

Comparative Constitutional Law: Courts and Constitutions in Global Perspective

Matthew H. Young

Instructor: Matthew H. Young

Email: mhyoung@live.unc.edu

Office Hours: TBD

Course Description

What is a Constitution, and what role does constitutionalism play in the development of legal, political, and social institutions? For many scholars and students throughout history, the questions have been answered through an in-depth study and analysis of the history of the United States Supreme Court. Yet as valuable as this effort is to those who intend to further their study of American politics and institutions, it runs the risk of promoting a parochial and myopic view of the world. The United States is not the only nation with a Constitution, courts tasked with its interpretation, or citizens who care deeply about the structure and source of their legal and political rights.

This course aims to take a historically narrow field of study – constitutional law – and place it within global perspective. Using the methods of comparative political analysis, we will examine and evaluate the constitutions and judicial systems of numerous countries across the world, appreciating the remarkable variation in institutional design arising from differences in historical, social, and political contexts. Despite these differences, however, states and citizens around the globe often face similar political and legal questions concerning questions of liberty, conscience, equality, and justice. By comparing constitutional decisions on these common questions, we will gain an ability to analyze and compare alternative forms of constitutionalism, judicial review, and civil liberties around the world.

This course will consider a number of traditional questions of constitutional law in comparative perspective: How does basic constitutional structure dictate the judicial process of a nation? What role does judicial review play in the interpretation of a constitution? What limits are placed on the actions of executive and legislative bodies, and what power do the courts have to enforce those limits? How do different courts and constitutions respond to pressing issues such as those relating to discrimination on the basis of sex, gender, or race? How do other nations balance religious liberty or freedom of conscience with concerns for equality and autonomy? And finally: how do nations navigate the relationship between their own laws, international law, and the decisions of international courts?

The student in this course will: 1) gain an appreciation for and knowledge of the diversity of constitutional systems around the world; 2) Hone an ability to read and analyze legal decisions both in the United States and abroad; 3) Develop the skills necessary to produce high-quality legal writing of their own; 4) Learn to apply comparative methods of political analysis to international institutions and law.

Course Texts

Our readings for this course will be drawn from two sources: an excellent textbook (available for purchase both online and at Student Stores), and various other court decisions and documents that I will make available to you online via Sakai. You should purchase the textbook as soon as possible – we will use it in the very first week of class:

Vikram Amar and Mark Tushnet. *Global Perspectives on Constitutional Law*. 1st Ed., Oxford University Press, 2008.

For those students who wish to gain a deeper knowledge of a specific country's legal institutions (perhaps in preparation for a career in comparative politics, international law, or American constitutional law), I am more than willing to provide recommendations for additional reading. A few of these are listed below:

Abraham, Henry. *The Judicial Process: An Introductory Analysis of the Court of the United States, England, and France*. Oxford University Press, 2008.

Barron, Jerome, and C. Dienes. *Constitutional Law in a Nutshell*, 8th Edition. West Academic Publishing, 2013.

Glendon, Mary Ann, Michael Wallace Gordon, and Christopher Osakwe. *Comparative Legal Traditions*, 2nd Edition. West Wadsworth, 1994.

Kommers, Donald P. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, 1989.

O'Brien, David M. and Jasuo Ohkoshi. *To Dream of Dreams: Religious Freedom and Constitutional Politics in Postwar Japan*. University of Hawaii Press, 1996.

Stone, Alec. *The Birth of Judicial Politics in France*. Oxford University Press, 1992.

Sunstein, Cass R. *Designing Democracy: What Constitutions Do*. Oxford University Press, 2001.

Volcansek, Mary L. *Constitutional Politics in Italy: The Constitutional Court*. St. Martin's Press, 2000.

Course Requirements and Grading

Your grade in this course will be determined by your satisfaction of the following requirements, and weighted as listed below. I have outlined in some detail each dimension of the course grade:

Assignment Weights

Exam I: 15%

Exam II: 15%

Exam III: 20%

Legal Briefs: 35%

Participation: 15%

Exams:

There will be three short exams in this class. The first two exams are primarily factual, and designed to measure your knowledge of the readings assigned and your grasp of international legal institutions.

The final exam (Exam III) will be a take-home exam, and present you with one or more legal scenarios. You will then be asked to select one of the constitutional systems covered in the class, and adjudicate that case as a judge within that nation's constitutional schema. For instance, the prompt may present a thorny question of religious liberty, and students may choose to adjudicate the case from the perspective of a judge within the system of the United States, Japan, or France. In the scheduled final exam period, we will meet together and discuss our answers in a 'flipped classroom.'

Legal Briefs:

Case briefs are one of the most common forms of legal writing, and the skills developed in writing them will prove invaluable to any of you who pursues a legal career. A case brief is a, well, *brief* summary of a legal case, articulating the background for the case, the legal or constitutional questions at stake, outlining the relevant court opinions, and suggesting the significance of the case in 1-1.5 pages. Writing case briefs will develop your ability to read complicated texts and summarize them in clear and concise language. Sample case briefs are available on Sakai under the Resources tab.

You will write 7 legal briefs over the course of the term—each brief is worth 5% of your final grade. Briefs are graded on a simple scale: A marginal brief will receive 3 points (out of 5), an excellent brief will receive 5 points. If you receive a 3, you may choose to revise it and resubmit it (along with the original brief) within two class meetings to potentially improve your grade to a 4.

Participation:

Learning is a collaborative, as well as individual exercise. Accordingly, your active participation in this class is a critical part of both your own education, and that of your peers. Attendance is mandatory. If you must be absent from class for any reason, please let me know ahead of time. Active participation in a learning community, however, requires more than just your mere presence in a chair. In order to contribute fully to this class (and maximize your own enjoyment and benefit), you should come to each meeting having thoughtfully completed the assigned readings, and be prepared to engage with the material and each other. I promise you that I will always do my best to prepare for an engaging and interesting class discussion – but our success relies upon each other.

While I cannot, generally, excuse students from participating in class, I am sensitive to the many ways that in-class discussions can be challenging to individual students. Accordingly, there will be many ways to participate in the class, including reflective writing, small group discussions, and even visits to office hours. Participation is graded not on the *quantity* of your participation, but holistically, considering the *quality*, *regularity*, and *spirit* of your participation. Good participation will be regular (you don't have to talk every class, but you shouldn't go more than a week without participating), of high quality (thoughtful and on-topic), and reflect a desire for learning as well as the dignity and equality of others and the democratic nature of our education.

Reading:

Reading legal documents can be very challenging – there's a reason we joke about 'legalese', and that nobody reads the fine print at the bottom of an advertisement or agreement. Unfortunately, much of the material for this class consists of "the fine print" – but it is nonetheless extremely important. When

you read, set yourself up for success: find a well-lit place, read with a pencil in hand and a notebook nearby to record any questions or comments (I'm always happy to help!), and don't rush to cram the reading in before class.

Grading Scale:

All letter grades are awarded according to the following scale:

A	93-100
A-	90-92
B+	87-89
B	83-86
B-	80-82
C+	77-79
C	73-76
C-	70-72
D	60-69
F	0-59

Technology and Classroom Behavior

When you are in class, I expect you to be actively engaging in discussion or listening. Your cell phones and other electronic devices should be silenced and put away. Pedagogical studies suggest that material is better processed and retained when students take notes by hand—so I recommend that you come to class with the assigned readings in front of you and a notebook.

In this course, we will discuss ideas, theories, circumstances, and concepts that may be divisive or contentious. I expect the highest standard of civil discourse and mutual respect from, and for, all participants in this class.

If at any point you have questions for me, I encourage you to visit my office hours or reach out via email. I strive to be prompt in responding to emails, though I do keep normal working hours and as such may not immediately answer messages that arrive late at night or during the weekend. I do not, as a rule, read or respond to emails on Sunday. Email is best suited to quick questions—if you have a complicated question or detailed topic to broach, please come to my office hours!

Academic Integrity, Accommodations, and Resources

Students and faculty are governed by high standards of academic rigor and integrity. Any student who is caught presenting someone else's work as their own, making inappropriate use of scholarly resources, or behaving dishonestly in any manner will be strictly penalized, and may be subject to disciplinary proceedings through the appropriate University authorities.

For additional information about academic dishonesty and plagiarism, please see: <http://www.lib.unc.edu/plagiarism>, or chat with me. If you have any questions about what constitutes fair use of other resources, please ask!

Accommodations

Reasonable accommodations are available for students with disabilities, chronic medical conditions, a temporary disability, or pregnancy complications resulting in difficulty accessing learning opportunities. All accommodations are coordinated through the Accessibility Resources and Services Office. See the ARS Website for contact information: <http://ars.unc.edu>

Tentative Course Schedule

Week 1: Constitutions and Courts of Last Resort

Lon Fuller, "The Case of the Speluncean Explorers"
The Constitution of the United States and the Bill of Rights.
The Constitution of Japan
The Constitution of France
Russel Hardin, "Why A Constitution"
Nathan J. Brown, "Constitutions in a Non-Constitutionalist World"

Week 2: Judicial Authority and Federalism

Amar and Tushnet, pp. 1-44
Jeremy Waldron, "The Core of the Case Against Judicial Review"
Alec Stone Sweet, *Why Europe Rejected American Style Judicial Review*.
Mark Tushnet, "Marbury v. Madison Around the World"
Selected cases as assigned.

Week 3: Separation of Powers; Legislature.

Amar and Tushnet, pp. 48-58
David Williams, "Constitutional Design for Burma"
Bruce Ackerman, *The New Separation of Powers*.
Selected cases as assigned.

Week 4: Limits on Executive Power

Amar and Tushnet, pp. 34-47
Steven G. Calabresi, *The Virtues of Presidential Government*.
R. Elgie, *Varieties of Semi Presidentialism*.
Selected cases as assigned.

Week 5: Sovereignty

“Germany” and “Canada” in John Kincaid and Alan Tarr, *Constitutional Origins, Structure, and Change in Federal Countries*.

Sujit Choudhry, “Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies”

Vicki Jackson, “Constitutional Comparisons: Convergence, Resistance, Engagement.”

Week 6: Freedom of Speech and Expression

Amar and Tushnet, pp. 146-197

Adrienne Stone, “The Comparative Constitutional Law of Freedom of Expression”

Samuel Issacharoff, “Fragile Democracies.”

Selected cases as assigned.

Week 7: Freedom of the Press and Print

Declaration of Windhoek.

“Reporters Without Borders, Annual Report”

“The Trials of William Hone” (1817).

“Constitution of the Republic of Italy”

Brandenburg v. Hayes (1972)

New York Times v. Sullivan (1964)

The Constitution of Pakistan.

Selections from John Milton’s *Areopagitica*.

Week 8: Freedom of Religion and Free Exercise.

The Irish Constitution.

Nathan J. Brown and Mara Revkin, “Islamic Law and Constitutions” in *The Oxford Handbook of Islamic Law*.

Clark Lombardi, “Designing Islamic Constitutions: Past Trends and Options for a Democratic Future”

Gary Jacobsohn, “Three Models of Secular Constitutional Development: India, Israel, and the United States.”

Week 9: Gender and Sexuality

Amar and Tushnet, pp. 73-87; 116-145.

Week 10: Racial Equality

Amar and Tushnet, pp. 88-115.

Week 11: Multiculturalism

Readings TBD.

Week 12: Constitutions and Criminal Justice

Soering v. United Kingdom (1989), European Court of Human Rights
Selected cases as assigned.

Week 13: Constitutions in Context

Amar and Tushnet, pp. 228-240.

Mark Tushnet, “Some Reflections on Method in Comparative Constitutional Law”