

# Pol Sci 3255 Development of the American Constitution

Fall 2019

Mon. & Wed. 2:30-4:00, Wrighton 201

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Office hours: Tu-Th 4:00-5:00;  
Fri. 1:30-2:30;  
and by appointment

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course website (updated schedule, assignments, and links to readings):  
<https://pages.wustl.edu/calvert/ps-3255-development-american-constitution>

## Course Description

Americans' understandings of their constitutional rules have changed over the years, by means both formal—through amendment and judicial interpretation—and informal—through changes in conditions and application. It is a history that contradicts the common mythology of a U.S. Constitution that has functioned smoothly for 230 years, unchanged apart from 27 formal amendments. Our constitutional understandings have been a constant source of dispute, but American constitutional democracy today is under stress as seldom before.

The course examines the processes through which American constitutional democracy has developed in four areas that most challenge the notion of simple definition by constitutional text, and that are the most fraught in our politics today. These are: the electoral process, especially for presidents; our standards of citizenship and civil rights; the "administrative state" by which the federal government carries out the execution of increasingly complex programs; and presidential powers and limitations.

Main themes of the course

- The Constitution as a set of formal and informal institutions
- The nature of constitutional development and change in American history
- Internal limits on the actions of elected and unelected officials
- Challenges facing American constitutional government

As a result of this course, you should

- be familiar with common claims by Americans about the Constitution;
- be able to recognize the political, ideological, and rhetorical content of such claims;
- have a richer understanding of the nature of Constitutional “rules” and mechanisms underlying their effect; and more generally of how political and social institutions work;
- learn tools for researching constitutional and political issues, and distinguishing fact from fiction;
- gain an improved ability to read and write analytically, particularly concerning politics.

## Requirements

### Prerequisite

All students should have taken Pol Sci 101 American Politics, or the equivalent.

### Textbooks

One required textbook is available at the Campus Store

- Richard P. McCormick, *The Presidential Game*. Oxford University Press (1982).

### Course requirements and grading

Final grades for this class will be composed as follows:

- 30% total from short-essay assignments due every week or two. These essays (general instructions below) are designed both to focus your reading and to prepare you for class discussion on the due dates. Late essays will be penalized 2 points per weekday (out of 20 possible), up to 10 points.
- 40% from two in-semester, in-class, closed-book exams, each consisting of a few short essay-questions.
- 20% from a brief final paper project on an assigned topic, addressing the material covered during the last month or so of the course and integrating it with all the previous material. As a rough guide to expectations, his paper should be roughly double the length of a weekly essay. Further instructions to follow.
- 10% from class attendance and participation.
  - Showing up consistently is worth about 5 or 6 of 10 points; consistently improving the overall quality of class discussion earns 10/10.
  - Asking good questions is important.
  - Speaking up "appropriately" includes, of course, demonstrating respect for others at all times.

### Instructions for Weekly Essay Assignment

**Basic format:** Length: 750-1000 words, unless instructed otherwise. That's about 3-4 pages if you use 1-in. margins, double-spaced, 12-point proportional font).

Stylistically: Think of your essay as something like a short blogpost, brief review, or memo. There is no need for a title or a concluding paragraph; but it's usually a good idea to indicate in the first paragraph how you are going to approach the essay topic.

Include your name and the due date at the top of the first page.

**References:** Quotations must be attributed appropriately. References to quotations or other specific information from one of our assigned readings may be given simply by author and page number; no formal reference list is needed. No need to obsess about this; we're all reading the same material.

Any outside sources you use for any factual claim, paraphrase, or quotation should be cited fully. The reference format doesn't matter, but it should be possible for your reader to immediately locate exactly the material to which you are referring.

**Turning in your essay:** Your essay is due by the beginning of class on the due date assigned. Late papers will be penalized 2 points per weekday, up to a maximum of 10 points out of 20 possible.

Turn in your essay by posting it to the shared turn-in folder on Box as a MS Word or, preferably, PDF document. You should have received an email inviting you to share this folder; or you may find it convenient to use this direct link:

<https://wustl.box.com/s/zprvx48a64pchkbojn1898qnm2zvghgn>

You should post your essay with its file name constructed as follows:

Your\_last\_name Your\_given\_name date.pdf

You will only be able to post documents to the shared turn-in folder on Box, not read or modify the documents there. If you want to revise an essay after you turn it in, just post a new one.

## **Concise Topic outline**

### I. Introduction

### II. The Electoral System

- A. Political Parties
- B. The Presidential (and Legislative Election) Game Today

### III. Who Is a Citizen?

- A. Reconstruction, the 14<sup>th</sup> Amendment, and Jim Crow
- B. Immigration and Citizenship

### IV. The Administrative State

- A. The Executive Branch in the Beginning
- B. Professionalism and Civil Service
- C. Progressivism and Laissez Faire
- D. Commerce Powers and Delegation in the New Deal
- E. The National Security State

### V. Limits on Presidential Power?

- A. An Internal Separation of Powers?
- B. Congressional Oversight
- C. Presidential Removal

# Outline and Assignments

## I. Introduction

**Mon Aug 26**

Intro discussion

**Wed Aug 28**

**Read** before class:

Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy." *UCLA Law Review* (Feb. 2018), pp. 78-169. [Click here to obtain online.](#)

**Write** and turn in before class Wednesday:

- What sort of democratic or constitutional failure do H&G argue is an immediate threat to the U.S.? How, in their view, could such a thing happen?
- [For this assignment only, adhere to a strict length limit of 200 words (4/5 page). 10 points possible.]

## II. The Electoral System

### A. Political Parties

**Wed Sept. 4**

**Read** before class:

- McCormick *The Presidential Game*: Chapters 1-3 (72 pages).

**Mon Sept 9**

**Read** before class:

McCormick *The Presidential Game*:

- pages 136-163 from Chapter 5
- pages 182-206 from Chapter 6

**Write** and turn in before class Monday:

- Why, according to party politicians and activists in the 1840s, was their party a good feature in the American system of government? How do these explanations comport with the Framers' intent? What main principles of American self-government developed since the Framing are invoked or implied by these explanations?

## Wed Sept 11

Read before class:

- McCormick *The Presidential Game*: Epilogue (207-238)
- plus additional readings below

## B. The Presidential (and Legislative Election) Game Today

### 1. Gerrymandering, Voter Registration, Campaign Finance, and Rigged Primaries

#### Wed. Sept. 11

Read before class:

- On gerrymandering:
  - Vann R. Newkirk, “How Redistricting Became a Technological Arms Race.” *The Atlantic* (Oct. 28, 2017). [Click here to obtain on their website.](#)
  - Dylan Brogan, “No contest: Dems sweep statewide offices in midterms but remain underrepresented in Assembly.” *Isthmus* (Madison WI, Nov. 15, 2018) [Click here to obtain on their website.](#)
  - Jason Rosenbaum, “Missouri Voters Backed An Anti-Gerrymandering Measure; Lawmakers Want To Undo It.” National Public Radio online (Jan, 8, 2019) [Click here to obtain on their website.](#)
- voting rights vs. “voter fraud”: Jane Mayer, “The Voter-Fraud Myth: The man who has stoked fears about impostors at the polls.” *The New Yorker* (Oct. 29, 2012) (18pp) [Click here to obtain on their website.](#)
- campaign finance: CRS, “The State of Campaign Finance Policy: Recent Developments and Issues for Congress,” updated Dec. 13, 2018 (22 pages). [Click here to obtain on their website.](#)
- Ezra Klein, “Was the Democratic primary rigged?” *Vox* (Nov. 14, 2017) [Click here to obtain on their website.](#)

### 2. The Electoral College and its Discontents

#### Mon. Sep 16

Read before class:

- The [National Popular Vote](#) proposal: Explore the website a bit to understand their goal and method.
- A quick-reference guide: National Archives and Records Administration, “What are the Roles and Responsibilities...in the Electoral College Process?” Part of NARA's website [The Electoral College](#). Note especially the calendar of events.
- Do Electors have a choice?
  - Beinart, “The Electoral College Was Meant to Stop Men Like Trump From Being President.” *The Atlantic* (Nov. 21, 2016) [Click here to obtain on their website.](#)

- Flynn, “He tried to stop Trump in the electoral college. A court says his ‘faithless’ ballot was legal.” *Washington Post* (Aug. 22, 2019) [Click here to obtain on their website.](#)
- Norman J. Ornstein, “What Happens If the 2020 Election Is a Tie?” *The Atlantic* (Jul. 11, 2019) [Click here to obtain on their website.](#)
- skim: Chris Land and David Schultz, “On the Unenforceability of the Electoral Count Act.” *Rutgers Journal of Law & Public Policy* Vol. 13, No. 4 (Fall 2016), pp. 340-387. [Click here to obtain online.](#) Try to answer three questions:
  - What went wrong in 1876-77?
  - What does the Electoral Count Act provide?
  - Why, broadly speaking, are the authors skeptical?
- skim: Senate Select Committee on Intelligence, *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election. Volume 1: Russian Efforts Against Election Infrastructure.* [Click here to obtain online.](#) 61 pages, heavily redacted. What sorts of concerns ought one to have about future elections?

**Write** and turn in before class Monday:

- McCormick suggested that the original implementation of the presidential selection process disappointed many of the intentions of the Constitution's framers. Explain two ways in which the present-day version of the presidential game changes this assessment, whether bringing it more into line with Framers expectations or pushing it even further afield. (You may, if you wish, give one example of each.)

### III. Who Is a Citizen?

#### A. Reconstruction, the 14th Amendment, and Jim Crow

**Wed Sept 18**

**Read** before class:

- John Harrison, “The Lawfulness of the Reconstruction Amendments.” *Univ. of Chicago Law Review* (2001). Skip Sec. I.A.1; skip Sec II.B, except for its Intro and pp. 449-451. (Total assigned: about 55 pages.) <https://www.jstor.org.libproxy.wustl.edu/stable/1600377>.
- Klinkner with Smith, *The Unsteady March*, ch. 3 “...Reconstruction and Second Retreat” (33 pages). [Shared.](#)

**Mon Sept 23**

**Read** before class:

- Klinkner with Smith, *The Unsteady March*, ch. 8, “...The Civil Rights Revolution, 1954-1968” (46 pp). [Shared.](#)

- Feder, "Federal Affirmative Action Law: A Brief History." CRS Report (2015). [Click here to obtain online.](#)
- Liptak, "Supreme Court Invalidates Key Part of Voting Rights Act." *New York Times* (June 2013) [Click here to find online.](#)
- Bill McCarthy, "Have Trump judicial nominees refused to say *Brown vs. Board* was properly decided?" Politifact (Jul. 25, 2019). ("Mostly true.") [Click here to obtain online.](#)

Write and turn in before class Monday:

- TBA

## B. Immigration and Citizenship

Wed Sept 25

Read before class:

- Lorraine Boissoneault, "How the 19th-Century Know Nothing Party Reshaped American Politics," Smithsonian.com (Jan. 26, 2017) (about 3 pages). [Click here to obtain online.](#)
- Mark Pulliam, "What Did the 14th Amendment Congress Think about 'Birthright Citizenship'?" Posted on *Law & Liberty* (Aug. 21, 2015) (about 2 1/2 pages). [Click here to obtain online.](#)
- Josh Zeitz, "The 1965 Law That Gave the Republican Party Its Race Problem." *Politico* (Aug. 20, 2016) (about 6 pages). [Click here to obtain online.](#)
- Jeh Charles Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants." Secretary of DHS memorandum (Nov. 20, 2014) -- the DACA program. [Click here to obtain online.](#)
- CNN reporters, "What is the Flores settlement that the Trump administration has moved to end?" (Aug. 23, 2019). [Click here to obtain online.](#)
- Robert Barnes and Ann E. Marimow, "Supreme Court upholds Trump travel ban." *Washington Post* (Jun. 26, 2018). [Click here to obtain online.](#)

## FIRST EXAM

- Mon. Sept. 30: Finish and review
- Wed. Oct. 2: In-class exam

## IV. The Administrative State

### A. The Executive Branch in the Beginning

Mashaw "American Administrative Law: Federalist Foundations" thru Sec. II (48 pp).  
other Assignments TBA.

### **B. Professionalism and Civil Service**

Hoogenboom, "The Pendleton Act and the Civil Service" (17 pp., light reading)  
Riggs, "Bureaucracy and the Constitution" (7 triple-col. pages, so more like 20)  
other Assignments TBA.

### **C. Progressivism and Laissez Faire**

Sanders, "Rediscovering the Progressive Era" (15 pp)  
Rabin, "Federal Regulation in Historical Perspective" (Sec. I-IV, 45 pp); Secs. II and IV  
on Court role are esp. useful  
Other assignments TBA.

### **D. Commerce Powers and Delegation in the New Deal**

Cushman, "The Great Depression and the New Deal." Notre Dame Legal Studies Paper  
No. 1312 (2008; last revised 2012). 51 pages. On file. Available at SSRN:  
<https://ssrn.com/abstract=754231>  
Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal  
Administrative Law" (42 pp)  
Potter, *Bending the Rules: Procedural Politicking in the Bureaucracy* (Chicago 2019).  
Chapter 2, "The Nuts and Bolts of Notice-and-Comment"  
Other assignments TBA.

### **E. The National Security State**

War power; the defense establishment; emergency powers. Assignments TBA.

## **SECOND EXAM**

- Mon. Nov. 11: Finish and review
- Wed. Nov. 13: In-class exam

## **V. Limits on Presidential Power?**

### **A. An Internal Separation of Powers?**

Green & Roiphe, "Can the President Control the Department of Justice?" (72 pp.)  
Other assignments TBA.

### **B. Congressional Oversight**

Precedents, investigation powers, etc. Assignments TBA.

### **C. Presidential Removal**

History of impeachments; 25th Amendment. Assignments TBA.

## **FINAL PAPER**

- due date TBA