

Syllabus for Government 373
Comparative Constitutional Politics
Professor: Gemma Sala

E-mail: gsala@wesleyan.edu

Phone: 860-658-3459

Office: PAC 220

Office hours: Tuesdays and Thursdays from 11AM to 12PM, by appointment

Place and time: PAC 136; Thursdays 1:10PM to 4PM

Course description: Constitutions are political pacts aimed at binding the power exercised by politicians. This premise depicts the interaction between politics and constitutions: politics determine the contents and aims of constitutions and in turn constitutions shape political behavior. It also reflects one of the main paradoxes in the foundations of our political systems: politicians ultimately define the limits of their own power. If this is so, the question raises under what conditions can we expect constitutions to be properly enforced?

This seminar addresses these issues by focusing on the politics involved in constitutional choice and interpretation. It looks at the political aims of constitutions, the ways in which they are enforced, the conditions for weak and strong constitutional regimes, the political factors involved in the judicial interpretation of constitutions as well as the political strategies that derive from these interpretations, and the ways in which constitutional meaning evolves and changes. These processes are addressed in comparative perspective, by looking at constitutional structures and dynamics in Germany, France, Spain, the United States, Canada, Russia, Argentina, and Mexico.

Course requirements: There is no formal prerequisite to take this course, but some of the readings assigned require a basic knowledge of the logic of the comparative method as well as minimal understanding of formal modeling and statistical inference.

Class discussions are expected to be at the level of an advanced seminar. The format of the course is discussion-based. Each week deals with a set of related research questions addressed in the literature of constitutional politics. Students are required to prepare the assigned material before coming to class and participate actively in class discussion. To facilitate discussion students will write a brief (one page) response to the readings each week and post it every Thursday before 1pm in the course's blackboard. **Class participation** amounts to 30% of the grade of the course.

In addition, there will be a 24 hours take home **mid term exam** on week 9. Students will be asked to answer a set of questions discussed in class and in the readings. It will account for 30% of the final grade.

In addition, each student will write a **research paper** on any of the topics related to the course, in their preferred area of interest. Students need to submit an outline of their project, including their research question, interest, approach and preliminary or expected findings, by week five. After week five, students will present their research in class. The final paper will be due at the end of the term. The paper is worth 40% of the grade.

Reading materials: All reading materials will be posted on-line (ERes) at least one week before the assigned date. There will also be a copy of each week's readings on reserve in the library.

Week 1. Thursday January 25. Why do we have constitutions?

Russell Hardin (1989) "Why a Constitution?" Bernard Grofman, Wittman Donald (eds) *The Federalist Papers and the New Institutionalism*. NY: Agathon Press.

Week 2. Thursday February 1. Democracy and the rule of law

Weingast 1997 "The Political Foundations of the Rule of Law" *American Political Science Review* 91: 245-263

Stephen Holmes (2003) "Lineages of the Rule of Law" Maravall and Przeworski, *Democracy and the Rule of Law*, p. 19-61

Barros, Robert (2003) "Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile" in Maravall and Przeworski eds. *Democracy and the Rule of law*. Cambridge University Press, pp. 188-219.

Maravall, José Maria (2003) "The rule of Law as a Political Weapon" in Maravall and Przeworski eds. *Democracy and the Rule of law*. Cambridge University Press, pp. 261-301

Week 3. Thursday, February 8. The constitution as a social pact

Barry Weingast (1993) "Constitutions as Governance structures" in *Journal of Institutional and Theoretical Economics* 149/1, pp/ 286-311

Przeworski (1988) "Democracy as a contingent outcome of conflicts" in Jon Elster et al eds. *Constitutionalism and Democracy*. Cambridge University Press, pp. 59-80

Holmes (1988) "Gag rules or the politics of omission" in Jon Elster et al eds. *Constitutionalism and Democracy*. Cambridge University Press, pp. 19-58.

Jon Elster (1995) "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal*, Vol. 45, no. 2, pp. 364-96

David Laitin (1995) "Transitions to democracy and territorial integrity" in Adam Przeworski ed. *Sustainable Democracy*. Cambridge University Press, pp. 19-33

Week 4. Thursday February 15. Enforcing constitutions with judicial review

Tom Ginsburg (2003) "The decline and fall of Parliamentary sovereignty" and "Why judicial review" in *Judicial Review in New Democracies: Constitutional Courts in Asian cases*. Cambridge University Press. Pp. 1-33.

Robert Lowry Clinton (1994) "Game theory, Legal history and the Origins of Judicial Review: A revisionist Analysis of Marbury v. Madison" in *American Journal of Political Science* vol 38, n. 2, pp. 285-302

Capelletti (1989) *The judicial process in comparative perspective*. Oxford: Clarendon Press, pp. TBA

Alec Stone (2002) "Constitutional adjudication and Parliamentary democracy" in *West European Politics* 25: 77-100.

Klaus von Beyme (1989) "The genesis of constitutional review in Parliamentary systems" in C. Landfried ed. *Constitutional Review and Legislation: An International Comparison*. Baden-Baden, Nomos.

Week 5. Thursday February 22. Judicial Review and its Critics

(Research paper 3 page outline due)

Davies, Michael (1987) "A government of judges: a historical review" *American Journal of Comparative Law* 35: 559-580

Alexander Bickel (1986) "Establishment and general justification of judicial review" in *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Yale University Press, pp. 1-33.

Barry Friedman (1998) "The history of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" *New York University Law Review*

Robert A. Dahl (1957) "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* 6: 279-295 (re-printed in *Emory Law Journal* 50, 2001)

Week 6. Thursday, March 1. Judicial behavior: Legal realism v. the attitudinal model

Jeffrey A Segal and Harold J. Spaeth (2002) *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press, ch. 2 and 3. Alternatively read Spaeth, Harold J. (1995) "The attitudinal Model" in Lee Epstein *Contemplating Courts*. Washington DC: Congressional Quarterly Inc.

Gilman (2001) "What's Law got to do with it?" Judicial Behaviorists test the 'Legal model' of Judicial decision-making" *Law and Social Inquiry*, vol. 26:465-504.

Segal and Spaeth (1996) "Norms, dragons and stare decisis: A response" *American Journal of Political Science* 40: 1064-1082

Stephen Feldman (2005) "The rule of law and the rule of politics? Harmonizing the internal and external views of Supreme Court decision-making" in *Law and Social Inquiry* vol. 30 (1):89.

Week 7. Thursday, March 8. Strategic Judicial Decision-Making

Epstein Knight et al (2001) "The Supreme Court as a Strategic National Policy Maker. *Emory Law Journal* 50: 583-611

John Ferejohn and Barry Weingast (1992) "A positive theory of statutory Interpretation" *International Review of Law and Economics* 12: 263-279

Gretchen Helmke (2002) "The logic of Strategic Defection" Court-Executive relations in Argentina Under dictatorship and democracy" *American Political Science Review* 96: 291-303

Georg Vanberg (2001) "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review" *American Journal of Political Science* vol. 45, n.2, pp. 346-362

Epstein Lee, Jack Knight and OIGa Shvetsova 2001 "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of government" in *Law and society review* 35: 117-164.

Week 8. Thursday, March 29. A functionalist account of judicial behavior

Alec Stone Sweet (2002) "Path dependence, Precedent and Judicial Power" in Stone Sweet and Shapiro, *On Law, Politics and Judicialization*. Oxford University Press, p. 112-135.

Martin Shapiro (2002) "Towards a theory of *Stare decisis*" and "The giving reasons requirement" in Stone Sweet and Shapiro, *On Law, Politics and Judicialization*. Oxford University Press, P. 90-102 and 228-258.

Week 9. Thursday, April 5. Judicial independence

(Take home mid term)

William Landes and Richard Posner (1975) "The independent Judiciary in an Interest group perspective" *Journal of law and Economics* 18: 875-901.

E. M. Salzberger (1993) "A Positive Analysis of the Doctrine of Separation of Powers, or: Why do we have an independent judiciary" *International Review of Law and Economics* 13, n.4, pp. 349-379.

Keith E. Whittington (2003) "Legislative sanctions and the strategic environment of judicial review" *I-Con: The International Journal of Constitutional Law* 1: 446-74.

James Rogers (2001) "Information and Judicial Review: A signaling game of Legislative-Judicial interaction" in *American Journal of Political Science* 45: 84-99.

Julio Rios Figueroa (2007) "The emergence of an independent judiciary in Mexico 1994-2002" Forthcoming in *Latin American Politics and Society*.
Find it at
http://homepages.nyu.edu/~jrf246/Papers/SupremeCourt_JRF_LAPS.pdf

Week 10. Thursday April 12. Judicialization of politics

John Ferejohn (2002) "Judicializing Politics, Politicizing Law" in *Law and Contemporary Problems* 65, n. 3, pp. 41-68. Available at <https://www.law.duke.edu/journals/lcp/downloads/LCP65DSummer2002P41.pdf>

Bruce Ackerman (1997) "The Rise of World Constitutionalism" in *Virginia Law Review* 83:771-797.

Mark Graber (1993) "The non-majoritarian difficulty: Legislative deference to the judiciary" *Studies in American Political Development* 7: 35-73.

Ran Hirshl (2000) "The political origins of judicial empowerment through constitutionalization: Lessons from four constitutional revolutions" in *Law and Social Inquiry* 25: 91-149.

Keith E. Whittington (2005) "'Interpose your friendly hand': Political Support for the exercise of judicial review in the USSC" in *American Political Science Review* 99, n. 4, p. 583-609.

Week11. Thursday, April 19. The impact of judicial review on policy making

Rosenberg (1991) "The Hollow Hope: Can Courts bring about social change?" Chicago: University of Chicago Press, pp. TBA

Christine Landfried (1985) "The Impact of the German Federal Constitutional Court on Politics and Policy Output" in *Government and Opposition* 20, 4, pp. 522- 541.

Rose-Ackerman, S. (1992). "Judicial review and the power or the purse" *International Review of Law and Economics* 12, No. 2: 217-231.

Charles Epp (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative perspective*. Chicago: University of Chicago Press, pp. 11-25 and 197-206.

Mahoney (2001) "The Common Law and Economic Growth: Hayek might be right" *The Journal of Legal Studies* 30: 503-525

Week 12. Thursday, April 26. Constitutional change

Bruce Ackerman (1989) "Constitutional Politics/ Constitutional Law" in *Yale Law Journal* 99, n. 3, pp. 453-547

Stanford Levinson (1995) "How Many times has the US constitution been amended?" in *Responding to Imperfection: The theory and practice of constitutional amendments*. Princeton University Press, pp. 13-36.

Week 13. Thursday, May 3. What have we learned?

(final paper due)