

Political Science 601 – “Constitutional Studies”
Spring 2020

This course is run as a seminar, meaning that students will take turns making initial presentations of the readings and will lead the initial discussion (except for the first session). When presenting, students will distribute a 3-page (plus/minus ½ page) critical discussion of the reading ahead of time. It is expected that each student will present material twice in the course of the semester. These presentations and short papers will count for 25% of the course grade. The remainder of the course grade will be based on a final research paper of 20-25 pages.

There are five books that are required for the class:

Alexander, *Constitutionalism: Philosophical Foundations* \$41.00

Jacobsohn and Schor, eds., *Comparative Constitutional Theory* \$53.11

Tushnet, *Taking the Constitution Away From the Courts* \$30.00

John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* \$22.92

Seidman, *On Constitutional Disobedience* \$9.95

Additional readings will be posted on Canvas.

Please note that there are assigned readings for our first class meeting.

COURSE CREDITS

This is a 3-credit course. In accordance with university policies, that means there are expected to be 3 contact hours per week, and at least 30 pages of written work over the course of the semester. These requirements are satisfied by the scheduled lectures and discussion section meetings, and by the take-home exams and additional written work assigned in section.

LEARNING OBJECTIVES

The goal of this course is to give students a broad knowledge of philosophical and theoretical issues in modern constitutional thought. In the process of conveying this information it is expected that students will enhance their skills of critical reading, abstract and normative reasoning, and writing in a specialized and technical area.

ACADEMIC INTEGRITY

By enrolling in this course, each student assumes the responsibilities of an active participant in UW-Madison’s community of scholars in which everyone’s academic work and behavior are held to the highest academic integrity standards. Academic misconduct

compromises the integrity of the university. Cheating, fabrication, plagiarism, unauthorized collaboration, and helping others commit these acts are examples of academic misconduct, which can result in disciplinary action. This includes but is not limited to failure on the assignment/course, disciplinary probation, or suspension. Substantial or repeated cases of misconduct will be forwarded to the Office of Student Conduct & Community Standards for additional review. For more information, refer to studentconduct.wiscweb.wisc.edu/academic-integrity/.

ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES

McBurney Disability Resource Center syllabus statement: “The University of Wisconsin-Madison supports the right of all enrolled students to a full and equal educational opportunity. The Americans with Disabilities Act (ADA), Wisconsin State Statute (36.12), and UW-Madison policy (Faculty Document 1071) require that students with disabilities be reasonably accommodated in instruction and campus life. Reasonable accommodations for students with disabilities is a shared faculty and student responsibility. Students are expected to inform Prof. Schweber and Rebecca Anderson of their need for instructional accommodations by the end of the third week of the semester, or as soon as possible after a disability has been incurred or recognized. We will work either directly with the student [you] or in coordination with the McBurney Center to identify and provide reasonable instructional accommodations. Disability information, including instructional accommodations as part of a student's educational record, is confidential and protected under FERPA

DIVERSITY & INCLUSION

The UW has adopted the following institutional statement on the subject of diversity: “Diversity is a source of strength, creativity, and innovation for UW-Madison. We value the contributions of each person and respect the profound ways their identity, culture, background, experience, status, abilities, and opinion enrich the university community. We commit ourselves to the pursuit of excellence in teaching, research, outreach, and diversity as inextricably linked goals. The University of Wisconsin-Madison fulfills its public mission by creating a welcoming and inclusive community for people from every background – people who as students, faculty, and staff serve Wisconsin and the world.”

Jan. 24 What is a “constitution”? Large “C” and small “c” constitutionalism (all Readings on Canvas)

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* excerpts

Eskridge, “America’s Statutory Constitution”

Walther, “The Neglected Importance of America’s small-c constitution”, *The Week*

Jan. 31 American Constitutionalism, part 1

Gordon S. Wood, “The American Science of Politics” (canvas)

Johnathan Gienapp, “Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism,” *Journal of the Early Republic* 35 (2015): 375-418 (canvas)

Kay, “American Constitutionalism” (in Alexander, ed. *Constitutionalism*)

Ackerman, *We The People* vol. II, ch.s 3, 9-11 (canvas)

Corwin, “Higher Law” (canvas)

Feb. 7 Judicial Review and its Discontents

Eisgruber, *Constitutional Self-Government* ch.s 2, 3, 6 (canvas)

Waldron, “The Core of the Case Against Judicial Review” (canvas)

Ely, *Democracy and Distrust* (whole book)

Feb. 14 Judicial Review: Other versions

Schor, “Constitutional Dialogue and judicial supremacy” *Comparative Constitutional Theory*, ch. 5

Perez, “Judicial Dialogue and Fundamental Rights in the European Union” *CCT* ch. 6

King, “Social Rights in Comparative Constitutional Theory” *CCT* ch. 8

Weinrib, “Human Dignity and its Critics” *CCT* ch. 9

Jacobsohn, *The Wheel of Law* chapt.s 4, 6, 7 (canvas)

Feb. 21 Precommitment and the Countermajoritarian Difficulty

Jeremy Waldron, *Law and Disagreement*, ch.s 12 and 13 (canvas)

Robertson, *The Counter-Majoritarian Thesis* *CCT* ch. 10

Michelman (in Alexander, *Constitutionalism*),

Rubinfeld (in Alexander, *Constitutionalism*)

Rubinfeld, *Passion and Constraint* ch.s 5-7 (canvas)

Feb. 27 Constituent Power and “the people”

Tushnet, “Amendment Theory and Constituent Power” *CCT* 15

Roznai, “We the people,” “oui, the people” and the collective body: perceptions of constituent power” *CCT*

Jason Frank, "Unauthorized Propositions": The Federalist Papers and Constituent Power *Diacritics*, 37 (2007): pp. 103-120 (canvas)

Srinivasan, “The Theory of the Constituent Assembly” *The Indian Journal of Political Science* 1 (1940): 376-392 (canvas)

March 6 Methods of Interpretation and Construction

Rakove, “The Perils of Originalism” (canvas)

Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries” (Alexander, *Constitutionalism*)

Harris, *The Interpretable Constitution* ch. 1 (canvas)

March 13 Interpretation and Construction, cont.

Jacobsohn, “Anchoring and Sailing: contrasting imperatives of Constitutional Revolution” *CCT* ch. 17

Comella, “Beyond the Principle of Proportionality” *CCT* ch. 12

Goldsworthy, *Interpreting Constitutions* ch. 3 (Australia), ch. 6 (South Africa) (canvas)

Klug, “Reception, context and identity: a theory of cross-national jurisprudence” *CCT* ch. 14

March 27 Sham Constitutionalism? The Case of China

Law and Versteeg, “Sham Constitutions” (canvas)

Qianfan Zhang, “A constitution without constitutionalism? The paths of constitutional development in China” *International Journal of Constitutional Law*, Volume 8, Issue 4, October 2010, Pages 950–976 (canvas)

Han Zhai, “A reforming constitution never fails?: the latest evolution of China's 1982 constitutional order in the 'New Era'”, *Constitutional Studies* 6 (canvas)

April 3 Constitutional Endurance and Constitutional Failure

Ginsburg, Ver Steeg, Huq, “The Coming Demise of Liberal Constitutionalism?” *Univ. Chi. L. Rev.* 85 (2018) (canvas)

Josh Chafetz and David E. Pozen, “How Constitutional Norms Break Down”, *65 UCLA Law Review* 1430 (2018) (canvas)

András Jakab, What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law” *Constitutional Studies* 6 (canvas)

Elkins et. al., *The Endurance of National Constitutions* (excerpts to be announced and posted on canvas)

April 10 Specifics: Sample Cases

Readings TBD

April 17 Japanese Constitutionalism

Readings TBD

April 24 American Constitutionalism part 2

Tushnet, *Taking the Constitution Away From the Courts*

Seidman, *On Constitutional Disobedience*

May 1 Student paper topic presentations