

Law 881-R01 | The Constitution in the Early Republic | Winter 2025 | 2 credits

Professor(s): Judge Ryan D. Nelson | **Final Exam:** N/A

Reading(s): There is no assigned book for this class. Readings will be assigned from a variety of sources and links or pdfs will be supplied where necessary, although you are welcome to purchase any hardcopies of the books.

Schedule Announcement(s): This class will meet during the Winter 2025 Intersession. Class meetings will be held as follows:

Online instruction: January 6–10, 13, 14, 2025, from 1:00pm–4:00pm.

In-person instruction: January 31, 6:00–7:30pm, February 1, 10:00am–12:00pm, February 1, 1:00pm–3:00pm.

Students are expected to be on video for the duration of each online class. This is intended to be an interactive class with ample discussion so I will assume that if your camera is off that you are unable to participate at that time. We will aim to have a 10-minute break each day near the middle of the class.

Communication(s): ryan_nelson@ca9.uscourts.gov

Office Hours: There are no scheduled office hours, but I am available for meetings upon request.

COURSE DESCRIPTION

This course explores the liquidation of the U.S. Constitution in the Republic's early years. Reading both primary and secondary sources, students will learn how the public's understanding of the Constitution developed with time and how the Constitution's timeless provisions came to shape every aspect of American life.

COURSE OBJECTIVES

Upon completion of this course, students should be able to:

1. Identify the various sources of constitutional power for each branch of government.
2. Identify the Constitution's structural protections, including separation of powers and federalism.
3. Identify original constitutional sources of power relevant to modern issues.
4. Formulate legal arguments for or against the constitutional powers of each branch of government.

GRADING & PARTICIPATION

In order to earn credit for this class, students must be in class (on camera) 80% of the time, participate in discussions, and complete the assignments. There will also be a writing project assigned during class and due by the end of the day on February 21, 2025.

COURSE SCHEDULE & ASSIGNMENTS

Below is a schedule of class topics and reading.

Period I (Jan. 6) Introduction, Originalism and The American Revolution

- Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 (1989)
- Jack Balkin, Abortion and Original Meaning, 24 Const. Comment. 291 (2007)
- Randy Barnett, Trumping Precedent with Original Meaning: Not as Radical as it Sounds, 22 Const. Comment. 257 (2005)

See TWEN for copies of the above articles.

- Gordon Wood, Creation of the American Republic: 1776–1787, chs. 1, 4 (ed. 1982), *available at* <https://www.heinonline.org/HOL/Page?handle=hein.beal/cretamrup0001&id=1&size=2&collection=beal&index=beal>

Period II (Jan. 7) The Critical Period

- Federalist No. 3–7, 15–17, 21–22, *available at* https://avalon.law.yale.edu/subject_menus/fed.asp
- Wood, Creation of the American Republic, chs. 9, 10

Period III (Jan. 8) The Constitutional Convention: Representation

- Federalist No. 10, 37, 39, 50
- Wood, Creation of the American Republic, chs. 8, 12

Period IV (Jan. 9) The Constitutional Convention: Federalism

- Federalist No. 41, 45–46, 62–64
- Wood, Creation of the American Republic, ch. 13

Period V (Jan. 10) The Constitutional Convention: Separation of Powers

- Federalist Nos. 47–49, 51, 67–73
- John Yoo, Crisis and Command: A History of Executive Power From George Washington to George W. Bush (2009), ch. 2, *see TWEN for pdf copy*.
- Wood, Creation of the American Republic, ch. 11

Period VI (Jan. 13) Early Disputes I: The Government and the Bank

- Gordon Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, chs. 3, 4, *available at* <https://archive.org/details/empireoflibertyh0000wood>
- Yoo, Crisis and Command, 47–64 Speech of Madison
- Opinions of Jefferson and Hamilton, *see TWEN for pdf copy*.

Period VII (Jan.14) Early Disputes II: Foreign Policy

- Wood, Empire of Liberty, ch. 5
- Yoo, Crisis and Command, pp. 64–86
- Jefferson & Hamilton Opinions on Treaties with France, *available at*:
 - <https://founders.archives.gov/documents/Jefferson/01-25-02-0562-0001>
 - <https://founders.archives.gov/?q=Project%3A%22Hamilton%20Papers%22&s=1511311111&r=7016>
 - <https://founders.archives.gov/?q=Ancestor%3ATSJN-01-25-02-0562&s=1511311111&r=5>
- Helvidius-Pacificus Debate, Pacificus Nos. 1–2, Helvidius Nos. 1–2, *available at* https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1910/3953_LFeBk.pdf

Period XIII (Jan. 31, 6:00 – 7:30 p.m.) Current Disputes I: Presidential Power

- *Alabama Assoc. of Realtors v. HHS*, 594 U.S. 758 (2021).
- *NFIB v. OSHA*, 595 U.S. 109 (2022)
- Federalist Nos. 67–77
- Thomas Jefferson, Letter to John Colvin, Sept. 20, 1810, *available at* <https://founders.archives.gov/documents/Jefferson/03-03-02-0060>
- Abraham Lincoln, First Inaugural Address, March 4, 1861, *available at* http://avalon.law.yale.edu/19th_century/lincoln1.asp
- Abraham Lincoln, Message to Special Session of Congress, July 4, 1861 <http://millercenter.org/president/speeches/speech-3508>

Period IX (Feb. 1, 10:00 a.m. – 12:00 p.m.) Current Disputes II: Impeachment

- Robert Mueller, Report On Investigation Into Russian Interference In The 2016 Presidential Election (March 2019), *available at* <https://www.justice.gov/archives/sco/file/1373816/download>
- Impeachment of Donald J. Trump, Report of the Committee on the Judiciary of the House of Representatives, H.R. Rep. No. 116–346 (2019), *available at* <https://www.congress.gov/116/crpt/hrpt346/CRPT-116hrpt346.pdf> (“First House Impeachment Report”)
- H.R. Rep. No. 117–2 (2021), *available at* <https://www.govinfo.gov/content/pkg/CRPT-117hrpt2/pdf/CRPT-117hrpt2.pdf> (“Second House Impeachment Report”)
- James Phillips & John Yoo, You’re Fired: The Original Understanding of Impeachment, 94 S. Cal. L. Rev. 1191 (2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693312

Period X (Feb. 1, 1:00 p.m. – 3:00 p.m.) Disputes III: Slavery

- Frederick Douglass, What to the Slave is the Fourth of July?, July 5, 1852, available at <https://teachingamericanhistory.org/document/what-to-the-slave-is-the-fourth-of-july/>
- Thurgood Marshall, Reflections on the Bicentennial of the U.S. Constitution, 1987, available at <https://heinonline.org/HOL/Page?handle=hein.journals/hlr101&collection=journals&id=19&startid=&endid=23>
- Nikole Hannah-Jones, The 1619 Project, *New York Times Magazine*, August 18, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>
- Federalist No. 54
- Finkelman, The Founders & Slavery, [13 Yale J. L. & Humanities 413 \(2001\)](#).
- Michael Chan, Alexander Hamilton on Slavery, [66 Rev. of Pol. 207 \(2004\)](#).
- Michael Zuckert, Slavery and the Constitutional Convention, AEI Press (2013), available at https://www.aei.org/wp-content/uploads/2013/11/-slavery-and-the-constitutional-convention-2013-walter-berns-constitution-day-lecture_170503156114.pdf
- *Dred Scott v. Sanford*, 60 U.S. 393 (1857)
- Abraham Lincoln, First Inaugural Address, March 4, 1861, https://avalon.law.yale.edu/19th_century/lincoln1.asp