

## **COURTS AND CONSTITUTIONS (GPOL 6372)**

Spring 2017  
Thursdays, 2.00-3.50 p.m.  
6 East 16th Street, Room 601

Sanjay Ruparelia  
Associate Professor of Politics  
6 East 16 Street, Room 713  
[ruparelia@newschool.edu](mailto:ruparelia@newschool.edu)  
(212) 229-5747 ext. 3083  
Office Hours: by appointment

### **Overview**

What is a constitution? How are constitutions made? Why have some constitutions effectively structured the political lives of their respective countries and endured, while others have struggled to shape their dynamics of power, let alone survive? What roles do apex courts play in interpreting, amending and preserving distinct constitutional values? Does constitutionalism generally, and judicial review in particular, empower or constrain the prospects for democracy and justice? And why have these practices varied across countries over time? This course explores these questions in comparative, historical and theoretical perspective. The first part addresses basic conceptual questions: the origins, purposes and ramifications of courts, the rule of law and constitutionalism for politics. In part two of the course, we investigate how societies have variously established constitutions, and seek to interpret and amend them. Part three considers the foundations, legitimacy and consequences of courts reading, changing and reviewing constitutions and judging the constitutionality of legislation. Finally, in part four of the course we investigate where, how and why high judicial activism and popular constitutional mobilization have controversially inaugurated an era of new constitutionalism, especially regarding a positive socioeconomic conception of rights, and assess the ramifications of these recent trends.

### **Requirements & Assessment**

**Attendance:** You are expected to attend each class and read all the set material in advance. Attendance comprises 20% of your final grade.

**Participation:** The success of the class depends on your active and informed participation. Being active means engaging in discussion and debate; being informed entails careful reading of the set material. To encourage both activities each student is required to post a set of questions and comments in the Discussion section on Canvas one day prior to each class. Your commentaries are worth an additional 20% of your final grade.

**Papers:** Lastly, you are required to write two short papers (roughly 10 pages, double-spaced, 12-point font), which should address the readings of a particular week in two different sections of the course: 'Making, Interpreting and Amending Constitutions', 'The Foundations, Legitimacy and Consequences of Judicial Review' and 'The New Constitutionalism'. Papers are due at the beginning of the class in question. Each paper comprises 30% of your final grade.

The aim of your short papers is to provide a critical evaluation of the assigned readings for a particular week: to identify the main issues, situate the various positions taken by the authors and appraise their respective contributions. The following questions are useful to bear in mind in writing your responses: What are the principal theoretical, methodological and empirical

issues at stake in the readings? What are the central arguments of each author? What are the main strengths or weaknesses of each work? Are they coherent, or does a lack of consistency or bias in evidence impair the argument put forward, and if so, how? How valuable, original and viable is the theory or argument proposed? How does a particular contribution relate to larger debates we are studying? Your papers should not be a mere summary of the readings but a critical evaluation of the issues and arguments that arise in the material. Remember that a critique does not necessarily mean a negative evaluation; it also involves explicating the conceptual foundations, theoretical reasoning and empirical basis of a piece of work. Indeed, it is far easier to say what is wrong or missing in an argument than to show why it works or how it might be developed. Each paper will be evaluated according to the clarity, insight and comprehensiveness of your analysis.

Alternatively, you may wish to write a single longer paper (approximately 20-25 pages: worth 60% of your final grade) that focuses on a specific topic, country or set of countries in greater depth. Students who wish to pursue this option should let me know by February 16, and submit the question or questions they wish to investigate, as well as a brief outline of and working bibliography for their proposed essay by March 2. Final papers will be due on May 11.

### **Course Material**

There are no required texts for the course. All required material will be available electronically through Canvas.

**Week 1 (January 26): Introduction**

**Week 2 (February 2): Courts and constitutions**

Required:

- Martin Shapiro, “The prototype of courts,” *Courts: a comparative and political analysis* (Chicago: University of Chicago, 1981), pp. 1-64.
- Giovanni Sartori, “Constitutionalism: a preliminary discussion,” *American Political Science Review*, 56, 4 (1962): 853-864.
- Mark Tushnet, “Constitution,” in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 217-232.
- Dieter Grimm, “Types of constitutions,” in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 98-132.
- Catherine A. Mackinnon, “Gender in constitutions,” in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 397-417.

Suggested further reading:

- Yasuo Hasebe and Cesare Pinelli, “Constitutions and constitutionalism,” in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *The Routledge Handbook of Constitutional Law* (Routledge, 2013), pp. 9-20.
- Thomas Fleiner and Cheryl Saunders, “Constitutions embedded in different legal systems,” in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *The Routledge Handbook of Constitutional Law* (Routledge, 2013), pp. 21-32.
- Victor Ferreras Comella, “The rise of specialized constitutional courts,” in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 265-277.
- Alec Stone Sweet, “Constitutional courts,” in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 816-830.
- Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law, 3<sup>rd</sup> edition* (New York: Foundation Press, 2014), Chapter 3: 212-243.

**Week 3 (February 9): Constitutionalism and the rule of law**

Required:

- Stephen Holmes, “Pre-commitment and the paradox of democracy,” in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (New York: Cambridge University Press, 1988), pp. 195-240.
- Richard Bellamy, “Republicanism, democracy and constitutionalism,” in Cecile Laborde and John Maynor (eds), *Republicanism and political theory* (Malden, MA: Blackwell, 2008), pp. 159-189.
- Rune Slagstad, “Liberal constitutionalism and its critics: Carl Schmitt and Max Weber,” in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (New York: Cambridge University Press, 1993), pp. 103-130.

- Stephen Gardbaum, “The place of constitutional law in the legal system,” in Michael Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 169-188.
- Norman Dorsen, Michael Rosenfeld, Andrés Sajó and Susanne Baer, “Constitutionalism and the rule of law,” *Comparative Constitutionalism: cases and methods, 2<sup>nd</sup> edition* (St. Paul, MN: West Group, 2010), pp. 41-53.

Suggested further reading:

- Hans Kelsen, “The pure theory of law and analytical jurisprudence,” *Harvard Law Review*, 55, 1 (November 1941): 44-70.
- Carl Schmitt, *Constitutional Theory* (Durham, NC: Duke University Press, 2008), pp. 75-88, 97-111, 125-146, 268-279.
- *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, with translation, introduction, and notes by Lars Vinx (New York: Cambridge University Press, 2015)
- Martin Krygier, “Rule of law,” in Michael Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 233-249.
- Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law, 3<sup>rd</sup> edition* (New York: Foundation Press, 2014), pp. 243-273.

**Week 4 (February 16): Comparative constitutionalism**

Required:

- Kim Lane Scheppele, “The agendas of comparative constitutionalism,” *Newsletter of Law and Courts*, American Political Science Association, 13, 2 (2003): 5-22.
- Vicki C. Jackson, “Comparative constitutional law: methodologies,” in Michael Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 54-74.
- Mark Tushnet, “Some reflections on method in comparative constitutional law,” in Sujit Choudhury (ed.), *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2011), pp. 67-83.
- Ran Hirschl, “From comparative constitutional law to comparative constitutional studies,” *Comparative Matters: the renaissance of comparative constitutional law* (New York: Oxford University Press, 2014), pp. 151-191.
- Norman Dorsen, Michael Rosenfeld, Andrés Sajó and Susanne Baer, “Why comparative constitutional law?” *Comparative Constitutionalism: cases and methods, 2<sup>nd</sup> edition* (St. Paul, MN: West Group, 2010), pp. 1-24.

Suggested further reading:

- S.E. Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Oxford: Clarendon Press, 1995)
- Mark Van Hoeke and Mark Warrington, “Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law,” *The International and Comparative Law Quarterly*, 47, 3 (July 1998): 495-536.
- Jennifer Widner, “Comparative politics and comparative law,” *The American Journal of Comparative Law*, 46, 4 (Autumn 1998): 739-749.
- Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009)

## *Making, Interpreting and Amending Constitutions*

### **Week 5 (February 23): Constitution making**

#### Required:

- Jon Elster, “Forces and mechanisms in the constitution-making process,” *Duke Law Journal*, 45, 2 (1995): 364-396.
- Jennifer Widner and Xenophon Contiades, “Constitution making,” in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *The Routledge Handbook of Constitutional Law* (New York: Routledge, 2013), pp. 57-69.
- Helen Irving, “Drafting, design and gender,” in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 19-37.
- David Landau, “Constitution-making gone wrong,” *Alabama Law Review*, 64, 5 (2013): 923-980.
- Andrew Arato, “Redeeming the still redeemable: post sovereign constitution making,” *International Journal of Politics, Culture, and Society*, 22, 4 (December 2009): 427-443.

#### Suggested further reading:

- Bruce A. Ackerman, *We the People, Volume I* (Cambridge: Harvard University Press, 1993)
- Robert A. Goldman and Art Kaufman (eds), *Constitution Makers on Constitution Making: the experience of eight nations* (Washington, DC: AEI Studies, 1988)
- Jon Elster, “Constitutional bootstrapping in Philadelphia and Paris,” in Michael Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham, NC: Duke University Press, 1994), pp. 57-84.
- Ulrich K. Preuss, “Constitutional power-making of the new polity: some deliberations on the relations between constituent power and the constitution,” in Michael Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham: Duke University Press, 1994), pp. 143-164.
- Andrew Arato, *Post Sovereign Constitutional Making: learning and legitimacy* (New York: Oxford University Press, 2016)

### **Week 6 (March 2): Constitutional interpretation**

#### Required:

- Jeffrey Goldsworthy, “Constitutional interpretation,” in Michael Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 689-717.
- Keith I. Whittington, *Constitutional Interpretation: textual meaning, original intent, and judicial review* (University of Kansas Press, 1999), pp. 50-76 and 195-212.
- Cass R. Sunstein, *A Constitution of Many Minds: why the founding document doesn't mean what it meant before* (Princeton: Princeton University Press, 2011), pp. TBD.
- Gary Jeffrey Jacobsohn, “Constitutional values and principles,” in Michael Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 777-792.
- Norman Dorsen, Michael Rosenfeld, Andrés Sajó and Susanne Baer, “Dilemmas of constitutional interpretation,” *Comparative Constitutionalism: cases and methods*, 2<sup>nd</sup> edition (St. Paul, MN: West Group, 2010), pp. 190-235.

#### Suggested further reading:

- Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986)
- Laurence H. Tribe, *The Invisible Constitution* (Inalienable Rights) (New York: Oxford University Press, 2008)
- Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2010)
- Norman Dorsen, Michael Rosenfeld, András Sajó and Susanne Baer, "The place of constitutional adjudication in a working constitutional order," *Comparative Constitutionalism: cases and methods, 2<sup>nd</sup> edition* (St. Paul, MN: West Group, 2010), pp. 139-149.
- Vicki C. Jackson and Jamal Greene, "Constitutional interpretation in comparative perspective: comparing judges or courts?" in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 599-623.

### **Week 7 (March 9): Constitutional amendment**

#### Required:

- Sanford Levinson, "How many times has the United States Constitution been amended? (A) < 26; (B) 26; (C) 27; (D) > 27: accounting for constitutional change," in Sanford Levinson (ed.), *Responding to Imperfection: the theory and practice of constitutional amendment* (Princeton: Princeton University Press, 1995), pp. 13-36.
- John Ferejohn, "The politics of imperfection: the amendment of constitutions," *Law and Social Inquiry*, 22, 2 (April 1997): 501-530.
- Rosalind Dixon, "Constitutional amendment rules: a comparative perspective," in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 96-111.
- Gary Jeffrey Jacobsohn, "An unconstitutional constitution? a comparative perspective," *International Journal of Constitutional Law*, 4, 3 (2006): 460-497.
- Norman Dorsen, Michael Rosenfeld, András Sajó and Susanne Baer, "Amending the constitution," *Comparative Constitutionalism: cases and methods, 2<sup>nd</sup> edition* (St. Paul, MN: West Group, 2010), pp. 130-138.

#### *The Foundations, Legitimacy and Consequences of Judicial Review*

### **Week 8 (March 16): The foundations of judicial review**

#### Required:

- Alec Stone Sweet, "Judicialization and the construction of governance," *Comparative Political Studies*, 32, 2 (April 1999): 147-184.
- Carlo Guarnieri and Patrizia Pederzolo, edited by C.A. Thomas, *The Power of Judges: a comparative study of courts and democracy* (New York: Oxford University Press, 2002), pp. TBD.
- John Ferejohn, "Judicializing politics, politicizing law," *Law and Contemporary Problems*, 65, 3 (Summer 2002): 41-68.
- Judith Resnik, "Judicial independence," in Vikram Amar and Mark Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press, 2008), pp. 15-33.
- Frank I. Michelman, "The interplay of constitutional and ordinary jurisdiction," in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 278-297.

Suggested further reading:

- J. Mark Ramseyer, “The puzzling (in)dependence of courts: a comparative approach,” *The Journal of Legal Studies*, 23, 2 (June 1994): 721-747.
- Barry Weingast, “The political foundations of democracy and the rule of law,” *American Political Science Review*, 91, 2 (June 1997): 245-263.
- John Ferejohn and Pasquale Pasquino, “Rule of law and rule of democracy,” in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (New York: Cambridge University Press, 2003), pp. 242-260.
- Keith E. Whittington, “‘Interpose your friendly hand’: political supports for the exercise of judicial review by the United States Supreme Court,” *American Political Science Review*, 99, 4 (2005): 583-596.
- Miguel Schor, “The strange cases of *Marbury* and *Lochner* in the constitutional imagination,” *Texas Law Review*, 87, 7 (2009): 1463-1498.

\*\*\*Spring Break: March 21-25 \*\*\*

**Week 9 (March 30): The legitimacy of judicial review**

Required:

- Robert A. Dahl, “Decision-making in a democracy: the Supreme Court as a national policy-maker,” *Emory Law Journal*, 50, 2 (Spring 2001): 563-582.
- Ronald Dworkin, “Constitutional cases,” *Taking Rights Seriously* (Cambridge: Harvard University Press, 1997), pp. 163-184.
- Duncan Kennedy, “The moderation and empowerment effects,” *A Critique of Adjudication (fin de siècle)* (Cambridge: Harvard University Press, 1997), pp. 215-235.
- Jeremy Waldron, “Between rights and bills of rights,” *Law and Disagreement* (Oxford: Clarendon Press, 1999), pp. 211-231.
- Christopher Eisgruber, “Judicial review and democratic legitimacy,” *Constitutional Self-Government* (Cambridge: Harvard University Press, 2007), pp. 46-78.

Suggested further reading:

- Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000)
- Larry D. Kramer, *The People Themselves: popular constitutionalism and judicial review* (New York: Oxford University Press, 2005)
- Jeremy Waldron, “Constitutionalism: a skeptical view,” in Thomas Christiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (Blackwell, 2009), pp. 268-282.

**Week 10 (April 6): The consequences of judicial activism in the United States**

Required:

- Gerald N. Rosenberg, “Introduction”, “The dynamic and the constrained court,” and ‘Conclusion”, *The Hollow Hope: can courts bring about social change? 2<sup>nd</sup> edition* (Chicago: University of Chicago Press, 2008), pp. 1-38 and 336-344.

- Mark Tushnet, “Assessing judicial review” and “Against judicial review”, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000), pp. 129-176.
- Michael W. McCann, “Introduction” and “Legal mobilization and political struggle”, *Rights at Work: pay equity reform and the politics of legal mobilization* (Chicago: University of Chicago Press, 1994), pp. 1-22 and 278-310.
- Charles Epp, *The Rights Revolution: lawyers, activists and Supreme Courts in comparative perspective* (Chicago: University of Chicago Press, 1998), pp. 1-25 and 44-70.
- Stuart A. Scheingold, “Prologue” and “Epilogue”, *The Politics of Rights: lawyers, public policy and political change* (Ann Arbor: University of Michigan Press, 2004), pp. 3-12 and 203-220.

Suggested further reading:

- Jack Knight and Lee Epstein, *The Choices Justices Make* (Washington, DC: Sage, 1998)
- Paul Frymer, “Acting when elected officials won’t: federal courts and civil rights enforcement in U.S. labor unions, 1935-85,” *American Political Science Review*, 97, 3 (August 2003): 483-499.
- Martin Shapiro, “The success of judicial review and democracy,” in Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (New York: Oxford University Press, 2002), pp. 149–84.

*The New Constitutionalism*

**Week 11 (April 13): The expansion of constitutional adjudication and judicial review**

Required:

- Ran Hirschl, “The political origins of judicial empowerment: lessons from four constitutional revolutions,” *Law and Social Inquiry*, 25, 1 (Winter 2000): 91-149.
- Mark Tushnet, “Alternative forms of judicial review,” *Weak Courts, Strong Rights: judicial review and social welfare rights in comparative constitutional law* (Princeton: Princeton University Press, 2008), pp. 18-42.
- Stephen Gardbaum, “The new commonwealth model of constitutionalism,” *American Journal of Comparative Law*, 49, 4 (Autumn 2001): 707-760.
- Ruti Teitel, “Transitional justice and the transformation of constitutionalism,” in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 57-76.
- Julian Go, “A globalizing constitutionalism? views from the postcolony, 1945-2000,” *International Sociology*, 18, 1 (March 2003): 71–95.

Suggested further reading:

- Tate, C. Neal, and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995)
- Lisa Hilbink, “Assessing the new constitutionalism,” *Comparative Politics*, 40, 2 (January 2008): 227-245.



- Stephen Gardbaum, “Reassessing the new Commonwealth model of constitutionalism,” *International Journal of Constitutional Law*, 8, 2 (2010): 167-206.
- César A. Rodríguez-Garavito, “Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America,” *Texas Law Review*, 89, 7 (2011): 1669–98.
- Henriette Sinding Aasen, Siri Gloppen, Anne-Mette Magnussen and Even Nilssen (eds), *Juridification and Social Citizenship in the Welfare State* (Northampton, MA: Edward Elgar, 2014)

## **Week 12 (April 20): The Indian experience**

### Required:

- Upendra Baxi, “Taking suffering seriously: social action litigation in the Supreme Court of India,” *Third World Legal Studies*, 4, 6 (1985): 107–32.
- Balakrishnan Rajagopal, “Pro-human rights but anti-poor? a critical evaluation of the Indian Supreme Court from a social movement perspective,” *Human Rights Review*, 18, 3 (April–June 2007): 157–86.
- Shylashri Shankar and Pratap Bhanu Mehta, “Courts and socioeconomic rights in India,” in Varun Gauri and Daniel M. Brinks (eds), *Courting Social Justice: judicial enforcement of social and economic rights in the developing world* (New York: Cambridge University Press, 2008), pp. 146-182.
- S. Muralidhar, “India,” in Malcolm Langford (ed.), *Social Rights Jurisprudence: emerging trends in international and comparative law* (New York: Cambridge University Press, 2008), pp. 102-125.
- Madhav Khosla, “Making social rights conditional: lessons from India,” *International Journal of Constitutional Law*, 8, 4 (2010): 739-765.

### Suggested further reading:

- Rajeev Dhawan, “Judges and Indian democracy,” in Francine R. Frankel, Zoya Hasan, Rajeev Bhargava and Balveer Arora (eds), *Transforming India: social and political dynamics of democracy* (New Delhi: Oxford University Press, 2000), pp. 314–352.
- Granville Austin, *Working a Democratic Constitution: a history of the Indian experience* (New Delhi: Oxford University Press, 2003)
- S.P. Sathe, *Judicial Activism in India: transgressing borders and enforcing limits, 2<sup>nd</sup> edition* (New Delhi: Oxford University Press, 2004)
- R. Sudarshan, “Courts and social transformation in India,” in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: an institutional voice for the poor?* (New York: Routledge, 2006), pp. 153-168.
- Zoya Hasan, E. Sridharan, and R. Sudarshan (eds), *India’s Living Constitution: ideas, practices, controversies* (New Delhi: Permanent Black, 2006)
- Shylashri Shankar, *Scaling Justice: India’s Supreme Court, anti-terror laws, and social rights* (New Delhi: Oxford University Press, 2009)

## **Week 13 (April 27): The Brazilian experience**

### Required:

- José Renaldo de Lipa Lopes, “Brazilian courts and social transformation: a case study revisited,” in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and*

*Social Transformation in New Democracies: an institutional voice for the poor?* (New York: Routledge, 2006), pp. 185-212.

- Florian F. Hoffman and Fernando R.N.M. Bentes, “Accountability for social and economic rights in Brazil,” in Varun Gauri and Daniel M. Brinks (eds), *Courting Social Justice: judicial enforcement of social and economic rights in the developing world* (New York: Cambridge University Press, 2008), pp. 100-145.
- Octavio Luiz Motta Ferraz, “Harming the poor through social rights litigation: lessons from Brazil,” *Texas Law Review*, 89, 7 (2011): 1643–68.
- Daniel M. Brinks, “‘Faithful servants of the regime’: the Brazilian Constitutional Court’s role under the 1988 Constitution,” in Gretchen Helmke and Julio Rios-Figueroa (eds), *Courts in Latin America* (New York: Cambridge University Press, 2014), pp. 128-153.
- Diana Kapiszewski, “Power broker, policy maker or rights protector? the Brazilian Supremo Tribunal Federal in transition,” in Gretchen Helmke and Julio Rios-Figueroa (eds), *Courts in Latin America* (New York: Cambridge University Press, 2014), pp. 154-186.

#### Suggested further reading:

- Carlos Santiso, “Economic reform and judicial governance in Brazil: building independence with accountability,” in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: the accountability function of courts in new democracies* (London: Frank Cass, 2004), pp. 117-131.
- Rogério B. Arantes, “Constitutionalism, the expansion of justice and the judicialization of politics in Brazil,” in Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005), pp. 231-262.
- Peter P. Houtzager, “The Movement of the Landless (MST), juridical field and legal change in Brazil,” in Boaventura de Sousa Santos and César A. Rodríguez-Garavito (eds), *Law and Globalization from Below: towards a cosmopolitan legality* (New York: Cambridge University Press, 2005), pp. 218-240.
- Flavia Piovesan, “Brazil,” in Malcolm Langford (ed.), *Social Rights Jurisprudence: emerging trends in international and comparative law* (New York: Cambridge University Press, 2008), pp. 182-192.
- Matthew M. Taylor, *Judging Policy: courts and policy reform in democratic Brazil* (Stanford: Stanford University Press, 2008)
- Joaõ Biehl, Joseph J. Amon, Mariana P. Social and Adriana Petryna, “Between the court and the clinic: lawsuits for medicines and the right to health in Brazil,” *Health and Human Rights*, 14, 1 (2012): 1-17.

#### **Week 14 (May 4): The South African experience**

##### Required:

- Jonathan Berger, “Litigating for social justice in post-apartheid South Africa: a focus on health and education,” in Varun Gauri and Daniel M. Brinks (eds), *Courting Social Justice: judicial enforcement of social and economic rights in the developing world* (New York: Cambridge University Press, 2008), pp. 38-99.
- Sandra Liebenberg, “South Africa,” in Malcolm Langford (ed.), *Social Rights Jurisprudence: emerging trends in international and comparative law* (New York: Cambridge University Press, 2008), pp. 75-101.
- Dennis M. Davis, “Socioeconomic rights: has the promise of eradicating the divide between first and second generation rights been fulfilled?” in Tom Ginsburg and

Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 519-531.

- Theunis Roux, “Social rights” and “Property rights”, *The Politics of Principle: the first South African Constitutional Court, 1995-2005* (New York: Cambridge University Press, 2013), pp. 262-333.
- Malcolm Langford, Jackie Dugard, Tshepo Madlingozi and Ben Cousins, “Concluding perspectives,” in idem (eds), *Socio-Economic Rights in South Africa: symbols or substance?* (New York: Cambridge University Press, 2014), pp. 421-458.

Suggested further reading:

- Cass Sunstein, “Social and economic rights? lessons from South Africa,” *Designing Democracy: what constitutions do* (New York: Oxford University Press, 2001), pp. 221-237.
- Theunis Roux, “Legitimizing transformation: political resource allocation in the South African Constitutional Court,” in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: the accountability function of courts in new democracies* (London: Frank Cass, 2004), pp. 66-80.
- Jackie Dugard and Theunis Roux, “The record of the South African constitutional court in providing an institutional voice for the poor: 1995-2004,” in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: an institutional voice for the poor?* (New York: Routledge, 2006), pp. 107-126.
- Albie Sachs, *The Strange Alchemy of Life and Law* (New York: Oxford University Press, 2009)
- Heinz Klug, *The Constitution of South Africa: a contextual analysis* (Portland, OR: hart Publishing, 2010)
- Mark S. Kende, *Comparative Constitutional Law: South African cases and materials in a global context* (Durham, NC: Carolina Academic Press, 2015)

**Week 15 (May 11): Conclusion**