

Princeton University
Department of Politics

POL 561 – Constitutional Theory
Fall 2023

Keith E. Whittington
113 Fisher Hall, 258-3453
kewhitt@princeton.edu

M 1:30-4:30pm
Fisher Hall 200

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, Alfred Kelly, Winfred Harbison and Herman Belz's The American Constitution, and Howard Gillman, Mark Graber, and Keith Whittington, American Constitutionalism. 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.

Materials:

The following books are available for purchase:

Bruce Ackerman, We the People, vol. 1

Samuel Issacharoff, Democracy Unmoored

Jamal Greene, How Rights Went Wrong

Adrian Vermeule, Common Good Constitutionalism

James Fishkin and William Forbath, The Anti-Oligarchy Constitution

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 three short papers of 6-8 pages each. 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.

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.

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

Alternatively, you may write a single research paper instead of the three short papers. If you do a term paper, you will still be expected to at least one oral presentation.

Readings

Week 1 – September 11

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

Week 2 – September 18

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, "Constitutionalism and Democracy," in Political Constitutionalism

Week 3 – September 25

Keith Whittington, "Status of Unwritten Constitutional Conventions in U.S.," U. of Ill. L. Rev. (2013)

Daphna Renan, "Presidential Norms and Article II," Harvard Law Review (2018)

Neil S. Siegel, "Political Norms, Constitutional Conventions, & Pres. Donald Trump," Indiana L. J. (2018)

Josh Chafetz & David Pozen, "How Constitutional Norms Break Down," UCLA Law Review (2018)

Week 4 – October 2

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

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)

Week 5 – October 9

Adrian Vermeule, Common Good Constitutionalism

Fall Break – October 16

Week 6 – October 23

Jamal Greene, How Rights Went Wrong,

Week 7 – October 30

Samuel Issacharoff, Democracy Unmoored,

Week 8 – November 6

David Landau, "Abusive Constitutionalism," UC Davis Law Review (2013)

Mark Tushnet, "Authoritarian Constitutionalism," Cornell Law Review (2014)

Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," UCLA Law Review (2018)

Week 9 – November 13

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)

Week 10 – November 20

Bruce Ackerman We the People ch. 9-10

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

Heinz Klug, "Constitutional Amendments," Annual Review of Law and Social Science (2015)

Week 11 – November 27

Joseph Fishkin and William Forbath, The Anti-Oligarchy Constitution, ch. 1-4

Week 12 – December 4

Joseph Fishkin and William Forbath, The Anti-Oligarchy Constitution, ch. 6-9