

Constitutionalism Before the Constitution

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Fall 2024, Wednesday 2-5pm, Wheeler 104
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This seminar will focus on reading and discussing component ideas of constitutionalism via a consideration of some important texts of the past. We will consider some of the forerunners of the conception of a constitution, and early articulations of some of the ideas that we associate with a constitution, including the balance of powers and a framework of government, basic rights, and fundamental law. Even with a focus restricted to texts in the Western European tradition, the temporal span of nearly 2200 years is such that we will not be able to do a thorough contextual or even textual analysis of each author or moment, and we will have to skip many important periods, places, and thinkers. Some of the texts were influential for American constitutional thinking, but I have chosen readings that should encourage reflection about how theorists of the past thought about some of these ideas differently, and not just about how past ideas may have helped to shape modern ones.

The purpose of this course is to read some intelligent and intriguing texts about these topics and to think about them together. It is not a forum for subjecting you to my pet ideas about constitutionalism. We will essentially come together for each session to have an open discussion of what we have read. *For the seminar to work, you have to do the reading and come prepared with some thoughts about what you wish to discuss.*

The focus of our discussions will be on the primary texts, in bold typeface below. Reading mentioned in square brackets is *not* required.

Please be courteous to others if you use computers or other electronic devices during the seminar. In particular, please be aware that some of us are distracted by almost anything on the screen that isn't just an electronic copy of the text. Social media, email or text use, and moving images seem particularly bad for concentration.

I encourage you to purchase published copies of works below, many of which are cheaply available. In case of electronically available copies, some of you will find that you read more actively if you print out copies rather than reading them on the screen, but I leave that to your judgment.

Please note that the syllabus may be altered somewhat as we go, depending on student interest and further consideration.

Requirements:

- Careful reading and thoughtful participation in discussion
- Five reading comments of up to two paragraphs, to be submitted to me via email by 9 am on the day of the class in which we will discuss that reading (with subject line that says only: Constitutionalism reading comment, yourlastname)
- Two papers of up to 2000 words. Please put the word count on each paper next to your name when you submit it.

Grading: First paper, 30%; second paper, 40%; reading comments, 10%; participation, 20%.

1) Aug. 28:

- ‘The Old Oligarch’ [ps.-Xenophon], *Constitution of the Athenians (Athēnaiōn Politeia)* (J. L. Marr and P. J. Rhodes, trans. (Aris & Phillips, 2008), pp. 37-57)

[You may find it helpful to read the provided introduction by Marr and Rhodes.]

2) Sep. 4:

- **Plato, *Republic (Politeia)*, 543a-580c** (trans. G. M. A. Grube, rev. Reeve)

[Plato, *Statesman (Politikos)* 291d-303c (trans. C. J. Rowe); Plato, *Laws (Nomoi)* 683a-685a, 690e-702e, 711c-715d, 751a-758e, 769a-772d (trans. Trevor J. Saunders). These translations are available in other forms, but available together in Plato, *Complete Works*, ed. John M. Cooper (Hackett, 1997): pp. 1155-88; 335-48; 1372-4, 1380-91, 1398-1402, 1428-34, 1443-6. There are other good translations – check with me if you wish.]

[For discussion, see Malcolm Schofield, *Plato: Political Philosophy* (OUP, 2006), esp. ch. 1. Melissa Lane’s *The Birth of Politics* (Princeton, 2014) is a good introduction to ancient political thought; in particular, see ch. 2, “Constitution.” For an enumeration of some relevant features of contemporary political arrangements, see Pierre Fröhlich, “Governmental Checks and Balances,” chapter 17 of *A Companion to Ancient Greek Government*, ed. Hans Beck (Wiley-Blackwell, 2013), pp. 252-66. David E. Hahm, “The Mixed Constitution in Greek Thought,” ch. 12 of *A Companion to Greek and Roman Political Thought* (Wiley-Blackwell, 2009), pp. 178-98, provides a synoptic account through Polybius.]

3) Sep. 11:

-**Aristotle, *Politics (Politika)*, Book III, chs. 1-13; Book IV, chs. 1-11, 14-16** (C. D. C. Reeve, trans. (Hackett, 2017: ‘A New Translation’).)

[A good introductory text for Aristotle is R. G. Mulgan's *Aristotle's Political Theory* (Oxford: Clarendon Press, 1977); see in particular chs. 4 and 6.]

4) Sep. 18:

- **Polybius, Book VI** (Robin Waterfield, trans. (OUP, 2010))

[For institutional context, see Andrew Lintott, *The Constitution of the Roman Republic* (OUP, 1999). For an account of the Roman republic closely related to what we'll read from Polybius, see Cicero, *De re publica* (a helpful edition is that by James E. G. Zetzel, *On the Commonwealth* (CUP, 1999)), esp. Books I and II. For a detailed commentary, see F. W. Walbank, *A Historical Commentary on Polybius* (Oxford, 1957-1979).]

5) Sep. 25:

- **Dante Alighieri, *Monarchy* (*Monarchia*)**, (Prue Shaw, trans. (CUP, 1996), pp. 3-94)

[See Shaw's prefatory materials for an outline of Dante's argument. For a summary of intellectual movements surrounding Dante and Marsilius, see J. H. Burns, *The Cambridge History of Medieval Political Thought, c. 350-c. 1450* (CUP, 1988), esp. ch. 15 (pp. 424-76) on law by Pennington (1150-1300) and Canning (1300-1450), and ch. 16 (pp. 477-519) on government by Dunbabin.]

6) Oct. 2:

- **Marsilius of Padua, *The Defender of the Peace* (*Defensor pacis*), Discourse I, chapters 10-15, 17-18** (Annabel Brett, trans. (CUP, 2005), pp. 51-97, 114-126)

[See recommended readings for Feb. 18, plus e.g. Brian Tierney, "Marsilius on Rights," *Journal of the History of Ideas* 52 (1991).]

7) Oct. 9:

- **Niccolò Machiavelli, *Discourses on Livy*, Book I: Preface and chs. 1-12, 18, 34-5, 40, 58; Book III: chs. 1, 3, 9** (Harvey C. Mansfield and Nathan Tarcov, trans. (U of Chicago Press, 1996), pp. 5-39, 49-52, 73-7, 85-9, 115-19; 209-12, 214-15, 239-41)

[For context, see the first two parts of *Machiavelli and Republicanism*, ed. Gisela Bock, Quentin Skinner, and Maurizio Viroli (CUP, 1990).]

8) Oct. 16:

- **Johannes Althusius, *Politica***, tr. Frederick S. Carney: 1603 Preface, I, IX, XVIII-XX, XXXIX) (pp. 3-9, 17-26, 66-78, 92-134, 201-8). Various formats available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=692&Itemid=99999999

[See e.g. Lee, *Popular Sovereignty*, ch. 7.]

***First paper deadline: Friday, October 18, 6 pm.**

9) Oct. 23:

- **Thomas Smith, *De republica anglorum*** (1583; first drafted c. 1565): Book I chs. 1-10, II chs. 1-4. Available at <https://constitution.org/1-History/eng/repang.htm>.

An edition is also available via <https://lawcat.berkeley.edu/record/1170661?ln=en>.

- **The Petition of Right** (1628): http://en.wikisource.org/wiki/Petition_of_Right

- **Charles I, Answer to the XIX Propositions** (1642): Joyce Lee Malcolm, ed., *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts*, vol. I, pp. 145-78, at http://files.libertyfund.org/files/810/0086-01_LFeBk.pdf (including also the Parliament's XIX Propositions)

10) Oct. 30:

- **Anon., *Touching the Fundamentall Lawes, Or Politique Constitution of this Kingdome*** (1642): Malcolm, ed., vol. I, pp. 161-79, at http://files.libertyfund.org/files/810/0086-01_LFeBk.pdf

- **Anon., *The Peoples Right Briefly Asserted*** (1649): Malcolm, ed., vol. I, pp. 359-68, at http://files.libertyfund.org/files/810/0086-01_LFeBk.pdf

[- Philip Hunton, *A Treatise of Monarchie* (1643): an apt and ample selection here: <http://www.arts.yorku.ca/politics/commnel/courses/3025pdf/Treatise.pdf>]

11) Nov. 6:

- **Thomas Hobbes, *De cive*** (1642 and 1647): chs. 1, 5-7, 10, [12-14]. = Richard Tuck and Michael Silverthorne, eds., *On the Citizen*, pp. 21-31, 69-101, 115-26, [131-67].

[- Robert Filmer, *The Anarchy of a Limited or Mixed Monarchy*, 1648]

[- K. Hoekstra, "Early modern absolutism and constitutionalism," *Cardozo Law Review* 34:3 (2013), pp. 1079-98, at <http://www.cardozolawreview.com/content/34-3/HOEKSTRA.34.3.pdf>]

12) Nov. 13:

- **James Harrington, *The Commonwealth of Oceana*** (1656): "The [First] Preliminarys," at

http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=916&chapter=75595&layout=html&Itemid=27

- **Harrington, *The Art of Lawgiving*** (1659): The First Book (http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=916&chapter=75661&layout=html&Itemid=27) and the Preface to the Third Book (http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=916&chapter=75688&layout=html&Itemid=27)

There are various print editions, e.g. John Pocock's *Oceana* for Cambridge University Press, or the selections (close enough to those we're reading) of *The Art of Lawgiving* in David Wootton, ed., *Divine Right and Democracy*.

13) Nov. 20:

- **Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *The Spirit of the Laws*** (1748): Books 1-4, Book 5 chs. 1-7, Book 8 chs. 1-4, Book 11, [Book 12] (Anne Cohler, Basia Miller, Harold Stone, eds. (Cambridge, 1989), pp. 3-51, 112-15, 154-86, [187-212])

[See e.g. Jacob Levy, "Montesquieu's Constitutional Legacies," in Rebecca Kingston, ed., *Modernity in Question: Montesquieu and His Legacy* (SUNY Pr, 2008).]

There will be no class on November 27th, which is a UCB non-instructional day.

14) Dec. 4:

- 'A Citizen of America' (Noah Webster), "An Examination into the Leading Principles of the Federal Constitution" (1787). (In e.g. Sheehan and McDowell, eds., *Friends of the Constitution: Writings of the "other" Federalists, 1787-1788*, pp. 373-405; or (in a different edn.) at

http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1670&chapter=1956&layout=html&Itemid=27 and

- 'Publius', **Federalist No. 10 (James Madison) and nos. 47-51 (usually attributed to Madison)** (1788). (In e.g., The Gideon Edn., ed. Carey and McClellan, pp. 42-9, 249-72) (links to Nos. 10 and 47-51 from here:

http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=28)

*** Final paper deadline: Tuesday, December 17, 10 pm.**