

Carleton University
Course Outline

Department of Law and Legal Studies

COURSE:	LAWS 2501 – Law, State and Constitution
TERM:	Fall 2017
PREREQUISITES:	Either LAWS 1000 [1.0], PAPM 1000 [1.0], PSCI 1000 [1.0] (No longer offered), PSCI 1001 and PSCI 1002 (no longer offered), PSCI 1100 and PSCI 1200.
CLASS:	Day: Friday
	Time: 2:35 – 5:50 (A&T sections)
	Room: Please check with Carleton Central for current room location
INSTRUCTOR:	Dr. Zoran Oklopčic
CONTACT:	Office: Loeb D587
	Office Hrs: Fridays 12:00 – 2:00pm
	Email: zoran.oklopčic@carleton.ca

Academic Accommodations:

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://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://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 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*). **Requests made within two weeks will be reviewed on a case-by-case basis.** After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website (www.carleton.ca/pmc) for the deadline to request accommodations for the formally-scheduled exam (*if applicable*).

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

Plagiarism

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence.

More information on the University's **Academic Integrity Policy** can be found at: <http://carleton.ca/studentaffairs/academic-integrity/>

Student Services: The Centre for Student Academic Support (CSAS) is a centralized collection of learning support services designed to help students achieve their goals and improve their learning both inside and outside the classroom. CSAS offers academic assistance with course content, academic writing and skills development. Visit CSAS on the 4th floor of MacOdrum Library or online at carleton.ca/csas

Department Policy

The Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations.

<http://carleton.ca/law/current-students/>

Course description:

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 theoretical and comparative perspective, drawing on the theoretical insights and practical experience of other countries, such as the United States, Great Britain, France, Venezuela, Egypt and Bolivia.

The 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 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:

First short essay - 20% on Saturday after class 4 (beginning: Sept 30 9:00am, submission deadline Oct 1 9:00am)

Second short essay - 20% on Saturday after class 7 (beginning: Oct 21 9:00am, submission deadline Oct 22 9:00am)

Both essays will require you to answer to one to three questions from the pool of study guide questions made available on CuLearn. You will have 24 hours to complete the essay after it becomes available on CuLearn. Their submission after the deadline will be penalized by deducting 10 percentage points per day from your essay mark.

Midterm exam – 35%

TIME: Saturday, November 4th (12:00 – 1:30 pm). LOCATION TBA

The multiple-choice midterm exam will test your factual knowledge of the important concepts and arguments in constitutional theory, comparative constitutionalism and Canadian constitutional law.

Third essay: Project (25%) after the end of the last class, due on the last day of the exam period

The third essay will require you to creatively employ your knowledge of central concepts and debates in constitutional law on an imagined, but realistic situation of post-conflict constitution making.

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:

The blog of the *International Journal of Constitutional Law* <http://www.icconnectblog.com/>

www.Constitutionmaking.org: Resources for Constitutional Design
www.constitutionmaking.org

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

COURSE SCHEDULE [THE READINGS MAY CHANGE!]

1. **September 8. Logistics. Overview of the course.**
2. **September 15. Why do we need (public) law? The ‘state of nature’ and ‘social contract’. A first glance into the ideas of separation of powers and popular sovereignty**
 - David Graeber, “Are you an anarchist? The answer may surprise you!” <http://theanarchistlibrary.org/library/david-graeber-are-you-an-anarchist-the-answer-may-surprise-you>
 - 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 22. Constitutional change I: Revolt, rebellion and revolution**
 - Emmanuel Joseph Sieyes, What is the Third Estate? [excerpts]
 - J. Locke, *The Second Treatise of Civil Government* [excerpts]
 - *Opinion No. 17 about the Referendum to Convene a Constituent Assembly* Supreme Court of Justice of Venezuela [Excerpt]
 - *Opinion C-551/03*, Colombian Constitutional Court [Excerpt]

- Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, “When to Overthrow Your Government: The Right to Resist in the World's Constitutions” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125186 [excerpts]

4. September 29. Whose sovereignty? Constitutionalism, Nationalism and Federalism

- Bernard Yack, “Popular Sovereignty and Nationalism” (2001) *Political Theory* 519 [excerpts]
- Federalist Papers, No. 10 [excerpts]
- *Quebec Secession Reference* (Supreme Court of Canada) [excerpts]
- “Federalism”, Stanford Encyclopaedia of Philosophy [optional]

5. October 6. Whose sovereignty? Federalism, power-sharing and beyond

- Arendt Lijphardt, “Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories” (1985) 15:2 *Publius* 3 [excerpts]
- Jean-François Caron & Guy Laforest, “Canada and Multinational Federalism: From the Spirit of 1982 to Stephen Harper's Open Federalism” (2009) 15:1 *Nationalism and Ethnic Politics* 27 [excerpts]
- John McGarry and Brendan O’Leary, “Iraq’s Constitution of 2005: Liberal consociation as political prescription” (2007) 5:2 *International Journal of Constitutional Law* [excerpts]
- Audra Simpson, “Subjects of sovereignty: indigeneity, the revenue rule, and juridics of failed consent” (2008) 71 *Law and Contemporary Problems* 191 [excerpts]

6. October 13. Horizontal organization of powers: presidential, semi-presidential and parliamentary systems

- Federalist Papers 47, 48, 51 [excerpts]
- Bruce Ackerman, “The New Separation of Powers” (2000) 113: 3 *Harvard Law Review* 633 [excerpts]
- Charles De Gaulle, “Bayeux Speech” (1946) [excerpts]
- Walter Bagehot, “English Constitution” [excerpts]

7. October 20. Constitutionalism, Democracy and Fundamental Rights

- Cass Sunstein, “Why Does the American Constitution Lack Social and Economic Guarantees?” [working paper] [excerpts]

- Cass Sunstein, “Social and Economic Rights? Lessons from South Africa” [working paper] [excerpts]
- Cecile Fabre, “Constitutionalizing Social Rights” (2002) *Journal of Political Philosophy* 263 [excerpts]
- Raymond Geuss, “Human rights” in *History and Illusion in Politics* [excerpts]
- Joel Feinberg, “The Nature and Value of Rights” (1970) 4:4 *The Journal of Value Inquiry* 263 [excerpts]
- Jurgen Habermas, “Constitutional democracy: a paradoxical union of contradictory principles?” (2001) 29:6 *Political Theory* 766 [excerpts]

8. November 3. Constraining democracy ? (II): Judicial Review and Constitutionalism

- *Marbury v. Madison* [excerpts] *Same Sex Marriage Reference* [excerpts]
- A. Stone-Sweet, “Why Europe Rejected American Judicial Review and Why it May Not Matter”, 101 *Michigan Law Review* 2744 [excerpts]
- Kent Roach, “Dialogic Judicial Review and its Critics” (2004) 23 *Supreme Court Law Review* 44 [excerpts]
- *Same Sex Marriage Reference* [excerpts]

Midterm exam review!

9. November 10. Constitutional change II: Constitutional amendments and beyond

- Additional material TBA
- Bruce Ackerman and James Fishkin, “Deliberation Day” 10:2 *Journal of Political Philosophy* (2002) 129 available at: <http://digitalcommons.law.yale.edu> [excerpts]

10. November 17. Constitutional change III: constitutionalism at its limit?

- *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [excerpts]
- <http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html> paras 33-108

11. November 24. Constitution-making between the inside and the outside: what role for external actors?

- Jean-Jacques Rousseau, “The Lawgiver”, *On the Social Contract* [excerpts]

- Andrew Arato, “Post-Sovereign Constitution-Making and Its Pathology in Iraq” (2012) *New York Law School Law Review* 538 [excerpts]
- Nehal Bhuta, “New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation” (2010) 60 *University of Toronto Law Journal* 799 [excerpts]
- Donald Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-conflict States” (2007) 49:4 *William & Mary Law Review* 1213 [exerpts]

12. December 1. Recap session. Preparation for the final assignment.