

Constitutionalism

Political Science 4402

Professor Randy Calvert
calvert@wustl.edu
Seigle 238

Spring 2019
Mondays
2:00 – 5:00 pm
Seigle 111

Professor Frank Lovett
flovett@wustl.edu
Seigle 282

Students in this seminar will read and discuss a variety of theoretical, empirical, legal, and historical works concerning the nature and practice of constitutional government. Central questions include: What is a constitution? How is it distinct from and related to the other aspects of political systems? What can be accomplished with a constitution, and how? How are constitutions established, and under what conditions will they succeed? How do constitutions change? What does it mean for a constitution to fail, and when do they fail?

Course Requirements

Both undergraduate and graduate students may take this course, and the requirements are somewhat different for each, as indicated below:

1. **Attendance and participation.** This is a seminar class, so regular attendance and active participation in class discussion is expected from all students, and will count for 30% of your overall grade.
2. **Readings.** The course schedule below organizes the readings into three types. “Required” readings should be read by all students in advance of each class. Graduate students should additionally read all the “suggested” readings, whereas undergraduates can read them as they seem interesting or useful (but see also requirement 3 below). The “optional” readings are optional for all students.
3. **Nine weekly reflection memos.** Sometime before midnight on the Sunday before each class, students should email both professors Calvert and Lovett a short memo reflecting on one of the readings for that class. The memos may be as short as a paragraph, and cannot be longer than one page. *At least three of the nine memos must address one of the “suggested” or “optional” readings.* The memos will together count for 10% of your overall grade.
4. **Papers.** Undergraduates will write three papers of about 2,000 words each. Paper topics will be provided in advance, but with prior approval may be on any topic

of interest to the student related to the themes of this class. Topics will pertain to the material covered in each third of the course, and students should make maximum use of the ideas found in all readings prior to the due date, including some of the “suggested” and “optional” readings.

To smooth our schedule of grading of the essays, each of the two mid-semester essays will be collected across two consecutive weeks, rather than all at once. Students will be assigned to the pairs of dates either at random or on a volunteer basis. Due dates for the three papers are as follows:

- Paper 1, pertaining to classes 1–5: Feb. 15 or 22
- Paper 2, pertaining to classes 4–9: Mar. 22 or 29
- Paper 3, pertaining to classes 8–13: Apr. 26 (last day of classes)

Late papers will be marked down two points per day until turned in; extensions will be considered only if requested at least 48 hours in advance. Graduate students will write a single seminar paper, due at the end of the semester, on a topic developed in consultation with the professors. Papers will count for 60% of your overall grade.

Course Materials

Most of the readings for this course will be made available online through a shared Box folder. In addition, however, two books are available for purchase at the Campus Bookstore:

H.L.A. Hart, *The Concept of Law* (Oxford)
David Strauss, *The Living Constitution* (Oxford)

Schedule of Readings and Assignments

1. *Introduction: What is a Constitution?*

Jan 14 Topics: constitution in the broad (enabling) and narrow (limiting) sense; written and unwritten constitutions; defining constitutionalism and constitutional government.

Required readings:

- Aristotle, *Politics*, III: 6–7, IV: 1, V: 1
- Kingsley, “On the Surface, Hungary Is a Democracy. But What Lies Underneath?”

Suggested readings:

- Dicey, *Introduction to the Study of the Law of the Constitution*, “The True Nature of Constitutional Law”

Jan 21 No class (Martin Luther King Jr. Day)

Part I: Foundations of Constitutionalism

2. *Is Constitutional Government Possible?*

Jan 28 Topics: sovereignty and the rule of law; the (im)possibility of constitutionalism; constitutional resistance; constituent versus constituted sovereignty.

Required readings:

- Hobbes, *Leviathan*, chs. 16–19, 21
- Locke, *Second Treatise*, chs. 7–9, 13, 19
- Hart, *Concept of Law*, chs. 2, 4, 6

Suggested readings:

- Bodin, *On Sovereignty*, I: 8, II: 1
- Franklin, *Constitutionalism and Resistance*, introduction
- Franklin, *John Locke and the Theory of Sovereignty*, chs. 1, 4

Optional readings:

- Harrington, *Oceana*, preliminaries
- Austin, *Province of Jurisprudence Determined*, Lecture VI
- Dicey, *Introduction to the Study of the Law of the Constitution*, “The Rule of Law”
- Lovett, “Harrington’s Empire of Law”

3. *Coordination, Social Rules, and Constitutions*

Feb 4 Topics: the nature of conventions; constitutions as coordination mechanisms; sovereignty as convention.

Required readings:

- Hart, *Concept of Law*, ch. 5
- Postema, “Coordination and Convention at the Foundations of Law”
- Weingast, “Democratic Stability as a Self-Enforcing Equilibrium”

Suggested readings:

- Hampton, “Democracy and the Rule of Law”
- Myerson, “Learning from Schelling’s Strategy of Conflict”
- Calvert, “Rational Actors, Equilibrium, and Social Institutions”

Optional readings:

- Sugden, “A Theory of Focal Points”
- McAdams, “The Expressive Power of Adjudication”

4. *What are the Benefits of Constitutionalism?*

Feb 11 Topics: the benefits of constitutionalism; the distribution of those benefits; motivating submission to a constitution.

Required readings:

- North and Weingast, "Constitutions and Commitment"
- Hardin, "Why a Constitution?"
- Przeworski, *Democracy and the Market*, ch. 1

Suggested readings:

- Holmes, "Lineages of the Rule of Law"
- Pettit, *Republicanism*, chs. 1, 6
- Hayek, *The Constitution of Liberty*, chs. 2, 10

Optional readings:

- Holmes, *Passions and Constraint*, ch. 5
- Elster, *Ulysses Unbound*, ch. 2
- Maravall & Przeworski, *Democracy and the Rule of Law*, introduction

5. *Creating a Constitutional Polity*

Feb 18 Topics: constituent assemblies and constitutional conventions; run-away conventions; ratification and consolidation.

Required readings:

- Sieyès, "What is the Third Estate?" sect. 1, 5
- Wood, *Creation of the American Republic*, VIII: 1-2, 4; IX: 1
- Elster, "Constitutional Bootstrapping in Paris and Philadelphia"

Suggested readings:

- Elster, "Forces and Mechanisms in the Constitution-making Process"
- Rakove, *Original Meanings*, chs. 2-4
- Przeworski, *Democracy and the Market*, ch. 2

Optional readings:

- Elster, "Rebuilding the Boat in the Open Sea"
- Ackerman, *We The People*, vol. 2, chs. 2-3

Part II: Constitutionalism in Practice

6. Organization of a Constitutional Polity I

Feb 25 Themes: liberal democracy and its alternatives; constitutional design; mixed constitutions and the separation of powers.

Required readings:

- Montesquieu, *Spirit of the Laws*, II: 1–5, III: 1–11, XI: 1–6
- *Federalist Papers*, no. 51
- Linz, “The Perils of Presidentialism.”

Suggested readings:

- Aristotle, *Politics*, IV: 1–14
- Polybius, *Histories*, VI
- Carey and Shugart, *Presidents and Assemblies*, chs. 1–3
- Devenish, “The Republican Constitution of 1961 Revisited: A Re-Evaluation after Fifty Years.”

Optional readings:

- Aristotle, *The Constitution of Athens*
- Bagehot, *The English Constitution*, chs. 1–2, 7
- Carey and Shugart *Presidents and Assemblies*, chs. 4–5, 7

7. Organization of a Constitutional Polity II

Mar 4 Themes: mass and elite; representation and the natural aristocracy; parties and factions; constitutional culture.

Required readings:

- *Federalist Papers*, no. 10
- Wood, *Creation of the American Republic*, XII: 1–3
- Tocqueville, *Democracy in America*, vol. 1, part 2, chs. 6 and 9

Suggested readings:

- Manin, *Principles of Representative Government*, chs. 2–3
- J.S. Mill, *Considerations on Representative Government*, ch. 16
- Brennan and Hamlin, “Economizing on Virtue”

Optional readings:

- Wilentz, *Rise of American Democracy*, chs. 9, 16
- Kramer, *Popular Constitutionalism*, chs. 8–9
- Habermas, “Citizenship and National Identity”

Mar 11 No class (spring break)

8. *The Politics of Constitutionalism I*

Mar 18 Themes: constitutional politics versus ordinary politics; constitutional rhetoric; formal and informal institutions; the administrative state.

Required readings:

- Whittington, *Constitutional Construction*, ch. 1
- Kessler, "The Struggle for Administrative Legitimacy"

Suggested readings:

- Llewellyn, "The Constitution as an Institution"
- Sunstein and Vermeule, "Libertarian Administrative Law"
- Bestor, "The American Civil War as a Constitutional Crisis"

Optional readings:

- Metzger, "1930s Redux: The Administrative State under Siege"

9. *The Politics of Constitutionalism II*

Mar 25 Themes: enforcing the constitution; judicial supremacy and its alternatives.

Required readings:

- Eskridge and Ferejohn, *A Republic of Statutes*, ch. 1 (pp. 34–42 only)
- *Federalist Papers*, no. 78
- Ely, *Democracy and Distrust*, ch. 4
- Waldron, "The Core of the Case Against Judicial Review"

Suggested readings:

- Schauer, "Guarding the Guardians"

Optional readings:

- Wilentz, *Rise of American Democracy*, ch. 12
- Schwartzberg, "Was the Graphe Paranomon a Form of Judicial Review?"

III. Constitutional Change

10. *Constitutional Interpretation*

Apr 1 Themes: the open-texture of rules and the inevitability of interpretation; precedent; originalism and its alternatives; constitutional drift.

Required readings:

- Hart, *The Concept of Law*, ch. 7
- Dworkin, *Law's Empire*, ch. 1, 6
- Strauss, *The Living Constitution*, intro and ch. 1

Suggested readings:

- Wittgenstein, *Philosophical Investigations*, §§ 143–242
- Taylor, "To Follow a Rule"
- Pettit, "The Reality of Rule Following"

Optional readings:

- Lovett, "A Republican Theory of Adjudication"

11. *Constitutional Alteration*

Apr 8 Themes: formal versus informal change; intentional versus unintentional change; constitutional amendment; entrenchment; landmark legislation as amendment.

Required readings:

- Strauss, *The Living Constitution*, chs. 2–4, 6
- Eskridge and Ferejohn, *A Republic of Statutes*, intro (paragraph at bottom p. 5 thru p. 9), and ch. 1 (pp. 29–65 only).

Suggested readings:

- Ackerman and Nou, "Canonizing the Civil Rights Revolution"
- Dellinger, "The Recurring Question of the Limited Constitutional Convention"
- Munzer and Nickel, "Does the Constitution Mean What It Always Meant?"

Optional readings:

- Schwartzberg, *Democracy and Legal Change*, chs. 1 and 6

12. *The Constitution Under Stress*

Apr 15 Themes: pushing interpretive boundaries; the need for forbearance; constitutional hardball; emergency powers.

Required readings:

- Locke, *Second Treatise of Government*, ch. 14
- Strauss, *The Living Constitution*, ch. 5
- Fishkin and Pozen, “Asymmetric Constitutional Hardball”
- Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order?”

Suggested readings:

- Schmitt, *Political Theology*, ch. 1
- Levitsky and Ziblatt, *How Democracies Die*, chs. 5–6
- Mattie, “Prerogative and the Rule of Law in John Locke and the Lincoln Presidency”

Optional readings:

- Kleinerman, “Can the Prince Really Be Tamed?”

13. *Constitutional Failure*

Apr 22 Themes: constitutional crisis and failure; what counts as constitutional failure; conclusion.

Required readings:

- Huq and Ginsburg, “How to Loose a Constitutional Democracy”
- Bermeo, “On Democratic Backsliding”
- Balkin, “Constitutional Rot and Constitutional Crisis”
- Primus, “The Republic in Long-Term Perspective”

Suggested readings:

- Levitsky and Ziblatt, *How Democracies Die*, chs. 1–2
- Evans, *The Coming of the Third Reich*, ch. 4
- Mickey, Levitsky, and Way, “Is America Still Safe for Democracy?”
- Mounk, *The People vs. Democracy*, chs. 1–2 (pp. 23–98)

Optional readings:

- Wilentz, *Rise of American Democracy*, chs. 23–24