Constitutional Integrity: Interpretation, Construction, and Freedom in the Thought of Keith Whittington

Thursday, May 16, 2024
Aaron Burr Hall 219
A private conference presented by
The James Madison Program in American Ideals and Institutions
in honor of Keith Whittington for his 25 years of distinguished service
to Princeton University and his many contributions to the field of
classical studies.

Funded by Bouton Law Lecture Fund

Contributions to and/or sponsorship of any event does not constitute departmental or institutional endorsement of the specific program, speakers or views presented.
CONFERENCE SCHEDULE

9:00 TO 10:15 AM Constitutional Interpretation and Construction

Panelists:  
Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School  
Christopher Green, Whitten Chair in Law and Government, University of Mississippi School of Law  
John O. McGinnis, George C. Dix Professor in Constitutional Law, Northwestern University School of Law

Respondent:  
Keith Whittington, William Nelson Cromwell Professor of Politics, Princeton University

Chair:  
John Breen, Visiting Fellow 2023-2024, James Madison Program, Princeton University; Georgia Reithal Professor of Law, Loyola University Chicago School of Law

10:30 AM TO NOON American Political Development

Panelists:  
Mark Graber, Regents Professor, Francis King Carey School of Law, University of Maryland  
Tara Leigh Grove, Vinson & Elkins Chair in Law, University of Texas School of Law  
Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair; Professor of Government, The University of Texas at Austin School of Law  
Emily Zackin, Associate Professor of Political Science, Johns Hopkins University

Respondent:  
Keith Whittington, William Nelson Cromwell Professor of Politics, Princeton University

Chair:  
Alan Patten, Howard Harrison and Gabrielle Snyder Beck Professor of Politics; Chair, Department of Politics, Princeton University

1:30 TO 3:00 PM Free Speech and Academic Freedom

Panelists:  
Robert George, McCormick Professor of Jurisprudence; Director, James Madison Program, Princeton University  
Jonathan Marks, Professor of Politics, Ursinus College  
David Rabban, Dahr Jamail, Randall Hage Jamail and Robert Lee Jamail Regents Chair in Law, The University of Texas School of Law

Respondent:  
Keith Whittington, William Nelson Cromwell Professor of Politics, Princeton University

Chair:  
Greg Conti, Assistant Professor of Politics, Princeton University
K

Keith Whittington, William Nelson Cromwell Professor of Politics, is a towering figure in the fields of constitutional law and American political development. His work is followed closely, and critically engaged, by legal scholars and historians as well as by political scientists. His writings are widely assigned in courses across a range of fields. He is taking emeritus status at Princeton after twenty-five years of distinguished service to our university, and we wish him happiness and continued success in his new institutional home, Yale Law School.

Keith’s work in constitutional studies began at Yale where he completed his doctorate in the Department of Political Science (and where he will now hold a secondary appointment in addition to his endowed chair at the Law School). His dissertation became a pair of important books: Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (published by the University Press of Kansas) and Constitutional Construction: Divided Powers and Constitutional Meaning (published by Harvard University Press). The former work reformed, refined, and defended the controversial general approach to constitutional interpretation that has come to be known as “originalism.” The latter challenged the most prominent accounts of major periods of constitutional change in American history, and proposed and defended an alternative understanding. His concern with integrating law, politics, and history is reflected in his innovative casebook and series of reference works, American Constitutionalism (Oxford University Press), authored with Howard Gillman and Mark A. Graber.

Among the most important moments in American constitutional history are those that brought the President and the presidency into conflict with the Supreme Court. One thinks, for example, of Lincoln’s resistance to the Court’s ruling in Dred Scott v. Sanford, denying Congress and the President the power to prohibit slavery in the federal territories, and of Franklin Roosevelt’s efforts—including even a threat to pack the Supreme Court—to break the back of judicial resistance to New Deal Programs and agencies. Keith made a major contribution to scholarly understanding of these sorts of conflicts in the work he turned his mind to next: Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (published by Princeton University Press). The book garnered not just one but two prizes from the American Political Science Association: the C. Herman Pritchett Award for best book in Law and Courts, and the J. David Greenstone Award for best book in Politics and History.

A few years later, in Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present (published by the University Press of Kansas), another award winning work, Keith tackled what has been called the vexata quaestio of American constitutional law: the basis, nature, and scope of the power of courts to invalidate as putatively unconstitutional legislation duly enacted by the representatives of the people in the House of Representatives and the Senate. The power of “judicial review” is nowhere mentioned in the Constitution. Rather it has been held by the courts themselves, beginning with the Supreme Court’s decision in the 1803 case of Marbury v. Madison, to be a power implicitly granted to them. Even if that claim is defensible, it leaves open issues that Keith illuminatingly explores, such as: Should the judgments of courts on questions of constitutional interpretation always trump the contrary judgments of other officials? Are
presidents always bound to enforce them and even treat them as establishing binding principles governing future executive and legislative actions? Are some constitutional questions outside the ambit of judicial authority, resting exclusively with the executive office of the president or the houses of Congress? Consider, for example, matters pertaining to impeachment—a topic on which Keith has a forthcoming scholarly monograph.

An area of passionate concern for Keith—in practice as well as theory—has been freedom of speech, both on university campuses and in the broader society. He has been highly active in the promotion and protection of free speech on our own campus, even playing a leading role in the University’s adoption in 2015 of the University of Chicago Free Speech Principles. He is a founding member of the Academic Freedom Alliance and chairs its governing committee. In 2018, he published (in Princeton University Press’s New Forum Books series) *Speak Freely: Why Universities Must Defend Free Speech*, which was chosen by President Christopher Eisgruber as the “Freshman Pre-Read” the following year. Soon to be released is another book on the subject that promises to be equally consequential: *You Can't Teach That! The Battle over University Classrooms* (Polity Press).

Keith’s vigorous defense of freedom of thought, inquiry, and discussion as necessary for the university’s fulfillment of its mission of providing a forum for truth-seeking scholarly research and non-indoctrinating teaching has stimulated many important discussions here at Princeton and in the larger academic community. His ideas continue to shape the national—and, indeed, international—debate.

It is not just in his work on behalf of free speech that Keith has been an exemplary university citizen. He is an award-winning teacher and a dedicated adviser of undergraduate independent work and doctoral dissertations. He served three terms as director of the graduate program in politics and one as director of the undergraduate program. He has served as acting director of both the Program in Law and Public Affairs and the James Madison Program in American Ideals and Institutions. The many committees on which he has served include the editorial board of Princeton University Press and the board of trustees of the Whig-Cliosophic Society.

Keith possesses a richly earned reputation as a scholar who is utterly devoted to the pursuit of truth, the advancement of knowledge, and the deepening of understanding. He is never deflected from his vocation as a scholar by ideology, ambition, or anything else. He calls them as he sees them and lets the chips fall where they may. His thinking and his work are consistently analytically rigorous, thoughtful, and fair-minded. He is impecably honest (and thorough) in his expositions and criticisms of the work of others and is always careful to identify and address the best possible lines of counterargument to any view he advances. He lives by J.S. Mill’s teaching in *On Liberty* that “he who knows only his own side of the case, knows little of that.”

Keith is a Fellow of the American Academy of Arts and Sciences and the recipient of an Open Inquiry Award for Exceptional Scholarship from the Heterodox Academy. He held a John Maclean Jr. Presidential Preceptorship when he was an assistant professor at Princeton. He served on the Presidential Commission on the Supreme Court of the United States.

For some of us—and we are more than a few—Keith is above all a loyal and devoted friend, someone with whom we can share ideas, aspirations, and problems, and even joys and sorrows. We shall miss having him here in our midst, but we are comforted that he will be “just up the road” in New Haven.
PARTICIPANTS

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School. He is the founder and director of Yale’s Information Society Project, an interdisciplinary center that studies law and new information technologies. He also directs the Abrams Institute for Freedom of Expression and the Knight Law and Media Program at Yale. Professor Balkin is a member of the American Academy of Arts and Sciences and the American Law Institute, and the founder and editor of the group blog, Balkinization. He is the author of over a hundred and forty articles in many different fields. His books include *Memory and Authority: The Uses of History in Constitutional Interpretation*; *The Cycles of Constitutional Time; Democracy and Dysfunction* (with Sanford Levinson); *Living Originalism; Constitutional Redemption: Political Faith in an Unjust World; Processes of Constitutional Decisionmaking* (8th ed. with Levinson, Amar, Siegel, and Rodriguez); *Cultural Software: A Theory of Ideology; The Laws of Change: I Ching and the Philosophy of Life; and What Brown v. Board of Education Should Have Said.*

John M. Breen serves as the Georgia Reithal Professor of Law at Loyola University Chicago School of Law. John received his BA with highest honors from the University of Notre Dame where he read the Great Books in the Program of Liberal Studies. He received his JD from Harvard University where he was a member of the Law School’s Board of Student Advisors. After law school John clerked for Hon. Boyce F. Martin, Jr., of the United States Court of Appeals for the Sixth Circuit. He then practiced law at Sidley & Austin in Chicago where he specialized in commercial litigation. At Loyola, John teaches courses in contracts, commercial law, professional responsibility, jurisprudence and Catholic social thought and the law. His published articles and other works have addressed such topics as commercial law, statutory interpretation, legal ethics, Catholic social teaching, legal education, law and religion, and abortion. He is currently working to complete a book on the history of Catholic law schools in the United States.

Greg Conti is an Assistant Professor of Politics at Princeton University. He is a political theorist and intellectual historian. His research focuses on the history of modern political thought, especially in Britain and France, and on the lessons that can be drawn from that history for contemporary debates in political philosophy. Recently, Conti’s primary interests have concerned the relationship between ideas of democracy, liberalism, and representative government. He has also addressed, among other subjects: toleration and freedom of speech; deliberative democracy and theories of deliberation more broadly; the development of electoral systems and political parties; Enlightenment political philosophy; the history of utilitarianism; the thought of John Stuart Mill and its reception; and modern French political theory. Conti’s book *Parliament the Mirror of the Nation: Representation, Deliberation, and Democracy in Victorian Britain* was released by Cambridge University Press in 2019 (paperback, 2020). In addition, Conti has published in a number of journals in political theory and the history of political thought. Conti is currently at work on a book about the constitutional lawyer and political philosopher Albert Venn Dicey. He earned his BA from the University of Chicago and a PhD from Harvard University, and he has also been a fellow of Jesus College, University of Cambridge.
Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. He has several times been a Visiting Professor at Harvard Law School. He has served as Chairman of the U.S. Commission on International Religious Freedom and on the U.S. Commission on Civil Rights and the President’s Council on Bioethics. He has also served as the U.S. member of UNESCO’s World Commission on the Ethics of Scientific Knowledge and Technology. He was a Judicial Fellow at the Supreme Court of the United States, where he received the Justice Tom C. Clark Award. A Phi Beta Kappa graduate of Swarthmore, he holds the degrees of J.D. and M.T.S. from Harvard University and the degrees of D.Phil., B.C.L., D.C.L., D.Litt. from Oxford University, in addition to twenty-one honorary doctorates. He is a recipient of the U.S. Presidential Citizens Medal, the Honorific Medal for the Defense of Human Rights of the Republic of Poland, the Irving Kristol Award of the American Enterprise Institute, the Canterbury Medal of the Becket Fund for Religious Liberty, and Princeton University’s President’s Award for Distinguished Teaching. His books include Making Men Moral: Civil Liberties and Public Morality and In Defense of Natural Law (both published by Oxford University Press).

Mark A. Graber is the Regents Professor at the University of Maryland Carey School of Law. Determined to vex his parents by becoming a permanent student, he earned an AB from Dartmouth College, a JD from Columbia Law School, an MA in Philosophy from Yale University, and a PhD in Political Science from Yale University before being forced by his spouse and two (soon three) infant children to earn a living. Professor Graber has published numerous books, articles, and essays on constitutional law, constitutional development, constitutional theory, constitutional politics, and pretty much any other matter in which “constitutional” is used as an adjective. His most recent book is Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War. In response to absolutely no demand for a sequel, he is presently finishing up Making the Thirteenth Amendment Work, another study highlighting the limited place of Section One of the Fourteenth Amendment in postbellum Republican thought.

Christopher Green has taught at the University of Mississippi School of Law since 2006, where he is a Professor of Law and the Jamie L. Whitten Chair in Law and Government. He has an AB in Politics from Princeton, a JD from Yale, and a PhD in philosophy from Notre Dame. He has written extensively about constitutional theory and the Fourteenth Amendment, interpreting the Privileges or Immunities Clause in terms of equal citizenship, the Due Process Clause in terms of traditional judicial procedure, the Equal Protection Clause in terms of protection from violence, and the Commerce Clause in terms of a sharp distinction among its three components. He roots the bindingness of the original textually-expressed meaning in the Constitution’s self-definition, the Article VI oath, and the sense-reference distinction, and he sees constitutional construction through the lens of stakes-sensitive epistemology. His work has been cited in Haaland v. Brackeen, 143 S.Ct. 1609, 1655, 1666 (2023) (Gorsuch, J., concurring); United States v. Vaello Madero, 142 S.Ct. 1539, 1546, 1550, 1551 n.4 (2022) (Thomas, J., concurring); and McDonald v. Chicago, 561 U.S. 742, 859 n.2 (2010) (Stevens, J., dissenting).

Tara Leigh Grove is the Vinson & Elkins Chair in Law at the University of Texas School of Law. Grove graduated summa cum laude
from Duke University and magna cum laude from Harvard Law School. Grove then clerked for Judge Emilio Garza on the U.S. Court of Appeals for the Fifth Circuit, and spent four years as an attorney for the U.S. Department of Justice, Civil Division, Appellate Staff, where she argued fifteen cases in the courts of appeals. Grove’s research focuses on the federal judiciary, interpretive theory, and the constitutional separation of powers. She has published with such prestigious law journals as the *Harvard Law Review*, the *Columbia Law Review*, the *University of Pennsylvania Law Review*, and the *New York University Law Review*. Grove has received awards for both her research and her teaching. In 2021, Grove served on the Presidential Commission on the Supreme Court of the United States, a bipartisan commission created by President Biden and charged with examining proposals for Supreme Court reform. Since 2022, Grove has worked on the Princeton Initiative on Reclaiming the Constitutional Powers of Congress, which brings together former members of Congress, political scientists, and law professors. Grove has been a visiting professor at both Harvard Law School and Northwestern Pritzker School of Law.

**Sanford Levinson** is the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law at the University of Texas Law School and a Professor in the Government Department at the University of Texas at Austin. He earlier taught at Princeton from 1975-1979. He is the co-editor of a casebook, *Processes of Constitutional Decisionmaking* and the author, among other books, of *Constitutional Faith* (1988, 2d ed. 2011); *Our Undemocratic Constitution* (2006); *Framed* (2012); and, most recently, *Fault Lines in the Constitution* (with Cynthia Levinson). He was elected to the American Academy of Arts and Sciences in 2001 and received the Lifetime Achievement Award from the Law and Courts Section of the American Political Science Association in 2010.


**John McGinnis** is the George C. Dix Professor in Constitutional Law at the Northwestern University Law School where he teaches courses in constitutional law, administrative law, antitrust, and cryptocurrency. He is a graduate of Harvard College, Balliol College, Oxford, and Harvard Law School, where he was an editor of the *Harvard Law Review*. He clerked on the District of Columbia Circuit Court of Appeals and was a Deputy Assistant Attorney General in the Office of Legal Counsel in the Reagan and George H. W. Bush Administrations. He has published over ninety articles and essays, including ones in the *Yale and Duke Law Journals* and the *California, Chicago, Georgetown, Harvard, Michigan, Northwestern, Virginia, Stanford, and Texas Law Reviews*. He is the author of *Accelerating Democracy: Transforming Governance Through Technology* (Princeton 2013) and *Originalism and the Good Constitution* (with M. Rappaport) (Harvard 2013). He is a past winner of the Paul M. Bator award, given to an outstanding legal scholar under forty.

**Alan Patten** is Howard Harrison and Gabrielle Snyder Beck Professor of Politics

David Rabban served as counsel to the American Association of University Professors for several years before joining the Texas faculty in 1983. He served as General Counsel of the AAUP from 1998 to 2006 and Chair of its Committee on Academic Freedom and Tenure from 2006 to 2012. His teaching and research focus on free speech, higher education and the law, and American legal history. He is best known for his path-breaking work on free speech in American history. He is the author of Free Speech in Its Forgotten Years, 1870-1920 (Cambridge, 1997), which received the Forkosch Prize from the Journal of the History of Ideas for “the best book in intellectual history published in 1997.” His many articles have appeared in Yale Law Journal, Stanford Law Review, University of Chicago Law Review, and elsewhere. He was a fellow of the John Simon Guggenheim Foundation in 2016 and of the Program in Law and Public Affairs at Princeton University in 2016-17. His most recent book is Law’s History: American Legal Thought and the Transatlantic Turn to History. His book, Academic Freedom: From Professional Norm to First Amendment Right, will be published in August 2024 by Harvard University Press.

Emily Zackin is an Associate Professor of Political Science at Johns Hopkins University. She received her PhD from Princeton University, where she studied with Keith Whittington. Dr. Zackin’s research focuses on constitutional theory and American political development. Her book, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights (Princeton University Press, 2013) highlights America’s neglected positive rights tradition and explores its origins in a variety of social movements. Her other research in constitutional theory (co-authored with Mila Versteeg) has been published in the Chicago Law Review and the American Political Science Review. Her work also appears in the Law and Society Review, Law and Social Inquiry, Studies in American Political Development, and the Oxford Handbook of the US Constitution. Her new book, The Political Development of American Debt Relief, (co-authored with Chloe Thurston) will be published by the University of Chicago Press in June.