

# COURTS AND CONSTITUTIONS (POG447)

Fall 2021  
Virtual

Sanjay Ruparelia  
Politics Department  
[ruparelia@ryerson.ca](mailto:ruparelia@ryerson.ca)  
Office Hours: by appointment

## Overview

What is a constitution? What are its relations to democracy, the rule of law and other constitutions? How are constitutions made, interpreted and amended? Why have some constitutions effectively structured the political lives of their countries and endured, while others have struggled to shape the dynamics of power, let alone survive? Does constitutionalism generally, and judicial review in particular, empower or constrain the prospects for democracy, equality and justice? Why have these practices varied across countries over time? This course explores these questions in comparative, historical and theoretical perspective.

## Structure, requirements & assessment

1. Lecture and Discussion: Each week, we shall meet from 3:00-5:00 p.m., via Zoom or Google Meet (links will be shared in advance). I will begin by presenting a brief virtual lecture to introduce the topic and readings. We will then have a collective discussion.

Since this is an upper-level undergraduate course, more akin to a seminar, it requires your active and informed participation. Being informed entails carefully reading the material before we meet. Being active means contributing to our discussion.

Your attendance and participation are worth 10% of your final grade.

2. Preparation: To engage with the material we are reading and prepare adequately for our weekly discussions, you are required to upload a short post (100-200 words) by 9:00 a.m. each Tuesday.

Your posts can raise questions, or share comments and reflections, regarding the readings. They should be uploaded to the relevant Discussions section on the D2L Brightspace portal (the Discussions section can be found under the Communication drop-down tab).

Your weekly posts are worth 10% of your final grade.

3. Short papers: You are required to write two short papers (5 pages each, double-spaced, 12-point font). Each paper is worth 20% of your final grade.

Your first paper should answer one question from the first part of the course, *Concepts and Approaches* (weeks 2-4).

Due date: 12:00 p.m. (noon) on Friday, October 8.

Your second paper should answer one question from the second part of the course, *Making, Interpreting and Amending Constitutions* (weeks 5-7).

Due date: 12:00 p.m. (noon) on Friday, November 5.

Each question below presumes you have carefully read and understood the set material for the topic in question, and expects you to develop an argument that draws on the readings, citing them where necessary. Your papers should be submitted to me, by the deadline for each paper, at [ruparelia@ryerson.edu](mailto:ruparelia@ryerson.edu).

### *Concepts and Approaches*

- What is a constitution?
- Is there an inevitable tension between constitutionalism and democracy?
- “...an understanding of constitutionalism must reach beyond constitutional case law and the operations of a high court.” Discuss.

### *Making, Amending and Interpreting Constitutions*

- Does an ideal approach to constitution making exist?
- How should we interpret our constitutions?
- “The contrast between interpretation and amendment is akin to that between organic development and the *invention* of entirely new solutions to old problems.” Discuss.

4. Long paper: Lastly, your final assignment (10 pages, double-spaced, 12-point font) invites you to address the following statement:

“... judicial empowerment through the constitutional fortification of rights may provide an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage.”

Do you agree? Discuss with reference to three cases we study in the third part of the course, *The Politics of Judicial Review and the New Constitutionalism*.

Your long paper is worth 40% of your final grade.  
Due date: 12:00 p.m. (noon), Friday, December 10.

### **Course material**

All required readings will be available on the course webpage through the D2L Brightspace portal.

For each topic, I have also suggested a few supplementary readings if you are interested in learning more about it. However, I have not uploaded any of these to the course portal.

## Concepts & Approaches

### Week 1 (September 7): Introduction

### Week 2 (September 14): Constitutions

#### Required:

- Mark Tushnet, "Constitution," in Michael Rosenfeld and Andrés 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 Andrés 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 Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 397-417.

#### Suggested further reading:

- Giovanni Sartori, "Constitutionalism: a preliminary discussion," *American Political Science Review*, 56, 4 (1962): 853-864.
- 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 Andrés 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 (September 21): 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.
- 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)
- 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.
- Richard Bellamy, "Republicanism, democracy and constitutionalism," in Cecile Laborde and John Maynor (eds), *Republicanism and political theory* (Malden, MA: Blackwell, 2008), pp. 159-189.
- Martin Krygier, "Rule of law," in Michael Rosenfeld and András 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 (September 28): 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.
- 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.

#### 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)
- Vicki C. Jackson, "Comparative constitutional law: methodologies," in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 54-74.
- Norman Dorsen, Michael Rosenfeld, András 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.

## Making, Interpreting and Amending Constitutions

### Week 5 (October 5): Constitution making

#### Required:

- Jon Elster, “Forces and mechanisms in the constitution-making process,” *Duke Law Journal*, 45, 2 (1995): 364-396.
- Helen Irving, “Drafting, design and gender,” in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 19-37.
- 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.
- 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.
- David Landau, “Constitution-making gone wrong,” *Alabama Law Review*, 64, 5 (2013): 923-980.
- Andrew Arato, *Post Sovereign Constitutional Making: learning and legitimacy* (New York: Oxford University Press, 2016)

**\*\*\*Reading Week: No Class on October 12\*\*\***

### Week 6 (October 19): Constitutional interpretation

#### Required:

- Jeffrey Goldsworthy, “Constitutional interpretation,” in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 689-717.
- 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. 1-16.
- Norman Dorsen, Michael Rosenfeld, András 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)
- Keith I. Whittington, *Constitutional Interpretation: textual meaning, original intent, and judicial review* (University of Kansas Press, 1999), pp. 50-76 and 195-212.
- 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.
- Gary Jeffrey Jacobsohn, "Constitutional values and principles," in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), pp. 777-792.

### **Week 7 (October 26): 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.

#### Suggested further reading:

- 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 Politics of Judicial Review and the New Constitutionalism*

### **Week 8 (November 2): The foundations of judicial review**

#### Required:

- Carlo Guarnieri and Patrizia Pederzolo, "Introduction," in C.A. Thomas (ed.), *The Power of Judges: a comparative study of courts and democracy* (New York: Oxford University Press, 2002), pp. 1-17.
- 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.

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.
- Alec Stone Sweet, “Judicialization and the construction of governance,” *Comparative Political Studies*, 32, 2 (April 1999): 147-184.
- 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.
- 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.

**Week 9 (November 9): The legitimacy of judicial review**

Required:

- Ronald Dworkin, “Constitutional cases,” *Taking Rights Seriously* (Cambridge: Harvard University Press, 1997), pp. 163-184.
- 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:

- 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.
- Duncan Kennedy, “The moderation and empowerment effects,” *A Critique of Adjudication (fin de siècle)* (Cambridge: Harvard University Press, 1997), pp. 215-235.
- 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 (November 16): 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.
- 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:

- 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.
- Jack Knight and Lee Epstein, *The Choices Justices Make* (Washington, DC: Sage, 1998)
- Mark Tushnet, “Assessing judicial review” and “Against judicial review”, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000), pp. 129-176.
- 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.

**Week 11 (November 23): The new constitutionalism**

Required:

- Ran Hirschl, “The political origins of judicial empowerment: lessons from four constitutional revolutions,” *Law and Social Inquiry*, 25, 1 (Winter 2000): 91-149.
- Stephen Gardbaum, “The new commonwealth model of constitutionalism,” *American Journal of Comparative Law*, 49, 4 (Autumn 2001): 707-760.
- 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)
- 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.
- 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.



- 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.
- 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 (November 30): Constitutionalizing social rights in the global South**

### Required:

- 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.
- 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.
- 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.
- 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.

### Suggested further reading:

- Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: the accountability function of courts in new democracies* (London: Frank Cass, 2004)
- 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)
- 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)
- Malcolm Langford (ed.), *Social Rights Jurisprudence: emerging trends in international and comparative law* (New York: Cambridge University Press, 2008)