

Political Theory Seminar: Constitution-Making

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Fall 2006

Mondays: 2-4:30 p.m.

194 Mercer Street room 207

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1. Course Description

The seminar is an introduction to research in the field of political and constitutional theory. It is specially addressed to students who are interested in these subject matters and may have the project of going to Law School or of making graduate studies in Political Theory.

Three topics will be the main object of analysis and discussion:

1. The concept of constitution.
2. The doctrine of the “constituent power”, of which we shall present a typology.
3. Experiences of constitution making in different countries and historical contexts.

2. Course Requirements

Students are required to make serious, on-time, critical reading of all assigned materials before each class meeting.

Students are required to hand in written comments each week on the readings assigned for that week. Active and informed participation in discussion is also required. The final grade will be based on the written weekly comments and on class participation. No paper will be required at the end of the seminar.

3. Course Schedule

Note: the readings, particularly those of the second and third parts of the course, may be modified to fit the seminar interests.

I. Theoretical Foundations:

The objective of the first part of the seminar will be to establish the basic theoretical tools we will use in the second and third part of the course.

Week 1

I.1 Introduction – The Aristotelian “Politeia”

- Aristotle, *Politics*, III 6-11; IV 1-12

Week 2

I.2 “Constitution” in the Political Debate of the 18th and 19th Centuries

- James Madison, *Federalist Papers*, # 53 [available on the internet]
- Emmanuel Sieyès, *What is the Third Estate*, 1789, ch. V [handout]
- GWF Hegel, *Philosophy of Law*, # 273 [blackboard]
- Ferdinand Lassalle, *Über Verfassungswesen*, 1862 [notes in English on blackboard]

Week 3

I.3 Legal Theories of the Constitution in the 19th and the 20th Centuries

- Albert V. Dicey, *Lectures introductory to the Study of the Law of the Constitution*, London 1885, pp. Lecture I: The true nature of constitutional law; pp. 34-79
<http://books.google.com/>
- James Bryce, *Studies in History and Jurisprudence*; Vol. I, Oxford, 1901: “Flexible and Rigid Constitutions”; pp. 145-254
<http://books.google.com/>
- Hans Kelsen, *General Theory of Law and State*, New York, 1961 [1945]; pp. 110-134; 153-163; 258-269 [handout]

Week 4

I.4 Contemporary Theory of Constitution and Constituent power

- Carl Schmitt, *Verfassungslehre*, pp. 1-121 : “The Concepts of Constitution and Constituent Power” [this book is translated in almost any language except English] The instructors will present Schmitt’s doctrine in class. Some secondary literature will be indicated.

Week 5

Contemporary Theory: Why a constitution?

- R. Hardin, “Why a Constitution?” [reading package]
- S. Holmes “Constitutionalism” [reading package]
- J. Elster *Ulysses Unbound* Chapter II [reading package]

II Constitution Making

In the second part of the seminar we will discuss experiences of constitution-making, in different countries and historical contexts. We will begin by discussing texts that have proposed some theoretical claims on constitution-making. As we will see these texts have mainly focus on the American case. We will then discuss other countries' experiences what will enable us to make some comparisons and to discuss the applicability of the theoretical claims studied in the first part of the semester. Each week we will select two or three cases to discuss in class. The final list of the cases will be based on the seminar's interests.

Weeks 6 and 7

II.1 Constitution Making: Theory and the American case

- J. Elster "Forces and mechanisms in the constitution-making process"
{J. Elster "Arguing and bargaining in two constituent assemblies"}
- W. Riker, "The heresthetics of constitution-making: The Presidency in 1787"
- Heckathorn and S.M. Maser, "Bargaining and constitutional contracts"
- Jillson, Constitution Making, New York: Agathon Press 1988, Ch. 1.
- Anderson, , Creating the Constitution, Ch.4
- J. Madison – notes for the Convention
- Jack N. Rakove. 1997. *Original Meanings*. New York: Vintage Books

Weeks 8-11

II.2 Constitution Making: Possible Cases and Possible Bibliography

Spain 1978

- Bonime-Blanc *Spain's Transition to Democracy: The Politics of Constitution-Making*
- Rubio Llorente Francisco "The writing of the constitution of Spain" in: Robert A. Goldwin & Art Kaufman *Constitution makers on constitution making : the experience of eight nations*

France 1958 [actually some sections of J. Huber and N. Wahl, *The Fifth Republic*, 1959 +J-M. Danquin 1958. *La genèse de la Ve République*, 1988]

- Elster "Executive-legislative relations in three French constitution- making episodes"
- Bogdanor (ed.), Constitutions in Democratic Politics, Ch. 12.
- Goldwing and Kaufman Constitution Makers and Constitution Making France 1958
- Hoffman, Stanley. 1959 "The French Constitution of 1958" *American Political Science Review* 53

Germany 1919 and/or 1949[actually Johannes Mattern, *Principles of the Constitutional Jurisprudence of the German National Republic*, Oxford U.P., 1928: pp. 54-96 and John Finn, *Constitutions in Crisis*, Oxford U.P., 1991: pp. 135-178]

1949 C. Friedrich article in my computer][Edmund Spevack, *Allied Control and German Freedom*, Lit Verlag, 2001]

- Hucko "Introduction" to The Democratic Tradition: Four German Constitutions

- Koch A Constitutional History of Germany, Chs.3, 7, 10.
- Steinberger, Helmut, "American Constitutionalism and German Constitutional Development
- Blankenburg, Erhard, "Changes in Political Regimes and Continuity of the Rule of Law in Germany,"
- Currie, David P., *The Constitution of the Federal Republic of Germany*
- Eberle, Edward, *Dignity and Liberty: Constitutional Visions in Germany and the United States*

Post-Soviet Constitution-Making: Poland and/or Hungary and/or Russia

- Jon Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea,"
- Wiktor Osiatynski, "The Roundtable Talks in Poland," in Elster
- Wiktor Osiatynski, "A Brief History of the Constitution," *East European Constitutional Review* vol. 6 (1997): 66-76
- Ewa Letowska, "A Constitution of Possibilities," *East European Constitutional Review* vol. 6 (1997): 76-81.
- Brzezinski, M1998The Struggle for Constitutionalism in Poland, London: Macmillan
- Ahdieh, Robert B. 1997. *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985-1996*. State College: Pennsylvania State University Press
- Howard. Dick ed 1993*Constitution making in Eastern Europe* Washington, D.C. : Woodrow Wilson Center Press : Distributed by the Johns Hopkins University Press

Japan 1946 [actually Moore and Robinson, *Partners for Democracy*, Oxford UP, 2002 + Koseki Shoichi, *The Birth of Japan's Postwar Constitution*, Westview Press, 1997]

- Moore, Ray A. and Donald L. Robinson, *Partners for Democracy: Crafting the New Japanese State under MacArthur* (New York: Oxford University Press, 2002), pp. 3-20 and 317-338.
- Inoue, K. 1991. *MacArthur's Japanese Constitution*. Chicago: University of Chicago Press.
- Moore, Ray A. and Donald L. Robinson. 1998. *The Constitution of Japan: A Documentary History of Its Framing and Adoption 1945-1947*. Princeton: Princeton University Press

Chile 1980:

- Barros, Robert. 2002. *Constitutionalism and Dictatorship*. Cambridge: Cambridge University Press.

The Andean Region in the 90's (Colombia 91, Ecuador 97 and Venezuela90):

- Renata Segura and Ana María Bejarano "¡Ni una asamblea más sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes"
- Maria Pilar Garcia-Guadilla and Mónica Hurtado "Participation and Constitution Making in Colombia and Venezuela: Enlarging the Scope of Democracy?" Manuscript

Brazil1985-95:

- Martínez-Lara, Javier, *Building democracy in Brazil* St. Antony's series

Nigeria:

- Williams F.R.A. The making of the Nigerian constitution. in: Robert A. Goldwin & Art
- Vivian Roli Mottoh-Migan Constitution making in post-independence Nigeria : a critique Spectrum, 1994.

South Africa

- Johnston Alexander ed. et.al. 1993.*Constitution-making in the new South Africa*
London ; New York : Leicester University Press

Kenya

- Kaufman *Constitution makers on constitution making : the experience of eight nations*
- Mutunga Willy *Constitution-making from the middle : civil society and transition politics in Kenya, 1992-1997*

Arab States

- Saleh Ibrahim “The writing of the 1971 Egyptian constitution” in: Robert A. Goldwin & Art Kaufman *Constitution makers on constitution making : the experience of eight nations*
- Brown, Nathan. 2002. *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*. Albany NY: State University of New York Press.
- Brown, Nathan. 2003. “Regimes Reinventing Themselves: Constitutional Development in the Arab World” *International Sociology* 18(1).

III Constitution-Making and its Effects

We will close the seminar with three weeks of discussion on Constitution-Making Constitutional Efficacy, and Constitutional Longevity.

III.1 Constitution-Making and Constitutional Efficacy

Week 12

When constitutions work?:

- Przeworski, Adam. “Why Parties Obey the Results of Elections”
- Holmes, Stephen. “Lineages of the rule of law”
- Voigt, Stefan. “Making Constitutions Work”

III.2 Constitution-Making and Constitutional Longevity

Week 13

- Aristotle *Politics* (parts on the ways of preventing stasis and on the reasons why the mixed constitution is the only constitution free of stasis).
- Hardin *Liberalism and Constitutionalism*
- Brandon “Constitutional Failure”

Week 14

Conclusion: Constitution Making, Constitution Makers, and the Effects of Constitutions