

POLS 385: Comparative Constitutional Law and Politics in Latin America

Emory University
Spring 2017

Meeting room: Tarbutton 105
Meeting times: Tuesday, Thursday and Friday, 9:00am–9:50am

Instructor: Jeffrey K. Staton
Email: jeffrey.staton@emory.edu
Phone: 404-727-6559
Office: Tarbutton 321B
Office hours: TBA (after consultation with students) and by appointment

Course Description

The goals of this course is to introduce students to key concerns in the study of constitutionalism and to connect those concerns to broader questions of democratic quality and stability. The course introduces students to the goals of constitutionalism and the challenges presented to those goals by the political nature of institutional design, constitutional interpretation, and policy implementation. We consider the role that constitutional courts and supreme courts play in shaping the meaning of the constitution, and we ask how underlying political processes in states influence constitutional interpretation and by implication constitutionalism itself. The course blends historical and legal theoretical accounts with positive political theory and modern empirical techniques.

Grading

Your final grade is a weighted average of the following components:

Participation/Homework (15%) I expect you to be present. I expect you to be prepared. Preparation means that you have read the assignment before class and that you are ready to discuss it. In the event that you do not understand all that you have read, you need to be prepared to ask questions. For selected classes, there will be homework assignments that will help prepare you to discuss the subject. I will release these assignments in advance of class. You are required to complete the assignment prior to the start of the class on the day it is assigned.

Exams (each worth 25%) You will take a midterm exam and a final on the subjects we cover in class.

Research paper (25%) You will write a 15-20 page research paper on a question concerning comparative law and politics. Each paper must contain the following elements: 1) a research question, 2) an argument that answers your question, 3) an empirical test of some implication of your argument, 4) a conclusion. We will discuss the research paper in detail early in class. You are encouraged to show me an outline of the paper idea. You are also encouraged to turn in a rough draft.

Research presentation (10%) You will give a 15 minute research presentation to the class, in which you will summarize your question, argument, data and findings.

Readings

The readings for this class are all available via the library for free.

Incomplete Grades

No incomplete grades will be given unless there is an agreement between the instructor and the student **prior** to the end of the course. The instructor retains the right to determine legitimate reasons for an incomplete grade.

Integrity of Scholarship

I will follow the guidelines established by Emory College, which can be found at http://www.college.emory.edu/current/standards/honor_code.html. In short, dont cheat. The benefits are small. Even if the probability of getting caught is tiny, the costs of getting caught are huge.

Students with Disabilities

Students requiring any type of academic accommodation should consult with the Office of Disability Services (<http://www.ods.emory.edu/> or 404-727-6016) and discuss the issue with the instructor within the first week of class.

Final Course Grades

Final course letter grades will reflect the Department of Political Sciences grading standard, detailed below. Clearly, it is impossible for each assessment to reflect the standard exactly. Instead, the assessments, taken as a whole, are designed to produce a final grade that reflects the departments standards.

A Exceptional Performance Consistently outstanding work on all course-related tasks at a level that distinguishes the student from other members of the class. A comprehensive and incisive command of the issues, literature, and substantive information relevant to the course. A frequently demonstrated exceptional capacity for original, creative, critical and logical thinking. The ability to master and integrate large amounts of factual material and abstract theories. An outstanding ability to discuss effectively course subject matter using both written and oral communication skills.

A- Excellent Performance Consistently strong work on all course-related tasks. A comprehensive command of the issues, literature, and substantive information relevant to the course. A clearly demonstrated capacity for original, creative, critical and logical thinking. Understands well and can integrate the relevant factual and theoretical material central to the course. A strong ability to discuss effectively course subject matter using both written and oral communication skills.

B+ Very Good Performance Consistently above average work on all course-related tasks. A very good grasp of the issues, literature, and substantive information relevant to the course. A generally demonstrated capacity for original, creative, critical, and logical thinking. A very good command of factual and theoretical material, and some capacity to integrate the two. A solid ability to discuss effectively course subject matter using both written and oral communication skills.

B Good Performance Good and generally consistent work on all course-related tasks. A general understanding of the issues, literature, and substantive information relevant to the course. Modest evidence of the capacity for original, creative, critical and logical thinking. A good understanding of factual and theoretical material, but limited evidence of the capacity to integrate the two. A basic ability to discuss effectively course subject matter using both written and oral communication skills.

B- Satisfactory Performance Satisfactory work on course-related tasks. A reasonable understanding of the issues, literature, and substantive information relevant to the course. An infrequently demonstrated capacity for original, creative, critical and logical thinking. Understands at a basic level the facts and theories related to the course, but demonstrates weak integration skills. A limited or inconsistent ability to discuss effectively course subject matter using both written and oral communication skills.

C+/C/C- Adequate Performance Adequate performance on course-related tasks. An understanding of the basic elements of the issues, literature, and substantive information relevant to the course. A rarely demonstrated capacity for original, creative, critical and logical thinking (C+). An inability to go beyond a recitation of basic factual material related to the class (C). Demonstrated weaknesses in the ability to discuss effectively course subject matter using both written and oral communication skills (C-).

D/D+ Minimal Passing Performance Barely acceptable work on course-related tasks. A generally superficial and often inconsistent familiarity with the issues, literature, and substantive information relevant to the course. A failure to demonstrate the capacity for original, creative, critical and logical thinking related to course content (D+). An uneven understanding of basic factual material related to the course; no evidence of fact/theory integration. Demonstrates significant gaps in the ability to discuss effectively course subject matter using both written and oral communication skills (D).

F Unacceptable Performance Fails to meet minimum course expectations. Unable to understand even the most basic elements of the issues, literature, and substantive information relevant to the course. Demonstrates an inability to engage in coherent written or oral discussion of course material. Does not satisfy specific course expectations with respect to attendance, deadlines, participation, etc.

Integrity of Scholarship

The honor code is in effect throughout the semester. By taking this course, you affirm that it is a violation of the code to cheat on exams, to plagiarize, to deviate from the teachers instructions

about collaboration on work that is submitted for grades, to give false information to a faculty member, and to undertake any other form of academic misconduct. You agree that the teacher is entitled to move you to another seat during examinations, without explanation. You also affirm that if you witness others violating the code you have a duty to report them to the honor council. <http://catalog.college.emory.edu/academic/policies-regulations/honor-code.html>

Access, Disability Services and Resources

Emory University is committed under the Americans with Disabilities Act and its Amendments and Section 504 of the Rehabilitation Act to providing appropriate accommodations to individuals with documented disabilities. If you have a disability-related need for reasonable academic adjustments in this course, provide the instructor(s) with an accommodation notification letter from Access, Disabilities Services and Resources office. Students are expected to give two weeks-notice of the need for accommodations. If you need immediate accommodations or physical access, please arrange to meet with instructor(s) as soon as your accommodations have been finalized.

Class schedule

January 10: Class Introduction What are the goals of our course? What are your responsibilities? What are mine? What will we learn about about?

January 12 and 13: No class

January 17: The Law and the Rule of Law? What is law? What does it mean to say that a country is characterized by the rule of law?

Readings:

Roscoe Pound. *An introduction to the philosophy of law*. Yale University Press, 1954.

Joseph Raz. The rule of law and its virtue. *The Law Quarterly Review*, 93:195, 1997.

Notes: In Pound, only read "II The End of Law."

January 19 and January 24: Measuring the (un)rule of law In what sense have the states of Latin America been characterized by the rule of law? How would we know? Readings:

Stephan Haggard and Lydia Tiede. The rule of law and economic growth: where are we? *World Development*, 39(5):673–685, 2011.

Guillermo O'donnell. *Polyarchies and the (un) rule of law in Latin America*. Instituto Juan March de Estudios e Investigaciones, 1998.

January 20: No class

January 26: The (Un)rule of Law in Action Readings:

Daniel M Brinks. Informal institutions and the rule of law: The judicial response to state killings in buenos aires and são paulo in the 1990s. *Comparative Politics*, pages 1–19, 2003.

Notes: Watch *Presunto Culpable*

January 27: Constitutions What is a constitution? What are the goals of constitutions? In so far as constitutional rules are supposed to bind individuals that control coercive sources of state authority, under what conditions do we expect rules to bind?

Readings: Bolívar, Simón, Address to the Congress of Angostura, 1819, <http://homepages.undayton.edu/~santamjc/angosturatxt.html>

Barry Weingast. The political foundations of democracy and the rule of law. *American Political Science Review*, 91(2):245–263, 1997.

January 31: Research Paper Discussion

February 2 and 3: No class

February 7: Historical Successes and Failures? Rosenn argues that the U.S. Constitution has largely been a success while Latin American constitutions have consistently failed. What does he mean and do you find his explanation persuasive? Do you worry about the robustness of the U.S. Constitution to changing political, economic and social conditions in the United States? Can the U.S. learn from the Latin American experience? If so, how?

Readings:

Keith S Rosenn. The success of constitutionalism in the united states and its failure in latin america: An explanation. *The University of Miami Inter-American Law Review*, pages 1–39, 1990.

February 9: Modern Latin American Constitutions What if anything has changed since the Rosenn article was published? Do the rights provisions of modern Latin American constitutions change Rosenn's core argument?

Readings:

José Antonio Cheibub, Zachary Elkins, and Tom Ginsburg. Still the land of presidentialism? executives and the latin american constitution. In Almut Schilling-Vacaflor and Detlef Nolte, editors, *New Constitutionalism in Latin America: Promises and Practices*, pages 73–97. Routledge, 2016.

Juan Fernando Jaramillo Pérez. Colombia's 1991 constitution: A rights revolution. In Almut Schilling-Vacaflor and Detlef Nolte, editors, *New Constitutionalism in Latin America: Promises and Practices*. Routledge, 2016.

February 10: Drafting Constitutions Thinking about constitutions as coordinating devices, under what conditions should we expect constitutional terms to be clear? When should they be vague? When should they rely on unwritten understandings and when should they clearly articulate their meaning?

Readings: Ginsburg, Tom. 2010. "Constitutional Specificity, Unwritten Understandings and Constitutional Agreement." https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707619

February 14: Authoritarian Constitutions If we typically envision constitutions as constraining devices, why do authoritarian leaders draft constitutions? Are they "sham" documents? If not, for what purpose are they designed? Readings:

Robert Barros. *Constitutionalism and dictatorship: Pinochet, the Junta, and the 1980 constitution*, volume 4. Cambridge University Press, 2002.

Pages to be determined later.

February 16: Legal Traditions There is considerable variation across states in their legal traditions. What are these traditions? In what ways do they matter for the questions that animate political science?

Readings:

John Henry Merryman. *The civil law tradition: an introduction to the legal systems of Europe and Latin America*. Stanford University Press, 2007.

Pages to be determined later.

February 17: Judicial Power What powers of constitutional review do the courts of Latin America possess? Readings:

Patricio Navia and Julio Ríos-Figueroa. The constitutional adjudication mosaic of latin america. *Comparative Political Studies*, 38(2):189–217, 2005.

Matthew Campbell Mirow. Marbury in mexico: Judicial review's precocious southern migration. *Hastings Constitutional Law Quarterly*, 35(1):41–117, 2007.

February 21: Expanding Judicial Power Why would a powerful political coalition expand the powers of the judiciary?

Readings:

Jodi Finkel. Judicial reform as insurance policy: Mexico in the 1990s. *Latin American Politics and Society*, 47(1):87–113, 2005.

Aylin Aydın. Judicial independence across democratic regimes: Understanding the varying impact of political competition. *Law & Society Review*, 47(1):105–134, 2013.

February 23: General Questions of Constitutional Interpretation: The Scalia - Breyer Debate Video: The Scalia and Breyer Debate

https://www.youtube.com/watch?v=_4n8g0UzZ8I

February 24: Latin American Innovations: The link between international and domestic law in Costa Rica How should international human rights commitments be understood in light of domestic constitutional commitments? How might domestic commitments be influenced by international commitments?

Readings: *Medellín v. Texas*, 552 U.S. 491 (2008); I will send you an excerpt of the opinion.

Fernando Cruz Castro. Costa Rica's constitutional jurisprudence, its political importance and international human rights law: Examination of some decisions. *Duquesne Law Review*, 45:557, 2006.

February 28: Latin American Innovations: Constitutional Law for a violent society Colombia experienced a long and traumatic period of civil conflict. At the same time it developed a constitutional jurisprudence that has come to be understood as transformative. How has that been possible?

Readings: León, Juanita, *Country of Bullets: Chronicles of War*, selected readings

Manuel José Cepeda-Espinosa. Judicial activism in a violent context: The origin, role, and impact of the Colombian constitutional court. *Wash. U. Global Stud. L. Rev.*, 3:529, 2004.

Readings:

Santiago Basabe-Serrano. The quality of judicial decisions in supreme courts: A conceptual definition and index applied to eleven Latin American countries. *Justice System Journal*, pages 1–17, 2016.

Tom S. Clark, Benjamin G. Engst, and Jeffrey K. Staton. Estimating the effect of leisure on judicial performance. Working Paper. Emory University., August 12 2016.

March 2: Review

March 3: Exam

March 7, 9 and 10: SPRING BREAK

March 14: Paper Workshop

March 16: Paper Workshop

March 17: The Tradeoff between Judicial Independence and Judicial Accountability

What does judicial independence mean? Do we want fully independent courts? If so, why? If not, why not? Readings:

Christopher M Larkins. Judicial independence and democratization: A theoretical and conceptual analysis. *The American Journal of Comparative Law*, 44(4):605–626, 1996.

Miguel Schor. Squaring the circle: Democratizing judicial review and the counter-constitutional difficulty. *Minnesota Journal of International Law*, 16:61, 2007.

XXXXXXXXXXXXXXXXXXXX New Schedule Follows XXXXXXXXXXXXXXXXXXXXXXX

March 24: Measuring Judicial Independence How can judicial independence be measured?

What are the core challenges of its measurement? How can these challenges be overcome?

Readings:

Julio Ríos-Figueroa and Jeffrey K Staton. An evaluation of cross-national measures of judicial independence. *Journal of Law, Economics, and Organization*, 30(1):104–137, 2014.

Drew A Linzer and Jeffrey K Staton. A global measure of judicial independence, 1948–2012. *Journal of Law and Courts*, 3(2):223–256, 2015.

March 28: The link between de jure and de facto independence What institutions do

we believe enhance judicial independence? What do empirical tests of their effectiveness tell us?

What do these results tell us about institutional design for judicial independence?

Readings:

James Melton and Tom Ginsburg. Does de jure judicial independence really matter? *Journal of Law and Courts*, 2014.

March 30: Political Competition, Political Fragmentation and Deference What are the

political determinants of judicial independence? What do these findings suggest about our

ability to build independent courts? More generally, how do political pressures influence judicial decision making?

Readings:

Julio Ríos-Figueroa. Fragmentation of power and the emergence of an effective judiciary in Mexico, 1994–2002. *Latin American Politics and Society*, 49(1):31–57, 2007.

Juan Carlos Rodríguez-Raga. Strategic deference in the Colombian constitutional court, 1992–2006. *Courts in Latin America*, page 81, 2011.

March 31: Judges and the Public How do judges use the media to influence their power?

Readings:

Jeffrey K. Staton. Constitutional review and the selective promotion of case results. *American Journal of Political Science*, 50(1):98–112, 2006.

April 4 : Judicial Appointments Political actors control judicial appointments. Let's consider how that simple fact influences judicial independence. Readings:

Andrea Castagnola and Anibal Pérez-Liñán. The rise (and fall) of judicial review. In Gretchen Helmke and Julio Ríos Figueroa, editors, *Courts in Latin America*, page 278. Cambridge University Press, 2011.

April 6: Judicial Councils What are judicial councils? Why should they influence judicial independence? Do they? Readings:

Nuno Garoupa and Tom Ginsburg. Guarding the guardians: Judicial councils and judicial independence. *American Journal of Comparative Law*, 57(1):103–134, 2009.

April 7: Judicial Career Judges are workers after all. How do career incentives influence judicial behavior? Readings:

Anibal Pérez-Liñán, Barry Ames, and Mitchell A Seligson. Strategy, careers, and judicial decisions: Lessons from the bolivian courts. *Journal of Politics*, 68(2):284–295, 2006.

Gretchen Helmke and Mitchell S Sanders. Modeling motivations: A method for inferring judicial goals from behavior. *Journal of Politics*, 68(4):867–878, 2006.

April 11: Law and Social Change How have judges influenced social change in Latin America? Readings:

Bruce M. Wilson. Enforcing rights and exercising an accountability function: Costa Rica's constitutional chamber of the supreme court. In Gretchen Helmke and Julio Ríos Figueroa, editors, *Courts in Latin America*. Cambridge University Press, 2011.

April 13: Compliance To meaningfully affect public policy outcomes we can assume that judicial decisions should be enforced in practice. Under what conditions is that possible? Readings:

Alexandra Huneus. Courts resisting courts: Lessons from the inter-american court's struggle to enforce human rights. *Cornell Int'l LJ*, 44:493, 2011.

April 14: Compliance To meaningfully affect public policy outcomes we can assume that judicial decisions should be enforced in practice. Under what conditions is that possible? Readings:

Varun Gauri, Jeffrey K Staton, and Jorge Vargas Cullell. *The Journal of Politics*, 77(3):774–786, 2015.

April 18: Research Presentations

April 20: Research Presentations

April 21: Research Presentations

April 27: Exam (3:00 p.m. - 5:00 p.m.)