

Princeton University
Department of Politics

POL 561 – Constitutional Theory
Fall 2007

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Room: TBA
Thursday 9:00-11:50 am

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 Robert McCloskey's [The American Supreme Court](#) and Alfred Kelly, Winfred Harbison and Herman Belz's [The American Constitution](#). There are a number of American constitutional law casebooks available, including Walter Murphy, James Fleming and Sotirios Barber's [American Constitutional Interpretation](#).

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? Finally, 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.

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 20: Introduction: The Political Constitution
2. September 27: The Legal Constitution: Rights and Constraints
3. October 4: Structure and Order

4. October 11: Norms and Ideals
5. October 18: Popular Sovereignty
6. October 25: Promises and Precommitments

Who Interprets?

7. November 8: Judicial Review
8. November 15: Departmentalism

Structural Issues

9. November 29: Origins, Crisis, and Failure
10. December 6: Maintenance and Change

Structural Issues

11. December 13: Presidents, Parliaments, and Courts
12. December 18: Power and Representation (NOTE this is a Tuesday, making up for 11/22)

Materials:

The following books are available for purchase:

Bruce Ackerman We the People
Sotirios Barber and Robert George, ed. Constitutional Politics

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 three short papers of 6-8 pages each during the course of the semester. Each paper is to explore some problem arising from or addressed by the readings for that 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.

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 Sunday, 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 strongly urged 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

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

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 and the Constitution: The ‘Higher Law Background’ Reconsidered,” Review of Politics (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?

Required:

- William H. Riker “Implications from the Disequilibrium of Majority Rule for the Study of Institutions” APSR (1980)
- Kenneth S. Shepsle “Studying Institutions: Some Lessons from the Rational Choice Approach” Journal of Theoretical Politics (1989)
- Rogers M. Smith “If Politics Matters: Implications for a ‘New Institutionalism,’” Studies in American Political Development (1992)
- 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

4. Norms and Ideals

If constitutions delimit the sphere of normal political activity, then our notion of a “constitution” may have to be extended beyond the formal institutions of traditional constitutional theory. The polity is “constituted” by ideas, as well as by institutions. To what extent are ideas “constitutional”? To what degree do they function as a constitution? How constraining are ideas? What is the relationship between political ideals and political institutions? What does the inclusion of ideology add to our study of constitutionalism? Does it alter our perspective on American constitutionalism and how it operates?

Required:

Clifford Geertz “Ideology as a Cultural System,” in The Interpretation of Cultures
Gabriel Almond and Sidney Verba, The Civic Culture, ch. 1, 13
Herbert McClosky and John Zaller, The American Ethos, ch. 7
John Finn, “The Civic Constitution,” in Constitutional Politics
Stephen Macedo, “Transformative Constitutionalism and the Case of Religion,” in Constitutional Politics
Robert Cover “Foreword: Nomos and Narrative” Harvard Law Review (1983)

Suggested:

James Boyd White When Words Lose Their Meaning
Wayne Moore Constitutional Rights and the Powers of the People
Marshall Sahlins Culture and Practical Reason
William Harris An Interpretable Constitution
Michael Lienesch New Order of the Ages
James Scott Resistance and the Art of Domination
Antonio Gramsci The Prison Notebooks
Michel Foucault The Archeology of Knowledge
Raymond Williams The Sociology of Culture
Michael McGann Rights at Work
Clifford Geertz Negara
Peter Berger and Thomas Luckmann The Social Construction of Reality
Alan Hunt Explorations in Law and Society
Sheldon Wolin Politics and Vision
Samuel Huntington American Politics
James Morone The Democratic Wish
Jerome Bruner Actual Minds, Possible Worlds
Richard Ellis American Political Cultures
Nelson Goodman Ways of Worldmaking
J. Cropsey “The U.S. as Regime & the Sources of the American Way of Life,” in Political Phil. & Issues of Politics
Donald Lutz “The United States Constitution as an Incomplete Text,” Annals of the American Academy of Political and Social Sciences (1987)
Michael Kamman A Machine that Would Go of Itself
Pierre Bourdieu Language and Symbolic Power
Max Weber Economy and Society
Emile Durkheim The Division of Labor in Society
Jurgen Habermas Legitimation Crisis
Anne Norton The Republic of Signs
Mark Casson, ed. Culture, Social Norms, and Economics
Ann Swidler, “Culture in Action: Symbols and Strategies,” American Sociological Review (1986)
Michael Schudson The Good Citizen
George Steinmetz, ed. State/Society
Victoria Bonnell, et al., eds. Beyond the Cultural Turn
Robert Axelrod, “Disseminating Culture,” Journal of Conflict Resolution (1997)
David Laitin Hegemony and Culture
Timur Kuran Private Truths, Public Lies

5. 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

James Fleming, “We the Exceptional People,” in Constitutional Politics

Jeffrey Tulis, “Constitution and Revolution,” in Constitutional Politics

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

6. 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

Anne Norton "Transubstantiation: The Dialectic of Constitutional Authority" University of Chicago Law Review 72 (1986)

Dennis Mueller Constitutional Democracy ch. 5

Russell Hardin Liberalism, Constitutionalism, and Democracy ch. 3

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

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)

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)

Ran Hirschl, “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions,” Law and Social Inquiry 25 (2000)

David Erdos, “Postmaterialist Social Forces, Elite Triggers, and National Bill of Rights Institutionalization in Westminster Democracies” (manuscript)

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

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)
Christopher Eisgruber, "Judicial Supremacy and Constitutional Distortion," in Constitutional Politics
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. Origins, Crisis, and Failure

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:

Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law,” APSR (1997)
Keith E. Whittington, “Yet Another Constitutional Crisis?” William and Mary Law Review (2002)
John Finn, Constitutions in Crisis, ch. 1
Mark Brandon, Free in the World, ch. 1
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)

Keith Whittington Constitutional Construction ch. 1, 6

Mark Graber, “Settling the West: Annexation of Texas, the Louisiana Purchase, and Bush v. Gore,”

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)

Persson Torsten, "Constitutions and Economic Policy," Journal of Economic Perspectives (2004)

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

Jose Cheibub and Fernando Limongi, "Modes of Government Formation and the Survival of Democratic Regimes: Presidentialism and Parliamentarism Reconsidered," Annual Review of Political Science (2002)

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

Alfred Stepan & Cindy Skach, "Constitutional Frameworks & Democratic Consolidation," World Politics 46 (1993)

Steven Solnick, "Federalism and State-Building," in The Architecture of Democracy

Alfred Stepan, "Federalism and Democracy: Beyond the U.S. Model," in Federalism and Territorial Cleavages

Nancy Bermeo, "The Import of Institutions," in Federalism and Territorial Cleavages

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