Constitutional Law I: Structure of Government
LAW 121-003
Prof. Greve
Fall Semester 2023

Times: Tues/Thurs 4:00 –6:00pm
Exam: Thurs, Nov. 30, 12:00
Office Hours: Tues/Thurs 2:30-3:30pm; or by appointment (email mgreve@gmu.edu to schedule; send email from your gmu account.)

Welcome

to ConLaw I—the *real* ConLaw (as distinct from ConLaw II, where you get to make things up). If you've followed the news, you will have noticed that the Constitution's structure has re-emerged as a serious bone of judicial contention. We'll have to see what that's all about. This will be fun.

Readings

The required textbook is Ernest A. Young., *The Supreme Court and the Constitution of the United States* (Foundation Press, 2017; ISBN 978-1-62810-030-3). The most recent Supplement to the textbook will be posted on TWEN when it becomes available. Additional readings appear by hyperlink in the Syllabus below or are/will be posted on TWEN. ("Supp" refers to the textbook Supplement, which isn't available yet. I'll post as soon as I have it.)

No further readings are required. The textbook contains some of the central, canonical *Federalist* essays; however, you may want to purchase, peruse, and even think about the entire *Federalist*. (I'll revert to the authors' riff on the Constitution throughout.) If you want to look at a broad-sweep history of the Supreme Court and the major themes of constitutional law, check out Robert McCloskey, *The American Supreme Court*. A quick read and still a great one, after all these decades.

We will parse the constitutional text in every single class. It's in the textbook; but it's laborious to flip to and fro between the text and the cases. If you can, keep a pocket version of the Constitution at hand for class prep and instruction time.

Teaching Format

This class is a mix of lecture and conventional, "Socratic" teaching. I strongly encourage active class participation (I freely alternate between cold calls and "any volunteers?"), and I will consider it for purposes of your grade. Active, constructive participation means a .33 upgrade; consistent failure to prepare for class or to follow the discussion may result in a downgrade.

I will divide the class into two sections and, from session to session, call on one group and then the other. (This does *not* apply to the first session.) The not-on-call group will prepare and submit questions, per email, pertaining to the readings for the upcoming class. I will retain the notes and consider them in my "class participation" evaluation. Group assignments, further explanation at the beginning of the first session.

If for some reason you have been unable to prepare for a class, send me an advance email. No harm if you do this once or twice; just don't make a habit of it. *Obviously*: even if your turn isn't up, you should still prepare for class (it'll be hard to follow the discussion without diligent preparation); and obviously, you may still volunteer questions and thoughts.

I use PowerPoint (albeit sparingly), and I will from time to time post the slides for prior sessions on TWEN. Also, if you miss a class or things remain obscure even after reviewing your notes etc., I am willing to share my class notes, on an individual basis and upon request. Please don't overuse this privilege. ***You may not share the class notes with anyone, and you must delete them from your computer after use and, in any event, no later than the last day of class***.

Interim Assessment

It's a good idea to check on your progress during the semester (and the ABA requires it). I've experimented with mid-Terms and quizzes—only to have students rebel. Far preferable: at least one ***mandatory*** **consultation session** roughly half-way through the semester. Details, scheduling to follow.

Obviously, you may request additional consultations at any time. That is a good idea especially if this or that topic or session leaves you confounded.

Exam

Four hours; essay questions. Open book; internet secure. It pays to mark up your book and related materials as we go along. I will supply additional information and distribute a practice exam well before the actual exam. You'll have a full opportunity to review your final exam (and, if you wish, the practice exam) with me. I'll explain the mechanics when the time comes.

Learning Outcomes

Here's what you are expected to take away from this course:

- Solid comprehension of the Constitution's principles, structure, and individual provisions
- Ability to recognize and apply different modes of constitutional argument (*e.g*., text, context, institutional practice)
- Elementary understanding of our constitutional history (Founding; early development; Civil War Amendments; New Deal; civil rights era)
- Solid knowledge of the basic modern doctrines governing the separation of powers, federalism, and judicial review; ability to analyze cases/problems by applying those doctrines

That's a mouthful, so let me explain:

Students entering ConLaw tend to entertain certain misconceptions: (1) their private opinions about liberty, truth, and justice matter greatly. Wrong: your prof doesn't care, or at least *this* prof doesn't. (2) Law should be formalistic and rule-like, like CivPro. ConLaw isn't, as you'll discover in a real hurry; therefore, it's all politics. Also wrong, I think. I ask you to believe, for the purposes of this course, that there is a form of (not-wholly-formalistic) constitutional law that is actually *law*. You may come to reject that position; but then it's all about counting to five votes and what are we doing here?

Related note: the Constitution is not a bunch of isolated provisions you can cram into your heads. You must learn what's in the document—but that's only a start. The Constitution has a deep structure, and every darn thing (federalism, separation of powers, judicial review, popular sovereignty, constitutional

supremacy) hangs together with every other darn thing. The Syllabus (below) has reading suggestions to orient you to the central, connecting questions.

For my own true (and correct) views *see* Greve, *The Upside-Down Constitution* (Harvard UP 2012). I do *not* recommend this book as an introductory text: it's tough sledding. If you absolutely insist on probing your instructor's mind prior to the course: Greve, *The Constitution* (2013), is short, accessible, cheap, and available on Amazon. (And no: I get no royalties.)

Syllabus

Check the syllabus on a regular basis. It is subject to change. A lot depends on our progress. We will not always be able to cover the assigned materials in a single session; I just don't know in advance which ones those are. As a rule: when we run over, you are still expected to do the readings for the next class. **The operative version of the Syllabus is the one on TWEN**. Case titles in the assignments include the editor's notes. The listed **page numbers** reflect the full assignments.

All even-numbered sessions: Group A to submit questions; Group B on call.

All odd-numbered sessions (except Session 1): Group B to submit questions; Group A on call.

1. Reading the Constitution

U.S. Constitution (4-22); *McCulloch v. Maryland* (146-168)

McCulloch is the wellspring of numerous important doctrines. We'll come back to it time and again. I'm hitting you over the head with it because it's a great way of exploring forms of constitutional argument: text, structure, context, history, etc. Try to understand what Marshall is doing, and how he does it. Make a list of the constitutional provisions that are implicated.

2. Constitutional Structure

Articles of Confederation https://avalon.law.yale.edu/18th_century/artconf.asp; U.S. Constitution (yes, again); Raz (21-23)

You won't be able to understand any constitutional clause without understanding *why* it's in the document; and you won't be able to figure that out without some context and a sense of the overall architecture. For starters, the Constitution is (among other things) a response to a failed institutional experiment, the Articles of Confederation. Put the Constitution next to the Articles; cross-reference the clauses. What are the major differences? What exactly are the problems that the Constitution is meant to solve? Put differently: why couldn't the Convention delegates just fix the Articles (as they had been instructed to do), instead of writing a whole new Constitution?

The second half of this session is a mini-lecture on the Constitution's structural principles. It'll be easier to follow if you have some rough familiarity with *The Federalist*. If you can find the time here's a small selection: No. 1&2 (constitutional moments); 15&16 (defects of the Articles); 39 (republican government, federalism); 10&51 (federalism, separation of powers--pp 537-549 in your textbook).

3. Constitutional Supremacy and Judicial Review

Federalist 78 (69-77); *Marbury v. Madison* (77-94)

Marbury is the most famous case you'll ever read, in any course. It has two parts: (1) the riff on the Judiciary Act and Art III; (2) the explanation of the power of judicial review (starting bottom p. 86).

Part (1) has some fairly tricky stuff you'll encounter again in AdLaw (*Marbury* is our first big AdLaw case) and in FedCourts. We'll go through it. This is your first encounter with the grants of jurisdiction in Art. III Sec 2: read it very carefully. And consider Note (4), pp. 91-92: do we think Marshall got this right?

Part (2): There are actually *two* theories of judicial review that find support in *Marbury*, depending on how you understand Marshall's argument(s). Pay very close attention to what he says about the judiciary's role: what exactly does this entail?

4. More on Constitutional Supremacy and the Court—and the States

Virginia and Kentucky Resolutions https://billofrightsinstitute.org/primary-sources/virginia-and-kentucky-resolutions ; *Martin v. Hunter's Lessee* (TWEN)

The textbook omits this but it's simply too important, historically and systematically.

The Resolutions were passed in response to the Alien and Sedition Acts (I'll explain). What *exactly* would they have the states do? What *may* states do (now) under the Constitution to resist an oppressive federal government?

Martin v. Hunter's Lessee is the juridical counterpart. (Suppose Congress had never enacted Section 25: what would follow?) The case is difficult; I'll explain some of the nuances. What are the arguments *for the Virginia courts'* position—and what's the comeback?

5. The Judicial Power: Cases, Controversies, and Other Such Matters

Correspondence of the Justices (94-99); *Warth v. Seldin* (99-117); *Nixon v. United States* (124-137); Note on Other Limits, Nos. 1&2 (137-138); *Cooper v. Aaron* (401-414); *Rucho v. Common Cause* (Supp); *U.S. v. Windsor* (excerpts— TWEN)

Your editor wisely offers "a relatively brief overview" because this stuff gets very FedCourts-y and involved, very quickly. I'll give you a roadmap. The important thing to recognize is that the convoluted doctrines on jurisdiction, justiciability, remedies etc. all go back to different understandings of *Marbury*. See if you can trace the connections.

Two more notes:

(1) I've skipped *Baker v. Carr* (117-124) to lighten your reading load. The one paragraph you should know/flag/memorize is at the top of p. 120, beginning with "Prominently."

(2) I've added the *Windsor* excerpts to introduce a slightly esoteric but increasingly salient question: standing for *legislators*. Also, there's some criminally bad lawyering going on here.

6. Separation of Powers: Introduction

Federalist 10 & 51 (537-549); Federalist 47 & 48 (905-914); *Youngstown Sheet & Tube Co.* (914-939); "Executive Privileges and Immunities" (Supp).

The Constitution, you've learned, embodies certain structural principles; and you've examined one: judicial review. Now the next one: the separation of powers, and checks and balances (not the same).

Youngstown is instructive in many ways. It's not all that easy to tell legislative from executive power—is it? Which of the opinions strikes you as most compelling, and why?

Mazars presents pretty good institutional/constitutional claims on both sides—no? How would you resolve the issue?

7. Legislative Powers; Delegation

A.L.A. Schechter Poultry (942-951); *Whitman v. American Trucking Ass'n* (951 -968); *Gundy v. U.S.* (Supp) *Biden v. Nebraska* (Supp).

Two questions about legislative powers: (1) their scope/extent: that's *McCulloch*, and cases and sessions later in this course. (2) Can Congress *delegate* the powers to someone else? That's this; and it's a big deal because only a fraction of the (federal) rules that govern us come from Congress. Almost all come from agencies (FCC, SEC, EPA….) If you think that Congress may not delegate its powers, all that has to be unconstitutional—no? What's the answer in *Schechter*—does it really stand for an "intelligible principle" rule of (non-)delegation? Read the case carefully!

Note 7 (p. 964), *re* President Obama's DAPA program, is too much AdLaw for this course. But consider it; think of Mr. Trump's attempts to find money for the "Wall" and his unilateral tariffs; and then contemplate this puzzle: the Founders feared that Congress would draw all powers into its "impetuous vortex." That did not happen, did it? We've seen astounding unilateral exertions of presidential power, while Congress stands pat and 535 blowhards compete with the President for airtime. Does that lend force to Justice Gorsuch's *Gundy* dissent?

8. Bicameralism and Presentment

INS v. Chadha (968-986)*; Clinton v. New York* (986-1005)

Contrast the hyper-formalism in these decisions with the Court's anything-goes approach in delegation cases: what explains the difference? Are these decisions (non-)delegation cases in drag?

9. Executive Power: Appointments and Removal

Morrison v. Olson (1017-1047); "Appointments" (Supp); *Seila Law* (TWEN)

I'll add a bit more background.

The most contentious issue here is removal. After *Free Enterprise Fund* (1045-1046) and a case called *Lucia* (not assigned—I'll explain), *Humphrey's Executor* and *Morrison* already hung by a thread; and Justice Kavanaugh mused about "driving the final nail" into *Morrison*'s coffin. Still, in *Seila Law* and yet again in *Collins v. Yellen* (also not assigned), the Court declined to overrule those cases and instead added yet more curlicues to the doctrine. Why?

10. Foreign Affairs

Neutrality Controversy (1050-1055); *U.S. v. Curtiss-Wright Export* (1055-1069); *Zivotovsky v. Kerry* (1069-1107); *Trump v. Hawaii* (Supp).

This session and the next are the stuff of entire courses on foreign relations law (not international law—the *domestic* law of foreign relations). We'll try to get a general lay of the land. If you can't recall *Youngstown*, this would be a fine time to re-read it.

Hamilton plainly won the argument against Madison, didn't he? Why or why not?

11. War Powers

Little v. Barreme (1107-1111); *Prize Cases* (1111-1118); Ramsey, Textualism and War Powers (1123-1128); War Powers Resolution (1128-1142)

Everyone agrees that the Founders wanted to make it hard to get into wars, and easy to get out. How has that worked for them?

12. Emergency Powers? Habeas, Detentions and Such

Ex parte Merryman (1142-1155); *Korematsu v. U.S.* (TWEN); *Hamdan v. Rumsfeld* (1155-1179)

I've added *Korematsu* because ConLaw II courses focus (naturally) on the Equal Protection piece of the case. But it's a great case to noodle over the "emergency power" question that lurks behind all these cases. Many constitutions contain *textual* emergency powers; ours doesn't. Should it?

13. Legislative Powers: Commerce

Gibbons v. Ogden (168-178); *Willson v. Black Bird Creek Marsh Co* (178-184); *E.C. Knight* (292-299); *Shreveport Rate Cases* (300-303); *Hammer v. Dagenhart* (303-307); *A.L.A. Schechter Poultry* (308-317)

Enough of executive power; on to legislative powers (their scope, not their delegation—we've done that). Hard to bring order to this because the question hangs together with federalism: the basic idea is that states may do, within constitutional limits (what are those limits? Look them up!!!), what Congress may *not* do or has left undone. But you've already seen in *McCulloch* (re-read!) that it's a quite bit more complicated. On top of that the whole system underwent a massive change during the New Deal, which you'll have to understand.

We'll do this one step at a time. For this session, try to comprehend the conceptual distinctions CJ Marshall draws in *Gibbons*, a foundational case right up there with *McCulloch*. What are they? Do they work? What happens to them in *E.C. Knight* and beyond?

14. Commerce, Again: Come the (Counter-)Revolution?

Roosevelt, Fireside Chat (319-327); *West Coast Hotel v. Parrish* (327-331); *NLRB v. Jones & Laughlin* (331-339); *Wickard v. Filburn* (339-346); *U.S. v. Lopez* (623-649); *Gonzalez v. Raich* (650-670); Notes 1-5 (670-674)

Guns in schools and pot plants on the windowsill: after *Wickard*, is this game seriously worth playing?

Put aside the conceptual distinctions that the Court draws and then conspicuously declines to apply in *Lopez*: there may be a serious *McCulloch* argument in that case, and in *Raich*. Can you see it? Does it persuade you?

15. The Power of the Purse—and the "Fiscal Constitution"

NFIB v. Sebelius (674-676 n.6, 702-717, 723-747); *South Dakota v. Dole* (717-723)

Few constitutional lawyers take the fiscal Constitution—stuff that has to do with money—seriously. But I do, and so therefore will you. We'll try to understand the structure of the fiscal Constitution. To that end, *before* you read the cases, do two things:

(1) make a list of *all* constitutional provisions that have to do with the power of the purse—to tax, borrow, etc. On that occasion, make a list of commonly-used fiscal instruments that are *not* in the constitutional text—but probably should be.
(2) Tell me: in what ways, if any, do the *fiscal* powers differ from the powers to regulate (*e.g*. pursuant to the Commerce Clause)—textually, structurally, federalism-wise?

NFIB involves at least three powers, depending on how you count: regulate, tax, spend. Do any of its holdings make sense?

16. The Federal Structure (I)

Erie RR v. Tompkins (TWEN)

Recommended: Greve, "Federalism" (TWEN)

Repeat: Federalism isn't "in" the Constitution; but it pervades the Constitution. (You've already seen some of the ways in which it's entangled with the powers to Congress—and there's much more to come.) It's very important to have a general overview and a sense of the historical trajectory.

To that end there's no better case than *Erie.* It isn't just a CivPro case; it's a Conflicts case, and a constitutional case, and a federalism case ("the most important federalism case of the twentieth century," your editor writes (p. 619)—before he inexplicably omits the case). It's the linchpin of the New Deal Revolution; and it centrally implicates—and connects—federalism, *and* the separation of powers, *and* the role of the Court.

Many constitutional originalists (Justices Scalia and Thomas among them) have deemed this case absolutely foundational, and indelibly right: why? Contrary proposition: so long as you think that *Erie* was right, you will never comprehend the U.S. Constitution. True?

17. Federal Structure (II)

Federalist 10 (537—re-read), 45&46 (606-616); *U.S. Term Limits v. Thornton* (549-580); *Garcia v. SAMTA* (589-606); Moore v. Harper (Supp)

Read the *Federalist* essays first, and tell me: in these *United* States, what exactly are states good for?

The *Term Limits* opinions are remarkably good, or at least serious: instead of mailing it in, the Justices go back to the basics, before they go over the top. What case (you've read it!) does this remind you of, and who has the better of the argument?

Garcia is the opposite: how-do-you-feel burble on all sides. It's technically still good law. But the conservative justices have engineered a half-dozen ways around it; I'll explain.

18. Sovereign Immunity

Chisholm v. Georgia (TWEN)*; Hans v. Louisiana* (TWEN); *Seminole Tribe* (TWEN)

Your textbook author clerked for Justice Souter during the *Seminole Tribe* Term and did much of the work on that case—and then left the whole subject out of this textbook, probably because the problems are a bit nasty. The nuances are for FedCourts; but it's important for you to know the basics. The central question (yet again) is the interplay between the judicial power, the separation of powers, and federalism.

Was *Hans* rightly decided? Why or why not? Should they have decided *that* question in *Seminole Tribe*? Why or why not?

19. Dormant Commerce

Camps Newfound (TWEN); *Philadelphia v. New Jersey* (822-830)*; Kassel v. Consolidated Freightways* (830-847)*; South Central Timber* (847-856)*; City of Camden* (856-865)*; Metropolitan Life v. Ward* (865-875); *NPPC v. Ross* (Supp)

Don't sweat the nuances of these copious cases; we'll tackle them in class. Ask instead: where does all this come from—the constitutional text? Structure? The Justices' fevered minds? Recall, and maybe re-read, *Gibbons* and the second holding in *McCulloch*. And read Justice Thomas's *Camps Newfound* dissent against that backdrop.

20. Federal Preemption

PG&E v. State Energy Comm'n (875-884); *Lorillard Tobacco v. Reilly* (875-897); *Wyeth v. Levine* (TWEN); Note on Federal Preemption (898-904)

The "Note" is illuminating; you may want to read it before tackling the cases.

These are *statutory* cases; why are we reading them in *Con*Law? (1) Preemption cases are the kind of stuff you may actually encounter in real-world practice; and because I'm getting paid to train lawyers and the subject isn't systematically covered in any course, I teach it when I have a chance. (2) *every* Justice seems to think that we have to lard this up with quasi-constitutional canons. Why?

Here, as on dormant Commerce, Justice Thomas has proposed to re-think the entire edifice, for profound constitutional reasons: *Wyeth*. To the corporate defense bar's immense relief, that proposal has gone nowhere. *Should* the courts adopt his analysis?

21. Clear Statement Rules

Jones v. U.S. (749-754); *Gregory v. Ashcroft* (755-764); *SWANCC* (764-775)

Yet more (underhanded?) canons; you'll recall a few from Statutory Interpretation. Question from Session 20, in reverse: Why can't they just decide these darn cases directly under the Constitution?

22. Commandeering States

New York v. United States (775-795)*; Printz v. U.S.* (795-820); "The Anticommandeering Doctrine" (Supp).

Printz isn't Justice Scalia's best opinion (it's actually a bit sloppy) but it may be among his most important: Why? The answer hinges on a case you know: which? It's foundational for a case you've also read: which?

23. Slavery

Prigg v. Pennsylvania (185-196); *Dred Scott* (196-217); Note (222-225)

You will go over this stuff again in ConLaw II, in much greater depth. The theme we'll pursue here is federalism between and among the states. Slave states and free states in a single union: how does the Constitution resolve this (in a manner of speaking)? What are the relevant constitutional provisions? Did *Prigg* get that right? Could it be that the hideous *Dred Scott* decision was perhaps right on the Conflicts questions?

24. Civil War Amendments; Reconstruction

Barron v. Baltimore (225-229); Slaughter-House Cases (229-246); *Civil Rights Cases* (246-266)

Yale professor Akhil Amar has insisted on reading "The Bill of Rights as a Constitution"—as a structure that's continuous with the unamended Constitution. Is this also true of the Civil War Amendments? Did the *Slaughter-House Cases* and the *Civil Rights Cases* get the synthesis right, or obviously wrong?

25. Enforcement

Katzenbach v. Morgan (677-684); *City of Boerne* (684-702)

A final riff on the connections between the separation of powers, federalism, and the judicial power. How precisely would you articulate the line that separates permissible congressional "enforcement" from, umh, making things up?