Constitutional History I: 
From the Articles of Confederation to the Civil War
Spring 2015
Professor Michael Klarman

Our primary course materials will consist of photocopied materials available to you from the law school copy center. Those materials will be supplemented with readings from Kelly, Harbison & Belz, The American Constitution: Its Origins and Development (7th ed., vol. I) (referred to below as Kelly), which should be available for purchase at the bookstore.

My office is Areeda 332. My office hours this semester will be Wednesdays, 3:30 to 5:30. There is a good chance that I will also be available many Friday afternoons at roughly the same time, for those for whom Wednesday appointments are inconvenient. It would be a good idea to make an appointment even if you are coming during those hours; this enables me to better distribute the traffic. To set up an appointment, please email me—not my assistant—at mklarman@law.harvard.edu.

The exam for the class will be an open-book, any-day takehome. Sometime before the mid-point of the semester, I will ask my assistant to post on the course webpage an old exam or two, along with some model answers. These will give you some sense of what to expect on the final exam.

This is going to be a large class, and, as the course description stated, the format of the class is largely lecture, not Socratic or a seminar-like discussion. That said, it is important that people take the frequent opportunities I will offer to raise questions, make objections, and offer alternative perspectives. In addition, I encourage people to come up after class for discussion and to take advantage of my office hours. The burden is on you in a class this size if you want to get to know the professor, but I am eager to make that happen, if you are willing to seize the opportunities.

PAGE

1. Flaws in the Articles of Confederation
Kelly, pp.76–87

Articles of Confederation..............................................................................................................1
Rakove, The Road to Philadelphia, 1781–87...............................................................................6
Federalist Paper #15 ......................................................................................................................17
Federalist Paper #22 ....................................................................................................................22

2. The Constitutional Convention and the Theory of the Constitution
Kelly, pp. 87–102

Banning, The Constitutional Convention...................................................................................28
Federalist Paper #10 ....................................................................................................................38
3. The Anti-Federalists and the Critique of the Constitution
Kelly, pp. 103–16

*Essays of Brutus* ................................................................................... 69

4. Ratification and the Bill of Rights .........................................................
James W. Ely, Jr., “The Good Old Cause”: *The Ratification of the Constitution and Bill of Rights in South Carolina* ...................................................... 77
Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity* .......... 89

5. Constitutionalism in the Early Republic: Constitutional Issues of the 1790s
Kelly, pp. 117–30

*Chisholm v. Georgia*
Jefferson Powell, *Languages of Power: A Sourcebook on Early American Constitutional History* .............................................................. 113
Charles Warren, *The Supreme Court in US History* ........................................ 119

*The Bank Controversy*
Brest & Levinson, *Processes of Const’l Decisionmaking* .................................. 126

*Hayburn’s Case*
Warren, *Supreme Court, supra* ..................................................................... 134

Kelly, pp. 130–37

Presser & Zainaldin, *Law and American History* .................................................. 144
Kentucky and Virginia resolutions of 1798–99 ............................................. 156

7. The Jeffersonian Attack on the Federal Judiciary and the Chase Impeachment
Kelly, pp. 156–70

Presser & Zainaldin, *supra* ........................................................................ 184
Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* ................................................................. 189
Kelly, pp. 170–77

Charles Grove Haines, The American Doctrine of Judicial Supremacy ..........204
Rossum, The Courts and the Judicial Power......................................................213
Federalist Paper #78 .......................................................................................218
Sylvia Snowiss, Judicial Review and the Law of the Constitution ..............223
Marbury v. Madison (S.Ct. 1803) ....................................................................232
Chronology of events (from Knight & Epstein) ..............................................241
Kent Newmyer, The Supreme Court Under Marshall and Taney .................242

9. The Nationalism of the Marshall Court

Martin v. Hunter’s Lessee (S.Ct. 1816) .............................................................250
McCulloch v. Maryland (S.Ct. 1819) .................................................................255
Gibbons v. Ogden (S.Ct. 1824) .......................................................................266
Newmyer, Supreme Court, supra .................................................................272
Amphictyon Essays, in Gerald Gunther, ed., John Marshall’s Defense of
McCulloch v. Maryland ...................................................................................283

10. The Contracts Clause Decisions of the Marshall Court
Kelly, pp. 186–93

Fletcher v. Peck (S.Ct. 1810) ...........................................................................302
Notes on Dartmouth College v. Woodward (S.Ct. 1819) and
Sturges v. Crowninshield (S.Ct. 1819) .............................................................306
Benjamin Wright, The Contract Clause of the Constitution..........................307

11. States Rights Constitutionalism and Jackson’s Response
Kelly, pp. 200–212

South Carolina Protest Against the Tariff of 1828 ........................................319
South Carolina Ordinance of Nullification ......................................................320
President Jackson’s Proclamation to the People of South Carolina ..........321
South Carolina’s Reply .......................................................................................324
John C. Calhoun, Fort Hill Address .................................................................325
William Freehling, Prelude to Civil War .........................................................335
Warren, Supreme Court, supra ......................................................................343
12. Slavery at the Constitutional Convention

Constitutional Provisions Regarding Slavery .................................................................369
Paul Finkelman, *Slavery and the Constitutional Convention* ..................................370
William Freehling, *The Founding Fathers and Slavery* ...........................................389

13. The Fugitive Slave Issue

Kelly, pp. 241–49

1793 Fugitive Slave Act ..................................................................................................396
*Prigg v. Pennsylvania* (S.Ct. 1842) ...........................................................................397
1850 Fugitive Slave Act ..............................................................................................406
*Ableman v. Booth* (S.Ct. 1859) .................................................................................408
Finkelman, *Prigg v. Pennsylvania and Northern Courts: Anti-Slavery Use of a Pro-Slavery Decision* .................................................................419

14. Slavery and Various Comity Issues

*Elkison v. Deliesseline* (D.S.C. 1823) .........................................................................435
*Commonwealth v. Aves* (Massachusetts 1837) .......................................................441
*Lemmon v. People* (New York 1850) .........................................................................444
Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* ..................452

15. Slavery in the Territories and *Dred Scott*

Kelly, pp. 249–79

*Dred Scott v. Sandford* (S.Ct. 1857) ...........................................................................466
Russel, *Constitutional Doctrines with Regard to Slavery in Territories* .................481
Mendelson, *Dred Scott's Case — Reconsidered* .......................................................486
Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* .................................................................493
Abraham Lincoln's "House Divided" Speech ...............................................................499
Excerpts from the Lincoln–Douglas Debates ..............................................................504

16. Secession, the Nature of the Union, and Other Constitutional Issues Raised by the Civil War

Kelly, pp. 280–301, 308–18

Jesse T. Carpenter, *The South as a Conscious Minority 1789–1861* .................508
Lincoln's First Inaugural Address .................................................................................523
*Prize cases* (S.Ct. 1863) ............................................................................................533
Roger B. Taney, “Thoughts on the Conscription Law of the United States” ............536
Benjamin Curtis on the Emancipation Proclamation.......................................................543

*Time Permitting*

17. The Civil War and Civil Liberties
   Kelly, pp. 301–307

   *Ex parte Merryman* (D. Md. 1861).................................................................546
   *Ex parte Milligan* (S.Ct. 1866).......................................................................553
   President Lincoln on the suspension of habeas corpus...............................566
   Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln* ...568
   J.G. Randall, *Constitutional Problems Under Lincoln*..................................571
   Mark Neely, *The Fate of Liberty*........................................................................578