

Carleton University  
Course Outline

Department of Law and Legal Studies

**COURSE:** LAWS 2501 C - Law, State and Constitution

**TERM:** Fall 2012

**PREREQUISITES:** Either LAWS 1000 [1.0] or PSCI 1000 [1.0], or the combination of PSCI 1001 and PSCI 1002, or second-year status or higher in the Bachelor of Public Affairs and Policy Management Program.

**CLASS:** Day & Time: Tuesdays, 2:35-5:25pm  
Room: Please check Carleton Central for current room location.

**INSTRUCTOR:** Dr. Zoran Oklopčić

**CONTACT:** Office: Loeb D483  
Office Hrs: TBA  
Email: Zoran\_Oklopčić@carleton.ca

---

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

**Pregnancy obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

**Religious obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

**Academic Accommodations for Students with Disabilities:** The **Paul Menton Centre** for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or [pmc@carleton.ca](mailto:pmc@carleton.ca) for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your **Letter of Accommodation** at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (*if applicable*). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (*if applicable*) at <http://www2.carleton.ca/pmc/new-and-current-students/dates-and-deadlines/>

You can visit the Equity Services website to view the policies and to obtain more detailed information on academic accommodation at <http://www2.carleton.ca/equity/>

---

**Course description:**

This course deals with some of the most important and foundational questions of public (constitutional) law: What is an adequate way to think about the constitution of a legitimate state? How should we organize political power in a new polity? Should we embrace the idea of the separation of powers, and, if so, which one of its variants? What are the merits and demerits of federalism? Can public (constitutional) law guide the most radical of political changes – secession?

The aim of this course is to enable you to become familiar with the most important areas of public law, and its theoretical background. The focus of the course will be on Canadian constitutional law, but we will approach it from a comparative perspective, drawing on the theoretical insights and practical experience of other countries, such as the United States, Great Britain and France.

The success of this course depends on student engagement and interaction. Questions and discussion on specific points are welcomed and actively encouraged. In order to reap maximum benefits from the course material and class discussions, students will be expected to have read the required material before each class.

**Objectives of the course:**

- Familiarize yourself with central theoretical *concepts* of modern constitutional theory;
- Gain a solid grasp of diverse institutional *options* in constitution-making, and constitutional design; and
- Establish a *foundation* in Canadian constitutional law in the context of comparative constitutional debates.

**Grading:**

Midterm exam – 50%

The midterm will test your factual knowledge of the important concepts and arguments in constitutional theory, comparative constitutionalism and Canadian constitutional law. The midterm will consist of two components: multiple choice questions, and one or two questions that require shorter-length, essay-type answers.

In-group collaboration – 40%

The other component of your grade is based on collaborative work. You are expected to constructively engage with your colleagues in thematic groups that mimic the actual caucuses of different political parties in a constituent assembly, tasked with producing a new constitution for a country.

You are expected to work together to produce weekly reports that engage the course readings, but which then creatively appropriates them for the political platform of your caucus

(for the description of the respective groups see Annex A). For example, if we tackle various systems of the separation of powers in week 7, your goal will collaborate with your peers and choose a particular system of government (or suggest an original alternative!) and explain why you chose it, and how it aligns with the values of your caucus.

While all members of the group are expected to provide input for the weekly position paper, only one person in the group will be in charge of producing the final version of the weekly paper, to be submitted on WebCT in the space provided for group discussion.

The 40% of your grade will be calculated taking your individual and group efforts in consideration, as well as the final product of your caucus/political party: a draft of a constitution for our fictitious country. 75% of these 40% will be devoted to your average individual contribution; and the other 25% will be devoted to your collective product—the draft of the constitution. (an example will help illustrate this: If the average mark of all of your individual contributions is, say, 7, and the mark for your collective ‘product’ is 8, your individual mark for the in-group collaboration will be:  $(7 \cdot 0.75 + 8 \cdot 0.25) \cdot 4 = 29\%$  which is then to be added to the midterm, and weekly position paper mark.

Which leads us to the final component of your grade:

Weekly position paper – 10%

The weekly position paper you will write in the name of your caucus will also be graded as your individual contribution, worth 10%. If you feel that members of your group have an erroneous view of some constitutional issue, you are free to add an explanatory note distancing yourself, if you wish, from the dominant view. For an explanation of the grading structure of the weekly position paper, see Annex B.

### Readings and resources:

In addition to the readings that will be available either through links on WebCT, or edited texts of non-copyrighted material, there are a number of excellent **online resources** you should consult:

For theoretical discussions of the important concepts we will be dealing with, see:  
Stanford Encyclopaedia of Philosophy <http://plato.stanford.edu/>

For more practice-oriented, yet theoretically informed discussions of current developments in comparative constitutionalism, see:

www.Constitutionmaking.org: Resources for Constitutional Design  
[www.constitutionmaking.org](http://www.constitutionmaking.org)

Toronto Initiative for Economic and Social Rights, <http://www.tiesr.org/data.html>

**Course Schedule [the readings may change!]****1. Sept 11: Logistics. Overview of the course.****2. Sept 18: Why do we need (public) law? The ‘state of nature’ and ‘social contract’. A first glance into the separation of powers, and popular sovereignty**

- Hobbes, Thomas, *Leviathan*, [excerpts]
- Jean-Jacques Rousseau, *The Social Contract* [excerpts]
- John Locke, *The Second Treatise of Civil Government*, chs. XII and XIII [excerpts]

**3. September 25: Between constituent power of the people and parliamentary sovereignty**

- Emmanuel Joseph Sieyès, *What is the Third Estate?* [excerpts]
- Albert Venn Dicey, *On Parliamentary Sovereignty* [excerpts]

**4. Sept 28: Federalism: Territorial and Multinational**

- Federalist, no. 10 [excerpt]
- *Quebec Secession Reference* [excerpts]
- *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 [sections]
- “Federalism”, *Stanford Encyclopaedia of Philosophy*
- Will Kymlicka, “Multinational Federalism In Canada: Rethinking the Partnership”, *Policy Options*, (1998), available on:  
<http://www.irpp.org/po/archive/mar98/kymlicka.pdf>

**5. Federalism – cont’d. Consociationalism**

- The Constitution of Bosnia and Herzegovina [excerpts]
- *Sejdic and Finci v. Bosnia and Herzegovina*, European Court of Human Rights (27996/06 and 34836/06)
- *Constitution of Iraq*, 2005 (excerpts)
- John McGarry and Brendan O’Leary, “Iraq’s Constitution of 2005: Liberal consociation as political prescription” *International Journal of Constitutional Law* (2007)

**6. Oct 19 Horizontal organization of powers: presidential, semi-presidential and parliamentary systems**

- Federalist Papers 47, 48, 51 [excerpts]
- Charles De Gaulle, “Bayeux Speech” (1946) [excerpts]
- *Constitution Act 1867* [excerpts]
- *French Constitution 1958* [excerpts]
- Bagehot, “English Constitution” [excerpts]
- **Optional:** Bruce Ackerman, “The New Separation of Powers”, (2000) 111:3 Harvard Law Review 633

**7. Constraining democracy: Judicial Review, and Counter-majoritarian difficulty**

- *Marbury v. Madison* [excerpts]
- Mark Tushnet, *Marbury v. Madison Around the World*, 71 Tenn. L. Rev. 251
- Cass Sunstein, “Why Does the American Constitution Lack Social and Economic Guarantees?” working paper,  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=375622](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=375622)

**8. Nov 2: Constraining democracy, (but not too much): Notwithstanding clause**

- *Same Sex Marriage Reference* [excerpts]
- **Optional:** Peter W. Hogg and Allison A. Bushell, *The Charter Dialogue Between Courts And Legislatures: Or Perhaps The Charter Of Rights Isn’t Such A Bad Thing After All*  
[http://www.ohlj.ca/archive/articles/35\\_1\\_hogg\\_bushell.pdf](http://www.ohlj.ca/archive/articles/35_1_hogg_bushell.pdf)

Midterm exam review!

**9. Midterm exam**

**10. Constitutional Amendments, Unconstitutional constitutional change, constituent power reconsidered**

- *Patriation Reference*, [1981] 1 S.C.R. 753
- *Quebec Veto Reference*, [1982] 2 S.C.R. 793
- Constitution Act 1982, Part V

- *His Holiness Kesavananda Bharati v. The State of Kerala and Others* ([AIR 1973 SC 1461](#)) [selected passages]
- *Minerva Mills Ltd. & Ors vs Union Of India*, 1980 AIR 1789 [selected passages]
- **Optional:** Richard Albert, “Nonconstitutional Amendments”, 22 Can. J. L. & Jurisprudence 5 2009

## 11. **Constitutional law at its limit: Secession of Quebec**

- *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [select passages]
- <http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html>

## 12. **“Constitutional Convention”**