

**Draft Syllabus**  
**PolSci 4532: Seminar in Constitutional Politics**  
**Fall 2017**  
**Professor Calvert**

### **Course Description**

American voters overturned the anticipations of most political observers when they selected Donald J. Trump as president in the 2016 election. The intentions of many Trump supporters, as well as his own statements, should lead us to re-evaluate our understandings and expectations about the nature, practice, and prospects of American constitutional government. For students already having done upper-division course work in American or comparative political institutions, this course offers an opportunity to combine what they have learned with pertinent advanced material on the nature of American constitutionalism; and to pursue and share with one another their original individual research on topics of their own choosing, pertaining to American political prospects to on broader topics concerning the success and failure of constitutional republics. Material to be covered prior to the research projects includes the development of the American constitutional system; the nature of constitutional function and constitutional change; constitutional crises and emergencies; and the fate of republican constitutions in famous instances such as Weimar Germany and recent developments in Eastern Europe.

Prerequisite: A previous course at the 300-level or above on constitutional politics, constitutional law, or law and society; or, with instructor's permission, other relevant advanced coursework.

This course satisfies the Writing Intensive requirement for the College of Arts and Sciences.

### **Requirements and Grading**

- Each student will produce a final research paper for the course in three parts, distributed across the semester. Each of the three parts, about 3000 words is to make maximal reference to the reading material from the corresponding section of the course, as well as bringing in appropriate material from scholarly and primary sources beyond the course reading assignments.
- **Scheduling:** For each paper, the class will be divided well in advance into two groups to turn in papers on the first and second due dates below (shown as, for example, "weeks 5-6"). Initial paper submissions are to be turned in and distributed on Monday of that week, for class discussion on Thursday. A revised version of the paper (see below) is due in class the following week.
- **Class discussion and revisions:** Papers will be distributed to all students in the class. Each student will briefly introduce his or her paper (about 5 minutes) and lead discussion (about 15 minutes). Based on that discussion and, especially, on the instructor's stylistic and substantive comments—to be supplied that same week—each student is to turn in a revised paper. The revised version of the third

- paper is to be turned in as part of the **final paper**, also incorporating suitably revised and connected versions of the first two papers, a total length of about 9000 words (about 9 pages, if single-spaced and
- **Grading:** The initial version of each paper will contribute 10% of the course grade; the class presentation 5%; and the revised version of the first two papers, 10%. The final paper, including the revised 3<sup>rd</sup> paper, will contribute 20% of the course grade. The remaining 15% of the course grade will depend on your weekly participation in seminar discussion, on both assigned readings and on other students' papers.
  - **Paper topics:** Each student is to choose a general topic, based on consultation with me, connected with expansion and limitation of executive powers. Some general topic suggestions:
    - financial conflicts of interest
    - search, seizure, and surveillance
    - secrets and leaks
    - presidential power to deploy military forces
    - rule-making by federal agencies or by executive order
    - the powers of investigation and prosecution
    - spending and taxing authority
    - executive power versus political opponents
    - presidential appointments
    - the Office of Legal Counsel and its authority
    - the politics of national security
    - the executive branch versus the states
- The three papers are to examine the following aspects of that topic:
- 1st paper, week 5-6: events surrounding some assertion, extension, challenge, or limitation of executive power, and a first look at constitutional implications.
  - 2<sup>nd</sup> paper, week 9-10: evaluating this issue in terms of constitutional interpretation or construction by the courts and by political officials.
  - 3<sup>rd</sup> paper, week 13-14: incorporating revisions of the other two and examining the implications and prospects for the constitutional system as a whole.

## Topics, Readings, and Assignments

### Week 1:

Course preliminaries and discussion of some in-class general readings, to be supplied.

### Topic 1: Executive power: expansion and limitation

#### Week 2

Louis Fisher, *Presidential War Power* (Univ. of Kansas Press, 3<sup>rd</sup> ed., 2013).

#### Week 3

Andrew Jackson, the Bank, and Congress

- “Andrew Jackson, Banks, and the Panic of 1837.” The Lehrman Institute.
- K. Daniel Glover, “The Censure Of Andrew Jackson.”
- John Yoo, “Of Course Republicans Can Censure Obama.” *National Review* (Dec. 2, 2014)

The Steel Seizure Case

- U.S. Supreme Court, *Youngstown Sheet & Tube Co. v. Sawyer* (1952).
- Neal Devins and Louis Fisher, “The Steel Seizure Case: One of a Kind?” *Constitutional Commentary*, Vol. 19 (2002), pp. 63-86.

Watergate

- Fred Emery, *Watergate: The Corruption of American Politics and the Fall of Richard Nixon*. Simon and Schuster (1995). Excerpts TBA.

#### Week 4

- Iran-Contra
  - Lawrence Walsh, *Final Report of the Independent Counsel for Iran-Contra Matters*, excerpts
  - *Report of the Congressional Committees Investigating Iran-Contra Affair*, Minority Report of Representative Dick Cheney et al., chapters 1-4
- Cheney, Bush, and the executive power; the Guantanamo cases
  - John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them*. Memorandum, Sept. 25, 2001, Department of Justice Office of Legal Counsel.
  - Julian Sanchez, “DOJ releases, abjures Bush administration surveillance memos.” *Ars Technica* (3/2/2009). With links to newly released Bush Administration DoJ memos.
  - John Cassidy, “N.S.A. Latest: The Secret History of Domestic Surveillance.” *The New Yorker* (June 27, 2013). Includes links to material from Snowden leak.
  - U.S. Supreme Court, *Rasul v. Bush* (2004); *Hamdi v. Rumsfeld* (2004); *Boumediene v. Bush* (2008)

**Week 5-6 discussion of first papers. For each group of students, the paper is to be circulated on Monday for class discussion on Thursday; revised paper is due the following Thursday.**

**Topic 2: Constitutional construction and Constitutional interpretation**

**Week 7:**

Keith Whittington, *Constitutional Construction* (Harvard U. Press, 1999). Chapter 1.

Mark A. Graber, *A New Introduction to American Constitutionalism* (Oxford U. Press, 2013). Excerpts.

Stephen R. Munzer and James W. Nickel, “Does the Constitution Mean What It Always Meant?” *Columbia Law Review*, Vol. 77, No. 7 (Nov., 1977), pp. 1029-1062.

**Week 8:**

Antonin Scalia, “Constitutional Interpretation the Old Fashioned Way.” Speech delivered March 14, 2005 at Woodrow Wilson International Center for Scholars, Washington, D.C.

U.S. Supreme Court, *District of Columbia v. Heller* (2008).

Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*.” *Ohio State Law Journal*, Vol. 69 (2008), pp. 625-640.

Jack M. Balkin, “Abortion and Original Meaning.” *Constitutional Commentary*, vol. 24 (2007), pp. 291-352.

Ronald Dworkin, *Law’s Empire* (Belknap-Harvard, 1986). Excerpts.

**Week 9-10 discussion of second papers. Same plan as for week 5-6 above.**

**Topic 3: Emergencies, Crisis, and Constitutional Failure**

**Week 11:**

Harold Hongju Koh, *The National Security Constitution* (Yale, 1990). Excerpts.

William E. Scheuerman, “Survey Article: Emergency Powers and the Rule of Law After 9/11.” *Journal of Political Philosophy*: Vol. 14, No. 1 (2006), pp. 61–84.

John Ferejohn and Pasquale Pasquino, “The law of exception: a typology of emergency powers.” *International Journal of Constitutional Law* Vol. 2 (2004), pp. 210–39.

Bruce Ackerman, “The Emergency Constitution.” *Yale Law Journal* Vol. 113 Issue 5 (Mar. 2004), pp. 1029-1091.

**Week 12**

Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar*. Duke University Press (2004). Excerpts.

Aziz Z. Huq and Tom Ginsburg, “How to Lose a Constitutional Democracy.” Unpublished paper (Jan. 18, 2017), available on SSRN.

Kim Lane Scheppele, “Hungary's constitutional revolution.” *New York Times*, Opinion Pages. 19th December, 2011.

Kim Lane Scheppele, “Worst Practices and the Transnational Legal Order (Or How to Build a Constitutional “Democratorship” in Plain Sight).” Background paper: Wright Lecture, University of Toronto, Nov. 2, 2016.

**Week 13-14: Discussion of third papers; same plan as above.**

**Final paper, including first two parts and revision of third due final exam week, date TBA.**