

BAYLOR UNIVERSITY
POLITICAL SCIENCE 5344
FALL 2007

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Course description:

Comparative constitutional law was seen by John W. Burgess, the man who founded the first political science department in the United States, as the core of the discipline. In the ensuing years, institutional analyses were the staple of the discipline. In time, though, a “behavioral revolution” turned the attention from institutions to voting and other manifestations of political behavior. In the comparative field, “political development” assumed center stage, especially as comparativists concentrated on the newly independent nations of Asia and Africa. Constitutional law, and public law generally, receded into a neglected corner of the discipline.

In recent years, however, there has been a resurgence of interest in the study of public law, and in comparative constitutional law especially. Fueled by the new institutionalism, a belated recognition that courts handle a good bit of public policy (e.g., criminal justice) in all political systems, a revived interest in natural law in political theory, and the practical issues surrounding designing new constitutions for the post-communist regimes, the area has blossomed. Law schools, too, have raised the profile of comparative constitutional law in their curricula, as even the justices of the United States Supreme Court now cite foreign cases in their decisions.

This is a political science course, not a law school course. Our roots are, therefore, decidedly in comparative politics. All polities, accordingly, are within our purview. Our goal is to survey the major issues facing scholars who study comparative constitutional law and evaluate how they shed light on the major theoretical questions in comparative politics.

Prerequisites/corequisites:

There are no special prerequisites for this course. Some background in either comparative politics or public law would be helpful but is not necessary.

Required texts:

Alec S. Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, UK: Oxford University Press, 2000).

Giovanni Sartori, *Comparative Constitutional Engineering* (New York: New York University Press, 1997).

Gary Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton, NJ: Princeton University Press, 2003)

Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997).

Requirements:

There will be three elements of evaluation: 1) A major research paper, 30%; 2) Class participation 30%; and 3) A final exam (40%).

Grades:

The grading will be on the 10 point breaks.

Class schedule and readings

August 20 Introduction

August 27 Law versus political science

Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *Yale Law Journal*, 108 (1999), 1225.

Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *American Journal of Comparative Law*, 53 (2005), 125.

September 3 Labor Day holiday

September 10 The historical and conceptual foundations of constitutionalism

Howell Lloyd, "Constitutionalism," in J.H. Burns, ed., *The Cambridge History of Political Thought, 1450-1700* (Cambridge, UK: Cambridge University Press, 1991).

Thomas Grey, "Constitutionalism: An Analytic Framework," in J. Roland Pennock and John Chapman, eds., *Constitutionalism* (New York: New York University Press, 1979).

Reit Ludwikowski and William Fox, *The Beginnings of the Constitutional Era* (Washington: Catholic University Press, 1993), Chaps. 1-4.

September 17 The religious foundations of constitutionalism

Carl J. Friedrich, *Transcendent Justice: The Religious Dimension of Constitutionalism* (Durham, NC: Duke University Press, 1964).

Said Amir Arjomand, "Religion and Constitutionalism in Western History and in Modern Iran and Pakistan," in Said Amir Arjomand, ed., *The Political Dimension of Religion* (Albany: State University of New York Press, 1993).

September 24

Constitutionalism and democracy

Richard Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights, and Representative Democracy," in Richard Bellamy and David Castiglioni, eds., *Constitutional Transformation: European and Theoretical Perspectives* (London: Blackwell, 1996).

Luigi Ferrajeli, "Democracy and the Constitution in Italy," in Bellamy and Castiglioni, *Constitutional Transformation*.

Giovanni Bogneri, "The Concept of Human Dignity in European and U.S. Constitutionalism," in Georg Nolte, ed., *European and U.S. Constitutionalism* (Cambridge, UK: Cambridge University Press, 2005).

Ian Shapiro, "Three Fallacies Concerning Majorities, Minorities, and Democratic Politics," in John Chapman and Alan Wertheimer, eds., *Majorities and Minorities* (New York: New York University Press, 1990).

October 1

Judicial review

Paul Kahn, "Judging Judicial Review: *Marbury* in the Modern Era: Comparative Constitutionalism in a New Key," *Michigan Law Review*, 101 (2003), 2677.

Miguel Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty," *Minnesota Journal of International Law* 16 (2007), 61.

Jeffrey Goldsworthy, "Australia: Devotion to Legalism," in Jeffrey Goldsworthy, ed., *Interpreting Constitutions: A Comparative Analysis* (Oxford, UK: Oxford University Press, 2006).

October 8

Rational choice theory and constitutionalism

Alex Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, UK: Oxford University Press, 2000).

October 15

Constitutional engineering

Giovanni Sartori, *Comparative Constitutional Engineering* (New York: New York University Press, 1997).

October 22

Constitutions in emerging democracies

Ulrich Preuss, *Constitutional Revolution* (Atlantic Highlands, NJ: Humanities Press, 1995), Chap. 1. (Translated by Deborah Schneider)

Miguel Schor, "Constitutionalism Through the Looking Glass of Latin America," *Texas International Law Journal* 41 (2006), 1

Jiri Priban, "Constitutional Edge: Reconstructing Paradise Lost: Temporality, Civility and Ethnicity in Post-Communist Constitution-Making," *Law and Society Review* 38 (2004), 407.

H. Kwasi Prempeh, “*Marbury* in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,” *Tulane Law Review* 80 (2006), 1239.

October 29 Case study: India

Gary Jacobsohn, *The Wheel of Law* (Princeton, NJ: Princeton University Press, 2003).

November 5 Religious liberty

Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, Introduction and chapters 1-5. Skim remaining chapters.

November 12 Federalism

Daniel Elazar, *Covenant and Constitutionalism: The Great Frontier and the Matrix of Federal Democracy* (New Brunswick, NJ: Transaction, 1998), Chapters 7 and 10.
Nicholas Aroney, “Formation, Representation and Amendment in Federal Constitutions,” *American Journal of Comparative Law* 54 (2006) 277.

November 19 Emergency powers

David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006), Chapter 1.
Alexander Domrin, *The Limits of Russian Democratization: Emergency Powers and States of Emergency* (London: Routledge, 2006), Chapter 1.

November 26 Case study: Germany

Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997).

December 3 Final exam