founders' Constitution* is a remarkable five-volume treatise from which a coursepack of public domain documents has been selected, edited, and provided at copying cost. An entire edition of *The Founders' Constitution* is available inexpensively through Amazon.com as a CD-ROM, and an internet version is also freely available at <http://press-pubs.uchicago.edu/founders/>.

We will also review other public domain documents as collected in the coursepack, as well as excerpts from Hon. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997), and Hon. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Vintage Press 2005), and other more modern interpretive material, which will be made available later in the semester.

RECOMMENDED BACKGROUND

Although not required reading, the following three books provide succinct historical background on the structure and framing of the Constitution in a very accessible presentation:

- Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005)
- Akhil Reed Amar, *The Bill of Rights* (Yale University Press 1998)
- Edward J. Larson and Michael P. Winship, *The Constitutional Convention: A Narrative History from the Notes of James Madison* (Modern Library 2005).

CLASS PARTICIPATION

The selected documents present the historical view of difficult concepts permeating the Constitution. Classes will provoke thought and discussion on these origins, while contrasting and considering the current understanding. I will be calling on you to discuss and help us understand these materials.

You will also be required to prepare sufficiently to assist in guiding the discussion for at least one of the parts of the syllabus. You will turn in your outline for that discussion, supplemented by important questions and aspects raised during the discussion. I will give further instructions in this regard during our first class.

CLASSES AND CONFERENCES

Our class meets once weekly this semester, on Tuesdays from 4:00 to 6:00. I will be available for questions after each class. I will also be available by appointment, and I invite you to call or e-mail me in that regard.

There are 14 parts to the syllabus; we will cover one each week. Lectures may not be audio- or video-recorded. If a conflict arises due to my litigation practice, I will arrange a make-up on a convenient day.

FINAL PAPER AND GRADING

Your final grade will be weighted 70% to an end-of-term paper, 20% to the week where you assist in facilitating the discussion, and 10% to general class participation.

For your end-of-term paper, you will select (subject to my approval) a relatively recent decision of the U.S. Supreme Court that presents an extended consideration of a constitutional issue. You will analyze and interpret the provision at issue, limited to consideration of the historical documents found in *The Founders' Constitution* and similar historical sources, and contrast that interpretation with the Court's own. Having in mind our discussion on interpretive principles, you will also state and justify which result you prefer. Only one student per case will be allowed. As such, let me know by email when you select the case you wish to address.

The paper will be due on our class exam day. It should be between 15 and 20 pages in length exclusive of footnotes, double-spaced with 1-inch margins and 12 pt Times New Roman font. You may, but are not required to, submit a draft or an annotated outline by November 16th for my review and comment.

PART 1:
ENDING, AND BEGINNING

- I. Art. VII (Ratification)
- II. Preamble

PART 2:
ORGANIZING PRINCIPLES AND ANTECEDENT FRAMEWORKS

- I. Organizing Principles
- II. Antecedent Frameworks

PART 3:
THE CONGRESS AND LEGISLATIVE POWER

- I. Legislative Power
 - A. Art. I, sec. 1 (Vesting of Legislative Power)
 - B. Art. I, sec. 8, cl. 18 (Necessary and Proper Clause)
- II. Role of the President
 - A. Art. I, sec. 3, cl. 4 (The Vice President)
Art. I, sec. 3, cl. 5 (Senate Officers)
 - B. Art. I, sec. 7, cl. 2 (Approval by the President of Bills)
Art. I, sec. 7, cl. 3 (Presentation of Orders, Resolutions, and Votes)
 - C. Art. II, sec. 3 (Legislative Duties of President)
- III. Legislative Qualifications, Terms, and Procedure
 - A. Art. I, sec. 2, cl. 2 (Qualifications of Representatives)
 - B. Art. I, sec. 2, cl. 3 (Apportionment of Seats in the House)
 - C. Art. I, sec. 2, cl. 4 (Vacancies)
 - D. Art. I, sec. 3, cl. 2 (Classes of Senators)
 - E. Art. I, sec. 3, cl. 3 (Qualifications of Senators)
 - F. Art. I, sec. 4, cl. 2 (Time of Assembling)
 - G. Art. I, sec. 5, cl. 1 (Power to Judge Elections)
Art. I, sec. 5, cl. 2 (Rules of Proceedings)

- Art. I, sec. 5, cl. 3 (Duty to Keep a Journal)
- Art. I, sec. 5, cl. 4 (Adjournments)
- H. Art. I, sec. 6, cl. 1 (Compensation and Immunities of Members)
- Art. I, sec. 6, cl. 2 (Disabilities of Members)
- I. Amend. XX, secs. 1, 2, and 4 (Terms of Members of Congress)
- J. Amend. XXVII (Congressional Pay Limitations)

PART 4: THE PRESIDENT AND EXECUTIVE POWER

- I. Executive Power
 - A. Art. II, sec. 1, cl. 1 (Vesting of Executive Power)
 - B. Art. II, sec. 2, cl. 1 (Presidential Advisers)
 - C. Art. II, sec. 2, cl. 2 (Treaties and Appointments of Officers)
 - Art. II, sec. 2, cl. 3 (Vacancies During Recess of Senate)
 - D. Art. II, sec. 3 (Legislative, Diplomatic, and Law Enforcement Duties of the President)
 - E. Art. I, sec. 3, cl. 4 (The Vice President)
- II. Qualification and Terms
 - A. Art. II, sec. 1, cl. 1 (Term of the President)
 - B. Art. II, sec. 1, cl. 5 (Qualifications of the President)
 - C. Art. II, sec. 1, cl. 6 (Presidential Succession)
 - D. Art. II, sec. 1, cl. 7 (Compensation and Emoluments)
 - E. Amend. XX, secs. 1, 3, and 4 (Term of President; Presidential Vacancy)
 - F. Amend. XXII, sec. 1 (Presidential Tenure)
 - G. Amend. XXV (Presidential Vacancy, Disability, and Inability)

PART 5: THE UNION AND THE STATES

- I. Federal and Republican Government
 - A. Background Considerations
 - B. Art. IV, sec. 1 (Full Faith and Credit)

- C. Art. VI, cl. 2 (Supremacy of the Federal Constitution, Laws, and Treaties)
- II. Citizenship
 - A. Art. I, sec. 8, cl. 4 (Naturalization and Citizenship)
 - B. Art. IV, sec. 2, cl. 1 (State Citizenship; Privileges and Immunities)
 - C. Amend. XIV, sec. 1 (Rights Guaranteed)
- III. Federal Property and Creation of States
 - A. Art. I, sec. 8, cl. 17 (Federal Property)
 - B. Art. IV, sec. 3, cl. 1 (Admission of New States to the Union)
 - C. Art. IV, sec. 3, cl. 2 (Property of the United States)
- IV. Powers Denied to, and Inherent in, the States
 - A. Art. I, sec. 10, cls. 1, 2, and 3 (Powers Denied to the States)
 - B. Amend. X (Rights Reserved to the States or to the People)
 - C. Amend. XI (Suits Against States)

PART 6: SECURITY AGAINST WAR, INSURRECTION, AND INVASION

- I. Preparing for War
 - A. Art. I, sec. 8, cl. 1 (Power to Tax and Spend)
 - B. Art. I, sec. 8, cl. 12 (Raising and Supporting Armies)
 Art. I, sec. 8, cl. 13 (Providing and Maintaining Navy)
 Art. I, sec. 8, cl. 14 (Regulating Land and Naval Forces)
 - C. Art. I, sec. 8, cl. 17 (Federal Property)
- II. Waging War
 - A. Art. I, sec. 8, cl. 10 (Defining and Punishing Maritime Crimes)
 - B. Art. I, sec. 8, cl. 11 (Declaring War)
 - C. Art. I, sec. 9, cl. 2 (Suspension of *Habeas Corpus*)
 - D. Art. II, sec. 2, cl. 1 (President as Commander-in-Chief)
 - E. Amend. V (Indictments Excepted in Military in Time of War)

III. Defense of the Homeland

- A. Art. I, sec. 8, cl. 15 (Calling Forth the Militia)
Art. I, sec. 8, cl. 16 (Regulation of the Militia)
- B. Art. I, sec. 10, cls. 1 and 3 (Powers Denied to the States)
- C. Art. IV, sec. 4 (Obligation of United States to the States)
- D. Amend. II (Right to Arms)
- E. Amend. III (Quartering of Troops)

PART 7: HISTORICAL STATEMENTS OF RIGHTS

- I. Formal Declarations of Rights
- II. Founding Consideration of Rights
 - A. Debate and Contentions
 - B. Amend. IX (Unenumerated Rights)

PART 8: ELECTIONS AND RIGHTS OF VOTING, PETITION, AND ASSEMBLY

- I. Voting, Petition, and Assembly Rights
 - A. Background Considerations
 - B. Art. I, sec. 9, cl. 8 (Titles of Nobility; Presents)
 - C. Art. IV, sec. 4 (Guarantee of Republican Form of Government)
 - D. Amend. I (Petition and Assembly)
 - E. Amend. XIV, secs. 1 and 2 (Rights Guaranteed; Apportionment of Representatives)
 - F. Amend. XV (Rights of Citizens to Vote)
 - G. Amend. XIX (Women's Suffrage Rights)
 - H. Amend. XXIII (Presidential Electors for the District of Columbia)
 - I. Amend. XXIV (Abolition of the Poll Tax Qualification in Federal Elections)
 - J. Amend. XXVI (Reduction of Voting Age Qualification)
- II. Congressional Elections

- A. Art. I, sec. 2, cl. 1 (Congressional Districting)
- B. Art. I, sec. 3, cl. 1 (Composition and Selection of Senators)
- C. Art. I, sec. 4, cl. 1 (Congressional Power to Regulate Elections)
- D. Amend. XVII (Popular Election of Senators)

III. Presidential Elections

- A. Art. II, sec. 1, cls. 2 and 3 (Presidential Elections)
- B. Art. II, sec. 1, cl. 4 (Day of Presidential Election)
- C. Amend. XII (Election of President)

PART 9: COMMERCE, REVENUE, TAXATION, AND PROPERTY RIGHTS

I. Property Rights

- A. Background Considerations
- B. Art. I, sec. 8, cl. 4 (Bankruptcies)
- C. Art. I, sec. 8, cl. 8 (Copyrights and Patents)
- D. Amend. IV (Right of Security in Persons, Houses, Papers, and Effects)
- E. Amend. V (Takings for Public Use)

II. Commerce

- A. Art. I, sec. 8, cl. 3 (Commerce Power)
- B. Art. I, sec. 8, cl. 5 (Coinage of Money)
Art. I, sec. 8, cl. 6 (Punishment of Counterfeiting)
- C. Art. I, sec. 8, cl. 7 (Post Office and Roads)
- D. Art. I, sec. 10, cls. 1 and 2 (Powers Denied to the States)
- E. Art. IV, sec. 3, cl. 2 (Property of the United States)

III. Revenue and Taxation

- A. Art. I, sec. 2, cl. 3 (Apportionment of Taxes)
- B. Art. I, sec. 7, cl. 1 (Revenue Bills)
- C. Art. I, sec. 8, cl. 1 (Power to Tax and Spend)

- D. Art. I, sec. 8, cl. 2 (Borrowing Power)
- E. Art. I, sec. 9, cl. 4 (Restrictions on Taxation)
- F. Art. I, sec. 9, cl. 5 (Prohibitions on Duties on Exports from States)
Art. I, sec. 9, cl. 6 (Prohibitions on Preference to Ports and Duties)
- G. Art. I, sec. 9, cl. 7 (Restrictions on Appropriations and Accounting of Public Money)
- H. Art. VI, cl. 1 (Validity of Prior Debts and Obligations)
- I. Amend. XIV, sec. 4 (Civil War Debt)
- J. Amend. XVI (Income Tax)

PART 10: JUDICIAL POWER, JURISDICTION, AND RIGHT TO JURY TRIAL

- I. Judicial Power
 - A. Art. III, sec. 1 (Vesting of Judicial Power; Courts and Judges)
 - B. Art. VI, cl. 2 (Supremacy of the Federal Constitution, Laws and Treaties)
- II. Federal Court Jurisdiction
 - A. Art. I, sec. 8, cl. 9 (Creation of Courts)
 - B. Art. II, sec. 2, cl. 2 (Presidential Appointment Power)
 - C. Art. III, sec. 2, cl. 1 (Cases and Controversies; Grants of Jurisdiction)
 - D. Art. III, sec. 2, cl. 2 (Original and Appellate Jurisdiction)
 - E. Amend. XI (Suits Against States)
- III. Right to Jury Trial
 - A. Art. III, sec. 2, cl. 3 (Trial by Jury of Crimes)
 - B. Amend. VII (Civil Trials)

PART 11: CRIMINAL PROSECUTION, RIGHTS, AND PUNISHMENT

- I. Prosecution of Crimes and Rights of the Accused
 - A. Art. I, sec. 9, cl. 2 (Suspension of *Habeas Corpus*)
 - B. Art. I, sec. 9, cl. 3 (Bills of Attainder and *Ex Post Facto* Laws)

- C. Art. I, sec. 10, cl. 1 (Powers Denied to the States)
 - D. Art. II, sec. 3 (Law Enforcement Duties of the President)
 - E. Art. III, sec. 2, cl. 3 (Trial by Jury of Crimes)
 - F. Art. IV, sec. 2, cl. 2 (Interstate Rendition)
 - G. Amend. IV (Search and Seizure; Warrants)
 - H. Amend. V and VI (Rights in Criminal Actions)
 - I. Amend. XIV, sec. 1 (Rights Guaranteed)
- II. Punishment
- A. Art. II, sec. 2, cl. 1 (Reprieves and Pardons)
 - B. Amend. VIII (Excessive Bail or Fines; Cruel and Unusual Punishments)

PART 12: LOYALTY, TREASON, AND RIGHTS OF THE MIND

- I. Loyalty and Treason
- A. Impeachment Clauses: Art. I, sec. 2, cl. 5
Art. I, sec. 3, cls. 6 and 7
Art. II, sec. 4
Art. III, sec. 1
 - B. Art. II, sec. 1, cl. 8 (Presidential Oath of Office)
 - C. Art. III, sec. 3, cls. 1 and 2 (Treason)
 - D. Art. IV, sec. 2, cl. 2 (Interstate Rendition)
 - E. Art. VI, cl. 3 (Oath of Office)
 - F. Amend. XIV, sec. 3 (Civil War Disqualification)
- II. Free Expression
- A. Art. I, sec. 6, cl. 1 (Compensation and Immunities of Congressional Members)
 - B. Amend. I (Speech and Press)
- III. Religious Liberties
- A. Art. VI, cl. 3 (Religious Tests)
 - B. Amend. I (Religion)

PART 13:
SLAVERY AND CIVIL RIGHTS

I. Slavery

- A. Art. I, sec. 2, cl. 3 (Apportionment of Seats in the House)
- B. Art. I, sec. 9, cl. 1 (Importation of Slaves)
- C. Art. IV, sec. 2, cl. 3 (Fugitives from Labor)
- D. Art. IV, sec. 3, cl. 1 (Admission of New States to the Union)
- E. Art. V (Mode of Amendment)

II. Civil Rights

- A. Background Considerations
- B. Art. IV, sec. 2, cl. 1 (State Citizenship; Privileges and Immunities)
- C. Amend. XIII (Abolition of Slavery)
- D. Amend. XIV, secs. 1 and 5 (Rights Guaranteed; Enforcement)
- E. Amend. XV (Rights of Citizens to Vote)

PART 14:
AMENDING AND INTERPRETING

I. Amending

- A. Art. V (Mode of Amendment)
- B. A Failed Amendatory Experiment: Amend. XVIII (Prohibition)
Amend. XXI (Repeal of Prohibition)

II. Interpreting

- A. Founding Interpretive Comment
- B. Modern Interpretive Approach

III. Concluding Thoughts