

**Princeton University**  
**Department of Politics**

**POL 561 – Constitutional Theory**  
**Fall 2012**

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This course is concerned with examining the nature of constitutionalism. This is a broad topic, and we can only scratch the surface in a semester. The goal of the course is to propose some questions about constitutionalism and to provide some familiarity with alternative approaches and conceptions of constitutional theory and practice. This is not a course in constitutional law. The judiciary lurks in the background of many of our readings, but we will read few opinions and judges carry no special authority for our purposes. Much of this theorizing and discussion draws upon the American case in particular. Although the lessons to be learned are generalizable, they are largely elaborated in the context of American institutions, culture and theoretical assumptions. If you need more to refresh yourself on American constitutional history, I suggest Lucas Powe's [The Supreme Court and the American Elite](#) and Alfred Kelly, Winfred Harbison and Herman Belz's [The American Constitution](#). There are a number of American constitutional law casebooks available that provide introductions to some canonical cases. There are a smaller number of comparative constitutional law casebooks, including Vicki Jackson and Mark Tushnet's [Comparative Constitutional Law](#).

Our concerns include defining what a constitution actually is and identifying its function within a political system. This requires expanding our inquiry beyond the traditional emphasis on the legal constitutional text that predominates in American constitutional analysis. Examining what a constitution is also requires us to ask why we have one. A commitment to constitutionalism raises questions of constitutional interpretation. How should we interpret our fundamental political commitments and who is authorized to resolve disagreements as to its meaning? The mechanisms of constitutional change must be examined. If constitutions are to be binding, they must be relatively stable. But if constitutions are to be authoritative, they must be flexible. We will consider some ways of asking these questions and some ways that they have been answered. Finally, we will consider some important issues of constitutional design and the empirical and normative significance of some common constitutional features.

Our examination of constitutionalism should raise both empirical and normative questions. The Constitution is not only the subject of normative theory, it is also an aspect of political practice. If constitutions are to be authoritative, the is and the ought must be linked. Determining what the Constitution is should also determine how we should behave. On the other hand, constitutions should not only prescribe political practice, but a functioning constitution should also describe the actual political system. Ultimately, those two aspects of the Constitution must be related to one another. The topics under examination this semester are only a selection of the possible ones. Not only will our examination of each individual topic necessarily be limited, but also there will be other topics of constitutional theory that will not be examined at all (for example, other possible justifications for constitutionalism). These readings should relate not only to the other readings within a given week, but also to other readings in the semester and to other topics not discussed this semester. Class discussion in any given week should be permeable to those concerns. The syllabus provides a brief comment on each week's readings. The questions asked in those comments are at best starting points for your thinking, and are merely intended to help orient you toward that week's material in the context of the course. Those suggested questions are also framed in a rather general fashion, and do not explore the specifics raised by the assigned readings. You should certainly be thinking about those specifics, as well as how the readings relate to our general concerns.

Schedule:

What and Why?

1. September 17: Introduction: The Political Constitution
2. September 24: The Legal Constitution: Rights and Constraints
3. October 1: Structure and Order
4. October 8: Democracy and Sovereignty
5. October 15: Promises and Commitments
6. October 22: Functionality

#### Who Interprets?

7. October 29: Judicial Review
8. November 12: Departmentalism

#### Temporality

9. November 19: Constitutional Survival
10. December 3: Maintenance and Change

#### Structural Issues

11. December 10: Presidents, Parliaments, and Courts
12. December 17: Power and Representation

#### Materials:

The following books are available for purchase:

Bruce Ackerman *We the People*

Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions*

The remaining readings are on electronic reserve at the library. All required readings are available on reserve in the library.

#### Requirements:

Seminar participants will prepare two short papers of 6-8 pages each and one substantial literature review or review essay of 6-8 pages during the course of the semester. Each short paper is to explore some problem arising from or addressed by the readings of a selected week. There is no reason why two or even three of your papers could not address different facets of a common problem. The papers may be guided by the suggested questions provided in the syllabus, but they are by no means constrained by those suggestions.

The literature review or review essay should be framed around a work or topic suggested by a given week of the syllabus. The essay should provide an original, synthetic, and analytical accounting of the subject at hand. It should integrate **at least** seven relevant sources into the discussion. This is not a short book review, of the type that can be found in *Perspectives on Politics* or the *Law and Politics Book Review* (<http://www.bsos.umd.edu/gvpt/lpbr>), which are generally limited to under 2000 words and focused on summary and quick evaluation of a single book. Some useful tips on writing a literature review can be found at <http://www.writing.utoronto.ca/advice/specific-types-of-writing/literature-review>. Literature reviews can be found as a section in most journal articles and as a chapter or portion of a chapter in most dissertations and some academic books. Good examples can be found in JOP 72 (2010): 767; JOP 72 (2010): 747; JOP 72 (2010): 672. Stand-alone review essays are related but take a somewhat different form. Examples can be found in journals like *Reviews in American History*, *Law and Social Inquiry*, *Political Theory*, as well as some law reviews, annuals and handbooks. For some models, consider LSI 24 (1999): 221; LSI 17 (1992): 715; LSI 34 (2009): 747. You have flexibility in choosing the thesis and central works for the review, so long as it connects to a specific week in the syllabus.

Each paper should include a brief abstract (150-500 words). Papers should not simply be read at the seminar, but you should be prepared to present an oral version of your argument. The oral presentation should develop the argument contained in your paper and initiate that day's discussion. Papers will be scheduled at the beginning of the semester and are **due the day before the relevant seminar**. They should be emailed to me and the other seminar participants by 5:00 pm on the preceding Thursday, if not before.

The "required" readings are absolutely required. You are expected to have read thoroughly and thought about each of these readings before every class. The suggested readings are for your further consideration and reference. You are welcome to make use of the suggested readings in preparing your papers, and to incorporate them as appropriate for the benefit of the other participants. The suggested readings are sometimes directly related to the required readings. In other weeks, the suggested readings are a diverse collection of interesting works that raise related questions.

Each of the three papers will constitute a quarter of your final grade, with the remainder determined by participation.

## Readings

### 1. Introduction: The Political Constitution

What is “the Constitution,” and what does it do within the political system? Is the Constitution constraining or empowering?

Required:

Karl Llewellyn “The Constitution as an Institution” Columbia Law Review (1934)  
Edward S. Corwin “The Constitution as an Instrument and as Symbol” APSR (1936)  
William F. Harris II The Interpretable Constitution ch. 1  
Keith E. Whittington, “Constitutionalism,” in Oxford Handbook of Law and Politics

### 2. The Legal Constitution: Rights and Constraints

The “standard” view of the Constitution is that it is a mechanism for limiting government and protecting minority and individual rights. Constitutionalism contrasts with democracy, and the enforcement of constitutional constraints is best conceptualized as countermajoritarian. The Constitution is a “law” that is applied against the government. What is a constitution? What does it mean to think of the constitution as a law? What is the significance of the legalization of the constitution? What are constitutional rights, and how should they be enforced? Is there a relationship between the negative, legal constitution and the positive, political constitution?

Required:

Charles McIlwain Constitutionalism: Ancient and Modern ch. 1, 6  
Giovanni Sartori “Constitutionalism: A Preliminary Discussion” APSR (1962)  
Ronald Dworkin “Constitutional Cases” in Taking Rights Seriously  
Richard Bellamy, “Republicanism, Democracy and Constitutionalism,” in Republicanism and Political Theory

Suggested:

Edward S. Corwin The “Higher Law” Background of American Constitutional Law  
Edward S. Corwin “The Basic Doctrine of American Constitutional Law,” Michigan Law Review (1914)  
Dennis S. Mueller “Constitutional Rights” Journal of Law, Economics and Organization 7 (1991)  
Carl Friedrich Constitutional Government and Democracy  
Carl Friedrich “Constitutions and Constitutionalism,” Internat’l. Encyclopedia of the Social Sciences (1968)  
Thomas Grey “Constitutionalism: An Analytical Framework,” in Constitutionalism: NOMOS XX  
Graham Maddox “A Note on the Meaning of ‘Constitution,’” APSR (1982)  
Gary McDowell “Coke, Corwin & the Constitution: The ‘Higher Law Background’ Reconsidered,” ROP (1993)  
James Stoner Common Law and Liberal Theory  
Harvey Wheeler “Constitutionalism,” in Fred Greenstein and Nelson Polsby, eds. Handbook of Political Science, vol. 5  
Gerald Stourzh “Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century,” in Terence Ball and J.G.A. Pocock, eds. Conceptual Change and the Constitution  
Stephen Elkin “Constitutionalism: Old and New,” in Stephen Elkin and Karol Soltan, eds. A New Constitutionalism  
Ronald Dworkin “Constitutionalism and Democracy” European Journal of Philosophy (1995)  
Walter Murphy “Constitutions, Constitutionalism and Democracy,” in D. Greenberg, et al., Constitutionalism and Democracy  
Neil MacCormick “Constitutionalism and Democracy,” in Richard Bellamy, ed. Theories and Concepts of Politics  
Harry Hirsch A Theory of Liberty  
Jennifer Nedelsky Private Property and the Limits of American Constitutionalism  
Friedrich Hayek The Constitution of Liberty  
Daniel Sutter “Enforcing Constitutional Constraints” Constitutional Political Economy (1997)

### 3. Structure and Order

Constitutions can also be conceptualized as a mechanism for imposing order within a political system. The political universe is not inherently ordered; structure must be imposed. The political sphere must be “constituted.” Why is the ordering of politics a “constitutional” project? Why does politics need ordering? What is the conceptual problem driving concerns of institutional structure? What is the relationship, if any, between the constitution as an institution and the constitution as a law? How is order constituted? To what extent are ideas “constitutional”?

Required:

Kenneth S. Shepsle “Studying Institutions: Some Lessons from the Rational Choice Approach” Journal of Theoretical Politics (1989)

Rogers M. Smith “Historical Institutionalism & the Study of the Law,” in The Oxford Handbook of Law & Politics

John Finn, “The Civic Constitution,” in Constitutional Politics

Herbert McClosky and John Zaller, The American Ethos, ch. 7

John M. Carey, “Parchment, Equilibria, and Institutions,” Comparative Political Studies (2000)

Suggested:

Jon Elster and Rune Slagstad, eds. Constitutionalism and Democracy

Stephen Holmes Passions and Constraint

Jack Knight Institutions and Social Order

Jack Knight and Itai Sened, eds. Explaining Social Institutions

Anthony Giddens The Constitution of Society

Walter Powell and Paul DiMaggio, eds. The New Institutionalism in Organizational Analysis

H.L.A. Hart The Concept of Law

James Hart Ely Democracy and Distrust

Louis Fisher Constitutional Conflicts Between the Congress and the President

M.C. Vile Constitutionalism and the Separation of Powers

Martin Reddish The Constitution as Political Structure

Giovanni Sartori Comparative Constitutional Engineering

Roland Czada and Adrienne Windhoff-Heritier, eds. Political Choice

Elinor Ostrom Governing the Commons

Vincent Ostrom The Political Theory of a Compound Republic

Terry Moe “Interests, Institutions and Positive Theory: The Politics of the NLRB,” Studies in APD (1987)

Jan-Erik Lane Constitutions and Political Theory

Kenneth Shepsle “Institutional Equilibrium and Equilibrium Institutions” in Political Science, ed. Weisberg

Kathleen Thelen and Sven Steinmo “Historical Institutionalism in Comparative Politics,” in Structuring Politics

William Riker “Heresthetic and Rhetoric in the Spatial Model,” in Advances in the Spatial Theory of Voting, eds.

James Enelow and Melvin Hinich

Bert Rockman “The New Institutionalism and the Old Institutions,” in New Perspectives on American Politics, eds.

Lawrence Dodd and Calvin Jillson

Karen Orren and Stephen Skowronek “Beyond the Iconography of Order: Notes for a ‘New Institutionalism,’” in

The Dynamics of American Politics, eds. Lawrence Dodd and Calvin Jillson

Thomas Hobbes Leviathan

Carl Schmitt The Concept of the Political

Hans Kelsen “The Function of a Constitution” in Essays on Kelsen, eds. Richard Tur and William Twining

T.H. Hammond and G.J. Miller “The Core of the Constitution” American Political Science Review (1987)

Paul Pierson and Theda Skocpol, “Historical Institutionalism in Contemporary Political Science,” in Political Science, eds. Ira Katznelson and Helen Milner

I. Katznelson, “Structure & Configuration in Comparative Politics,” in Comp. Politics, eds. Lichbach & Zuckerman

B. Guy Peters, Institutional Theory in Political Science

Clifford Geertz “Ideology as a Cultural System,” in The Interpretation of Cultures

Robert Cover “Foreword: Nomos and Narrative” Harvard Law Review (1983)

Pierre Bourdieu Language and Symbolic Power

James Boyd White When Words Lose Their Meaning

#### 4. Popular Sovereignty

American constitutionalism in particular elevates the idea of popular sovereignty. Fidelity to the U.S. Constitution has been justified in terms of popular sovereignty, and the constraints imposed on government have been regarded as democratically legitimated. In this context, the Constitution can be seen as the expression of the will of the people, and judges act as agents of the people in enforcing its terms against government officials. Alternatively, the Constitution can be seen as a vehicle of democracy, shaping the popular will and well as expressing it. What is the democratic status of the Constitution? Is it authorized by “we the people”? Is any such authorization sufficient to establish constitutional legitimacy? Is American constitutionalism an expression of democracy, or a constraint on democracy?

Required:

Bruce Ackerman We the People ch. 1-2, 7-8, 11

Bryan Garsten, “Representative Government and Popular Sovereignty,” in Political Representation

Dennis Thompson, “Deliberative Democratic Theory & Empirical Political Science,” Ann. Rev. of Pol. Sci. (2008)

Andrei Marmor, “Are Constitutions Legitimate?” Canadian Journal of Law and Jurisprudence (2007)

Suggested:

James Buchanan and Gordon Tullock The Calculus of Consent

James Buchanan “The Ethics of Constitutional Order,” in The Economics and the Ethics of Constitutional Order

Michael Lienesch New Order of the Ages

Gordon Wood The Creation of the American Republic, 1776-1789

Bernard Bailyn The Ideological Origins of the American Revolution

Donald Lutz Popular Consent and Popular Control

James Morone The Democratic Wish

Paul Kahn Legitimacy and History

Alexander Hamilton, James Madison and John Jay The Federalist Papers

Thomas Paine The Rights of Man

Ian Shapiro “Three Fallacies Concerning Majorities, Minorities and Democratic Politics,” in Majorities and Minorities: NOMOS XXXII (1990)

Hanna Pitkin The Concept of Representation

Kent Greenawalt “Dualism and Its Status,” Ethics (1994)

Don Herzog “Democratic Credentials,” Ethics (1994)

Edmund Morgan Inventing the People

William Riker Liberalism Against Populism

John Locke Two Treatises of Government

Jean-Jacques Rousseau On the Social Contract

Thomas Hobbes Leviathan

William Nelson On Justifying Democracy

James Gardner “Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution,” University of Pittsburgh Law Review (1990)

Patrick Riley Will and Political Legitimacy

John Simmons On the Edge of Anarchy

H. Jefferson Powell “The Political Grammar of Early Constitutional Law,” North Carolina Law Review (1993)

Richard D. Parker “Here, the People Rule”

James Gray Pope “Republican Moments: The Role of Direct Popular Power in the American Constitutional Order,” University of Pennsylvania Law Review (1990)

Bernard Manin “On Legitimacy and Deliberation” Political Theory (1987)

Richard Bellamy and Dario Castiglione “Constitutionalism and Democracy – Political Theory and the American Constitution” British Journal of Political Science (1997)

Sheldon Wolin “Collective Identity and Constitutional Power,” in The Presence of the Past

Harry Beran The Consent Theory of Political Obligation

Hans Lindahl, “Sovereignty and Representation in the European Union,” in Sovereignty in Transition

## 5. Promises and Precommitments

The Constitution can be seen as a promise, a precommitment or a contract. In this reading, the Constitution is not primarily seen as a constraint on government imposed by the people, but rather as a constraint on the people themselves. The question then becomes how the people can constrain themselves and what the implications of such self-constraint are. Is self-restraint possible? Can prior commitments be binding on contemporary political actors? Should they be binding? What is the difference between a promise, a precommitment and a contract? Is the Constitution a promise? What is being promised, and to whom? Can democratic theory justify constraints on democratic politics?

Required:

Stephen Holmes Passions and Constraints ch. 5

Roger B. Meyerson, "The Autocrat's Credibility Problem & Foundations of the Constitutional State," APSR (2008)

Russell Hardin Liberalism, Constitutionalism, and Democracy ch. 3

Larry Alexander, "Constitutionalism," in Contemporary Debates in Political Philosophy

Alan Keenan, "Promises, Promises: The Abyss of Freedom and the Loss of the Political," Political Theory (1994)

Suggested:

Jon Elster Ulysses and the Sirens

Jon Elster Ulysses Unbound

Thomas Schelling "Enforcing Rules on Oneself" Journal of Law, Economics, and Organization (1985)

Michael Seidman "Ambivalence and Accountability" Southern California Law Review (1988)

Paul de Man "Political Allegory in Rousseau" Critical Inquiry 2 (1976)

Samuel Freeman "Constitutional Democracy and the Legitimacy of Judicial Review," Law and Philosophy 9 (1990)

Stephen Holmes Passions and Constraints

Friedrich Hayek The Political Order of a Free People

James Buchanan The Limits of Liberty

James Buchanan and Gordon Tullock The Calculus of Consent

Richard Epstein Takings

John Rawls Theory of Justice

James Gwartney and Richard Wagner, eds. Public Choice and Constitutional Economics

Paul Kahn Legitimacy and History

Douglass North "Institutions and Credible Commitment," Journal of Institutional and Theoretical Economics (1993)

Douglass North and Barry Weingast "Constitutions and Commitment: the Evolution of Institutions Governing Public Choice in Seventeenth Century England," Journal of Economic History (1989)

Geoffrey Brennan and James Buchanan The Reason of Rules

Kenneth Shepsle "Discretion, Institutions and the Problem of Government Commitment," in Social Theory for a Changing Society, eds., Pierre Bourdieu and James Coleman

Anne Norton Alternative Americas

Benjamin Wright "The Early History of Written Constitutions in America," in Essays in History and Political Theory in Honor of Charles Howard McIlwain, ed. Carl Wittke

Andrew McLaughlin "Social Compact and Constitutional Construction" American Historical Review (1900)

Patrick Riley Will and Political Legitimacy

Akhil Amar "Of Sovereignty and Federalism," Yale Law Journal (1987)

John Dunn Political Obligation in its Historical Context

David Ericson The Shaping of American Liberalism

David Gauthier Moral Dealing

Stefan Voigt Explaining Constitutional Change

Peter C. Ordeshook, "Constitutional Stability," Constitutional Political Economy (1992)

## 6. Functionality

Many argue that constitutions (in the modern sense) and constitutionalism are concerned with limiting the state and protecting the rights of individuals and minorities. Some, however, have argued that a well-designed constitution should serve other purposes, which may or may not operate in tandem with the power-limiting features of the liberal constitution. Well designed constitutions might be instruments for achieving a well functioning and stable government and good public policy, for example. Constitutions might be designed to (or evaluated by their capacity to) limit government corruption, enhance national security, project national interests abroad, create or fairly distribute national wealth, draw able leaders into public office, maintain domestic peace and stability, facilitate territorial expansion or a variety of other pressing goals. Are these incidental features of constitutions? How should they be integrated into constitutional theory?

Required:

Alexander Hamilton, Federalist No. 70

Keith E. Whittington, "Recovering from the State of Imbecility," Texas Law Review (2006)

Stephen L. Elkin, "Constitutionalism's Successor," in A New Constitutionalism

Jeffrey Tulis, "The Two Constitutions," in The Presidency and the Political System

Pablo Spiller and Mariano Tommasi, "The Institutional Foundations of Public Policy," JLEO (2003)

Torsten Persson and Guido Tabellini, "Constitutional Rules and Fiscal Policy Outcomes," AER (2004)

Daron Acemoglu, "Constitutions, Politics, and Economics," J. of Econ. Lit. (2005)

Suggested:

Torsten Persson and Guido Tabellini, Political Economics

Vicki Birchfield and Markus Crepaz, "The Impact of Constitutional Structures and Collective and Competitive Veto Points on Income Inequality in Industrialized Democracies," European J. of Pol. Sci. (1998)

Markus Crepaz, "Global, Constitutional, and Partisan Determinants of Redistribution in Fifteen OECD Countries," Comp. Pol. (2002)

Avinash Dixit, et al., "The Dynamics of Political Compromise," J. of Pol. Econ. (2000)

David Brian Robertson, The Constitution and America's Destiny

Max Edling, A Revolution in Favor of Government

David Hendrickson, Peace Pact

Marc Kruman, Between Authority and Liberty

Alison LaCroix, The Ideological Origins of American Federalism

Roger Congleton and Birgitta Swedenborg, eds., Democratic Constitutional Design and Public Policy

Daniel Treisman, The Architecture of Government

Stephen Elkin, Reconstructing the Commercial Republic

Stephen Elkin and Karol Soltan, eds., A New Constitutionalism

Walter Murphy, Constitutional Democracy

Louis Fisher, "The Efficiency Side of Separated Powers," Journal of American Studies (1971)

Kenneth Dam, "The American Fiscal Constitution," University of Chicago Law Review (1977)

Geoffrey Brennan and James Buchanan, The Power To Tax: Analytical Foundations of a Fiscal Constitution

James Ceaser, Presidential Selection

Anne Van Aaken, et al., eds, Deliberation and Decision

Adrian Vermeule, Mechanisms of Democracy

Joseph Bessette, The Mild Voice of Reason



## 7. Judicial Review

The institution of judicial review is often viewed as the defining element of modern constitutionalism, especially as it is understood in its legalistic sense. The judiciary is seen as an external agent, standing outside of normal politics and enforcing the terms of the Constitution. This raises some questions of authority – why should we adhere to the Constitution rather than our political outcomes? Some of the justifications for that authority have already been considered. Judicial review also raises a particular question of authority – why should we obey the judicial interpretation of the Constitution rather than our political outcomes? Why should judges be able to trump other government officials? What is the justification for a particular institution like judicial review? What is the purpose of judicial review? This also raises empirical questions, however. What is judicial review? How have judges behaved in practice? Is the judiciary really a countermajoritarian force in American politics? How would the empirical practice of judicial review affect our understanding of the authority of judicial review?

Required:

J.B. Thayer “The Origin and Scope of the American Doctrine of Constitutional Law,” Harvard L. Rev. 7 (1893)

Robert Dahl “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” Journal of Public Law 6 (1957)

Keith Whittington, “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” APSR 99 (2005): 583

Howard Gillman, “Courts and the Politics of Political Regimes,” The Oxford Handbook of Law and Politics

Tom S. Clark, “The Separation of Powers, Court Curbing, and Judicial Legitimacy,” AJPS (2009)

Suggested:

William Lasser The Limits of Judicial Power

Ronald Kahn The Supreme Court and Constitutional Theory, 1953-1993

John Brigham The Cult of the Court

David O’Brien Storm Center

Keith E. Whittington “Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution,” Studies in American Political Development (1995)

Jesse Choper Judicial Review and the National Political Process

Robert McCloskey The American Supreme Court

John B. Taylor, “The Supreme Court and Political Eras: A Perspective on Judicial Power in a Democratic Polity,” Review of Politics (1992)

Stuart S. Nagel, “Court-Curbing Periods in American History,” Vanderbilt Law Review (1965)

Mark Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” Studies in American Political Development (1993)

Michael J. Klarman “Rethinking the Civil Rights and Civil Liberties Revolutions” Virginia Law Review (1996)

Gerald Rosenberg The Hollow Hope

H.W. Perry Deciding to Decide

Jack Knight and Lee Epstein “On the Struggle for Judicial Supremacy,” Law and Society Review (1996)

John Gates and Charles Johnson, eds. The American Courts: A Critical Assessment

John Gates The Supreme Court and Partisan Realignment

William Ross A Muted Fury

Bruce Ackerman Reconstructing American Law

Richard Kluger Simple Justice

Walter Murphy Elements of Judicial Strategy

Mark Tushnet Making Civil Rights Law

Charles Johnson and Bradley Canon Judicial Policies: Implementation and Impact

Martin Shapiro “The Supreme Court from Warren to Burger” in A. King, ed. The New American Political System

Thomas Reed Powell “Logic & Rhetoric of Constitutional Law” J. of Phil., Psychology & Scientific Methods (1918)

Barry Friedman, “The Road to Judicial Supremacy,” NYU Law Review (1998)

## 8. Departmentalism

Constitutional theory has generally assumed judicial supremacy: the Constitution is what the judges say it is, and the judges have the right to settle disputes over constitutional meaning. This view has been challenged. Other political actors may also offer interpretations of the Constitution, and those interpretations may conflict with the judiciary's interpretations. Who should interpret the Constitution? Under what circumstances? Should the judiciary defer to other political actors? Is the judiciary the final interpreter of the Constitution? Is it the exclusive interpreter? Does judicial review make sense in the absence of judicial supremacy? Does constitutionalism make sense in the absence of judicial supremacy?

Required:

Walter F. Murphy, "Who Shall Interpret? The Quest for an Ultimate Constitutional Interpreter" Rev. of Pol. (1986)  
Michael Stokes Paulsen, "The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation," Cardozo Law Review (1993)  
Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," Harvard Law Rev. (1997)  
Richard Fallon, "Constitutional Constraints," California Law Review (2009)  
Keith E. Whittington, Political Foundations of Judicial Supremacy, ch. 2, 4 (partial)

Suggested:

Stephen Macedo Liberal Virtues  
Robert Burt The Constitution in Conflict  
Bruce Ackerman We the People  
Paul Brest "The Conscientious Legislator's Guide to the Fourteenth Amendment," Stanford Law Review (1975)  
Lawrence Sager "Fair Measure: The Legal Status of Underenforced Constitutional Norms," Harvard L. Rev. (1978)  
Geoffrey P. Miller, "The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law," Law and Contemporary Problems (1993)  
Frederick Schauer "The Occasions of Constitutional Interpretation" Boston University Law Review (1992)  
Paul Dimond The Supreme Court and Judicial Choice  
Robert Lowry Clinton Marbury v. Madison and Judicial Review  
Wayne Moore Constitutional Rights and the Powers of the People  
William Harris II The Interpretable Constitution  
Robert Nagel Constitutional Cultures  
Donald Morgan Congress and the Constitution  
Robert Scigliano The Supreme Court and the Presidency  
Walter F. Murphy Congress and the Court  
Edward Corwin Court Over Constitution  
John Agresto The Supreme Court and Constitutional Democracy  
Louis Fisher Constitutional Conflicts Between Congress and the President  
James Meernik and Joseph Ignagni "Judicial Review and Coordinate Construction of the Constitution" American Journal of Political Science (1997)  
Gary J. Jacobsohn The Supreme Court and the Decline of Constitutional Aspiration  
Larry Alexander & Frederick Schauer "On Extrajudicial Constitutional Interpretation" Harvard Law Review (1997)  
Scott E. Gant "Judicial Supremacy and Nonjudicial Interpretation of the Constitution" Hastings Con. Law Q. (1997)  
Michael Stokes Paulsen "The Most Dangerous Branch: Executive Power to Say What the Law Is" Georgetown Law Journal (1994)  
Kent Greenfield "Original Penumbra: Constitutional Interpretation in the First Year of Congress," Connecticut Law Review (1993)  
James G. Wilson "American Constitutional Conventions," Buffalo Law Review (1992)  
Neal Devins Shaping Constitutional Values  
Susan Burgess Contest for Constitutional Authority  
Larry Kramer, "We the Court," Harvard Law Review (2001)  
K. Whittington, "The Road Not Taken: Dred Scott, Political Questions, & Constitutional Law," J. of Politics (2001)  
K. Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Const. Meaning," Polity (2001)  
K. Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," NC Law Rev. (2002)

## 9. Constitutional Survival

Constitutions must be created through political effort. Once put in place, constitutions must also be capable of surviving various crises and of effectively structuring actual politics over time. How can polities effect the transition from one constitutional regime to another? How do constitutions reflect their political origins? What allows constitutions to survive crises? What causes constitutions to fail? What is constitutional “failure”?

Required:

Zachary Elkins, Tom Ginsburg, and James Melton, The Endurance of National Constitutions  
Bernd Hayo and Stefan Voigt, “Determinants of Constitutional Change,” J. of Comp. Econ. 38 (2010): 283-305  
Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law,” APSR (1997)  
Larry Sager, “The Birth Logic of a Democratic Constitution,” in Constitutional Culture and Democratic Rule

Suggested:

Avinash Dixit, Gene M. Grossman, and Faruk Gul, “The Dynamics of Political Compromise,” Journal of Political Economy (2000)  
Avinash Dixit, Lawlessness and Economics (forthcoming)  
Herschel I. Grossman, “Constitution or Conflict?” Conflict Management and Peace Science (forthcoming)  
Matthew Shugart, “The Inverse Relationship Between Party Strength and Executive Strength: A Theory of Politicians’ Constitutional Choices,” British Journal of Political Science (1998)  
Jon Elster, Claus Offe, and Ulrich Preuss, eds., Institutional Design for Post-communist Societies  
Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” Duke Law Journal (1995)  
Jon Elster, “Constitution-Making in Europe: Rebuilding a Boat in the Open Sea,” Public Administration (1993)  
Claus Offe, Modernity and the State  
Ulrich Preuss, Constitutional Revolution  
Andrew Arato, Civil Society, Constitution, and Legitimacy  
Timothy Frye, “A Politics of Institutional Choice: Post-Communist Presidencies,” Comp. Political Studies (1997)  
Andrew Reynolds, ed., The Architecture of Democracy  
John Ferejohn, et al., eds., Constitutional Culture and Democratic Rule  
Allison Stanger, “Do New Constitutions Matter? Identity, Choice, and Development in post-Communist Central Europe’s Democratization,” working paper  
Larry Diamond, Developing Democracy  
Robert Gooden, ed., Institutions and their Design  
Nancy Bermeo, Ordinary People in Extraordinary Times  
Giovanni Sartori, Comparative Constitutional Engineering  
Kim Lane Scheppele, “Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influences through the Negative Model,” International Journal of Constitutional Law (2003)  
Clinton Rossiter, Constitutional Dictatorship  
Carl Friedrich, Constitutional Reason of State  
Juan Linz and Alfred Stepan, eds., The Breakdown of Democratic Regimes  
Philippe Schmitter, et al., eds., Transitions from Authoritarian Rule  
Frederick Watkins, The Failure of Constitutional Emergency Powers in the German Republic  
Leonard Binder, et al., eds., Crises and Sequences in Political Development  
Franz Neumann, Behemoth  
Daniel Nielson & Matthew Shugart, “Constitutional Change in Columbia,” Comparative Political Studies (1999)  
Arthur Bestor, “The American Civil War as a Constitutional Crisis,” American Historical Review (1964)  
Brian Loveman, The Constitution of Tyranny  
Alfred Stepan, The Military in Politics  
Barry Ames, The Deadlock of Democracy in Brazil  
Adam Przeworski, et al., Democracy and Development  
Robert Barros, Constitutionalism and Dictatorship  
Ruth Collier and David Collier, Shaping the Political Arena

## 10. Maintenance and Change

Constitutions constrain politics over time as well as within any given political moment. Constitutions help create political stability and continuity. But constitutions must also allow for change. One mechanism of change is amendment. How can we distinguish amendment from interpretation? What is the purpose of amendment? What do amendments do within a constitutional system? What is the authority of an amendment? Are there limits on amendment? In addition, constitutional commitments may change in the absence of any formal change in the constitutional text. What is the status of such changes in constitutional understandings? What practices are part of “the Constitution”? Is “the Constitution” more than the text?

Required:

Bruce Ackerman We the People ch. 9-10

David Strauss, “The Irrelevance of Constitutional Amendments,” Harvard Law Review 114 (2001)

Mark Graber, “Settling the West,” in The Louisiana Purchase and American Expansion

Avner Greif and David Laitin, “A Theory of Endogenous Institutional Change,” APSR (2004)

Suggested:

Akhil Amar “Philadelphia Revisited: Amending the Constitution Outside Article V” U. of Chicago Law Rev. (1988)

Akhil Amar “Consent of the Governed: Constitutional Amendment Outside Article V” Columbia L. Rev. (1994)

H. Monaghan “We the People(s), Original Understanding, & Constitutional Amendment,” Columbia L. Rev. (1996)

Michael Klarman “Constitutional Fact/Constitutional Fiction” Stanford Law Review (1992)

Walter F. Murphy “Slaughter-House, Civil Rights, and Limits on Constitutional Change” Am. J. of Juris. (1986)

Robert C. Palmer “The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment,” University of Illinois Law Review (1984)

Walter Dellinger “The Legitimacy of Constitutional Change” Harvard Law Review (1983)

Lawrence H. Tribe “A Constitution We Are Amending” Harvard Law Review (1983)

Lawrence H. Tribe “Taking Text and Structure Seriously” Harvard Law Review (1995)

John R. Vile Constitutional Change in the United States

Clement E. Vose Constitutional Change

David Kyvig Explicit and Authentic Acts

George Anastaplo The Amendments to the Constitution

Ronald King and Susan Ellis “Partisan Advantage and Constitutional Change: The Case of the Seventeenth Amendment,” Studies in American Political Development (1996)

Richard S. Kay “The Illegality of the Constitution” Constitutional Commentary (1987)

Sanford Levinson “‘Veneration’ and Constitutional Change,” Texas Tech Law Review (1990)

Peter Suber The Paradox of Self-Amendment

Kent Greenawalt “The Rule of Recognition and the Constitution” Michigan Law Review (1987)

Herman Belz “History, Theory, and the Constitution” Constitutional Commentary 11 (1994)

Edward S. Corwin “The Constitution versus Constitutional Theory,” American Political Science Review 19 (1925)

Henry Monaghan “Our Perfect Constitution” New York Law Review 56 (1981)

Lawrence Lessig “Understanding Changed Readings: Fidelity and Theory” Stanford Law Review 47 (1995)

John Finn Constitutions in Crisis

Stephen Munzer & James Nickel “Does the Constitution Mean What It Always Meant?” Columbia L. Rev. (1977)

Steven G. Calabresi “The Crisis in Constitutional Theory” Virginia Law Review (1997)

David A. Strauss “Common Law Constitutional Interpretation” University of Chicago Law Review (1996)

Benjamin Cardozo The Nature of the Judicial Process

Elaine K. Swift The Making of an American Senate

James G. Wilson “American Constitutional Conventions” Buffalo Law Review (1992)

Herbert W. Horwill The Usages of the American Constitution

Walter F. Murphy “Civil Law, Common Law, and Constitutional Democracy” Louisiana Law Review (1991)

Sanford Levinson, ed. Responding to Imperfection

Howard Gillman “The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living

Constitution’ in the Course of American State-Building,” Studies in American Political Development (1997)

M. Horwitz, “The Constitution of Change – Legal Fundamentality without Fundamentalism,” Harv. L. Rev. (1993)

## 11. Presidents, Parliaments, and Courts

A critical choice in designing a constitutional framework is the distribution of political power among various institutions. Those choices may affect the type of constitutional regime put in place and the kinds of political values and policy outcomes that it facilitates, and they may well affect the survival of the constitutional regime itself. What are the advantages and disadvantages of a presidential system as opposed to a parliamentary system? Are presidential systems inherently dangerous or unstable? How can horizontal checks on political power be established?

Required:

Richard Bellamy "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy," Political Studies (1996)

Juan Linz, "The Perils of Presidentialism," Journal of Democracy (1990)

Matthew Shugart and John Carey, Presidents and Assemblies, ch. 1, 3, 9

Jose Cheibub, Presidentialism, Parliamentarism, and Democracy, ch. 6

Suggested:

Terry Moe and M. Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems," J. of Inst. & Theoretical Econ. (1994)

David Samuels and M. Shugart, "Presidentialism, Elections, and Representation," J. of Theoretical Politics (2003)

Daniel Nielson, "Supplying Trade Reform: Political Institutions and Trade Liberalization," AJPS (2003)

Juan Linz, and Arturo Valenzuela, eds., The Failure of Presidential Democracy

John M. Carey and Matthew S. Shugart, eds., Executive Decree Authority

Matthew S. Shugart and John M. Carey, Presidents and Assemblies

Matthew S. Shugart and Scott Mainwaring, eds., Presidentialism and Democracy

Stephen Haggard and Mathew McCubbins, eds., Presidents, Parliaments, and Policy

Andreas Schedler, et al., eds., The Self-Restraining State

S. Mainwaring, "Presidentialism, Multipartyism, & Democracy: The Difficult Combination," Comp. Pol. St. (1993)

Scott Mainwaring and Matthew Shugart, "Juan Linz, Presidentialism, and Democracy: A Critical Appraisal," Comparative Politics (1997)

Scott Morgenstern & Gary Cox, "Latin America's Reactive Assemblies & Proactive Presidents," Comp. Pol. (2001)

Fred Riggs, "The Survival of Presidentialism in America: Para-constitutional Practices," Inter. Pol. Sci. Rev. (1988)

Robert Godwin and Art Kaufman, eds., Separation of Powers – Does It Still Work?

Jennifer Widner, Building the Rule of Law

John Huber and Charles Shipan, Deliberate Discretion?

Adam Przeworski, et al., eds., Democracy, Accountability, and Representation

George Tsebelis, Veto Players

Robert Barros, Constitutionalism and Dictatorship

Kent Eaton, "Parliamentarism versus Presidentialism in the Policy Arena," Comparative Politics (2000)

Torsten Persson and Guido Tabellini, The Economic Effects of Constitutions

Mark Jones, Electoral Laws and the Survival of Presidential Democracies

Michael Laver and Kenneth Shepsle, Making and Breaking Governments

David Mayhew, Divided We Govern

Keith Krehbiel, Pivotal Politics

Timothy Power and Mark Gasiorowski, "Institutional Design and Democratic Consolidation in the Third World," Comparative Political Studies (1997)

D. Samuels, "Presidentialized Parties: The Separation of Powers & Party Org. & Behavior," Comp. Pol. St. (2002)

David Samuels & Matthew Shugart, "Presidentialism, Elections, & Representation," J. of Theoretical Politics (2003)

Kaare Strom, Minority Governments and Majority Rule

J. Mark Ramseyer, "The Puzzling (In)dependence of Courts: A Comparative Approach," J. Legal St. (1994)

Keith Whittington, "Legislative Sanctions & the Strategic Environment of Jud. Review," Inter. J. of Con Law (2003)

## 12. Power and Representation

Constitutions structure politics as well as constrain it. In doing so, constitutions can channel politics in a variety of ways, and the structural features of a particular political system may reflect important constitutional choices about what kind of polity is desirable. What kind of polity should be constituted? What interests should be represented? How should those interests be represented? How should policy decisions be made? How distinct should the policymaking process be from the constitution-making process? How can subversive elements within the polity be contained through constitutional design? How can the constitutional system encourage political stability? Economic growth? Other substantive goods? How insulated should government be from society?

Required:

Arend Lijphart, Patterns of Democracy ch. 1-3

G. Bingham Powell, Elections as Instruments of Democracy ch. 10

Andrew Rehfeld, "Silence of the Land," Studies in American Political Development 15 (2001): 53-87

Adrian Vermeule, Mechanisms of Democracy, ch. 3-4

Suggested:

Gary Cox Making Votes Count

William Riker, Liberalism versus Populism

John Carey and Matthew Shugart Presidents and Assemblies

Kaare Strom Minority Government and Majority Rule

Heinz Klug Constituting Democracy

David Samuels & Richard Snyder, "The Value of a Vote: Malapportionment in Comp. Perspective," BJPS (2001)

Richard Bellamy, ed. Constitutionalism, Democracy, and Sovereignty

G. Bingham Powell Contemporary Democracies

Benjamin Reilly, Democracy in Divided Societies

George Tsebelis and Jeannette Money Bicameralism

Juan J. Linz The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibrium

Adam Przeworski, et al., Democracy and Development

Adam Przeworski, et al., eds. Democracy, Accountability and Representation

Alfred Stepan Arguing Comparative Politics

Scott Mainwaring and Matthew Shugart, eds. Presidentialism and Democracy in Latin America

Juan J. Linz and Arturo Valenzuela, eds. The Failure of Presidential Democracy

Andreas Schedler, Larry Diamond and Marc F. Plattner eds. The Self-Restraining State

Guillermo O'Donnell Counterpoints

Keith Krehbiel Pivotal Politics

Charles Cameron Veto Bargaining

David Mayhew Divided We Govern

Ann Althouse, "Electoral College Reform: Déjà vu," Northwestern University Law Review (2001)

N. McCarty & R. Razaghian, "Advice & Consent: Senate Responses to Exec. Branch Nominations," AJPS (1999)

Jack Snyder & Barry Weingast, "The American System of Shared Powers," J. of Law, Econ. & Organization (2000)

Barry Weingast, "The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development," J. of Law, Econ. and Organization. (1995)

Jonathan Rodden and Susan Rose-Ackerman, "Does Federalism Preserve Markets?" Virginia L. Rev. (1997)

K. Whittington, "Dismantling the Modern State? Changing Structural Foundations of Fed.," Hast. Con. L. Q. (1998)

Barry Weingast, "The Political Foundations of Democracy and the Rule of Law," APSR (1997)

David Epstein and Sharyn O'Halloran Delegating Powers

John Ferejohn, et al., eds. Constitutional Culture and Democratic Rule

John Mueller Constitutional Democracy

Robert Cooter The Strategic Constitution