

# Political Science 421: Constitutionalism and Crisis: From Catalina's Conspiracy to Covid

Prof. Georg Vanberg

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**Class Room:** Biological Sciences 155  
**Office:** 219 Gross Hall  
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**Class Time:** Tue/Thu 1:45-3pm  
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**Office Hours:** Tuesday 3:15-4:15pm  
and by appointment

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## COURSE OVERVIEW

Constitutional democracy combines two features: On the one hand, democracy implies popular control of government through the institution of free, fair, and competitive elections. On the other hand, constitutional rights guarantees and institutional mechanisms such as a separation-of-powers or judicial review impose significant restrictions on how, and for what purposes, political power can (and may) be used.

While constitutional democracy is a widely celebrated ideal, a common perception is that coping with crises – sudden, unanticipated challenges that pose significant risks and require quick responses – pose a particular challenge for this type of political system. And, as our recent history reminds us, crises are a constant feature of political life: 9/11, the financial crisis of 2008, or the Covid pandemic provide obvious examples.

In this course, we will take a “deep dive” into the relationship between constitutionalism and crisis by focusing on three thematic areas:

1. Many constitutions are written in the wake (or midst) of crisis, typically in the aftermath of war or the collapse of a previous regime. How does this affect the constitution-making process and its outcome? Put differently, what role does crisis play in the origin of constitutions, and their design?
2. Most constitutional democracies are confronted by crisis at some point. Some constitutions provide explicit provisions for addressing crises, others do not. How do constitutional democracies function during crisis? Which features make them more or less effective in dealing with crisis?
3. Crises – and the responses to them – may have significant downstream effects on constitutional practice by establishing precedents and shaping understandings of constitutional provisions and norms. What do we know about the long-lasting effects of crises on constitutional democracy?

By the end of the course, you will have developed a deeper theoretical understanding of constitutionalism and the politics of crisis, while engaging with a broad array of comparative and historical examples. You will also have honed your skills in critically examining arguments and evidence, and analyzing empirical cases through the lens of particular analytical frameworks.

## REQUIRED READINGS

Required readings are available through the **Sakai page** for this course, as well as through the electronic resources available through Duke Library. See the semester schedule below for details.

## GRADES AND EVALUATION

There are four components to your grade:

**Midterm Exam (30 percent of your course grade):** There will be one midterm exam on Thursday, November 18. If you miss the midterm exam, and have not made alternative arrangements prior to the exam with me, you will need to provide documentation of an acceptable reason for missing the exam (typically, a medical emergency). If you can document an acceptable reason for missing the exam, you will be given a make-up exam during the last week of classes. Please plan accordingly.

**Questions/short reactions (25 percent of course grade):** For each week with substantive readings, you are responsible for posting a short reaction to the readings for class discussion. These reactions need not be long – a short paragraph is sufficient. But they should be thoughtful and, ideally, pose a question for discussion. Posts are due by 5pm on the day before class – on Monday if you are posting on a reading for Tuesday, and on Wednesday if you are posting on a reading for Thursday. Please submit your posts through the “Assignments” link in Sakai. Each entry will be graded pass/fail. You have one free “pass” for the semester that will allow you to skip a week or to drop a “failed” post; additional failure to post will count as a “fail.” Your grade for this part of the course will equal the number of “passes” you earn, divided by 9 (the number of reading weeks-1), capped at 100%.

**Seminar Participation (15 percent of your course grade):** This is a seminar course. To succeed, all of us need to come prepared and contribute to discussion. Your participation grade for the course will be determined by your level of preparation for class and your participation in our debates. You will begin the course with an 85% participation grade. Your grade will decrease if you are not engaged or prepared. Your grade will go up as you actively participate and come prepared.

**Research Project (30 percent of your course grade):** The final components of your grade will come from an original research project you will undertake as a group. Your assignment is to find a topic/puzzle/question or an application related to the themes of this course and to investigate it. Your project has two components. First, you are responsible for conducting one class meeting that focuses on your project. This means that your group must identify the readings for your session, give a brief (10 minute) introductory talk, and lead class discussion. Second, you must produce a substantial research product that engages your chosen topic. You have two options regarding this product. You can **either** produce a short video (no more than 10-15 minutes) **or** write a short paper (6-10 pages). You may work on a video as a group. Papers must be written by individual students. Your paper or video will be due on the last day of class, 12/2, by midnight. The components will have the following weight:

- Assigning readings/leading class: 5 percent of your course grade
- Research product (video or paper): 25 percent of your course grade.

Course grades will be determined according to the following grading scale: **A:** 93-100 **A-:** 90-92 **B+:** 88-89 **B:** 83-87 **B-:** 80-82 **C+:** 78-79 **C:** 73-77 **C-:** 70-72 **D+:** 68-69 **D:** 63-67 **D-:** 60-62 **F:** 0-59

## COVID PROTOCOLS

For the health and safety of our campus community, it is critical that all of us observe the university's Covid protocols. This means that all of us should be aware of current campus regulations, and adhere to them. Thank you!

This is an in-person class, and attendance is critical to the interactive format. If you cannot attend class because you have been quarantined, please inform me as soon as possible so we can work out a way for you to participate remotely.

## PROCEDURE FOR TESTING ACCOMODATIONS

This class will use the Testing Center to provide testing accommodations to undergraduates registered with and approved by the Student Disability Access Office (SDAO). The center operates by appointment only and appointments must be made at least 7 consecutive days in advance, but please schedule your appointments as far in advance as possible. You will not be able to make an appointment until you have submitted a Semester Request with the SDAO and it has been approved. So, if you have not done so already, promptly submit a Semester Request to the SDAO in order to make your appointment in time. For instructions on how to register with SDAO, visit their website at <https://access.duke.edu/requests>. For instructions on how to make an appointment at the Testing Center, visit their website at <https://testingcenter.duke.edu>.

## ACADEMIC DISHONESTY

Students and faculty at Duke are governed by the **Duke Community Standard**, and academic dishonesty will not be tolerated. If I suspect that a student has attempted to represent someone else's work as their own, or to cheat in any other manner on an exam or a written assignment, I will refer the case to the Office of Student Conduct in accordance with university policy. If a violation of the academic integrity policy is found to have occurred, the minimum penalty will be a zero (0) on the assignment/exam in question. If you have any questions about plagiarism and proper citation methods, please consult the **Duke Tutorial on Plagiarism**.

## STUDENTS WITH CHALLENGES

Students with challenges who require individualized testing or other accommodations should identify themselves and express their needs during the first week of the semester. Where the challenge is not immediately apparent, verification will be required.

## APPROXIMATE SEMESTER SCHEDULE

### Week 1 (8/24-8/26): Introduction:

#### Reading:

- Jon Elster. 1988. "Introduction." In J. Elster and R. Slagstad (eds.). *Constitutionalism and Democracy*. Cambridge: Cambridge University Press.
- F. A. Hayek. 1960. *The Constitution of Liberty*. Chicago: University of Chicago Press. Chapter 12. "The American Contribution: Constitutionalism."

### Week 2 (8/31-9/2): Why a constitution?

#### Reading:

- Russell Hardin. 1989. "Why a constitution?" In B. Grofman and D. Wittman (eds.) *The Federalist Papers and the New Institutionalism*. New York: Agathon Press.
- James Buchanan. 1999. "An Individualistic Theory of Political Process." In *Moral Science and Moral Order*. Indianapolis: Liberty Fund.
- Georg Vanberg. 2020. "A Square Peg in a Round Hole: Democracy, Constitutionalism, and Citizen Sovereignty." *The Georgetown Journal of Law & Public Policy*. 18: 655-668.

### Week 3 (9/7-9/9): Constitutional enforcement

#### Reading:

- Thomas Schelling. 1985. "Enforcing Rules on Oneself." *Journal of Law, Economics, and Organization*. 1: 357-374.
- Barry Weingast. 2016. "Capitalism, Democracy, and Countermajoritarian Institutions." *Supreme Court Economic Review*. 23: 255-77.
- Daniel Sutter. 1997. "Enforcing Constitutional Constraints." *Constitutional Political Economy*. 8: 139-150.

### Week 4 (9/14-9/16): Designing constitutions in times of crisis

#### Reading:

- George William Van Cleve. 2017. *We Have Not A Government: The Articles of Confederation and the Road to the Constitution*. Chicago: University of Chicago Press. Chapter 9: "'The Truth is, We have not a government': Confederation Stalemate and the Road to the Philadelphia Convention."

- Jon Elster. 1993. "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea." *Public Administration* 71: 169-217.
- Kirsti Samuels. 2006. "Post-conflict peace-building and constitution-making." *Chicago Journal of International Law* 6: 663

### Week 5 (9/21-9/23): Crisis and Constitutionalism

#### **Reading:**

- Clinton Rossiter. 1948. *Constitutional Dictatorship: Crisis Government in Modern Democracies*. Chapter 1: "Constitutional Dictatorship."
- Kim Lane Scheppele. 2006. "North American emergencies: The use of emergency power in Canada and the United States."
- Jack N. Rakove. 2003. "The constitution in crisis times." *Cardozo Public Law, Policy, and Ethics Journal* 2:11-20.
- Sanford Levinson and Jack M. Balkin. "Constitutional Crises." *University of Pennsylvania Law Review*.157(3).

### Week 6 (9/28-9/30 – No class on Thursday): The Roman Dictatorship

#### **Reading:**

- Marc de Wilde. 2012. "The dictator's trust: Regulating and constraining emergency powers in the Roman Republic." *History of Political Thought*. 33: 555-77.
- Marc de Wilde. 2013. "The dictatorship and the fall the Roman Republic." *Zeitschrift der Savigny-Stiftung fr Rechtsgeschichte*. 130: 1-39.
- **Optional Background Podcast:** Dan Carlin. 2010. "Hardcore History Podcast: Death Throes of the Republic."

### Week 7 (10/7): Emergency Powers

#### **Reading:**

- John Ferejohn and Pasquale Pasquino. 2004. "The law of exception: A typology of emergency powers." *International Journal of Constitutional Law*. 2: 210-39.
- Mark Tushnet. 2008. "The political constitution of emergency powers: parliamentary and separation-of-powers regulation." *International Journal of Law in Context*. 3: 275-88.

## Week 8 (10/12-10/14): Emergency Powers/Financial Crises

### Reading:

- John Finn. 1991. *Constitutions in Crisis*. Oxford: Oxford University Press. Chapter 4: "Constitutional dissolution in the Weimar Republic."
- Ingo Müller. 1991. *Hitler's Justice: The Courts of the Third Reich*. Cambridge: Harvard University Press. Chapter 6: "The Legal System During the State of Emergency."
- John Ferejohn. 2019. "Financial crises." In Ginsburg, T., Rosen, M., and Vanberg, G. (eds). *Constitutions in times of financial crisis*. Cambridge: Cambridge University Press.
- Georg Vanberg and Mitu Gulati. "Financial crises and constitutional compromise." In Ginsburg, T., Rosen, M., and Vanberg, G. (eds). *Constitutions in times of financial crisis*. Cambridge: Cambridge University Press.

## Week 9 (10/19-10/21): War

### Reading:

- Erwin Chermersky. 2011. "Korematsu v. United States: A tragedy hopefully never to be repeated." *Pepperdine Law Review*. 163-172.
- Mark Tushnet. 2003. "Defending Korematsu? Reflections on civil liberties in wartime." *Wisconsin Law Review*. 273-307.
- Samuel Issacharoff and Richard Pildes. 2004. "Emergency contexts without emergence powers: The United States' constitutional approach to rights during wartime." *International Journal of Constitutional Law*. 2: 296-333.

## Week 10 (10/26-10/28): Research Project Check-In

- No regular class meetings. Each group must set up a 1-hour meeting with me to discuss your research project. On the day before the meeting, you must submit a **1-page outline of your project**, and a separate **preliminary bibliography with at least ten relevant sources**.

## Week 11 (11/2-11/4): Crisis and the Ratchet Effect

### Reading:

- Robert Higgs. 1985. "Crisis, Bigger Government, and Ideological Change: Two Hypotheses on the Ratchet Phenomenon." *Explorations in Economic History*. 22: 1-28.
- Bjornskov, Christian, and Martin Rode. 2019. "Crisis, ideology, and interventionist policy ratchets." *Political Studies*. 67: 815-833.

- Eric A. Posner and Adrian Vermeule. "Accommodating Emergencies." *Stanford Law Review*. 56(3)
- Mark Tushnet. "Issues of Method in Analyzing the Policy Response in Emergencies." *Stanford Law Review*. 56(3)

### **Week 12 (11/9-11/11): Lasting effects of crisis on constitutions**

#### **Reading:**

- Rebecca Kahan. 2005. "Constitutional Stretch, Snap-Back, and Sag: Why *Blaisdell* was a harsher blow to liberty than *Korematsu*." *Northwestern University Law Review*. 99: 1279-1313.
- TBD

### **Week 13 (11/16-11/18): Exam Week**

- Catch-up and review on Tuesday
- In-class exam on Thursday

### **Week 14 (11/23 - THANKSGIVING): Group Presentations**

#### **Reading:**

- Two readings to be determined by the group, submitted no later than 11/11.

### **Week 15 (11/30-12/1): Group Presentations**

#### **Reading:**

- Two readings to be determined by each group, submitted no later than 11/18.