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
- 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


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

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

Robertson, The Counter-Majoritarian Thesis CCT ch. 10

Michelman (in Alexander, Constitutionalism),

Rubenfeld (in Alexander, Constitutionalism)
Rubenfeld, *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)


**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)

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**


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