

## **The Constitutional Imagination: Between Power and Constraint**

GOVT 4240-03: Hopper UG Seminar in Govt

Nicholas Barden

nb786@georgetown.edu

Wednesday, 2–4:30 p.m.

Car Barn 306

Office Hours TBD

### **Course Overview**

What are constitutions? What problems did they emerge to solve, and why have they become such a permanent feature of our political world? The prevalence of written constitutions is a distinctly modern phenomenon, emerging alongside new ways of imagining popular sovereignty and democratic forms of government. Yet modern constitutions often hold a conflicted relationship with the democratic values they mean to express. Do they primarily serve to empower citizens or to constrain effective action? Do they provide forums for democratic deliberation and government or enshrine counter-majoritarian rule? Do they protect human rights or serve as useful tools for autocrats? Are they bulwarks against tyranny or ineffective paper restraints? Are our current constitutional orders well-equipped to help us navigate the crises and upheavals of contemporary political life, or must they adapt to confront the unique challenges that face us today?

This course will engage with these questions by returning to a set of foundational concepts and problems that have informed constitutional theorists throughout the modern period (c. 1500 to the present). As our contemporary institutions face sustained attacks on democratic governance and the rule of law, re-engaging with the fundamental purposes of constitutional order is vital for navigating an increasingly fractious and crisis-laden political climate. During the semester, students will have the opportunity to grapple with both classic and contemporary texts concerning constituent power, popular sovereignty, the separation of powers, rights frameworks, the “tyranny of the majority,” the “counter-majoritarian difficulty,” crisis and emergency, and the politics of countervailing interests.

Our first unit will provide a historical exploration of the constitutional tradition from the Renaissance to the French Revolution. Our second unit will provide a sustained engagement with the American constitutional tradition in a comparative perspective, aimed at interrogating self-interest and rights-based frameworks for constitutional design. Our final unit will examine a series of contemporary controversies facing modern constitutional thought, especially concerning judicial review, constitutional fidelity, and climate crisis.

#### *1) Course Focus*

This course introduces students to the historical and conceptual foundations of the modern constitutionalist tradition, an approach to government characterized by a commitment to fundamental law, limitations on state power, and the regulative function of counterbalancing institutions. The course is designed primarily for

students interested in pre-law, American government, or political theory, especially constitutional theory, state theory, or American political thought. It is divided into three major units.

The first unit, **imaginaries of power**, seeks to provide students with the historical and conceptual resources needed to situate the controversies explored throughout the rest of the class. Through a series of weeks that pair classic texts with contemporary scholarship, students will be encouraged to reflect on the relationship between institutional design and moral psychology while developing the conceptual framework needed to evaluate the claims made by the authors explored in the later two units. Upon completing this unit, students will be familiar with the paradox of constitutionalism; the sovereignty-government distinction; absolutism and its critics; constituent power; the separation of powers; and the relationship between constitutionalism and moral psychology.

The second unit, **constitutional architectures**, will provide an exploration of American constitutional order in historical perspective while encouraging students to bring decolonial (*e.g.* Dahl), Indigenous (*e.g.* Yellowtail), and comparative (*e.g.* Gargarella) perspectives to classic texts. These weeks will pair primary source readings in American constitutional theory with contemporary reflections on the role of constitutional orders in structuring the politics of self-interest, ambition, and factionalism. Upon completing this unit, students will be familiar with central arguments concerning checks and balances; curbing ambition; the “tyranny of the majority” and “the counter-majoritarian difficulty”; and constitutional entrenchment.

The third unit, **contemporary challenges**, will work through a series of contemporary problems facing constitutional theorists in light of our earlier course discussions. Weeks will be structured by a series of contemporary readings on the topics of judicial review; fidelity, entrenchment, and the “dead hand problem”; and constitutional responses to crises or emergencies, especially climate change.

## *2) Significance of the Course*

In the past decade, constitutional governance has undergone a sustained assault. Far-right political movements have made substantial political gains, invoking the language of constitutional fidelity while placing democratic norms and institutions under stress. The 20s have so far been a decade of global emergency, with the COVID-19 pandemic and worsening effects of climate change prompting calls to reformulate our constitutional architectures in the face of recurring states of emergency and the threat of permanent crisis. In the United States, mismatches between the Electoral College and popular vote, paired with the long-term effects of lifetime Supreme Court appointments, have reignited debate concerning majority governance and minority rule. The next few decades promise to be an era of intense contestation over the nature and purpose of constitutional governance, requiring us to develop conceptual frameworks that can help us navigate this fraught political and ethical landscape.

In addition, each unit aims at a series of concrete pedagogical outcomes that equip students for further study or practice in law and politics. This course is also well-positioned to support students who wish to take advantage

of other courses on institutional design and constitutional systems, especially in the subfields of American government and comparative government.

### 3) *Major Themes*

The course is characterized by three interlocking themes, which resurface in each of our assigned readings. The first is the titular theme of *power and restraint*. In each of our readings, students will be encouraged to reflect on the role of fundamental law in creating the institutions and contexts that empower political actors to act responsibly while simultaneously imposing restraints on irresponsible use or abuse. A second, closely related theme, is the difference between constitutionalism as concerned with *the constitution of public authority vs. the regulation of public authority*. This distinction, introduced in our first reading by Daniel Lee, will recur as we revisit the “paradox of constitutionalism,” that is, the insight that “the people” by exercising their constituent power simultaneously limit the exercise of that power by binding themselves to conduct normal politics within the institutional contexts that they have established. Though each of our authors will naturally discuss both the constitutive and regulative functions of constitutions, students will be encouraged to reflect on how an overarching concern with one aim or another leads authors to differing views concerning the promises and challenges of constitutional rule. A third major theme is the relationship between *constitutionalism and democracy*, a richly contested subject in the scholarly literature. Students will be encouraged to assess the ways that constitutions establish contexts for democratic deliberation and self-rule while seeking to referee and impose outer limits on democratic activity, reflecting on the possibilities for constitutions to serve both as conduits for and barriers to democratic politics.

### 4) *Course Readings*

The first unit relies heavily on primary sources in the history of political thought. The second unit marks a shift in emphasis in the course, as primary sources anchor discussions developed in the secondary literature. The third unit focuses on contemporary topics and literature. All readings will be made available to students on Canvas. Most selected materials are available via Lauinger’s electronic resources, augmented by photocopies as needed. Students are not expected to purchase materials but may find Roberto Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press, 2022) worth acquiring.

### **Course Policies/Requirements**

This course is designated as a Department Seminar, which fulfills the college’s graduation requirement for an Integrated Writing course in the major. Department Seminars are advanced courses characterized by intensive reading and discussion, as well as a substantial independent research and writing project. This course fulfills these requirements through several scaffolded assignments that culminate in a 22–25 page end-of-term research paper. Specific requirements are included below.

*Attendance:* Attendance is required. Students are permitted one (1) unexcused absence. Additional unexcused absences will affect your participation grade. Excused absences should be approved in advance. In case of an emergency, the instructor may excuse an absence retroactively; please notify the instructor as soon as practicable.

*Readings/Discussion Thread:* Students are encouraged to annotate their readings, keep a reading journal, and arrive at class prepared to contribute to in-class discussion. Students will also be expected to contribute to a weekly discussion thread before class, where they may reflect on the week’s readings, pose questions, or engage with comments from their peers. Readings listed as “additional resources” are fully optional, and students may pursue them if/when they desire. To ensure that our conversations remain anchored in a set of common *loci*, we will not discuss optional texts during our in-class discussions.

*Presentation:* Each student will give a short (5–6 minute) presentation on one of our required weekly readings. The presentation should include a discussion of 1) who our author is, 2) a summary of the central argument of the reading, and 3) a reflection on the significance of the reading for our ongoing class discussion. Students may present based on notes, or choose to read a written reflection (1000–1200 words). The instructor will provide instructions for signing up during the first week of class.

*Analysis Paper:* Students will write a 3–4 page paper (double-spaced) analyzing one of our primary sources in light of the required secondary literature. Students should choose to write on readings from either week 3, 5, 7, or 8, but may not select a week in which they are giving a presentation.

*Research Paper:* Students will propose and write a 22 to 25-page (double-spaced) research paper on a topic related to the course material. Students are expected to submit a prospectus six weeks before the final paper is due, including a research question, hypothesis, and annotated bibliography of primary and secondary source materials. The paper will be due at the time assigned by the registrar for a final exam.

*Grading Breakdown:* Attendance/Participation: 30%; In-Class Presentation: 15%; Analysis Paper: 15%; Research Paper Prospectus: 10%; Final Research Paper: 30%.

#### *General Class Structure*

2:00–2:05: Hot Takes	3:21–3:30: Break
2:06–2:20: Presentations (if applicable)	3:31–4:15: Moderated Discussion
2:21–3:20: Moderated Discussion	4:15–4:30: Instructor Presentation

### **Course Policies & Resources**

*Charitable and Critical Dialogue.* Students are expected to conduct all class activities on the basis of mutual respect, understanding, and constructive critique. Although this course will approach our subject a degree removed from immediate political contexts, the discussion of politics is inherently controversial. Accurate and sympathetic reconstruction must always precede incisive critique. This course will support robust and charitable disagreement based on sympathetic construal and the presumption that our colleagues are acting in good faith. This presumption of good faith requires that we always *act* in good faith, especially when exploring topics that carry enormous consequences for us and for our colleagues.

*Academic Honesty and Integrity.* Students are expected to conduct themselves according to the highest standards of academic integrity and to follow the guidance of Georgetown’s honor code with regard to both written assignments and in-class behavior. Please familiarize yourself with the university’s honor system at: <https://honorcouncil.georgetown.edu/>. Faculty have the obligation to report academic misconduct to the Honor Council.

All work completed for the course must be your own; any engagement with another’s work must be properly attributed and cited. While the development of new AI technologies raises unique opportunities for classroom instruction, the assignments for this seminar seek to provide students the opportunity to cultivate their writing skills and authorial voice. Investing in hard research and writing skills at the undergraduate level will pay dividends at a future date. For this reason, the use of AI language models or other forms of machine learning for course assignments is prohibited and will be treated as an academic integrity violation.

A limited exception to the course’s AI policy may be approved if the student proposes a research project that would require or greatly benefit from the use of AI as a research tool (*e.g.* for text-as-data analysis, AI-assisted translations, *etc.*). In such a case, the student must receive a) explicit, b) written, and c) advance permission from the instructor, and d) their use of AI must be confined to the particular application authorized by the instructor.

*Keeping up in Class.* A certain amount of intrinsic motivation is necessary to keep pace in this class, but each of you will, at certain times, have personal issues arise, have difficulty navigating competing obligations, or generally feel overwhelmed. Many of you will feel an immense pressure to project an image of tranquility and competence during the term. Remember, you are not the only one; many of your peers feel the same way. If you find yourself falling behind, please reach out. There is no penalty for asking for help. Please don’t hesitate to take advantage of the institutional resources that Georgetown has to offer, such as [CAPS](#) for counseling and psychiatric services, the [ARC](#) for improving your study methods, the [Writing Center](#) for improving writing in general, or [Title IX Resources](#)

### Grading Scale

Before assigning a final letter grade for the course, grades will be rounded to the nearest tenth of a point (*e.g.*, a cumulative grade of 89.95 will result in a 90 or A-, while an 89.94 will result in an 89.9 or B+).

A	94 and above	C+	77–79.9
A-	90–93.9	C	74–76.9
B+	87–89.9	C-	70–73.9
B	84–86.9	D	60–69.9
B-	80–83.9	F	Below 60

## Introduction

### **Week 1 (8/28): Constituting and Regulating Public Authority**

Purdy, Jedediah. "What is the Constitution For?" *The New Republic*, January 19, 2016.

Waldron, Jeremy. "Constitutionalism: A Skeptical View," in *Political Political Theory*. Harvard University Press, 2016. 22–44.

Lee, Daniel. "Introduction: Popular Sovereignty, Constitutionalism, and the Civil Law," from *Popular Sovereignty in Early Modern Constitutional Thought*. Oxford University Press, 2016. 1–15.

#### *Optional Resources*

Bellamy, Richard and Jeff King. "On Constitutions and Constitutional Theory." *The Cambridge Handbook of Constitutional Theory*. Cambridge University Press, 2024. (forthcoming, accessed from SSRN).

## Unit 1: Imaginaries of Power

### **Week 2 (9/4): Reins, Bits, and Bridles: Taming the Prince**

Saarinen, Risto. Intro, "Ancient and Medieval Background," and "The Renaissance" in *Weakness of Will in Renaissance and Reformation Thought*. Oxford University Press, 2011. 1–27, 43–54, 78–83.

Reading Packet: Selections from the French Renaissance.

- Clichtove, Josse. *A Treatise on the Office of the King* [1520]. III–IV.
- Plutarch. "To an Uneducated Ruler."
- Calvin, Jean. *Seneca Commentary* and *Institutes of the Christian Religion*. Excerpts.

de Seyssel, Claude. *The Monarchy of France* [1517]. Yale University Press, 1981. I.1–12; II.1–7, 11. Appendix 2: Proem.

Lloyd, Howell. "Constitutionalism" in *The Cambridge History of Political Thought, 1450–1700*. Cambridge University Press, 2008. 254–279 (OPTIONAL: 280–297).

#### *Optional Resources*

Kingston, Rebecca. "A Brief Introduction to Plutarch and a Comparison of Cicero and Plutarch on Public Ethics" in *Plutarch's Prism: Classical Reception and Public Humanism in France and England, 1500–1800*. Cambridge University Press, 2022. 23–64, especially "Plutarch and Cicero," 48–64.

Keohane, Nannerl. "Claude de Seyssel and Sixteenth-Century Constitutionalism in France." *Nomos* 20 (1979): 47–83.

### **Week 3 (9/11): Sovereigns and Sovereignists: The Puzzle of Absolutism**

Bodin, Jean. “On Sovereignty” and “On the Kinds of State in General” in *The Six Books of the Republic* [1576], I.8, II.1.

Tierney, Brian. “‘The Prince is Not Bound by the Laws’: Accursius and the Origins of the Modern State,” *Comparative Studies in Society and History* 5:4 (1963): 378–400.

Hoekstra, Kinch. “Early Modern Absolutism and Constitutionalism.” *Cardozo Law Review* 34:3 (2013): 1079–1098.

Tuck, Richard. “Jean Bodin” in *The Sleeping Sovereign: The Invention of Modern Democracy*. Cambridge University Press, 2016. 1–62.

#### *Optional Resources*

Mortimer, Sarah. “Sovereignty and Reason of State” in *Reformation, Resistance, and Reason of State (1517–1625)*. Cambridge University Press, 2022. 178–183.

Salmon, J.H.M. “The Legacy of Jean Bodin: Absolutism, Populism, or Constitutionalism?” *History of Political Thought*, 17:4 (1996): 500–522.

Edelstein, Dan. “Rousseau, Bodin, and the Medieval Corporatist Origins of Popular Sovereignty.” *Political Theory* 50:1 (2022): 142–168.

Lee, Daniel. *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations*. Oxford University Press, 2021.

#### **Week 4 (9/18): Dividing and Delegating Power**

Harrington, James. *The Commonwealth of Oceana* [1656]. Cambridge University Press, 1992. 18–34.

Locke, John. *The Second Treatise* [1689], in *Two Treatises of Government...*, ed. Ian Shapiro. Yale University Press, 2003. I–III, VII–XIV, XVIII–XIX [100–109, 133–175, 188–209].

Lovett, Frank. “Harrington’s Empire of Law.” *Political Studies* 60 (2012): 59–75.

#### *Optional Resources*

de Jouvenel, Bertrand. “The Minotaur Presented,” “*Imperium* and Democracy,” “Totalitarianism and Democracy” and “Limited Power” in *On Power* [1945]. Liberty Fund, 1993. 3–18, 261–333.

Laslett, Peter. “The Social and Political Theory of ‘Two Treatises of Government’” in John Locke, *The Two Treatises of Government*. Cambridge University Press, 1988. 93–122.

Dunn, John. *The Political Thought of John Locke: A Historical Account of the Argument of the Two Treatises of Government*. Cambridge University Press, 1969. 87–200.

#### **Week 5 (9/25): The People: Self-Constituting and Self-Regulating? I**

Sieyès, Emmanuel-Joseph. *What is the Third Estate?* [1789] in *The Essential Political Writings*. Brill, 2014. Chs. 1–3, 5–6 [pgs. 43–67, 87–117].

Loughlin, Martin. "The Concept of Constituent Power." *European Journal of Political Thought* 13:2 (2014): 218–237.

Rubinelli, Lucia. Intro and "Sieyès and the French Revolution" in *Constituent Power: A History*. Cambridge University Press, 2020. 1–18, 33–74.

#### *Optional Resources*

Baczko, Bronisław. "The Social Contract of the French: Sieyès and Rousseau." *The Journal of Modern History*. 60. Supplement (1988): S98–S125.

Colón-Ríos, Joel. "Sieyès *via* Rousseau" in *Constituent Power and the Law*. Oxford University Press, 2020. 56–76.

## **Unit 2: Constitutional Architectures**

### **Week 6 (10/2): The People: Self-Constituting and Self-Regulating? II**

Jefferson, Thomas. *The Declaration of Independence*  
*The Constitution of the United States*

Derrida, Jacques. "Declarations of Independence." *New Political Science* 7:1 (1986): 7–15.

Dahl, Adam. "The Coloniality of Constituent Power" from *Empire of the People: Settler Colonialism and the Foundations of Modern Democratic Thought*. University of Kansas Press, 2018. 47–74.

Ewing, Connor. "Publius' Proleptic Constitutionalism." *American Political Science Review*. First View (2023): 1–14.

Griffin, Stephen. "Constituent Power and Constitutional Change in American Constitutionalism," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford University Press, 2008. 49–66.

#### *Optional Resources*

Armitage, David. *The Declaration of Independence: A Global History*. Harvard University Press, 2007.

### **Week 7 (10/9): Balancing Interests I**

Madison, James. *The Federalist*, nos. 10, 51.

de Tocqueville, Alexis. "Individualism Combated by the Doctrine of Self-Interest," *Democracy in America*. Harper Collins, 2006. II.2.8 [pgs. 525–528].

Hirschman, Albert. "How the Interests Were Called Upon to Counteract the Passions," in *The Passions and the Interests*. Princeton University Press, 1977. 9–56.

Bailyn, Bernard. "Power and Liberty: A Theory of Politics," in *The Ideological Origins of the American Revolution*. Harvard University Press, 1967. 55–93.



*Optional Resources*

Epstein, David. *The Political Theory of the Federalist*. University of Chicago Press, 1984.

**Week 8 (10/16): Balancing Interests II**

Madison, James. *The Federalist*, nos. 39, 57.

Gargarella, Roberto. “Democratic Dissonance,” “A Constitution Marked by a ‘Discomfort with Democracy,’” “Motivations and Institutions,” and “Checks and Balances,” in *The Law as a Conversation Among Equals*. Cambridge University Press, 2022. Chs 3–5, 9 [pgs. 32–81, 124–135].

**Week 9 (10/23): Barbarism, Civilization, and Nation-Making**

Guest speaker. Readings TBD.

**Week 10 (10/30): Minority Rights and Majority Rule**

Madison, James. Speech Introducing the Bill of Rights, June 8, 1789.

de Tocqueville, Alexis. “The Advantages of Democratic Government” and “The Omnipotence of the Majority,” in *Democracy in America*. I.2.6 [pgs. 231–235, 237–240]; I.2.7 [pgs. 246–253, 259–261].

Yellowtail, Robert. “An Address: In Defense of the Rights of the Crow Indians and the Indians Generally, before the Senate Committee of Indian Affairs.” *American Indian Magazine* 7:3 (September 9, 1919): 130–137.

Dworkin, Ronald. “Constitutionalism and Democracy,” *European Journal of Philosophy* 3:1 (1995): 2–11.

Blackhawk, Maggie. “The Constitution of American Colonialism,” *Harvard Law Review* 137:1 (2023): 1–152 (excerpts).

*Optional Resources*

Smith, Rogers. “Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America.” *American Political Science Review* 87:2 (1993): 549–566.

**Week 11 (11/6): Crisis and Exception**

Lincoln, Abraham. Proclamation 94 and Letter to Congress, July 4, 1861.

Article 48 of the Weimar Constitution [1919] & the Reichstag Fire Decree [1933].

Weber, Max. “The Reich President.” [1919] *Social Research* 53:1 (1986): 125–132

Schmitt, Carl. “Definition of Sovereignty” in *Political Theology* [1922]. University of Chicago, 2005. 5–15.

McCormick, John P. “The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*. Duke University Press, 1998. 217–251.

*Optional Resources*

Agamben, Giorgio. "The Paradox of Sovereignty" from *Homo Sacer: Sovereign Power and Bare Life*. Stanford University Press, 1998. 15–29.

**Unit 3: Contemporary Challenges****Week 12 (11/13): Judicial Review**

*Marbury v. Madison*, 5 U.S. 173, 176–180 (1803).

Bickel, Alexander M. "Establishment and General Justification of Judicial Review," in *The Least Dangerous Branch*. Yale University Press, 1962. 1–33.

Ely, John. "Policing the Process of Representation: The Court as Referee" in *Democracy and Distrust*. Harvard University Press, 1980. 73–104.

Waldron, Jeremy. "The Core of the Case Against Judicial Review," *The Yale Law Journal* 115:6 (2006): 1346–1406.

*Optional Resources*

Waldron, Jeremy. "Political Political Theory" in *Political Political Theory*. Harvard University Press, 2016.

**Week 13 (11/20): Fidelity and Futurity**

Basic Law for the Federal Republic of Germany. Articles 1, 20, 79, 146.

Hein, Michael. "Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism." *European Journal of Law Reform* 21:3 (2019): 226–242.

Grewal, David and Jedediah Purdy. "The Original Theory of Constitutionalism." *Yale Law Journal* 127:3 (2018): 664–705.

Klarman, Michael. "Antifidelity." *Southern California Law Review* 70:2 (1997): 381–416.

Gargarella, Roberto. "The Law as Conversation among Equals" in *The Law as a Conversation Among Equals*. Ch 2 [pgs. 16–31].

**Week 14 (12/4): Constitutions and Climate Crisis**

*Sierra Club v. Morton*, 405 U.S. 727, 741–752 (1972).

Mittiga, Ross. "Political Legitimacy, Authoritarianism, and Climate Change." *American Political Science Review* 116:3 (2022): 998–1011.

Purdy, Jedediah. "Introduction" and "What Kind of Democracy?" in *After Nature: A Politics for the Anthropocene*. Harvard University Press, 2015. 11–50, 256–288.

Latour, Bruno. "How to govern struggling (natural) territories" in *Facing Gaia*. Polity Press, 2017. 255–292.