

## Contextualizing Comparative Constitutional Law Summer 2014

Comparative constitutional law, at least as it is taught in American law schools, typically neglects any close consideration of comparative theory and methodology. To the degree that these foundational elements are addressed, the field's functionalist tradition is invoked despite its origins in and widespread application to comparative private law (see JACKON/TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2<sup>nd</sup> ed. 2006); DORSEN ET AL, *COMPARATIVE CONSTITUTIONALISM* (2<sup>nd</sup> ed. 2010)). The Bloc-Seminar aims to address these deficiencies. First, it will devote several sessions to a critical reflection on the relevant concepts as well as the theory and method of comparative law. Second, the substantive sessions follow an approach that rejects functionalism, preferring a context-rich and context-sensitive approach to comparison. One claim for this departure from the functionalist tradition is that thick, contextual comparison is better suited to constitutional law.

After our introductory and methodological work, the course will consider the historical and institutional foundations of American and German constitutional law before taking up a detailed examination of the two systems' responses to distinct constitutional problems.

The narrow focus on just two constitutional regimes will afford opportunities to examine and discuss the social, political, cultural and historical meaning of the substantive constitutional law the course treats.

Readings will be drawn from materials assembled by the lecturer. Ten sessions are planned.

Monday 12 May 2014	<p><b>Concepts: Constitutionalism &amp; Comparison</b></p> <ul style="list-style-type: none"><li>▫ Craig, <i>Constitutions, Constitutionalism, and the European Union</i>, 7 EUROPEAN LAW JOURNAL 125 (2001) [handout] [read only pages 126-28]</li><li>▫ Levinson, <i>Do Constitutions Have a Point?</i>, in WHAT SHOULD CONSTITUTIONS DO? (Ellen Frankel Paul <i>et al.</i> eds., 2011) [handout] [read only pages 150-155]</li><li>▫ Reimann, <i>The End of Comparative Law as an Autonomous Subject</i>, 11 TULANE EUROPEAN &amp; CIVIL LAW FORUM 49 (1996) [handout] [read only pages 49-60]</li><li>▫ Vicki Jackson, <i>Methodological Challenges in Comparative Constitutional Law</i>, 28 PENN. ST. INT'L L. REV. 319-326 (2010) [handout]</li></ul>
Tuesday 13 May 2014	<p><b>Introducing Comparative Constitutional Law – Functional Tradition</b></p> <ul style="list-style-type: none"><li>▫ Zweigert &amp; Kötz, <i>INTRODUCTION TO COMPARATIVE LAW</i> (3<sup>rd</sup> ed. 1998) [read only 32-47]</li><li>▫ Rutti Teitel, <i>Comparative Constitutional Law in a Global Age</i>, 117 HARVARD L. REV. 2570 (2004) [read only pages 2574-2584]</li></ul>

Wednesday 14 May 2014	<p><b>Introducing Comparative Constitutional Law – Contextual Challenge</b></p> <ul style="list-style-type: none"> <li>▫ Günter Frankenberg, <i>Critical Comparisons: Re-Thinking Comparative Law</i>, 26 HARVARD INTERNATIONAL LAW JOURNAL 411 (1985) [handout excerpt]</li> <li>▫ Günter Frankenberg, <i>Comparing Constitutions: Ideas, Ideals, and Ideology – Towards a Layered Narrative</i>, 4 INT’L J. CONST. L. 439-459 (2006) [handout]</li> <li>▫ Upendra Baxi, <i>The Colonialist Heritage</i>, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 46 (Pierre Legrand &amp; Roderick Munday eds., 2003) [handout] [read only pages 46-54]</li> <li>▫ Pierre Legrand, <i>The Same and Different</i>, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand &amp; Roderick Munday eds., 2003) [handout excerpt]</li> </ul>
Thursday 15 May 2014	<p><b>Deep Context – Political Framework &amp; Legal Culture</b></p> <ul style="list-style-type: none"> <li>▫ Dickovic &amp; Eastwood, COMPARATIVE POLITICS [Germany] [United States] (2013) [handout] [read only pages 441-454; 470-486]</li> <li>▫ Vivian Grosswald Curran, <i>Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union</i>, 7 COLUMBIA JOURNAL OF EUROPEAN LAW 63 (2001) [handout excerpt]</li> </ul>
Friday 16 May 2014	<p><b>Constitutional Histories &amp; Texts</b></p> <ul style="list-style-type: none"> <li>▫ Werner Heun, THE CONSTITUTION OF GERMANY (2011) [handout] [read only pages 9-23]</li> <li>▫ Mark Tushnet, THE CONSTITUTION OF THE UNITED STATES OF AMERICA (2009) [handout] [read only pages 9-41]</li> <li>▫ <a href="#">United States Constitution</a> [hyperlink to text]</li> <li>▫ <a href="#">German Basic Law</a> [hyperlink to text]</li> </ul>
Monday 19 May 2014	<p><b>Constitutional Courts</b></p> <ul style="list-style-type: none"> <li>▫ Kommers &amp; Miller, <i>Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court</i>, 3 JOURNAL OF COMPARATIVE LAW 194 (2008) [handout]</li> <li>▫ Linda Greenhouse, THE U.S. SUPREME COURT – A VERY SHORT INTRODUCTION (2012) [handout] [read only pages 1-37; 48-58; 72-82]</li> </ul>

<p>Tuesday 20 May 2014</p>	<p><b>Different Constitutional Absolutes?</b></p> <p><u>Primacy of Dignity in German Jurisprudence</u></p> <ul style="list-style-type: none"> <li>▫ Dagmar Giersberg, <i>A Novel is Banned: Esra by Maxim Biller</i>, GOETHE INSTITUTE, <a href="http://www.goethe.de/kue/lit/aug/en2815556.htm">http://www.goethe.de/kue/lit/aug/en2815556.htm</a> [hyperlink]</li> <li>▫ <i>Mephisto</i> Case, BVerfGE 30, 173 (1971) [handout]</li> <li>▫ <a href="#">Esra Case</a>, BVerfG 119, 1 (2007) [hyperlink] [read only paras. 57-105]</li> <li>▫ <i>Life Imprisonment Case</i>, BVerfGE 45, 187 (1977) [handout]</li> </ul> <p><u>Primacy of Speech in American Jurisprudence</u></p> <ul style="list-style-type: none"> <li>▫ Adam Liptak, <i>American Exceptionalism – Unlike Others, U.S. Defends Freedom of Speech</i>, NY TIMES, June 12, 2008, <a href="http://www.nytimes.com/2008/06/12/us/12hate.html?pagewanted=all&amp;_r=0">http://www.nytimes.com/2008/06/12/us/12hate.html?pagewanted=all&amp;_r=0</a> [hyperlink]</li> <li>▫ <i>Hustler Magazine v. Falwell</i> (1988) &amp; <i>Snyder v. Phelps</i> (2011) [handout]</li> <li>▫ <i>Furman v. Georgia</i> (1972) &amp; <i>Gregg v. Georgia</i> (1976) [handout]</li> </ul>
<p>Wednesday 21 May 2014</p>	<p><b>Different Places in the World?</b></p> <p><u>German Constitutional Law &amp; the World</u></p> <ul style="list-style-type: none"> <li>▫ <i>Görgülü Case</i>, BVerfGE 111, 307 (2004) [handout excerpt]</li> <li>▫ Matthias Hartwig, <a href="#">Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights</a>, 6 GERMAN LAW JOURNAL 869 (2005) [hyperlink]</li> </ul> <p>Gertrude Lübke-Wolff, <a href="#">ECtHR and National Jurisdiction – The Görgülü Case</a>, HUMBOLDT FORUM RECHT (2006) [hyperlink]</p> <p><u>American Constitutional Law &amp; the World</u></p> <ul style="list-style-type: none"> <li>▫ <i>Medellín v. Texas</i> (2008) [handout]</li> <li>▫ Frederic L. Kirgis, <a href="#">International Law in the American Courts – The United States Supreme Court Declines to Enforce the I.C.J.'s Avena Judgment Relating to a U.S. Obligation under the Convention on Consular Relations</a>, 9 GERMAN LAW JOURNAL 619 (2008) [hyperlink]</li> <li>▫ Ted Cruz, <a href="#">Defending U.S. Sovereignty</a>, 33 HARVARD JOURNAL OF LAW &amp; PUBLIC POLICY 25 (2009) [hyperlink]</li> </ul>

Thursday 22 May 2014  Session One	<p><b>Different Privacies?</b></p> <p><u>German Privacy</u></p> <ul style="list-style-type: none"><li>▫ <i>Census Act Case</i>, BVerfGE 65, 1 (1983) &amp; <i>Data Collection Case</i>, BVerfGE 120, 274 (2008) [handout]</li><li>▫ Jochen Bittner, <i>Between Paranoia and Naïveté</i>, NY TIMES (Aug. 28, 2013), <a href="http://www.nytimes.com/2013/08/29/opinion/between-paranoia-and-naivete.html">http://www.nytimes.com/2013/08/29/opinion/between-paranoia-and-naivete.html</a> [hyperlink]</li><li>▫ Adam Liptak, <i>Supreme Court Taking Up Police Searches of Data Troves Known as Cellphones</i>, NY TIMES, April 27, 2014, <a href="http://www.nytimes.com/2014/04/28/us/supreme-court-taking-up-police-searches-of-data-troves-known-as-cellphones.html">http://www.nytimes.com/2014/04/28/us/supreme-court-taking-up-police-searches-of-data-troves-known-as-cellphones.html</a> [hyperlink]</li><li>▫ Ralf Poscher &amp; Russell Miller, <i>Surveillance and Data Protection in the Conflict between European and American Legal Cultures</i>, AICGS COMMENTARIES (Dec. 9, 2013), <a href="http://www.aicgs.org/issue/surveillance-and-data-protection-in-the-conflict-between-european-and-american-legal-cultures/">http://www.aicgs.org/issue/surveillance-and-data-protection-in-the-conflict-between-european-and-american-legal-cultures/</a> [hyperlink]</li><li>▫ <i>ACLU v. Clapper</i> (USDC SDNY) (27 Dec. 2013) [handout] [read only pages 1-3; 9-12; 37-54]</li><li>▫ <i>Klayman v. Obama</i> (USCD DC) (16 Dec. 2013) [handout] [read only pages 6-9; 14-23; 42-64]</li></ul> <p><u>American Privacy</u></p> <ul style="list-style-type: none"><li>▫ <i>Griswold v. Connecticut</i> (1965) &amp; <i>Roe v. Wade</i> (1973) [handout]</li><li>▫ <i>Abortion I Case</i>, BVerfGE 39, 1 (1975) &amp; <i>Abortion II Case</i>, BVerfGE 88, 203 (1993) [handout]</li><li>▫ Felix Lange, <i>American Liberalism and Germany's Rejection of the National Socialist Past—The 1973 Roe v. Wade Decision and the 1975 German Abortion I Case in Historical Perspective</i>, 12 GERMAN LAW JOURNAL 2033 (2011) [hyperlink]</li></ul>
Thursday 22 May 2014  Session Two	<p><b>Concluding Session - (Re)Considering Comparative Constitutional Law</b></p> <ul style="list-style-type: none"><li>▫ Mark Tushnet, <i>The Inevitable Globalization of Constitutional Law</i>, 49 VA. J. INT'L L. 985 (2009) [handout]</li></ul>