

POL 192b: Constitutional Theory and Design

Spring 2014

Olin-Sang 212

M, W 3:30 – 4:40PM

Professor Jeffrey Lenowitz

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Olin-Sang 206

Office Hours: Thursdays, 2:00-4:30

Course Description:

Constitutions are in the news. Politicians criticize each other for violating constitutions daily. Conventions and assemblies around the world are trying to make new ones. Citizens take to the streets to demand the revision or replacement of unwanted constitutions. And recently Google launched a digital archive of them. But what exactly is a constitution? Why should it matter if someone violates one? What purpose do constitutions even serve? This course, which lies at the intersection of political theory, law, and institutional design, focuses on such questions. Specifically, the course divides into three parts. First, we will look at the history, theory, and function of constitutions. Second, we will examine the procedures used to create new constitutions and the effects that these procedures might have. And third, we will investigate the amendment, enforcement, and interpretation of constitutions.

Prerequisites:

This seminar is designed for advanced undergraduates and graduate students. The readings are challenging and numerous, the subject matter complex, and students will engage with ideas and arguments drawn from the history of political thought, political philosophy, constitutional law, American politics, rational choice theory, and contemporary political theory. As such, students should have a foundation in political theory, political science, or constitutional law, meaning that they have taken two courses in these areas. Students who do not have this base but still wish to take the course may email me and we can discuss the possibility of an exception.

Requirements and Grading:

Students are expected to complete all assigned readings in accordance with the class schedule and to be prepared to discuss them in depth. This course combines lectures with vigorous discussion, neither of which will be useful unless all material is read ahead of time. Attendance is mandatory unless accompanied by a legitimate explanation.

Undergraduate Students:

- Seminar Participation, 15%
- Mid-term take home exam, 20%

- In-class Presentation, 15%
- Two papers (8-10 pages), 50%

Graduate Students:

- Seminar Participation, 30%
- Term paper (20-25 pages), 70%

**Please note that if you are a student with a documented disability on record at Brandeis University and wish to have a reasonable accommodation made for you in this class, please see me immediately.

Academic Integrity:

All students are expected to be familiar with and to follow the University's policies on academic integrity (see <http://www.brandeis.edu/studentlife/sdc/ai>). Faculty may refer any suspected instances of alleged dishonesty to the Office of Student Development and Conduct. Instances of academic dishonesty may result in sanctions including but not limited to, failing grades being issued, educational programs, and other consequences.

Technology Policy:

Keep all phones out of sight for the entirety of class. Computers and tablets can be used to take notes, but I will dock participation grades substantially if I see you using it for something other than taking notes.

Class Schedule:

Monday, January 13: Introduction to the Course

Part I – The History, Function, and Theory of Constitutions

Wednesday, January 15: Some overview

- Castiglione, Dario. "The Political Theory of the Constitution." *Political Studies* (1996), XLIV. 417-435

Wednesday, January 22: Ancient Political Thought

- Aristotle. "The Constitution of Athens." In *The Politics and the Constitution of Athens*. Edited by Stephen Everson. Cambridge: Cambridge University Press, 1996. 209-264
- Aristotle. *Politics*. Translated by C.D.C. Reeve. Indianapolis: Hackett Publishing Company, 1998. III 6-11; IV 1-12.

Monday, January 27: Modern Political Thought

- "Statement of Berkshire Country Representatives, November 17, 1778." In *The Popular Sources of Authority: Documents on the Massachusetts Constitution of 1780*. Edited by Oscar and Mary Handlin. Cambridge: Harvard University Press, 1996. 374 – 379
- Sieyes, Emmanuel Joseph. "What is the Third Estate?" In *Sieyes: Political Writings*. Edited by Michael Sonenscher. Cambridge: Cambridge University Press, 2003. 93-105, 127-144, 151-154.
- Madison, James. *Federalist No. 53*.

Wednesday, January 29: Modern Political Thought

- Schmitt, Carl. *Constitutional Theory*. Translated and edited by Jeffrey Seitzer. Durham, NC: Duke University Press, 2008. 75-82, 125-139
- Kelsen, Hans. *General Theory of Law & State*. London: Transaction Publishers, 2006. 110-134, 153–163, 258-269.

Monday, February 3: Constitution as Contract

- Brennan, Geoffrey and James M. Buchanan. *The Reasons of Rules: Constitutional Political Economy*. Indianapolis, IN: Liberty Fund, 2000. Chapter 2

Wednesday, February 5: Constitution as Contract

- Heckathorn, Douglas and Steven Maser. "Bargaining and Constitutional Contract." *American Journal of Political Science* 31 (1987), 142-168.
- Levy, Jacob. "Not so Novus an Ordo: Constitutions without Social Contracts." *Political Theory* 37, 2 (2009).

Monday, Feb 10: Constitutions as Equilibrium

- Hardin, Russel. "Why a Constitution?" In *The Federalist Papers and the New Institutionalism*, edited by Bernard Grofman and Donald Wittman, 100-120. New York, Agathon Press, 1989.

Wednesday, Feb 12: Constitution as Precommitment Devices

- Holmes, Stephen. "Precommitment and the Paradox of Democracy." In Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy*. Cambridge: Cambridge University Press, 1988. 195-241.

Monday, Feb 24: Constitutions as Precommitment Devices

- Elster, Jon. "Don't Burn Your Bridge before You Come to It: Some Ambiguities and Complexities of Precommitment." *Texas Law Review* 81 (2003):1751
- **First undergraduate paper due**

Wednesday, Feb 26: Constitutions as Precommitment Devices

- Ferejohn, John and Lawrence Sager. "Commitment and Constitutionalism." *Texas Law Review* 81 (2003): 1929

Part II – Constitution-Making

Monday, March 3: Who can create a constitution? Constituent power

- Preuss, Ulrich. "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution." In *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, edited by Michel Rosenfeld, 57-84. Durham: Duke University press, 1994.
- Arato, Andrew. "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe." In *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, edited by Michel Rosenfeld, 57-84. Durham: Duke University press, 1994.

Wednesday, March 5: Who can create a constitution? Constituent power

- Hart, Vivien. "Constitution Making and the Right to Take Part in a Public Affair." In *Framing the State in Times of Transition: Case Studies in Constitution Making*, edited by Laurel E. Miller, 20-54. Washington, D.C.: United States Institute of Peace Press, 2010.
- Tushnet, Mark. *Constitution-Making: An Introduction*. *Texas Law Review* 91 (2013): 1983 - 2013

Monday, March 10: Constitution-Making Processes

- Elster, Jon. "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Review* 45 (1995): 364-396.
- **Midterm Due**

Wednesday, March 12: Constitution-Making Processes

- Horowitz, Donald. "Constitutional Design: Proposals versus Processes." In *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, edited by Andrew Reynolds, 267-278. Oxford: Oxford University Press, 2002.
- Yash Ghai and Guido Galli. "Constitution Building Processes and Democratization." Stockholm, International Institute for Democracy and Electoral Assistance, 2006.

Monday, March 17: Constitution-Making in America

- Rakove, Jack N. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: A.A. Knopf. 1996, Chapters 2, 4, 5, 10

Wednesday, March 19: Constitution-Making in America

- Elster, Jon. "Constitutional Bootstrapping in Philadelphia and Paris." In *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, edited by Michel Rosenfeld, 57-84. Durham: Duke University press, 1994.
- Ackerman. *We the People: Transformations*. P. 32-68

Monday, March 24: Constitution-making Around the World

- Ebrahim, Hassen and Laurel Miller. "Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid." In *Framing the State in Times of Transition: Case Studies in Constitution Making*, edited by Laurel E. Miller, 111-157. Washington, D.C.: United States Institute of Peace Press, 2010.

Wednesday, March 26: Constitution-making Around the World

- Nicholas Wahl. "The French Constitution of 1958: II. The Initial Draft and its Origins." *American Political Science Review*. Vol. 53, No. 2 (1959).
- Widner, Jennifer. "Constitution Writing in Post Conflict Settings: An Overview." *William and Mary Law Review* 49 (2007)

Part III – Amendment, Enforcement, Interpretation

Monday, March 31: Enforcement and Judicial Review 1

- Knight, Jack. "Institutionalizing Constitutional Interpretation." In *Constitutional Culture and Democratic Rule*, edited by John Ferejohn, Jack N. Rakove, and Jonathan Riley, 361-392. Cambridge University Press, 2001.

- Ferejohn, John and Pasquale Pasquino, "Constitutional Adjudication: Some Lessons from Europe." *Texas Law Review* 83 (2004).

Wednesday, April 2: Enforcement and Judicial Review 2

- Waldron, Jeremy. "The Core of the Case Against Judicial Review." *Yale Law Journal*, 115 (2006).

Monday, April 7: Amending & Entrenchment 1

- Levinson, Sanford. "How many times has the United States Constitution been amended?" In *Responding to Imperfection*, edited by Sanford Levinson, 13-36. Princeton University Press, 1995.
- Lutz, Donald. "Towards a Theory of Constitutional Amendment." In *Responding to Imperfection*, edited by Sanford Levinson, 237-274. Princeton University Press, 1995.

Wednesday, April 9: Amending & Entrenchment 2

- Schwartzberg, Melissa. *Democracy and Legal Change*. Cambridge: Cambridge University Press, 2007. Chapters 1, 2, and 6.

Monday, April 14: Interpretation 1

- Marmor, Andrew. Interpretation and Legal Theory. Second Edition. Oxford: Hart Publishing, 2005. 1-44, 144-170
- Dworkin, Ronald. "The Moral Reading of the Constitution." *New York Review of Books*. March 21, 1996

Wednesday, April 23: Interpretation 2

- Kay, Richard S. "American Constitutionalism." In *Constitutionalism: Philosophical Foundations*. Edited by Larry Alexander. Cambridge: Cambridge University Press, 1998. 16-63
- Raz, Joseph. "On the Authority and Interpretation of Constitutions: Some Preliminaries." In *Constitutionalism: Philosophical Foundations*. Edited by Larry Alexander. Cambridge: Cambridge University Press. 152-193.

Monday, April 28: Conclusion.

- **Graduate paper due.**
- **Undergraduate second paper due.**