

Course # | Principles of American Constitutionalism

Description

“We’re not a democracy.” | “Democracy isn’t the objective; liberty, peace, and prosperity [sic] are. We want the human condition to flourish. Rank democracy can thwart that.”

– U.S. Senator Mike Lee (R – UT), October 7 and 8, 2020.

The U.S. Constitution holds a sacred place in American political culture, so it is not surprising to see constitutional concepts like “the “rule of law,” “separation of powers,” or “judicial review” appear in popular political debates, but what do they really mean, where do they come from, and what do they justify? And do our actual institutions do a good job embodying them? This course offers a guided tour of the conceptual riches behind the buzzwords from high school government classes—because often those buzzwords are used (and abused) to justify real policies with real consequences. Take the above quote from Sen. Mike Lee—is he correct to claim that the U.S. is not a democracy? Assuming he wasn’t openly embracing authoritarianism, it appears Senator Lee was repeating the view that “we’re a republic, not a democracy.” What does this mean? Isn’t it also true that the U.S. is a “constitutional democracy”? Most importantly, what, if anything, turns on this distinction?

Assignments

- (1) *Two Response Essays*: The readings for each class are accompanied by two or three reflection questions. Sign up for two classes for which you will compose a 1000-word response paper to one question for that date. Papers are due by 11:59 PM one week after the class to which you are responding.
- (2) *Op Ed Critique*: Write a 700-1000-word essay appropriate for the op-ed or “guest essay” genre. The editorial should be a *response* to a real op-ed that invokes one or more of the principles of American constitutionalism covered in the course. What does the original op-ed writer get wrong about the principle they invoke and/or its political relevance? Essays are graded on their rhetorical force as well as their analytical rigor.
- (3) *Original Op Ed*: Write a 700-1000-word essay appropriate for the op-ed or “guest essay” genre. The editorial should address a contemporary political or policy controversy, and it should offer an analysis that draws on one of the principles of American constitutionalism studied so far. Use key features of the op-ed genre that we have discussed in class, including a strong opening, short and punchy paragraphing, an acknowledgment of alternative points of view, and a “should” statement near the end of your essay. Essays are graded on their rhetorical force as well as their analytical rigor.
- (4) *Final Exam*: A 24-hour take home exam in which you will be asked to evaluate a politician’s rhetorical invocation of a constitutional principle in a contemporary political debate. You will be asked to charitably interpret the politician’s use of the principle, as well as evaluate the persuasiveness of its use in this case. (1000 – 1500 words.)

Course Schedule

Constitutionalism

- 01.
- The U.S. Constitution
 - *Federalist* No. 1
 - Waldron, Jeremy. “Constitutionalism: A Skeptical View,” in *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016.
 - Griffin, Stephen M. 1996. *American Constitutionalism: From Theory to Politics*. Princeton, NJ: Princeton University Press. Chapters 1 and 2.

The Rule of Law

- 02.
- Scalia, Antonin. 1989. “The Rule of Law as a Law of Rules.” *The University of Chicago Law Review* 56 (4): 1175–88.
 - Schauer, Frederick. 1991. “Rules and the Rule of Law.” *Public Policy* 14 (3): 645–651.

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- Tyler, Tom R. 2007. “Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority.” *DePaul Law Review* 56: 661–94.
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Separation of Powers

- 03.
 - John Locke, *Second Treatise*, §§143, 144, 150, 159.
 - Montesquieu, *The Spirit of the Laws*, Book 11, Chapters 1 – 6.
 - *Federalist* No. 47, 48, 51, 71.
 - Waldron, Jeremy. “Separation of Powers and the Rule of Law” and “Bicameralism and Separation of Powers” in *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016.
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The Legislative Power, the Filibuster, and Unorthodox Lawmaking

- 04.
 - Binder, Sarah A., and Steven S. Smith. *Politics or Principle? Filibustering in the United States Senate*. Washington, DC: Brookings Institution, 1997. [Ch. 1, pp. 1 – 26.]
 - Sinclair, Barbara. *Unorthodox: Lawmaking: New Legislative Processes in the U.S. Congress*. 3rd ed. Washington, DC: CQ Press, 2007. [Ch. 13, pp. 268 – 288.]
 - Waldron, Jeremy. “Representative Lawmaking” and “Principles of Legislation” in *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016.
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Presidential Power

- 05.
 - John Locke, *Second Treatise*, Chapter 14
 - *Federalist* No. 67 – 77
 - *Cato* No. 4
 - Kleinerman, Benjamin A. 2007. “Can the Prince Really Be Tamed?” *American Political Science Review* 101 (2): 209–22.
 - Neustadt, Richard E. 1991. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York, NY: Free Press. Chapters 1 and 3.
 - Rudalevige, Andrew. 2010. “The Presidency and Unilateral Power.” In *The Presidency and the Political System*, ed. Michael Nelson. Washington, DC: CQ Press.
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Judicial Review

- 06.
 - *Federalist* No. 78, 79, 84.
 - *Brutus* No. 2, 15.
 - *Marbury v. Madison*.
 - Bailey, Michael A., and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press. Chapters 1, 3, 4, and 6.
 - Waldron, Jeremy. “The Core of the Case Against Judicial Review,” in *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016.
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Federalism & States’ Rights

- 07.
 - Montesquieu, *The Spirit of the Laws*, Book 8, Chapters 16, 17, 19, 20; Book 9, Chapters 1 – 3.
 - James Madison to George Washington, 16 Apr. 1787.
 - *Federalist* No. 9, 10, 39, 45, 46.
 - *Brutus* No. 1.
 - Kelly, Nathan J., and Christopher Witko. 2012. “Federalism and American Inequality.” *The Journal of Politics* 74 (2): 414–26.
 - Plotica, Luke Philip. 2017. “Federalism, Devolution, and Liberty.” *American Political Thought* 6 (1): 106–33.
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Political Parties

- 08.
 - *Federalist* No. 10 (review)
 - George Washington’s Farewell Address
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- Bawn, Kathleen, Martin Cohen, David Karol, Seth Masket, Hans Noel, and John Zaller. 2012. “A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics.” *Perspectives on Politics* 10 (3): 571–97.
 - Muirhead, Russell. 2014. *The Promise of Party in a Polarized Age*. Cambridge, MA: Harvard University Press. Chapters 1, 4, and 5.
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The Administrative State

- 09.
- Lewis, David, and Terry M. Moe. 2010. “The Presidency and the Bureaucracy,” in *The Presidency and the Political System*, ed. Michael Nelson. Washington, DC: CQ Press.
 - Vermeule, Adrian. 2015. “The Administrative State: Law, Democracy, and Knowledge.” In *The Oxford Handbook of the U.S. Constitution*, edited by Mark Tushnet, Mark A. Graber, and Sanford Levinson. Oxford University Press.
 - Emerson, Blake. 2021. “Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory.” *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3779457>.
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“Democracy” or “Republic”?

- 10.
- Edmund Burke, “Speech to the Electors of Bristol,” 3 Nov. 1774
 - *Federalist* No. 52 – 58, 62.
 - *Brutus* No. 1 (review)
 - Amar, Akhil Reed. 1994. “The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem.” *University of Colorado Law Review* 65 (4): 749–86.
 - Achen, Christopher H., and Larry M. Bartels. 2016. *Democracy for Realists*. Princeton, NJ: Princeton University Press. Chapters 1 – 3.
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Representation, Accountability & Impeachment

- 11.
- Gilens, Martin. 2009. “Preference Gaps and Inequality in Representation.” *PS: Political Science & Politics* 42 (2): 335–41.
 - Waldron, Jeremy. “Accountability and Insolence,” in *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016.
 - Sunstein, Cass R. 2017. *Impeachment: A Citizen’s Guide*. Cambridge, MA: Harvard University Press. (Selections.)
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The Electoral System

- 12.
- *Federalist* No. 59 – 61.
 - *Cato* No. 7
 - Hardin, Russell. 1990. “Public Choice Versus Democracy.” *Nomos* 32: 184–203.
 - Tolbert, Caroline J., and Daria Kuznetsova. 2021. “The Promise and Peril of Ranked Choice Voting.” *Politics and Governance* 9 (2): 265–70.
 - Edwards, George. 2010. “The Faulty Premises of the Electoral College,” in *The Presidency and the Political System*, ed. Michael Nelson. Washington, DC: CQ Press.
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Campaigns and Voting

- 13.
- Beerbohm, Eric. 2016. “The Ethics of Electioneering: Ethics of Electioneering.” *Journal of Political Philosophy* 24 (4): 381–405.
 - Thompson, Dennis F. 2002. ““Electoral Justice” in *Just Elections: Creating a Fair Electoral Process in the United States*. Chicago, IL: University of Chicago Press.
 - Lomasky, Loren E., and Geoffrey Brennan. 2000. “Is There a Duty to Vote?” *Social Philosophy and Policy* 17 (1): 62–86.
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The Loyal Opposition

- 14.
- Gerken, Heather. 2014. “The Loyal Opposition.” *The Yale Law Journal* 123 (6): 1958–94.
 - Tushnet, Mark V. 2004. “Constitutional Hardball.” *John Marshall Law Review* 37: 523–54.
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- Waldron, Jeremy. “The Principle of Loyal Opposition,” in *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016.
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15. **REVIEW**
