

**Constitutionalism**  
**POLD45H3**  
University of Toronto Scarborough  
Fall 2019

**Instructor:** Elizabeth Acorn

**Class Time:** Tuesdays 3:00 p.m. – 5:00 p.m.

**Email:** elizabeth.acorn@utoronto.ca

**Class Location:** AC 332

**Office:** HL 572

**Office phone:** 647-601-4536

**Office hours:** Tuesdays 1 p.m. – 2:45 p.m.

**I. COURSE DESCRIPTION**

Starting in the second-half of the 20<sup>th</sup> century, countries around the world adopted new national constitutions and made constitutional democracy one of the dominant modes of governance today. Why have so many countries turned to written constitutions in this period and what are their defining features? How does constitutionalism differ from other modes of democratic governance? What impact have these new constitutions had on citizens, states, and global governance? These are the questions that motivate this course and that we will explore over the semester as we examine both the normative justifications for constitutionalism and its practice in several countries including Canada, the US, South Africa and Colombia.

This is an advanced seminar course that demands substantial weekly reading and independent research. Students in this course must have completed the following prerequisites: 1.5 credits at the C-level in POL courses and POLB72H3 or POLB30H3 (a student who has taken both POLB70H3 and POLB71H3 also meets this requirement).

**II. LEARNING GOALS & OBJECTIVES**

Students in this course will learn to:

- Describe the normative justification for constitutionalism and locate it alongside other theories of governance and conceptualizations of political authority
- Describe the history of constitutionalism
- Identify the main features of constitutional democracy and compare and contrast national constitutions and institutions for constitutional review
- Evaluate constitutionalism and its effects on states, citizens, and global governance
- Analyze judicial opinions in constitutional law in several jurisdictions
- Develop an empirical research project
- Present research verbally and in a written paper

### III. OVERVIEW OF STUDENT ASSESSMENT

- Class participation: 20%
- Concepts quiz: 15%
- Reading questions and discussion leader: 15%
- Research paper outline: 10%
- Research paper presentation: 10%
- Research paper: 30%

### IV. COURSE REQUIREMENTS & DUE DATES

- ***Class Participation (ongoing)***: This course is intended to create an active intellectual atmosphere that promotes participatory learning. Students are expected to have engaged with the readings *in advance* and participate in class by making comments, asking questions and sharing ideas. Students are always required to interact respectfully with each other and with the instructor. It is crucial that the spirit of discussion remain open, honest, and respectful, even when we disagree.

Students are also expected to consult with the instructor outside of class in office hours and over email regarding their research projects. This is an important part of the class participation requirement and will help students to improve their research and writing and make progress on the paper over the semester.

In addition, several weeks of the course include “Research skills” readings and in-class exercises to help students make progress with their final papers. Active engagement by students in these research skills sessions is expected and will be reflected in the participation grade. Further, during some weeks, students will be given an option to complete a written discussion response reflecting on a particular issue or question identified during class. These written discussion responses should be approximately one paragraph in length and must be submitted by 5pm on the Wednesday following class. Written discussion responses are optional. These responses supplement a student’s participation and do not replace the expectation of participation in class and class discussion.

- ***Concepts Quiz (Oct. 8<sup>th</sup> in class)***: students will complete a quiz in-class on October 8<sup>th</sup> that consists of short-answer questions. The quiz will be based on readings and class materials covered in the first section of the course Part I: Introducing Constitutionalism (Weeks 2 - 5).
- ***Discussion Notes and Discussion Leader (ongoing in Part II: “Constitutionalism in Practice)***: during Part II of the course (Weeks 7 - 10), each student must prepare an issue or question based on that week’s reading for class discussion. Students must submit their discussion notes on Quercus by at least **10 p.m. on the day before class**. These notes should be a few sentences and no more than a paragraph.

In addition, each student will serve as a discussion leader once during Part II of the course (see **sign-up sheet**). On the week that the student is the discussion leader, the student must

prepare a written response memo synthesizing and analyzing the readings for that week, plus a list of approximately 4-5 questions for discussion. The memo should not summarize the readings, but should discuss how the readings relate to each other and the issues they highlight. Students should critically evaluate the readings, identifying any strengths and weaknesses or avenues for further research. Memos should be no more than two pages double-spaced and must be submitted on Quercus **by noon on the day of class**. Students serving as discussion leader should consult the discussion questions raised by their classmates on Quercus and be prepared to take an active role in leading in-class discussion that week. Students serving as discussion leader do not need to complete the discussion note for that week.

- **Research Paper (final paper due Nov. 29<sup>th</sup> at 6 p.m.):** throughout the semester, students are required to develop a paper on any topic of their choosing that involves a comparative examination of a research question broadly relating to constitutionalism. The final paper should be approximately 3,500 words. As part of the final paper, all students are required to:
  - Complete an outline of the paper (**due Oct. 25<sup>th</sup> at 6 p.m.**)
  - Meet with the instructor at least once to discuss the paper (preferably early in the semester, but at least **prior to Oct. 29<sup>th</sup>**)
  - Present their final paper to the class (**in-class Nov. 19<sup>th</sup> or Nov. 26<sup>th</sup>**)

Further information about the research paper and its components will be provided throughout the semester.

## V. COURSE POLICIES

**Attendance:** I expect you to attend every class on time, prepared and ready to participate. Absences or lateness will negatively affect your participation grade. Absences can be excused for religious holidays and other extenuating circumstances, but must be approved in advance of class by the instructor via email. Absences can also be excused for illness and emergencies, but you must notify the instructor as soon as possible and provide appropriate documentation.

**Submitting Assignments:** reading memos, the paper outline, and the research paper should all be submitted electronically via Quercus.

**Late Assignments:** I expect all assignments to be submitted on time. Any assignment submitted after it is due is subject to a late penalty of one-third letter-grade per day.

**Electronics:** Cell phones are prohibited during class. You may use laptops in this class only to consult readings or take notes. Handwriting notes is strongly encouraged. Research has shown that handwriting notes is a more effective learning strategy than typing notes (see <https://www.washingtonpost.com/news/national/wp/2014/08/26/ditch-the-laptop-and-pick->

[up-a-pen-class-researchers-say-its-better-for-note-taking/?noredirect=on&utm\\_term=.903f750ab356](http://up-a-pen-class-researchers-say-its-better-for-note-taking/?noredirect=on&utm_term=.903f750ab356)).

Improper use of laptops or use of cell phones interferes with the learning environment and will negatively affect your participation grade. If the use of laptops during class becomes a problem, I will revise this policy and exclude all electronics from class.

**Communication, Email, and Office Hours:** Email is the best way to contact me and I will generally respond within 24 hours. I can often respond within a few hours if you send your message during the business day. A few other notes on email:

- Be sure to write email professionally and include all relevant information when emailing. For instance, if you cannot make office hours and would like to meet, please send me an email and include several proposed meeting times.
- Send email from your official university email address (and be sure to regularly check your university email).

Students are welcome to contact me outside of class and I encourage you to make use of office hours. I am happy to discuss the course and course materials, your research project, or your more general interests in law and political science and academic and professional goals.

**Privacy & Copyright:** unauthorized video or audio recording in the classroom, and unauthorized reproduction of course material is prohibited. The Provost's guidelines on the *Appropriate Use of Information and Communication Technology* (<https://www.provost.utoronto.ca/planning-policy/information-communication-technology-appropriate-use/>) state that: "The unauthorised use of any form of device to audiotape, photograph, video-record or otherwise reproduce lectures, course notes or teaching materials provided by instructors is covered by the Canadian Copyright Act and is prohibited. Students must obtain prior written consent to such recording. In the case of private use by students with disabilities, the instructor's consent must not be unreasonably withheld."

## **VI. ACADEMIC INTEGRITY**

The work that you submit in this course must be your own. All source material that you rely on must be appropriately acknowledged and cited. This course and the University treat cases of cheating and plagiarism very seriously. All students should be sure to review the University of Toronto's *Code of Behaviour on Academic Matters*, which outlines the behaviours that constitute academic dishonesty and the processes for addressing academic offences: (<http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/PDF/ppjun011995.pdf>),

If you have questions about academic integrity, including on how or what to cite, don't hesitate to ask.

Normally, students will be required to submit their course essays to Turnitin.com for a review of textual similarity and detection of possible plagiarism. In doing so, students will allow their essays to be included as source documents in the Turnitin.com reference database, where they will be used solely for the purpose of detecting plagiarism. The terms that apply to the University's use of the Turnitin.com service are described on the Turnitin.com web site.

## **VII. STUDENT WELL-BEING & ACCOMMODATIONS**

An inclusive learning environment is critical to the goals and objectives of this course, and it is of great importance to me that students from all backgrounds and experiences feel welcome, participate actively, and have the opportunity to excel in this course. Your reflections or suggestions on how to ensure an inclusive learning environment for you individually or for other students are always welcome.

Students with diverse learning styles and needs are welcome in this course. In particular, if you have a disability or health consideration that may require accommodations, please contact *AccessAbility Services* as soon as possible. *AccessAbility Services* staff (located in Rm SW302, Science Wing) are available by appointment to assess specific needs, provide referrals and arrange appropriate accommodations 416-287-7560 or email [ability@utsc.utoronto.ca](mailto:ability@utsc.utoronto.ca). The sooner you let us know your needs the quicker we can assist you in achieving your learning goals in this course.

There are many resources available on campus to support all students during the semester. The University's Center for Teaching and Learning can help with writing and more general academic strategies (<https://www.utsc.utoronto.ca/ctl/student-support>). The skills (and habits) you form now will follow you through graduate and professional school and your careers—take advantage of these resources to develop learning styles and strategies that work for you! Being a university student can be a stressful and challenging time. Take care of yourself and reach out if you could use more support. The University's **Health & Wellness Center** (<https://www.utsc.utoronto.ca/hwc/health-wellness-centre>) provides general health services, including counseling and student support and events throughout the semester to promote student well-being.

## VIII. READINGS AND SCHEDULE

### PART I: COURSE INTRODUCTION

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#### Week 1 (September 3<sup>rd</sup>): Introductions and Overview of the Course

- Jason MacLean, Nathalie Chalifour, and Sharon Mascher, “Work on Climate, Not Weaponizing the Constitution,” *The Conversation* (May 7, 2019).
- “Does Canada Still Need The Notwithstanding Clause? Two Insiders Involved in the Negotiations Weigh In,” *CBC Radio* (September 16, 2018), audio available at: <https://www.cbc.ca/radio/checkup/who-should-have-the-final-say-on-human-rights-in-canada-1.4822273/does-canada-still-need-the-notwithstanding-clause-two-insiders-involved-in-the-negotiations-weigh-in-1.4826146>.

### PART II: INTRODUCING CONSTITUTIONALISM

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#### Week 2 (September 10<sup>th</sup>): What is Constitutionalism?

- Walter F. Murphy, “Constitutions, Constitutionalism, and Democracy,” in *Constitutionalism & Democracy: Transitions in the Contemporary World* eds. Douglas Greenberg et al. (Oxford University Press, 1993), pp. 3-25.
- Donald S. Lutz, “Introduction,” in *Principles of Constitutional Design* (Cambridge University Press, 2010), pp. 1-15.
- Anthony F. Lang, Jr. and Antje Wiener, “A Constitutionalising Global Order: An Introduction,” in *Handbook on Global Constitutionalism* (Edward Elgar, 2017), pp. 4-14.
- A.C. Grayling, “Why the UK Needs a Written Constitution,” in *Constitution in Crisis: The New Putney Debates* (2017) (excerpts, approx. 3 pages).
- Asif Hameed, “Could Boris Johnson Really Force Through a No-Deal Brexit in the Middle of an Election? A Constitutional Lawyer Weighs In,” *The Conversation* (2019), available at: <https://theconversation.com/could-boris-johnson-really-force-through-a-no-deal-brexit-in-the-middle-of-an-election-a-constitutional-lawyer-weighs-in-121658>.

#### Week 3 (September 17<sup>th</sup>): Constitutionalism at Home: Canada’s Constitutional Transformation

- *The Constitution Act, 1982*
- Peter H. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms,” *The Canadian Bar Review* 61 (1983): 30-54.
- Edward McWhinney, “The Constitutional Patriation Project, 1980-1982,” *The American Journal of Comparative Law* (1984): 241-267.

#### Week 4 (September 24<sup>th</sup>): Constitutional Rights and Review

- Katherine Young, “Introduction,” in *The Future of Economic and Social Rights* (Cambridge University Press, 2019) pp. 1-16.
- Daniel Brinks, Varun Gauri, and Kyle Shen, “Social Rights Constitutionalism: Negotiating the Tension between The Universal and Particular,” *Annual Review of Law & Social Science* 11 (2015): 289-308.

- Tom Ginsburg, “Introduction: The Decline and Fall of Parliamentary Sovereignty,” in *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2004), pp. 1-11.
- *Research skills*:
  - Orin Kerr, “How to Read a Judicial Opinion: A Guide for New Law Students” (2005), pp. 1-4.
  - *R. v. Morgentaler* [1988] 1 SCR 30 (skim).

#### Week 5: (October 1<sup>st</sup>): Rights, Courts, and Constitutions, So What?

- Lisa Hilbink, “Assessing the New Constitutionalism,” *Comparative Politics* 40:2 (2008): 227-245.
- Ran Hirschl, “Rights and Realities,” *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007), pp. 149-168.
- Mark Tushnet, “Authoritarian Constitutionalism,” *Cornell Law Review* 100 (2015): 393-400.
- *Research skills*: Mary Fainsod Katzenstein, “Writing Political Science: Asking A Question Then (Actually) Answering It,” in *Local Knowledges, Local Practices: Writing in the Disciplines at Cornell*, ed. Jonathan Monroe (University of Pittsburgh Press, 2003), pp. 171-180.

#### Week 6 (October 8<sup>th</sup>): Quiz and Research Skills

- **Concepts Quiz** (first hour of class)
- *Research skills*:
  - Katarina Linos, “How to Select and Develop Comparative International Law Case Studies,” in *Comparative International Law* eds. Anthea Roberts et al (Oxford University Press, 2018), pp. 35-51.
  - Visit from UTSC librarian (refresher on academic research and introduction to comparative legal research).

**\*Reading Week October 12<sup>th</sup> - 18<sup>th</sup>\***

### **PART III. CONSTITUTIONALISM IN PRACTICE: COMPARATIVE AND GLOBAL CONSTITUTIONAL LAW**

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#### Week 7 (October 22<sup>nd</sup>): The Rise and Spread of Constitutionalism

- Louis Favoreu, “American and European Models of Constitutional Justice,” in *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* ed. David S. Clark (Duncker & Humblot, 1990), pp. 105-120.
- Ran Hirschl, “The Political Origins of Constitutionalization,” *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007), pp. 31-49.
- Jeffrey Goldsworthy, “Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence,” in *The Migration of Constitutional Ideas* ed. Sujit Choudhry (Cambridge University Press, 2006), pp. 115-141.
- **Paper Outline Due October 25<sup>th</sup> by 6 p.m.**

#### Week 8 (October 29<sup>th</sup>): Case Study: South Africa

- David M. Dennis, "Socioeconomic Rights: Do they Deliver the Goods?" *International Journal of Constitutional Law* 6(3-4) (2008): 687–711.
- Nicholas Rush Smith, "The Rule of Rights: Comparative Lessons from Twenty Years of South African Democracy," *Comparative Politics* 50(1) (2017): 123-141.
- Nicholas Rush Smith, "Rejecting Rights: Vigilantism and Violence in Post-Apartheid South Africa," *African Affairs* 114 (2015): 341-360.
- *Government of the Republic of South Africa v, Grootboom* [2000] ZACC 19, 4 October 2000 (excerpts).
- *Research skills*: Guest Lecture (speaker to be confirmed): Research design and conducting research in South Africa.
- **Deadline to meet with instructor regarding paper.**

#### Week 9 (November 5<sup>th</sup>): Case Study: Colombia

- Manuel José Cepeda-Espinosa and David Landau, "Introduction to the Colombian Constitution of 1991 and the Constitutional Court," in *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017), pp. 1-19.
- Manuel José Cepeda-Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court," *Washington University Global Studies Law Review* 3 (2004): 537-557 and 649-667.
- David Landau, "The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures," in *Economic and Social Rights after the Global Financial Crisis*, ed. Aoife Nolan (Cambridge University Press, 2015), pp. 267-298.
- Ted Piccone, "Is Colombia's Fragile Peace Breaking Apart?" *Lawfare Blog* (March 29, 2019), available at: <https://www.lawfareblog.com/colombias-fragile-peace-breaking-apart>.
- *Research skills*: Guest Lecture (Danielle Gilbert): Research design and conducting research in Colombia.

#### Week 10 (November 12<sup>th</sup>): Transnational and Global Constitutionalism

- Matthias Kumm, "Taking 'The Dark Side' Seriously: Constitutionalism and the Question of Constitutional Progress," *International Journal of Constitutional Law* 13(4) (2015): 777-785.
- Tom Ginsburg, Terence Halliday and Gregory Shafer, "Constitution-Making as a Transnational Legal Order" in *Constitution-Making as a Transnational Legal Order* (Cambridge University Press, 2019), pp. 1-25.
- *Research skills*: TED talks and giving effective presentations

### **PART IV. STUDENT RESEARCH PRESENTATIONS**

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#### Week 11 (November 19<sup>th</sup>): Student Presentations

#### Week 12 (November 26<sup>th</sup>): Student Presentations

**\*Research Paper due November 29<sup>th</sup> at 6 p.m.\* (submit via Quercus)**