

Comparative Constitutional Law
Spring 2013
Thursday from 11:00-12:50, Room 326

Professor David Landau: office 316, phone 850-644-6341, e-mail dlandau@law.fsu.edu
Office Hours: Wednesday 4:00-6:00, or by appointment

Course Description/Objectives:

This course looks at a series of interesting questions in the emerging field of comparative constitutional law. We will focus on four major questions where there is sharp differentiation between practice in the United States and practice in the rest of the world. First, we look at the role of courts in democracies, focusing on the increasing “judicialization” of politics in the rest of the world. Second, we explore the question of constitutional change, focusing on how constitutions are amended and how new constitutions are written. Third, we explore the literature related to the structure of the state, including the important question of how far a state can go to protect itself. Fourth, we explore the question of positive rights, a topic that has been banished from US Constitutional theory but which is important in the rest of the world. Finally, we look at the role of international and comparative law in the interpretation of domestic constitutions.

The class has two major aims. First, these questions of comparative institutional design and comparative doctrine can help to inform practice and policy in other countries. Second, a thorough understanding of comparative practice aids us in understanding our own system.

Readings:

All required readings will be posted on the course website at least one week before the required class; no text is required for this class.

Class Attendance:

Attendance is required for this course. In accordance with the law school’s accreditation requirements, you cannot receive credit for the course if you miss more than 20% of the scheduled class meetings.

Class Participation:

I expect students to be prepared for each class to discuss the readings assigned for that class. If you are unable to prepare due to extraordinary circumstances, you should contact me before class. Since this class is a seminar, class participation is critical and will count for 30 percent of your final grade. Students will also sign up to give a brief presentation of the material during one of our class sessions.

Paper:

The remaining 70 percent of your grade will be based on a 30 to 40 page research paper on some topic related to the course. Students should meet with the professor by the end of February to discuss preliminary paper topics. This course may be used to satisfy the upper level writing requirement.

Reading Assignments:

1. Week 1 (January 10) – Introduction: What is this Field? Why Study It?

Mark Tushnet, Some Reflections on Method in Comparative Constitutional Law, in *The Migration of Constitutional Ideas* (Sujit Choudhry, ed., 2006).

Abortion decisions from U.S., Canada, Germany

Optional: Kim Lane Scheppele, “The Agendas of Comparative Constitutionalism,” *Law and Courts* 13 (2003): 5-23.

I. The Role of Judiciaries

2. Week 2 (January 17) – The Origins and Consequences of Judicialization

Ran Hirschl, “The Political Origins of Judicial Empowerment: Lessons from Four Constitutional Revolutions,” 25 *Law & Social Inquiry* (2000).

Stephen Gardbaum, “Reassessing the New Commonwealth Model of Constitutionalism,” 8 *International Journal of Constitutional Law* (2010).

3. Week 3 (January 24) – Judicializing Huge Cases

Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science* 11 (2008).

Mark A. Graber, “The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,” 7 *Studies in American Political Development* 35 (1993).

Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 [Supreme Court of Canada].

Zafar Ali Shah v. Pervez Musharraf, PLD 2000 S.C. 869 [Supreme Court of Pakistan], available at <http://www.scribd.com/doc/12730582/Zafar-Ali-Shah-Case>

II. Constitutional Creation & Change

4. Week 4 (February 6) -- Writing New Constitutions

Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," 45 Duke L.J. 364 (1995).

William Partlett, Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution-Making (Nov. 2011)

Andrew Arato, Post Sovereign Constitution-Making and its Pathology in Iraq, 51 N.Y.L.S. L. Rev. 536 (2007)

Certification of the Constitution of the Republic of South Africa, CCT 23/1996.

5. Week 5 (February 13) – Constitutional Amendment

Donald Lutz, Principles of Constitutional Design, pgs. 145-183 (2006).

Miguel Schor, The Strange Cases of Marbury and Lochner in the Constitutional Imagination, 87 Tex. L. Rev. 1463 (2009).

Presidential Reelection Decisions, 2005 and 2009 (Colombia).

III. State Structure & Threats to the State

6. Week 6 (February 14) – Structuring the State

Bruce Ackerman, "The New Separation of Powers," 113 Harvard Law Review 633 (2000).

Steven A Calabresi, "The Virtues of Presidential Government," 18 Const. Commentaries (2000).

David Fontana, "Government in Opposition," 119 Yale Law Journal 548 (2009).

7. Week 7 (February 21) – Emergency Powers & Terrorism

Bruce Ackerman, "The Emergency Constitution," 113 Yale L.J. 1029 (2004).

Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?," 112 Yale L.J. 1011 (2003) (excerpts).

Anti-Terrorism Cases: from Israel (torture case) and Germany (shoot-down case)

8. Week 8 (February 28) – Political Speech and the Shape of the State

Samuel Issacharoff, "Fragile Democracies," 120 Harv. L. Rev. 1405 (2007).

Socialist Reich Party Case, German Constitutional Court (1952).

Holocaust Denial Case, German Constitutional Court (1994).

Welfare Party v. Turkey, European Court of Human Rights (2003).

9. Week 9 (March 14) – The Role of Religion in the State

Gary Jacobsohn, "Three Models of Secular Constitutional Development: India, Israel, and the United States," 10 Studies in American Political Development (1996).

Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism," 82 Texas L. Rev. 1819 (2004).

Shah Bano case, India (1985)

Sahin v. Turkey, ECHR (2004).

IV. Some Hot Topics in the Field

10. Week 10 (March 21) – Positive & Socio-Economic Rights 1: The Nature of Constitutional Law & Debates on Inclusion

Carmichele v. Ministers of Safety and Security, Constitutional Court (South Africa), 2001 (4) SALR 938

Frank B. Cross, "The Error of Positive Rights, 48 UCLA L. Rev. 857 (2001) (excerpts).

Hungarian Benefits Case, Decision 43/1995, June 30, 1995.

Andras Sajó, How the Rule of Law Killed Hungarian Welfare Reform, East European Constitutional Review, vol. 5, no. 1 (Winter 1996) (excerpts).

Kim Lane Scheppele, "Constitutional Courts in the Field of Power Politics: A RealPolitik Defense of Social Rights," 82 Texas L. Rev. 1921 (2004) (excerpts).

11. Week 11 (March 28) – Socio-Economic Rights 2 – Modes of Enforcement

Mark Tushnet, Weak Courts, Strong Rights (2008), chapter 8, pgs. 226-244; 247-250

South Africa v. Grootboom, CCT 11/00, Constitutional Court (South Africa) (2000).

Soobramoney v. Minister of Health, Constitutional Court (South Africa), 1998 (1) SALR 765.

Colombia Displaced Persons Case (translated by Landau & Cepeda)

12. Week 12 (April 4) – Relationship Between Domestic & International Law

Vicki Jackson, “Constitutional Comparisons: Convergence, Resistance, Engagement,” 119 Harv. L. Rev. 109 (2005).

State v. Makwanyane, Constitutional Court (South Africa), Case No. CCT 3/94 (1995).

US materials on the topic (excerpts from Roper v. Simmons (2005), Lawrence v. Texas (2003), and a debate between Justices Scalia and Breyer from 2005)

Optional reading: David Fontana, “Refined Comparativism in Constitutional Law,” 49 UCLA L. Rev. 539 (2001).

13. Week 13 (April 11) – paper presentations