The course will provide an introduction to central issues in constitutional law and theory, using a comparative perspective and a focus on the experience of the Israeli constitutional system. Israel is a uniquely instructive source for engagement and reflection on constitutional law: after five decades with no written constitution, it has transitioned in the 1990’s into a more formal constitutional regime, the contours of which are still being negotiated. Its legal and political culture is a hybrid of Anglo-American and Continental-European traditions. It defines itself as a “Jewish and democratic state,” adopting a non-neutral, ethno-national identity that excludes a fifth of its population, while at the same time committing to civic quality and a liberal human rights regime, and engaging the discourse of cultural group rights. Finally, Israel faces familiar challenges of terrorism, immigration, and class disparities, and constitutional law has been central in defining its response to them.

Issues to be covered include constitutional design, national identity, separation of powers, judicial review, human rights, immigration and membership, rule of law and national security, and state and religion. We will discuss each in the abstract, surveying the main theoretical frameworks of analysis and evaluation, and the employ the generalized notions to the case of Israel. The class should therefore be of interest both to those with a specific interest in Israeli constitutional politics, as well as to those seeking an introduction to central issues in constitutional theory.

Students will be asked to:

(1) Attend all classes and engage in informed discussion based on preparation of assigned readings – 10%

(2) Submit two response papers, two pages long each, during the term, and be prepared to lead a class discussion based on submitted response papers – 20%

(3) Write a take-home exam on the issues covered in class – 70%

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SYLLABUS

[Items marked by * are optional reading]

PART A: THE CHALLENGES OF CONSTITUTIONALISM

I. Introduction: Constitutional Challenges in Israel and Beyond

Tues Jan. 19

• HCJ 129/13 Axelrod v. Government of Israel (2014)

II. The Roles and Perils of Constitutionalism


1) MARK TUSHNET, WHY THE CONSTITUTION MATTERS 1-17 (2010)
2) HANS KELSEN, PURE THEORY OF LAW 193-214, 221-224 (Max Knight trans. 1967)
3) RONALD DWORKIN, FREEDOM’S LAW 15-35 (1996)
4) BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3-16 (1991)
7) David Ben Gurion in the Knesset, 1949

III. Comparative Constitutional Law

Tues. Feb. 2, Thurs. Feb. 4

3) Tom Ginsburg, Constitutional Endurance, in COMPARATIVE CONSTITUTIONAL LAW 112 (Tom Ginsburg & Rosalind Dixon eds., 2011)
5) Iddo Porat, The Use of Foreign Law in Israeli Constitutional Adjudication, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 151 (Gideon Sapir et al. eds., 2013)
IV. Israeli Constitutionalism: an Overview

Tues. Feb 9, Thurs. Feb. 11, Tues. Feb. 16


3) Declaration of Establishment of the State of Israel, May 14, 1948

4) HCJ 73/53 Kol Ha'Am v. Minister of the Interior (1953), p.18

5) Basic Law: Human Dignity and Liberty (Isr.)


V. Judicial Review I: Foundations

Thurs. Feb. 18

1) THE FEDERALIST No. 51 (James Madison), No. 78 (Alexander Hamilton)

2) *Marbury v. Madison*, 5 U.S. 137, 176-180 (1803)


VI. Judicial Review II: The Argument

Tues. Feb. 23, Thurs. Feb. 25


3) JOHN HART ÉLY, DEMOCRACY AND DISTRUST 73-88, 101-104 (1980)


PART B: STRUCTURAL ISSUES

VII. **Boundaries I: Territory**

Tues. Mar. 1, Thurs. Mar. 3

3) HCJ 6698/95 *Ka'adan v. Israel Land Administration* (2000)
4) HCJ 7957/04 *Mara'abe v. Prime Minister of Israel* (2005)

VIII. **Boundaries II: Immigration**

Tues. Mar. 8, Thurs. Mar. 10

3) The Law of Return, 1950 (Isr.)
5) HCJ 7146/12 *Adam v. The Knesset* (2013)

IX. **War, Terrorism, and the Rule of Law**

Tues. Mar. 15, Thurs. Mar. 17

3) HCJ 5100/94 *Public Committee against Torture in Israel v Government of Israel*, P.D. 53(4) 817 (1999)
4) HCJ 8276/05 *Adalah v. Minister of Defense* (2006) [Barak ¶¶ 1-8, 22-25, 36-37, 41]
5) HCJ 2722/92 *Alamarin v. IDF Commander in Gaza Strip* (1992)
PART C: RIGHTS

X. Constitutional Rights

Tues. Mar. 29, Thurs. Mar. 31

4) A Survey of Bills of Rights and Limitation Clauses

XI. Non-discrimination: Gender and Sexual Orientation

Tues. Apr. 5, Thurs. Apr. 7


XII. Multicultural Accommodation

Tues. Apr. 12, Thurs. Apr. 14

4) HCJ 746/07 *Ragen v. Ministry of Transport* (2011)

XIII. The Welfare State

Tues. Apr. 19, Thurs. Apr. 21, Tues. Apr. 26


4) * HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance (2005) [Barak]


**XIV. Conclusion**

Thurs. Apr. 28