

## POLS 202 - 01: Introduction to the Study of Public Law

Spring 2020    Tuesday, 5:10-7:30PM  
Graduate School Building Room 101

Instructor: Robinson Woodward-Burns

Email: [robinson.woodward@howard.edu](mailto:robinson.woodward@howard.edu)

Instructor Office Hours: Tuesday 3:00 – 5:00 PM or by appointment, Annex III Room 228

### Course Overview

This course is an introduction to the study of American public law. The course addresses institutional and constitutional design, the framing of the American Constitution, Congress' powers to revise the Constitution by formal amendment and informal statute, presidents' powers to execute and interpret the Constitution, federal judges' decision-making processes and powers, separation of powers and judicial review, state constitutionalism, constitutional politicking and hardball, and popular constitutional revision.

### Course Requirements and Grading

Your course grade has two parts:

- 1) Paper(s), worth 65% of the total grade. All papers must be submitted by the last day of the semester, **May 8**. Papers should include citations and/or a bibliography. Students may choose the citation style. Please use 10 to 12 pt. font and one inch margins. Students can choose one of two paper options:
  - A single article-length research paper of roughly 20 pages on a topic of the student's choice. The paper should engage a thinker, reading, or concept and the secondary scholarly sources on that topic. Students should submit a one-paragraph abstract and several sources on their topic by email to the instructor by **March 8**.
  - Three short response papers of roughly 6-8 pages each, each on a separate class topic or concept. For example, these papers can for example compare or contrast readings within a given topic.
- 2) Participation, worth 35% of the total grade. Students are required to give two in-class presentations of roughly 10-15 minutes each on the reading of their choice. Presentations should 1) give an overview of the thinker's context, 2) summarize the main points of the reading, and 3) include question(s) to prompt discussion. If a student misses his or her assigned presentation date, he or she may reschedule, but will lose a third of a letter grade for each time rescheduled. Students should email the instructor their reading choice by **Jan. 28**.

Students are expected to read and follow Howard University's [Academic Code of Student Conduct](#), including rules on cheating, plagiarism, etc. Plagiarized assignments, including papers, tests, and presentations, will receive a zero.

Late assignments decrease a third of a letter grade per day for up to five days.

This syllabus may be revised at the instructor's discretion.

## Course Schedule and Readings

Students are required to purchase:

Beeman, Richard. 2010. *The Penguin Guide to the United States Constitution: A Fully Annotated Declaration of Independence, U.S. Constitution and Amendments, and Selections from The Federalist Papers*. New York: Penguin.

Other readings are available on Blackboard as a course packet.

Jan. 14	<p><b>Introduction: Three Institutionalisms</b></p> <ol style="list-style-type: none"><li>1. Hall, Peter A, and Rosemary C. R. Taylor. 1996. "Political Science and the Three New Institutionalisms." <i>Political Studies</i> 44(5): 936–57.</li><li>2. Elster, Jon. 1979. <i>Ulysses and the Sirens: Studies in Rationality and Irrationality</i>. Cambridge University Press. a. Ch. II.1-2, pp.36-47</li><li>3. Weingast, Barry R. "The Political Foundations of Democracy and the Rule of Law." <i>The American Political Science Review</i> 91.2 (1997): 245–263.</li><li>4. Levinson, Sanford. 1987. "Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution 1787: The Constitution in Perspective." <i>William and Mary Law Review</i> 29: 113–44.</li><li>5. Levinson, Sanford. 2006. <i>Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)</i>. Oxford University Press. a. Ch.6, pp.159-166</li></ol> <p>Recommended:</p> <ol style="list-style-type: none"><li>1. Buchanan, James MacGill, and Gordon C. Tullock. 1962. <i>The Calculus of Consent: Logical Foundations of Constitutional Democracy</i>. Liberty Fund, Incorporated.</li></ol> <p>Reading Questions:</p> <ul style="list-style-type: none"><li>- What is a political institution?</li><li>- What are the three approaches to understanding political institutions?</li><li>- Why, according to each approach, has the Constitution endured?</li></ul>
Jan. 21	<p><b>The Constitution</b></p> <ol style="list-style-type: none"><li>1. Beeman, Richard. 2010. <i>The Penguin Guide to the United States Constitution: A Fully Annotated Declaration of Independence, U.S. Constitution and Amendments, and Selections from The Federalist Papers</i>. New York: Penguin.</li></ol> <p>Recommended:</p> <ol style="list-style-type: none"><li>2. Beeman, Richard. 2009. <i>Plain, Honest Men: The Making of the American Constitution</i>. Random House Publishing Group.</li><li>3. Robertson, David Brian. 2005. <i>The Constitution and America's Destiny</i>. Cambridge University Press.</li><li>4. Bilder, Mary Sarah. 2015. <i>Madison's Hand: Revising the Constitutional Convention</i>. Cambridge: Harvard University Press.</li></ol> <p>Reading Questions:</p> <ul style="list-style-type: none"><li>- How does the U.S. Constitution structure political institutions? Why did the framers pick this arrangement?</li></ul>

Jan. 28	<p><b>Congress</b></p> <ol style="list-style-type: none"> <li>Strauss, David. 2001. "The Irrelevance of Constitutional Amendments." <i>Harvard Law Review</i> 114: 1457.             <ol style="list-style-type: none"> <li>Skim</li> </ol> </li> <li>Eskridge, William N. Jr., and John Ferejohn. 2001. "Super-Statutes Special Symposium Issue: Congress and the Constitution." <i>Duke Law Journal</i> (5): 1215–76.</li> <li>Ackerman, Bruce. 2014. <i>We the People: The Civil Rights Revolution</i>. Cambridge: Belknap Press.             <ol style="list-style-type: none"> <li>Ch. 1, 4-5, pp.37-47, 83-104</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>Kyvig, David E. 1996. <i>Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995</i>. Lawrence: University Press of Kansas.</li> <li>Caplan, Russell L. 1988. <i>Constitutional Brinksmanship: Amending the Constitution by National Convention: Amending the Constitution by National Convention</i>. New York: Oxford University Press.</li> <li>Huq, Aziz Z. 2014. "The Function of Article V." <i>University of Pennsylvania Law Review</i> 162: 72.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- Why is the Article V amendment process prohibitively difficult? What alternatives to amendment can Congress use to reform the Constitution?</li> <li>- What are "super statutes?" Do they hold the same constitutional status as amendments?</li> <li>- How has Congress tried revising the Constitution in the 20<sup>th</sup> century?</li> </ul>
Feb. 4	<p><b>The Presidency</b></p> <ol style="list-style-type: none"> <li>Skowronek, Stephen. 1993. <i>The Politics Presidents Make: Leadership from John Adams to George Bush</i>. Cambridge, Mass: Belknap Press.             <ol style="list-style-type: none"> <li>Ch.1-3, pp.3-58</li> </ol> </li> <li>Tulis, Jeffrey K. 2017. <i>The Rhetorical Presidency</i>. Princeton University Press.             <ol style="list-style-type: none"> <li>Ch.1-2, pp.3-59</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>Rudalevige, Andrew. 2005. <i>The New Imperial Presidency: Renewing Presidential Power After Watergate</i>. Ann Arbor: University of Michigan Press.</li> <li>Schlesinger, Arthur M. 1989. <i>The Imperial Presidency</i>. Boston: Houghton Mifflin.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- How do presidents relate to the Constitution? How does their power in Congress and in their broader political coalition affect this relationship? How does the relationship change over time?</li> </ul>
Feb. 11	<p><b>Judicial Decision-making</b></p> <ol style="list-style-type: none"> <li>Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." <i>The American Political Science Review</i> 83(2): 557–65.</li> <li>Epstein, Lee, and Jack Knight. 1998. <i>The Choices Justices Make</i>. Washington: CQ Press.             <ol style="list-style-type: none"> <li>Ch.1, 3, pp.1-21, 56-111</li> </ol> </li> </ol>

	<p>3. Smith, Rogers M. 1988. "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law." <i>The American Political Science Review</i> 82(1): 89–108.</p> <p>Recommended:</p> <ol style="list-style-type: none"> <li>Segal, Jeffrey Allan. 2002. <i>The Supreme Court and the Attitudinal Model Revisited</i>. Cambridge: Cambridge University Press.</li> <li>George, Tracey E., and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." <i>The American Political Science Review</i> 86(2): 323–37.</li> <li>Clayton, Cornell W, and Howard Gillman, eds. 1999. <i>Supreme Court Decision-Making: New Institutionalist Approaches</i>. Chicago: University of Chicago Press.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- What guides judges' decisions? Their personal political preferences? Bargaining with other judges? The institutional constraints of their branch?</li> </ul>
Feb. 18	<p><b>Judicial Power I: Counter-majoritarian Courts</b></p> <ol style="list-style-type: none"> <li>Hamilton, Alexander. "Federalist 78." <i>The Federalist Papers</i></li> <li>Dahl, Robert Alan. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." <i>Journal of Public Law</i> 6: 279.</li> <li>Dworkin, Ronald. 1978. <i>Taking Rights Seriously</i>. Cambridge: Harvard University Press. <ul style="list-style-type: none"> <li>a. Ch. 4, pp.81-130</li> </ul> </li> <li>Bickel, Alexander M. 1986. <i>The Least Dangerous Branch: The Supreme Court at the Bar of Politics</i>. Yale University Press. <ul style="list-style-type: none"> <li>a. Ch.1, pp.1-33</li> </ul> </li> <li>Graber, Mark A. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." <i>Studies in American Political Development</i> 7(01): 35–73.</li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>Casper, Jonathan D. 1976. "The Supreme Court and National Policy Making." <i>The American Political Science Review</i> 70(1): 50–63.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- Do unelected judges make their own law, defying elected representatives?</li> </ul>
Feb. 25	<p><b>Judicial Power II: Courts and Social Movements</b></p> <ol style="list-style-type: none"> <li>Rosenberg, Gerald N. 2008. <i>The Hollow Hope: Can Courts Bring About Social Change?</i> 2nd ed. Chicago: University of Chicago Press. <ul style="list-style-type: none"> <li>a. Intro., Ch.1-2, pp.1-71</li> </ul> </li> <li>Hirsch, Ran. 2009. <i>Towards Juristocracy: The Origins and Consequences of the New Constitutionalism</i>. Harvard University Press. <ul style="list-style-type: none"> <li>a. Ch. 2, pp.31-49</li> </ul> </li> <li>Smith, Rogers M. 2009. "Judicial Power and Democracy: A Machiavellian View." In <i>The Supreme Court and the Idea of Constitutionalism</i>, eds. Steven Kautz, Arthur Melzer, Jerry Weinberger, and M. Richard Zinman. University of Pennsylvania Press, 199–218.</li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>Whittington, Keith E. 2005. "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court." <i>American Political Science Review</i> 99(4): 583–96.</li> </ol>

	<p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- Can the Supreme Court unilaterally advance social change?</li> <li>- Do judges tend to advance social reform or inhibit it?</li> </ul>
Mar. 3	<p><b>Judicial Power III: Courts and Equality</b></p> <ol style="list-style-type: none"> <li>1. Tsai, Robert. 2019. <i>Practical Equality: Forging Justice in a Divided Nation</i>. 1 edition. New York: W. W. Norton &amp; Company.             <ol style="list-style-type: none"> <li>a. Ch.1-3, pp.1-136</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>2. Golub, Mark. 2018. <i>Is Racial Equality Unconstitutional?</i> Oxford, New York: Oxford University Press.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- How can activists, litigants, and judges protect equality when the broader political circumstances prove hostile?</li> </ul>
Mar. 10	<p><b>Judicial Power IV: Conservative Activism</b></p> <ol style="list-style-type: none"> <li>1. Kersch, Kenneth Ira. 2019. <i>Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism</i>. Cambridge University Press.             <ol style="list-style-type: none"> <li>a. Ch.1, pp.1-26</li> </ol> </li> <li>2. Teles, Steven. 2008. <i>The Rise of the Conservative Legal Movement: The Battle for Control of the Law</i>. Princeton University Press.             <ol style="list-style-type: none"> <li>a. Intro., Ch.1-2, 5, pp.1-57, 135-81</li> </ol> </li> <li>3. Keck, Thomas M. 2002. "Activism and Restraint on the Rehnquist Court: Timing, Sequence, and Conjunction in Constitutional Development." <i>Polity</i> 35(1): 121–52.</li> <li>4. Forman, James. 2017. <i>Locking Up Our Own: Crime and Punishment in Black America</i>. New York: Farrar, Straus and Giroux.             <ol style="list-style-type: none"> <li>a. Intro., Ch.1, pp.1-46</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>5. Keck, Thomas M. 2010. <i>The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism</i>. University of Chicago Press.</li> <li>6. Segall, Eric J. 2018. <i>Originalism as Faith</i>. Cambridge University Press.</li> <li>7. Amanda, Hollis-Brusky. 2019. <i>Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution</i>. Oxford, New York: Oxford University Press.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- Since the mid-20<sup>th</sup> century, has the Court been activist or restrained? Liberal or conservative?</li> </ul>
Mar. 24	<p><b>Separation of Powers</b></p> <ol style="list-style-type: none"> <li>1. Whittington, Keith E. 2007. <i>Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History</i>. Princeton University Press.             <ol style="list-style-type: none"> <li>a. Ch.1-2, 5, pp.1-81, 230-284</li> </ol> </li> </ol> <p>Recommended:</p>

	<ol style="list-style-type: none"> <li>2. Adamany, David. 1973. "Legitimacy, Realigning Elections, and the Supreme Court." <i>Wisconsin Law Review</i> 1973: 790.</li> <li>3. Lasser, William. 1985. "The Supreme Court in Periods of Critical Realignment." <i>The Journal of Politics</i> 47(4): 1174–87.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- Powerful presidents and Congresses sometimes try overriding or restraining the Supreme Court – what tools can they use to do this? How might judges respond?</li> </ul>
Mar. 31	<p><b>State Constitutions</b></p> <ol style="list-style-type: none"> <li>1. Tarr, G. Alan. 1998. <i>Understanding State Constitutions</i>. Princeton University Press.             <ol style="list-style-type: none"> <li>a. Intro. Ch.1, pp.1-28</li> </ol> </li> <li>2. Dinan, John. 2006. <i>The American State Constitutional Tradition</i>. Lawrence: University Press of Kansas.             <ol style="list-style-type: none"> <li>a. Intro., Ch. 1, pp.1-28</li> </ol> </li> <li>3. Dinan, John. 2018. <i>State Constitutional Politics: Governing by Amendment in the American States</i>. University of Chicago Press.             <ol style="list-style-type: none"> <li>a. Intro., pp.1-8</li> </ol> </li> <li>4. Zackin, Emily. 2013. <i>Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights: Why State Constitutions Contain America's Positive Rights</i>. Princeton University Press.             <ol style="list-style-type: none"> <li>a. Ch.1, 4, pp.1-17, 48-66</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>5. Sturm, Albert L. 1982. "The Development of American State Constitutions." <i>Publius</i> 12(1): 57–98.</li> <li>6. Lutz, Donald S. 1982. "The Purposes of American State Constitutions." <i>Publius</i> 12(1): 27–44.</li> <li>7. Hammons, Christopher W. 1999. "Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions." <i>The American Political Science Review</i> 93(4): 837–49.</li> <li>8. Versteeg, Mila, and Emily Zackin. 2016. "Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design." <i>American Political Science Review</i> 110(4): 657–74.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- How does state constitutional replacement and amendment differ from federal constitutional replacement and amendment?</li> <li>- How do state constitutional rights protections compare to federal ones?</li> </ul>
Apr. 7	<p><b>Constitutional Hardball</b></p> <ol style="list-style-type: none"> <li>1. Tushnet, Mark. 2003. "Constitutional Hardball." <i>John Marshall Law Review</i> 37(2): 523–54.</li> <li>2. Fishkin, Joseph, and David E. Pozen. 2018. "Asymmetric Constitutional Hardball." <i>Columbia Law Review</i> 118(3): 915–82.</li> <li>3. Pozen, David E. 2018. "Hardball and/as Anti-Hardball." <i>New York University Journal of Legislation and Public Policy</i> 21(4): 949–56.</li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>4. Balkin, Jack M. 2017. "Constitutional Crisis and Constitutional Rot." <i>Maryland Law Review</i> 77(1): 147–60.</li> </ol>

	<p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- What is constitutional hardball? What are the incentives to use these tactics? Are they normatively acceptable?</li> </ul>
Apr. 14	<p><b>Democracy and Constitutions I: Undemocratic Constitutions</b></p> <ol style="list-style-type: none"> <li>1. Dahl, Robert Alan. 2003. <i>How Democratic Is the American Constitution?</i> New Haven, Conn: Yale University Press.             <ol style="list-style-type: none"> <li>a. Ch.1-2, 6, pp.1-40, 121-140</li> </ol> </li> <li>2. Levinson, Sanford. 2006. <i>Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)</i>. Oxford University Press.             <ol style="list-style-type: none"> <li>a. Intro., Ch.1-2, p.3-24</li> </ol> </li> <li>3. Tushnet, Mark. 2000. <i>Taking the Constitution Away from the Courts</i>. Princeton University Press.             <ol style="list-style-type: none"> <li>a. Prologue, Ch.1-2, pp.3-53</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>4. Wolin, Sheldon. 1994. “Fugitive Democracy” <i>Constellations</i> 1(1): 11–25.</li> <li>5. Marmor, Andrei. 2007. “Are Constitutions Legitimate.” <i>Canadian Journal of Law and Jurisprudence</i> 20: 69.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- Is the Constitution an anti-democratic document? If so, how could this be reformed?</li> </ul>
Apr. 21	<p><b>Democracy and Constitutions II: Popular Constitutionalism</b></p> <ol style="list-style-type: none"> <li>1. Mudde, Cass, and Cristobal Rovira Kaltwasser. 2017. <i>Populism: A Very Short Introduction</i>. Oxford, New York: Oxford University Press.             <ol style="list-style-type: none"> <li>a. Ch.1</li> </ol> </li> <li>2. Kramer, Larry D. 2004. <i>The People Themselves: Popular Constitutionalism and Judicial Review</i>. Oxford University Press.             <ol style="list-style-type: none"> <li>a. Ch.1, 5, pp.9-34, 128-144</li> </ol> </li> <li>3. Beaumont, Elizabeth. 2013. <i>The Civic Constitution: Civic Visions and Struggles in the Path Toward Constitutional Democracy</i>. Oxford University Press.             <ol style="list-style-type: none"> <li>a. Intro., Ch.1, 4, pp.xiv-28, 119-162</li> </ol> </li> </ol> <p>Recommended:</p> <ol style="list-style-type: none"> <li>4. Fritz, Christian G. 2007. <i>American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War</i>. Cambridge University Press.</li> <li>5. Finn, John E. 2014. <i>Peopling the Constitution</i>. University Press of Kansas.</li> <li>6. Pozen, David E. 2010. “Judicial Elections as Popular Constitutionalism.” <i>Columbia Law Review</i> 110: 2047.</li> </ol> <p>Reading Questions:</p> <ul style="list-style-type: none"> <li>- In what ways can “the people themselves” reform the Constitution?</li> </ul>