

G. J. Jacobsohn
Mezes 3.110
Email: gjacobsohn@austin.utexas.edu

Spring 2014
Ph: 232-1444
Off. Hrs.: T, 10-12, Th, 11-12

Government 384N

COMPARATIVE CONSTITUTIONALISM

According to the legal theorist, Roscoe Pound, "Experience, which is no longer merely local, must be subjected to the scrutiny of reason and developed by reason, and reason, which in its very nature transcends locality, must be tested by experience. The wider the experience, the better is the test. Thus the science of law must increasingly be comparative. Whether we are dreaming of a world law or thinking of the further development of our own law...the methods of the jurist must have a basis in comparison." Written in 1957, Pound's point is much older than fifty-six years; indeed the framers of the American Constitution proceeded in accordance with this insight, as their architectural design for constitution-making relied on comparative examples to supplement their Enlightenment faith in reason. Still, the comparative method was for many years marginalized as a tool of constitutional analysis. This is especially the case in the United States, where the longevity and success of the Constitution have surely contributed to a discernible insularity (and perhaps arrogance) in scholarly and juristic awareness of alternative constitutional possibilities. Yet, with the extraordinary regime changes that have occurred throughout the world over the last several decades, this appears to be changing. The heightened activity surrounding recent fundamental re-structurings of polities has led to a renewed interest in the old subject of comparative constitutionalism. Indeed, it is routine now regularly to encounter news items on constitutional design, amendment, and interpretation. This course will explore alternative traditions of constitutionalism, connecting them to the broader political cultures from which they have emerged. It will examine the various shades of meaning underlying political values and moral theories that inform concepts -- for example, liberty, autonomy, equality, and community -- within various constitutional traditions. It will seek to account for the similarities and differences within the constitutional ideas and arrangements in contrasting systems. It will explore the role of constitutional courts in polities with varying conceptions of judicial review and its significance. It will consider alternative approaches to the study of constitutional maintenance and change. It will attempt to clarify the elusive concepts of constitutional identity and revolution. And it will look closely at the ways in which foreign experience might illuminate and possibly enrich American constitutional understandings. As that other famous comparative legal scholar, Tom Waits, has said (actually sung), "I never saw my hometown until I stayed away too long."

Texts:

R. Hirschl, Towards Juristocracy
G. Jacobsohn, The Wheel of Law
H. Lerner, Making Constitutions in Deeply Divided Societies
M. Rosenfeld, ed., Constitutionalism, Identity, Difference, and Legitimacy

Additional materials (packet available at Paradigm Books, 407 West 24th St.)

Articles

B. Ackerman, "The Rise of World Constitutionalism"
B. Ackerman, "Rethinking Revolution"
H. Arendt, "The Meaning of Revolution"
R. Posner, "The Cosmopolitan Court"

V. Jackson, "Comparative Constitutional Law: Methodologies"
 R. Albert, "Nonconstitutional Amendments"
 D. Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconstruction"
 C. Klein and A. Sajo, "Constitution-Making: Process and Substance"
 M. Callahan, "Cultural Relativism and the Interpretation of Constitutional Texts"
 K. Scheppele, "Constitutional Ethnography: An Introduction"
 A. Scalia & S. Breyer, "A Conversation Between U. S. Supreme Court Justices"
 S. Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation"
 H. Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'"
 G. Jacobsohn, "The Formation of Constitutional Identities"
 D. Grimm, "Integration By Constitution"
 M. Rosenfeld, "The European Treaty-Constitution and Constitutional Identity: A View From America" Constitution: A Critical Reconstruction"
 N. Hashemi, "Religious Disputation and Democratic Constitutionalism: The Enduring Struggle of the Constitutional Revolution in Iran"
 G. Sapir, "Constitutional Revolutions: Israel as a Case-Study"
 V. Bogdanor, "Constitutional Reform in Great Britain: The Quiet Revolution"
 C. Mackinnon, "Gender in Constitutions"
 L. Besselink, "National and Constitutional Identity Before and After Lisbon"
 F. Mayer, "Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union"
 Federalist #40
 A. Stone Sweet, "Constitutional Courts"
 M. Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations"

Cases

Republic of South Africa v. Grootboom
 McGee v. Attorney General (Ireland)
 Southwest Case (Germany)
 Privacy of Communications Case (Germany)
 Abortion I Case (Germany)
 Abortion Information Case (Ireland)
 Regina v. Keegstra (Canada)
 Leyla Sahin v. Turkey (ECHR)
 Ford v. Quebec (Canada)
 Naz Foundation v. Government of India (India)
 Retroactive Criminal Legislation Case (Hungary)
 Decision on the Illegality of the Communist Regime (Czech Republic)
 Reference Re Secession of Quebec (Canada)
 United Mizrahi Ltd. v. Migdal Village (Israel)
 Deshaney v. Winnebago County (US)
 Lawrence v. Texas (US)
 Holocaust Denial Case (Germany)
 School Prayer Case (Germany)
 Kach Party Faction v. Hillel (Israel)
 Aircraft Shoot-down Case (Germany)
 Luth Case (Germany)
 Lisbon Case (Germany)

Course Requirements and Evaluation:

There are two written assignments, the first is a short reflective piece (5 pages) and the second is a research paper (20 pages) to be submitted at the end of the semester. A course grade will reflect performance on these papers (#1 – 20%, #2 – 60%) and on class participation (20%).
Course Outline:

I. Comparing Constitutions: Theory and Practice

- Jan. 15 V. Jackson, “Comparative Constitutional Law: Methodologies”
K. Scheppelle, “Constitutional Ethnography: An Introduction”
G. Jacobsohn, The Wheel of Law, xi-xvi, 1-18
Abortion Case I (Germany)
B. Ackerman, “The Rise of World Constitutionalism”
- Jan. 22 H. Klug, “Model and Anti-Model: The United States Constitution and
the ‘Rise of World Constitutionalism’”
Rosenfeld, 353-369
M. Callahan, “Cultural Relativism and the Interpretation of
Constitutional Texts”
Regina v. Keegstra (Canada)
Holocaust Denial Case (Germany)
- Jan. 29 A. Scalia & S. Breyer, “A Conversation Between U. S. Supreme Court
Justices”
S. Choudhry, “Globalization in Search of Justification: Toward a
Theory of Comparative Constitutional Interpretation”
R. Posner, “The Cosmopolitan Court”
Naz Foundation v. Government of India (India)
Lawrence v. Texas (US)
- Feb. 5 G. Jacobsohn, 12-121, 265-290
School Prayer Case (Germany)
Leyla Sahin v. Turkey (ECHR)

II. Constitutions: Identity, Change, Revolution

- Feb. 12 Rosenfeld, 57-84, 85-164
C. Klein and A. Sajo, “Constitution-Making: Process and Substance”
Federalist #40
- Feb. 19 G. Jacobsohn, “The Formation of Constitutional Identities”
M. Rosenfeld, 223-232, 245-252
R. Albert, “Nonconstitutional Amendments”
D. Conrad, “Constituent Power, Amendment and Basic Structure of
the Constitution: A Critical Reconstruction”
Southwest Case (Germany)
Privacy of Communications Case (Germany)
Abortion Information Case (Ireland)
- Feb. 26. H. Lerner, Making Constitutions in Deeply Divided Societies

- Mar. 5 G. Jacobsohn, 125-226
 Ford v. Quebec (Canada)
 Reference Re Secession of Quebec (Canada)
 Aircraft Shoot-down Case (Germany)
 Luth Case (Germany)
- Mar. 19 H. Arendt, "The Meaning of Revolution"
 B. Ackerman, "Rethinking Revolution"
 M. Rosenfeld, 335-352, 383-422
 Retroactive Criminal Legislation Case (Hungary)
 Decision on the Illegality of the Communist Regime (Czech Republic)
 Kach Party Faction v. Hillel (Israel)
- Mar. 26 G. Jacobsohn, 227-264
 N. Hashemi, "Religious Disputation and Democratic Constitutionalism:
 The Enduring Struggle of the Constitutional Revolution in Iran"
 V. Bogdanor, "Constitutional Reform in Great Britain: The Quiet
 Revolution"
 G. Sapir, "Constitutional Revolutions: Israel as a Case-Study"
 United Mizrahi Ltd. v. Migdal Village (Israel)
- Apr. 2. D. Grimm, "Integration By Constitution"
 M. Rosenfeld, "The European Treaty-Constitution and Constitutional
 Identity: A View From America"
 Lisbon Case
 L. Besselink, "National and Constitutional Identity Before and After
 Lisbon"
 F. Mayer, "Rashomon in Karlsruhe"

III. A Glimpse Into Constitutions and Their Courts

- Apr. 9 R. Hirschl, Towards Juristocracy
- Apr. 16 Republic of South Africa v. Grootboom
 Deshaney v. Winnebago County (US)
 A. Stone Sweet, "Constitutional Courts"
 M. Tushnet, "State Action, Social Welfare Rights, and the Judicial
 Role: Some Comparative Observations"
 C. Mackinnon, "Gender in Constitutions"
- Apr. 23 Research presentations
- Apr. 30 Research presentations