"Looking over the Crowd and Picking Your Friends:" The Social World of Legal Cases

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In the mad and largely fruitless debate over whether judges in the United States should consider foreign law in making their decisions, the charge of selectivity stings most. After all, if you were making an argument to an American court against a dense backdrop of case law, you wouldn't just cite the cases that support your position, let alone only the one case you liked best. You'd survey the field, assessing the evidence in in favor and evidence against the position you want to (or have been hired to) argue, and then make a richly textured argument about what the better argument should be – and why – set against the backdrop of the legal culture in which you operate.

But in comparative constitutional law, the reliance on only one side of the argument, bolstered by citations to only a few of the many cases on point, is common. In the 1980s, when I first went into this field, the dominant debate was over abortion, in which many of the American comparative constitutional law scholars were conservatives, attracted to the field by

¹ The quotation, with respect to legislative history, is from Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to "looking over a crowd and picking out your friends.""). Extended to comparative constitutional law by Justice Stephen Breyer in a debate with Antonin Scalia over whether the US Supreme Court should look to foreign law in making its decision, the same point applies. Breyer's extension is as follows:

The criticism is you'll look over the party, the cocktail party – remember Judge Leventhal said this about legislative history: Those who use legislative history, well it's like looking at a cocktail party, you look over the cocktail party to identify your friends. (Laughter.) And I say to that, well then you're not doing your job. And why would a -- that's what I said. I would refer to the cases against me that I come across as much as for me. And the fact that somebody's come out the other way in a foreign court doesn't make it any the less interesting. Maybe it's more interesting. But this is not a major thing. It's not some kind of determinative thing in dozens of cases of constitutional law; it's simply from time to time relevant. And if it becomes more than that, I don't know how it's going to work.

Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – American University's Washington College of Law, January 13, 2005, available at http://www.freerepublic.com/focus/news/1352357/posts.

the decision of the German Federal Constitutional Court arguing that the state must protect They argued that the US Supreme Court was wrong in Roe v. Wade to have fetal life. completely dismissed the potentiality of the fetus as a moral entity and then they cited the abortion decision of the Federal Constitutional Court of Germany as the model the US should have followed.² Since that time, the debate has shifted politically so that now the field is dominated by those on the political left, who make the argument that the US is the ugly outlier with respect to the death penalty, human dignity, gender and race equality, sexual orientation, hate speech, informational self-determination, social rights and more. But the underlying evidentiary basis has not changed. From the left now, as much as from the right then, the evidence most often adduced for the US's backward position is a single or a few cases from foreign courts, generally all on one side of the issue.

Legal analysis is not quantitative social science: the better argument in a case is not the one that has the largest poll results or the most cases in its favor. Nonetheless, law is not a field in which single cases, stripped of context and taken alone, are decisive either, even within one legal system. Somewhere between a majoritarian empirical analysis in which the more numerous position wins and a swooning respect for the charisma of a particular case, law finds its way in a world of cases in which some are clearly more important than others. understand how cases come to have particular importance, one must do field work in the field of law.³ The more time one spends in the law – working with cases, discussing them with colleagues and seeing how they are used - the more one sees that there is method in the madness. But it is not the methodology of counting - or even of "balance." Citing equal and opposing cases on each side is no better a methodology of law than is counting the total number of cases for a particular proposition. How does one know, then, what to do with cases?

In any domestic legal system that relies on case law, all cases are clearly not all equal, nor it is necessarily the case that some obvious rule allows the winning case to always be clear. In a unified precedent-based system, the rules of the game (higher court trumps lower court; most recent judgment trumps older judgment) are spectacularly unhelpful much of the time. For example, criticism of the infamous "torture memo" written in the US Justice Department's Office of Legal Counsel and dated 1 August 2002 often noted that John Yoo failed to mention

² MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); Donald P. Kommers, *The* Constitutional Law of Abortion in Germany: Should Americans Pay Attention, 10 J. CONTEMP. HEALTH L. & POL'Y 1 (1994); Donald Kommers, Abortion and the Constitution: The United States and West Germany, 25 Am. J. Comp. L. 225 (1977); Donald Kommers, Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective, 1985 B.Y.U. L. Rev. 371 (1985). Walter Murphy was also drawn into comparative constitutional law by the German abortion case, among other things. In the American field of comparative constitutional law in the 1980s, by far the most dominant presence was what we might call "concerned Catholics."

³ I've made this case at more length in Kim Lane Scheppele, Constitutional Ethnography, 38 L & Soc. Rev. 389 (2004).

and discuss the *Youngstown*⁴ case in considering the scope and extent of presidential power.⁵ The critics were right that it was an outrage for a crucial government memo advising the executive branch to exclude consideration of this case. But the outrage is hard to explain in technical legal terms. The opinion in *Youngstown* that the Yoo memo failed to cite was a concurrence by Justice Jackson, technically not binding either in the *Youngstown* case itself or in any other case either. In fact, the *Youngstown* case itself has such a fractured majority that it is hard to tell what the case stands for as a matter of American constitutional law and it is therefore rarely cited for anything other than the Jackson concurrence. But the Jackson concurrence has developed a life of its own, providing the key framework for considering the scope of presidential power by being cited in casebooks, law review articles and in other cases as the best summary of the law on point. In short, the Jackson concurrence matters because (almost) everyone thinks it does. Even if one is going to argue against it on doctrinal or political grounds, one cannot just ignore it. The legal culture won't let you, even if narrowly conceived doctrine does.

Global constitutional law works much the same way although, in the international context, there are not even rules of the game for determining which court decisions represent the best and most current statement of global constitutional law. In a case where the German Federal Constitutional Court says one thing and the South African Constitutional Court says another, which one is more important? In the international context, no case trumps any other as a matter of formal law. Without a single legal hierarchy or even an international "last in time" rule, the proliferation of cases and disagreements among courts requires judgment to sort out what to conclude from the various ideas that one might invoke. But rather than think that makes global constitutional law uniquely chaotic, so that the best one can do is to look over the crowd and see only your friends, this just means that comparative constitutional law is just like American constitutional law in crucial respects. Law is a culture as much it is a set of rules for determining and following authority.

As a result, the absence of rules for sorting out what is the highest and best case in the global legal order does not actually make the problem of authority much different from the identical problem in case-based common-law systems. In fact, the problem of the weight or persuasiveness or charisma of cases is a problem any time that a "blooming, buzzing

⁴ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Note how this is another of those cases that is always cited by its first name.

⁵ The official report prepared by H. Marshall Jarrett, the head of the Justice Department's Office of Professional Responsibility (OPR) noted that Youngstown had been bypassed by the torture memo authors and that a "thorough, objective and candid" analysis of the issue of presidential power should have cited it. http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf at 204 (2009). See also David Luban, Liberalism, Torture and the Ticking Bomb, Va. L. Rev. and Kathleen Clark, Ethical Issues Raised by the OLC Torture Memorandum, J. Nat. Sec. L. & Pol. for more pointed criticisms of the omission of Youngstown.

confusion"⁶ of cases forms the basis of any legal judgment. While common law systems are characterized by the fact that every reported judicial decision formally adds to the body of what counts as law, civil law systems are famously limited in their sources of law to considering formal legal enactments almost exclusively and this conspicuously excludes judicial decisions. Yet many civil law jurisdictions are moving in the direction of recognizing case law as a source of law more than the formal theory indicates. In constitutional jurisprudence particularly, where high courts operate through and with cases as the coin of the realm, reasoned cases of Constitutional Courts may not count as precedent in the formal and technical common-law sense, but they are also not only markers of concrete factual outcomes in specific cases either. Instead, in comparative constitutional jurisprudence as well as in the constitutional case law of common-law countries, cases are the most important manifestations of constitutional principles. And some cases are more important than others because they mark some crucial features of the global constitutional culture. Living in the comparative constitutional law world means living in a world of cases. And living in the world of comparative constitutional law means learning as a matter of legal culture how to understand the materials one finds.

To the question of what makes a case more important, then, I would rely not on formal criteria but instead on social ones. Cases in foreign law, just as in American law, come to be important not only because of their intrinsic merits but because of the social life they lead after they have been decided. Cases have a social life? Yes, of course – in the legal community, in commentaries, in citations and even in the legal world's equivalent of cocktail parties (conferences of professional bodies, workshops like this one). Some cases are asked out on dates often – paired up with cases from their own or other jurisdictions and given a spin in public in casebooks, law reviews or citations in other cases. Other cases languish on the sidelines, never asked to dance. Some cases spark furious fights, in which some defend the case as rightly decided and others consider the case pernicious. And yet the debate itself brings the case into prominence, where it is then often cited as an example by both sides for a long time afterwards. Other cases become so familiar that everyone addresses them by their first names (Marbury, Solange, Makwanyane, Kesanavananda, Big M. Drug Mart, and more). In short, cases - both in US law and in foreign law - live in a social world as well as in a formal legal world, and it is the social world even more than the formal legal one that determines which cases are more important than others.

American legal education solves the problem of training future lawyers to operate in a world of cases by assigning little *other* than cases to students through three years of law school.

⁶ The famous quotation comes from William James' discussion of how the baby experiences the world, not a bad metaphor for newcomers to the field of comparative constitutional law. William James, *The Principles of Psychology* 462 (1890)

⁷ Perhaps the most systematic evidence of the social life of cases can be found in Richard Posner's analysis of the opinions of Benjamin Cardozo. While he focuses on citation patterns of Cardozo's opinions, he also notes the way in which Cardozo's snappy, short and well-written opinions worked their way into casebooks and commentaries well beyond the normal shelf-life of an opinion. RICHARD POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

After that much case exposure, after students learn from *casebooks* (specifically not hornbooks) that edit, highlight, compare and contrast opinions by judges, students understand how to think not just like a judge, but also like a lawyer. As students learn quickly when they enter practice, however, three years is not really enough to operate in a case-law-based world without further education. In fact, it takes many years in the law to know that cases are not trumps but guides, and that legal culture may be made up of cases but is not reducible to any one or a few of them.

This example from American legal education will help us to understand why comparative constitutional law has a canon and why it doesn't matter as much as one would think.

Comparative constitutional law is constituted by cases as the core markers of the field, just as American constitutional law is. There is, in short, a canon. Some cases always wind up on comparative constitutional law shortlists. For example, it is hard to imagine a comparative constitutional law course without the first and usually also the second German abortion cases, sometimes paired with other abortion cases like Morgentaler II (from Canada, sometimes also Morgentaler I), the "X case" (from Ireland) and Roe and Casey (from the US), ⁸ and sometimes paired with other "human dignity cases" like the Israeli torture case, and the recent Aircraft Security Case from Germany. ⁹ The South African death penalty case is paired with the death penalty or other punishment jurisprudence from elsewhere. ¹⁰ And comparative free speech

⁸ US: Roe v. Wade, 410 U.S. 113 (1973)

US: Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Germany: Abortion Case I and Abortion Case II, Federal Constitutional Court, pp. 335-356 in Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY.

Canada: R. v. Morgentaler, Supreme Court of Canada [1988], 1 S.C.R. 30.

Ireland: The Attorney General, Plaintiff v X and Others, Defendants [1992 No 846P].

⁹ Israel: Judgment on the Interrogation Methods applied by the GSS, Supreme Court of Israel (1999).

Germany: Aviation Security Act case, BVerfG, 1 BvR 357/05 (2 February 2006, Decision of the Federal Constitutional Court, available at http://www.bundesverfassungsgericht.de/en/decisions/rs20060215 1bvr035705en.html

¹⁰ US: Gregg v. Georgia, 428 U.S. 153 (1976)

US: Roper v. Simmons, 543 U.S. 551 (2005).

South Africa: The State v. Makwanyane, Constitutional Court Case CCT/3/94.

generally has pride of place too, given its centrality as the most absolute right in the American constitutional order. And more. I'll spare everyone the listing here and will just attach the latest version of my comparative law syllabus (in a course taught this semester with Gábor Halmai) to the end of this paper as an appendix. My latest thoughts on what cases students should read in a first course are there. In general, most of the core cases are rights cases, but there is a growing number of cases on the list now that highlight principles of judicial interpretation, ways of dealing with constitutional amendments, how to understand checked and balanced powers and what are the limits of judicial review.

But as you can tell from what I have already said, I don't think that one can learn how to operate in the comparative constitutional law world primarily by reading the canon of specially vetted cases, though one has also to have a fair knowledge of specific cases ready to hand. Instead, one has to learn to live in this world as someone who has become a native to the constitutional culture, in which there is widespread agreement about the key operative principles and how they are used. This field is becoming ever deeper in terms of the nature of the agreement and ever wider in terms of the number of topics where answers are taken to be obvious. In short, comparative constitutional law is a global field of knowledge that is looking ever more similar to US constitutional law in its cultural density even as it is looking ever less similar to US constitutional law in its specific view of the world. In comparative constitutional

Germany: The Life Imprisonment Case, Federal Constitutional Court, pp. 306-313 in Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY.

Hungary: Decision 23/1990, On Capital Punishment (with Sólyom concurrence) in László Sólyom and Georg Brunner, Constitutional Judiciary in a New Democracy, pp. 118-138.

¹¹ US: New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Germany. Lüth Case, Federal Constitutional Court

Hungary: Decision 36/1994 AB, Constitutional Court

European Court of Human Rights: Lingens v. Austria (1986)

US: Gitlow v. New York, 268 U.S. 652 (1925).

Germany: Holocaust Denial Case and Tucholsky Case from Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, pp. 382-395.

Hungary: Decision 30/1992 on the Freedom of Expression from László Sólyom and Georg Brunner, Constitutional Judiciary in a New Democracy, pp. 229-238.

European Court of Human Rights: Jersild v. Denmark

UN Human Rights Commission: Faurisson v. France

law, just as in US constitutional law, certain sorts of solutions to legal problems are "on the wall" while others are "off the wall." And while surprises happen, most of those familiar with the culture understand them as surprises, which is further evidence of the depth of the constitutional culture. In a world of random cases, everything is a surprise and a revelation. In a deep culture, surprises are very specific and usually rare occurrences.

What would one learn if one were a denizen in this comparative constitutional culture? As with American constitutional law, the enduring principles may be flagged by case references but they are never reducible only to specific individual cases. Therefore, when someone urges a specific case as an example of how comparative constitutional culture works, it should not be understood merely a recommendation for a particular result. Instead individual cases in the comparative constitutional literature should be understood beyond their conclusions where there is still often a substantial amount of variation on questions like: Is abortion legal or not? May a government shoot down a hijacked aircraft to avoid the deaths of people on the ground? May a government restrict speech that insults a particular ethnic, racial or religious group?. Instead, we are likely to find greater coherence on the purpose of constitutionalism and its basic principles than on specific results.

Toward that end, I would like to suggest four entries to the comparative constitutional law canon, not as cases that everyone should read but as principles that are widely accepted elsewhere that guide judicial methodology. Those are:

- that all of the clauses of the constitution should be judicially enforceable,
- that judges should consider the purposes of the constitutional order taken as a whole
 and not its original intent taken clause by clause in understanding what the constitution
 means,
- that constitutional values are so important that they inform the whole legal order and not just "public" law, and
- that international law so permeates constitutional understandings that domestic and transnational law can no longer be sensibly separated.

If comparative constitutional law is organized this way — around very different assumptions about the nature of constitutionalism and constitutional practice than the American model --, then we can see how inapt is the metaphor of "looking over the crowd and picking your friends." That might be the right metaphor if you are looking to see what cases have the answers you want in a world where the jostle of cases means that you can't acknowledge them all. So you look out in a world of friends and strangers and pick your friends.

¹² Jack Balkin, Constitutional Redemption: Political Faith in an Unjust World 179-182 (2011).

But if comparative constitutional law works like a constitutional culture and not like a cocktail party, then the right metaphor might be instead: entering a house and feeling like you are at home. You might not agree with everyone there, but at least you know you belong.

APPENDIX: ONE VIEW OF THE CANON

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COMPARATIVE CONSTITUTIONAL LAW

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WHAT IS COMPARATIVE CONSTITUTIONAL LAW AND WHY STUDY IT?

Comparative constitutional law compares the constitutional law of more than one country/nation/state. As we will see this term, comparative constitutional law is a particularly fascinating area in which to look abroad these days. In many countries in the world, constitutional law has become a booming, ambitious, politically alive field, through which courts with constitutional jurisdiction have become aggressive players in new forms of politics. We are witnessing (as various authors call it) "the rise of world constitutionalism," "the inevitable globalization of constitutional law," "migration of constitutional ideas," "constitutional engagement in a transnational era," "global expansion of judicial power," "governing with judges," or simply the creation of

¹³ Bruce Ackerman, The Rise of World Constitutionalism, 83 Virginia L. Rev. 771 (May, 1997).

¹⁴ Mark Tushnet, The Inevitable Globalization of Constitutional Law, 49 *Virginia Journal of International Law* 985-1006 (2009).

¹⁵ Sujit Choudhry (ed.), *Migration of Constitutional Ideas* (Cambridge University Press, 2006)

¹⁶ Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010).

¹⁷ C. Neal Tate and Torbjorn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995)

¹⁸ Alec Stone Sweet, "Constitutional Adjudication and Parliamentary Democracy," pp. 31-60 in *Governing With Judges: Constitutional Politics in Europe* (Oxford University Press, 2000).

"courtocracies." Comparative constitutional law is where much of the political and legal action is these days – at least when one looks outside the United States.

Apart from its inherent interest, comparative constitutional law is important to study for another reason. It is hard to understand many important political transformations in the world without understanding the role of new constitutions and newly aggressive judicial review as critical elements of the changes. The development of new forms of constitutional law has been critical in the "transitions" of post-communist states to democratic and economically liberal regimes (e.g. Hungary, Poland, Slovenia, Bulgaria), in the integration of Europe (in both the European Union and in the Council of Europe), in the secularization of politics in potentially religious states (e.g. Israel, Turkey, India), in the maintenance of rights-respecting federal democracies in the face of regime-challenging pluralism (e.g. Spain, Russia, Canada), in the peaceful transformation of minority governments into more broadly based democracies (e.g. South Africa) and in the stunning transformation in the range of legally enforceable rights around the world (almost everywhere that functioning constitutions exist). It is one of the big questions on the table as the region and the world come to grips with "Arab Spring." It is not hyperbole to say that we are living in an age of constitutional revolution.

But the United States has stayed curiously out of most of these international trends. Of course, the US was one of the first countries to routinely guarantee judicial protection of rights and the separation of powers, so much of the rest of the world had to catch up first. And so, for a long time, Americans presumed that they did not have much to learn from anyone else. But much of the rest of the world has by now taken for granted constitutional ideas that are not even on the horizon in the US model of constitutionalism while, if anything, the US has moved away from its previous leadership position into more confined conceptions of rights, more purely formal ideas of equality, less critically engaged conceptions of democracy and more idiosyncratic ideas about governance. There are very few countries in the world where the detail and substance of American constitutional law serves as a model anymore. Much of the rest of the world, as we will see this term, dissents from the directions in which American constitutional law has been heading. America remains a world model as one of the original constitutionalist states and in its commitment to constitutional values, but the precise specification of constitutional values is generally different elsewhere.

There are some signs, however tentative and small, that American courts are starting to pay attention to this growing extraterritorial constitutional chorus. For some time now, the US Supreme Court has consulted the rest of the world in making its decisions about the death penalty. In 2005, for example, the US Supreme Court ruled that the death penalty was unconstitutionally applied to those who had committed their crimes when they were less than 18 years old (*Roper v. Texas*, 543 U.S. 551) As Justice Kennedy wrote in his opinion for the Court:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. (453 U.S. 551, 575, 578)

¹⁹ Kim Lane Scheppele, "Declarations of Independence: Judicial Reactions to Political Pressure." Pp. 227-279 in Stephen Burbank and Barry Friedman (eds.), *Judicial Independence at the Crossroads* (Sage, 2002).

But this view was met with a strong dissent from Justice Scalia, who is generally opposed to the practice of citing any sources from outside the United States:

I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment. . . . What these foreign sources 'affirm,' rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America (453 U.S. 551, 628, Scalia dissenting).

At the end of the 2002-2003 term, the US Supreme Court cited a judgment by the European Court of Human Rights (ECtHR) in its decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), noting that the ECtHR decision "is at odds" with prior precedent of the US Supreme Court and adding that this European judgment (*Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981)) was authoritative in 45 countries. The prior US precedent, *Bowers v. Hardwick*, 478 U. S. 186 (1986), had relied on the argument that "Western civilization" condemned homosexuality. "To the extent *Bowers* relied on values we share with a wider civilization," Justice Kennedy wrote for the majority, "it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere." Justice Scalia, however, snarled (with a quote from Justice Thomas to confirm his position): "The Court's discussion of these foreign views . . . is . . . meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.' *Foster* v. *Florida*, 537 U. S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari)." 123 S. Ct. at 2475 (Scalia, dissenting).

As you can see, the use of "foreign law" is by no means a commonplace of American constitutional practice. But, as the course will show, the use of constitutional ideas from other cultures is quite common elsewhere. By studying the range of what is happening abroad, you will be able to decide for yourself whether the international trends can enlighten or only contaminate American constitutional law.²⁰

WHY A COMPLETE COURSE IS IMPOSSIBLE

Comparative constitutional law is a vast subject. Imagine taking American constitutional law, where only a small fraction of the primary cases can be surveyed in a semester, and multiplying it by the number of countries that you want to know something about. Already the course bursts the boundaries of any sensible workload in a semester. But there are even more things to add into a comparative constitutional law course for it to provide anywhere near what someone who already knows the American system would know about American constitutional law:

• And add extra time for familiarizing yourself with the background constitutional structures in each country. Is there a president? a prime minister? a bicameral parliament? judicial review? popular elections? an electoral college? a constitutionally specified central bank? constitutionally specified constraints on political parties? American students typically know this sort of thing about the American constitutional order before they take a course in American constitutional law, and so it generally doesn't have to be covered in a basic constitutional law class. But when it comes to the basic political structures of other countries, it's not clear that a group of American university

²⁰ Gábor Halmai, The Use of Foreign Law in Constitutional Interpretation, in *Oxford Handbook on Comparative Constitutional Law* (Oxford University Press, forthcoming 2012).

students would have the same background knowledge about all of the countries under consideration. So, something has to be added to the course to make sure that everyone knows how a Constitutional Court differs from a Supreme Court, how a "Westminster" constitutional system differs from a strong presidential one, and how electing a parliament through proportional representation of party lists differs from electing a parliament through single member districts. Only if one knows the constitutionally defined institutions does the constitutional "law" make sense.

- Add extra time in a comparative constitutional law class for familiarizing yourself with the social, political and economic context within which constitutional law operates. Is this a homogeneous country or a racially/ethnically/religiously divided society? Are people relatively equal in their life chances or are there huge differences between rich and poor? (And, as is typically the case, do the social divisions turn into economic ones?) Is the country regionally divided so that problems in one part of the country signal broader political tensions that may tear the country apart? Is the country stable or on the brink of a social or cultural or economic civil war? movements that the law is called upon to handle - like movements for women's rights or gay and lesbian rights or environmental rights or property rights or the rights of gun owners? Or are there strong political organizations advocating fascism, communism or anarchy? Are the political parties strong, large and stable, or fragmented, small and constantly changing? When a court makes a decision about the constitution, does anyone listen? American students typically already know this sort of thing for the United States, but that knowledge cannot be taken for granted in talking about And constitutional law, which is frequently about the most contentious social, economic and political topics of the day, makes little sense if you only read the primary documents because the primary documents take these things for granted, as insiders to a political culture usually do.
- Add to the mix of a comparative constitutional law class the absence of an agreed-upon canon. Comparative constitutional law is a relatively new field of study. There are currently only two reasonably up-to-date casebooks in English in the subject, 21 though others are in preparation (some for many years). And there is little by way of the generally agreed canon that everyone who studies comparative constitutional law has to know. Most countries have their own constitutional canon. For example, there is a kind of professional consensus among American law professors about what first-year law students should learn in the basic constitutional law course (though there are also dissenters from the view that constitutional law should be a required subject in the first year of American law school and even that a case as generally famous as Marbury v. Madison are essential to such a course, if offered).²² American students should, in the usual view, learn about constitutional limitations on the powers of various branches of government and about the basic civil liberties – but they should save most of constitutional criminal procedure, federalism and separation of powers, as well as the elaboration of the first and fourteenth amendments, for elaboration in other courses (and then, only as electives in the later years of law school). administrative law are not even predominantly constitutional subjects in America, though they are clearly constitutionally infused topics in other countries. The basic topics that are taken for granted parts of a constitutional law course vary, often quite substantially, country by country.

²¹ Vicky Jackson and Mark Tushnet, *Comparative Constitutional Law* (Foundation Press, 2d. Ed. 2006); Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer, *Comparative Constitutionalism* (Thompson/West, 2d Ed. 2010).

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²² Sanford Levinson, Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either 38 *Wake Forest L. Rev.* 553 (2003).

adequately what a county's constitutional law is to the practitioners in any particular place, you need to pay attention different things in different places. Sometimes subjects handled by private law or administrative law or even criminal law in the United States are raised as constitutional issues elsewhere.

Finally, add the comparative part. Not only do you have to learn about a number of different
constitutional orders separately, but you have to save time in the course to compare them, to see
how one differs from another and why. That means that what goes into the course depends not
only on what is important in a particular country, taken by itself, but also on what is important in
other places, so that the results can be compared across countries.

With all of these additions, on top of the basic impossibility of a course that is as detailed as the basic American constitutional law course about more countries than America, you have some idea of what it would take to adequately learn comparative constitutional law in one semester. You'd either have to be very selective or you'd have to take no other courses that term – or that year – or two.

So, this course will pick and choose among possible constitutional law topics. But it is important that you know just how it is selective so that you know what you are *not* going to learn and how what you will encounter this term is only a specifically framed part of the whole. Because this course cannot adequately cover all of comparative constitutional law, you should know what has been selectively included and why – as well as what has been left out.

THE BORDERS OF THE COURSE

So, then, what we will concretely cover this term in this course, given that a comprehensive treatment is impossible? Let us explain the principles of selection:

Historical period:

While the American constitution was a product of the late 18th century, most of the world's constitutions are substantially more recent. In fact, it has been the norm in constitutional development for countries to throw out old constitutions and to write new ones rather than to simply amend the old ones and move on. Even in countries like France and Poland, which also enacted constitutions around the same time as the Americans did, their current constitutions date to 1958 and 1997 respectively. France, for example has had at least 15 constitutions of widely varying degrees of success in the last 200 years; Germany had several completely unsuccessful ones before their present constitution was able to define and constrain political power. This suggests an important principle of omissions: We are going to focus in this course only on the most recent constitutions of the particular countries under consideration and we are generally going to ignore the historic constitutions that are no longer in force.²³ That means that we will consider only cases from the post-World War II period, and sometimes from a period substantially shorter than that. Occasionally, we may make reference to a country's earlier history (for example, it is impossible to understand the historic significance of France's

²³ For students interested in a more historical development of constitutional thinking, Scheppele's courses on Constitutionalism and Crafting Constitutions cover this ground.

Association Case without knowing something about the history of government attempts to regulate free association). But in general, we will focus on recent developments.

Why? For most of the world's governments, meaningful constitutions date only to some point (often a very recent point) in the period following the Second World War. The war and its aftermath had an important influence on constitutions for two reasons:

- 1) The international community responded to the war with historic human rights conventions, rejecting with horror the historic levels of human rights violations that had occurred during the war itself. The war's horrors included the transnational genocide of European Jews, the massive casualties among unarmed civilians in the path of competing militaries and the playing out of all sorts of more local nationalist grievances under the cover of a broad-scale war (e.g. Germans against Poles and Russians, Croats against Serbs, Japanese against Koreans and Chinese, to name a few). To say "never again" to this sort of state-sponsored brutality meant making explicit what the losers of the war said were not evident before – principles of human rights that the world would now take as binding on all. While these international covenants (for example, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights to name only the most obvious) were not, strictly speaking, legally enforceable, countries that drafted their constitutions after the war often borrowed liberally from these documents, thereby importing international standards that were the direct result of the war into domestic constitutions. On occasion (for example, in Germany, Italy and Japan) the shape of the new post-war constitutions was meant to incorporate (either voluntarily or under military occupation) constitutional principles that would make a repeat of the war-time atrocities unlikely.
- 2) The Second World War was at least in part (or retrospectively became) a war among Fascism was defeated by both communism and liberalism; liberalism and ideologies. communism then appeared as opposing ideologies in the Cold War that followed the hot one. Liberal states marked their ideological victories with new or newly energized constitutions. Communist states had a more instrumental approach to law, where class (and party) interest rather than legal form constrained (or at least justified) the state. Constitutions in the former "second world" were rarely more than paper decorations of a regime fundamentally based on something else. With the collapse of communism (or the state socialism that passed for communism) and with the subsequent collapse of various third-world states that relied on the second world for protection or inspiration, liberalism apparently triumphed. And in so far as liberalism's chief device for keeping political power in check is a functioning constitution, constitutionalism spread rapidly to post-communist, post-militarist and even post-apartheid states. The Second World War was the beginning of what appears from our 2012 vantage point to be the rapid spread of constitutionalism from one newly liberal government to the next. As liberalism spread, so too did constitutionalism.

By limiting ourselves to the post-war period, we will be cutting out much that could be of interest in historical constitutional development, but we will be keeping our eye on the explosion of constitutional government and of count-centered constitutional law that has characterized this move toward more dense constitutional understandings.

Institutions:

Constitutional law is a field which constitutes as well as regulates political actors. The president of a country is an office created by a country's constitution, and the things that the president is authorized to do are generally specified – at least in broad outlines – by constitutional law as well. Ditto with a legislature, and courts, and all of the other constitutionally named political actors. The constitution of a country in general binds those named in it directly to behave in ways consistent with the vision implicit in that constitution, and so all political actors are potentially interpreters and enforcers of the constitution. Even citizens, themselves called into being by the constitution through its definition of citizenship and its specification of who can be the bearer of rights, have both constitutional status and important constitutionally grounded responsibilities in most constitutional regimes.

For various historical and political reasons, however, courts – and particularly the courts that are specially charged with interpreting and enforcing the constitution – have pride of place in determining what a constitution means in practice. This is not a necessary condition of constitutionalism; a number of perfectly constitutional states have existed within constitutional boundaries without an active judiciary being the primary institution charged with being the guardian of the constitution's promises. Constitutional actors, in short, can and do behave themselves constitutionally without having to be told to do so by a court. But in many countries, courts have taken particularly active roles through the power of judicial review to say whether laws are consistent with the constitution and even, in some cases, to require the passage of laws that further enable the constitution to make itself felt throughout the legal system as a whole.

In this course, we could look at the way that constitutional actors generally understand their roles under a country's constitution. We could examine executive overreaching and devices for bringing wayward presidents back into line that do not necessarily involve courts. We could examine political restraint, considering when parliaments and state agencies, central banks and political parties refrain from doing something that would otherwise be in their interest to do because it would violate the constitution. We could examine the offices of legal counsel in various branches of government to see what their views are on what the constitution requires of their political clients. But we will not be doing any of those things this term, except in passing. Instead, we will *focus on courts* – particularly on the highest courts in the various jurisdictions under examination, courts charged with ensuring constitutional compliance. In some countries, that will be a Supreme Court, a court of general jurisdiction that combines the role of chief constitutional guardian with the role of being the highest court of appeal for the "ordinary courts." In other countries, this will be a Constitutional Court, a court with specialized jurisdiction to hear only constitutional questions, generally the only court to have the power of judicial review over legal norms.

Our view of comparative constitutionalism, therefore, will be strongly shaped by the fact that we will be looking at it from a judicial perspective, from the standpoint of courts. And our primary materials this term will consist in large part of reading the opinions of those courts, parsing them for constitutional meaning. While this may seem an obvious choice in the context of American constitutional law teaching where cases are the currency of the realm, it is not an obvious choice in comparative context. In many of the legal systems that we will be studying, case law is only legally significant in the constitutional area; otherwise legal education in the country involved proceeds from studying only the laws and expert commentaries on the laws. The importance of case law is typically

limited to common law countries.²⁴ Since our course features both common law and civil law jurisdictions, we will sometimes be reading cases in countries where such materials are not so commonly used as sources of law.

Topics:

Constitutional law is a vast field substantively. From separation of powers to the definition of legitimate forms of state power, from free speech to privacy, from property to religion, from forms of state to the protection of individuals from the state itself, and from claims that individuals make for positive action on the part of the state to specification of places into which the state cannot go, constitutional law covers all activities connected with the structure of the state and its relationship to individuals.

We can't cover all topics that legitimately belong in the field of constitutional law this term. As noted above, even the required course on American constitutional law for first-year American law students doesn't even cover all of the topics that the American constitution regulates directly, so it would be even more impossible to cover the whole range of constitutional law topics over more countries in a single term in a course like this. As a result of this, we need to choose again a narrower focus. And we have decided in this course to give primary emphasis to two elements of constitutions: 1) the *allocation of constitutional powers* and 2) the *rights provisions* in national constitutions.

Why allocation of constitutional powers? Much of what a constitution does is to both create and constrain political power. A constitution creates political power by constituting offices with capacities to act within the constitutional framework. A constitution constrains political power by setting limits to the capacities of each office. Generally, constitutions achieve both the creation and constraint of power by setting up a competition for it among different parts of a government. As we go through the course, we will look at the construction of and interplay between a country's executive, legislative and judicial power, as well as between the national government and regional governments and between the national government and the transnational legal context. A constitution provides a plan for how power can be brought under constraint of law.

Why rights? Apart from their inherent importance, there are other reasons to pay special attention to rights in a course on comparative constitutional law. First, it is in the area of rights jurisprudence that constitutional courts have come into their own. If we are going to be focusing on courts in the post-war period, then rights constitute the main area in which courts have been especially active. By focusing on rights, we see courts in their most self-confident and popular moments. Second, the jurisprudence of rights is an area where courts in different countries are most likely to look to each other for support. While the political structures of a country are likely to be unique both in their

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²⁴ Common-law countries include Britain and all of those countries that Britain once colonized, from the US and Canada, to India, Australia, New Zealand, Ireland and much of the rest of the British Commonwealth. The distinctive feature of common law systems is that judicial decisions *make law* in the country. In other words, the pronouncements of judges have the force of law, not just for the case at hand, but as general norms of the legal system to be used in future similar cases. (This is the doctrine of precedent.) By contrast, in civil-law countries (most of the rest of the world outside the former British empire), only the enactment of legislatures (and on occasion executives) can count as law. Judicial decisions are only binding in the case in which the decision is made; there is no general norm created by the pronouncements of a judge. As we will see, however, many civil law jurisdictions have entrusted their constitutional courts with the power to create legal norms through their decisions even though no other judges can do so.

composition and in their relationship to particular national histories, rights have a claim to universality. It is the rare court that thinks of rights as being something that belong only in one country and in no other, or that have a special pedigree in one place while lacking a basis for it elsewhere. Because rights have nearly universal ambition, at least in the views of their leading advocates, rights cases are most likely to reach outside the jurisdiction of the particular country in which the court sits to make use of similar cases resolved elsewhere. The South African Constitutional Court, for example, cited the Hungarian Constitutional Court's decision on the death penalty, and the Hungarian Court cited the German Constitutional Court's decisions on hate speech. When one looks at the rights decisions of high courts, one is most likely to see the emergence of a common constitutional culture that is bridging liberal constitutional democracies that have otherwise very different histories. And this term, we will be focusing on the development of that common constitutional law especially.

REQUIREMENTS FOR THE COURSE

You are required to read the assigned readings before each class, and to participate actively in the discussion of them.

There will be a mid-term and a final examination, both of which will be generously timed takehomes. In each case, students will be expected to write essays chosen from a set list of questions.

The materials for the course can be found either through Blackboard or E-reserves. Many of the readings, as you will see, are cases of high courts. The rest are book chapters and articles by experts in the field.

We will be using parts of the book, Donald Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3d Ed. (Duke University Press, forthcoming late 2012). As you can see from the book's date, the book is not yet out. But the authors have given us the manuscript ahead of its publication so that we can use it for our course. Chapters from the new edition will be posted to Blackboard. But please do not circulate these chapters to others outside the class because the authors have limited their permission to use this text to our class members.

Special knowledge: Some members of the class may have special knowledge of one or more of these constitutional regimes. While special knowledge is not necessary (and it is highly unlikely that anyone in the class will have special knowledge about all of the constitutional systems under review), we encourage anyone with such knowledge to take an especially active role in the class when we get to your country of interest. If you read German, French, Hungarian, Hebrew or Spanish, you can have access to a wider range of materials than we will cover in class. For English speakers, you will find that the decisions of the Canadian, Indian, South African and European Court of Human Rights cases and many commentaries on the decisions are in English so you can easily read more widely in the jurisprudence of those courts if you have a special interest. Such additional reading is not required.

For those of you who have reading knowledge of any of the non-English jurisdictions under review, you are welcome to read the originals rather than the translations. If any of you wants to take this course as part of the Princeton Certificate in Translation, then talk to us at the beginning of the course about how we can make use of your language skills for translation in the class. The one caveat we should mention is that the exam will require that everyone write in English, and so specialized vocabularies that may be difficult to translate have to be mastered in English.

COMPARATIVE CONSTITUTIONAL LAW

PROFESSORS HALMAI AND SCHEPPELE SPRING 2012

SCHEDULE OF CLASSES AND ASSIGNMENTS

Class 1: Introduction to the Course

Required reading:

• The syllabus (which has an essay on the general nature on the subject and the limits of the course).

Recommended reading:

 Additional resources: relatively up-to-date translations of many of the world's constitutions into English can be found at the International Constitutional Law website at http://www.servat.unibe.ch/icl/.

Class 2: The American Controversy Over Comparative Constitutional Law

Required reading:

- Remarks by Sandra Day O'Connor, Southern Center for International Studies, Atlanta, GE. November 28, 2003.
- Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer American University's Washington College of Law, January 13, 2005
- Gábor Halmai, The Use of Foreign Law in Constitutional Interpretation, in Oxford Handbook on Comparative Constitutional Law (Oxford University Press, forthcoming 2012).
- Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models, 1 I-Con: Journal of International Constitutional Law 296 (2003). Read pages 296-301 and 312-324.

Recommended reading:

- John O. McGinnis, Foreign to Our Constitution, 100 Nw. U.L. Rev. 303 (2006).
- Robert J. Delahunty and John Yoo, Against Foreign Law, 29 HARV. J.L. & PUB. POL'Y 291 (2005).
- Anne-Marie Slaughter, Judicial Globalization, 40 VA. J. INT'L L. 1103 (2000).

- Ken Kersch, *The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law,* 4 WASH. U. GLOBAL STUD. L. REV. 345 (2005).
- Mattias Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, 15(5) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004).
- Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225 (1999).
- Diane Marie Amann, "Raise the Flag and Let it Talk": On the Use of External Norms in Constitutional Decision-Making. 2(4) I-CON: INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 597 (2004).

PART I: STRUCTURES

Class 3: Constitution-Making I: History (Scheppele)

Required reading:

- Kim Lane Scheppele, The Agendas of Comparative Constitutionalism, 13(2) LAW AND COURTS 5-22 (2003). The article can be found at http://www1.law.nyu.edu/lawcourts/pubs/newsletter/spring03.pdf (page through the issue to start at p. 5).
- Emmanuel Sièyes, What is the Third Estate? Pp. 92-162 in Sièyes, *Political Writings* (Hackett, 2003 [1788]).

Recommended reading:

- Christopher Thornhill, A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective (Cambridge UP, 2011).
- R.C. van Caenegem, An Historical Introduction to Western Constitutional Law (Cambridge UP, 1995).

Class 4: Constitution-Making II: Procedures (Scheppele)

Required reading:

- Andrew Arato, Forms of Constitution Making and Theories of Democracy, 17 Cardozo L. Rev. 191-232 (1995 – 1996).
- Jennifer Widner, Constitution Writing in Post-Conflict Settings: An Overview, 49 Wm. & Mary L. Rev. 1513-42 (2007-2008.
- Walter Murphy, Theories of Constitutional Design: Designing a Constitution: Of Architects and Builders, 87 Tex. L. Rev. 1303 (2009).

• South Africa: Christina Murray, Constitutional Beginning: Making South Africa's Final Constitution, 23 UALR L. Rev. 809-838 (2000-2001).

Recommended reading:

- International IDEA, Constitution Building Processes and Democratization (Pamphlet, 2006).
- Jon Elster, Forces and Mechanisms in the Constitution-Making Process, 45 Duke L.J. 364-396 (1995-1996).

Class 5: Constitutional Amendment (Halmai)

Required reading:

- Gábor Halmai, Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution? Constellations, 2012. forthcoming
- Germany: Privacy of Communications Case (The Klass Case), Federal Constitutional Court
- South Africa: Certification of the Constitution of the Republic of South Africa, Constitutional Court
- France: On Constitutional Amendment Adopted by Referendum, Constitutional Council
- India: Kesavananda Bharati v. State of Kerala, Supreme Court
- Hungary: Decision 61/2010 AB, Constitutional Court.

Class 6: Presidentialism (Scheppele)

Required reading:

- Juan Linz, The Perils of Presidentialism, 1 Journal of Democracy 51-69 (1990).
- Robert Elgie, The Politics of Semi-Presidentialism. Chapter 1 in Robert Elgie (ed.), Semi-Presidentialism in Europe (Oxford University Press, 1999).
- France: Charles de Gaulle, Bayeux Speech, June 16, 1946, from: http://dr-ghillebaert.hautetfort.com/media/00/02/3618022103.pdf
- America: The Federalist, #47 The Particular Structure of the New Government and the
 Distribution of Power Among Its Different Parts (James Madison), available at
 http://thomas.loc.gov/home/histdox/fed 47.html and # 48 These Departments Should Not

Be So Far Separated as to Have No Constitutional Control Over Each Other (James Madison) http://thomas.loc.gov/home/histdox/fed 48.html .

Class 7: Parliamentarism (Halmai)

Required reading:

- Germany: Parliamentary Dissolution Case, Federal Constitutional Court
- Pakistan: Muhammad Nawaz Sharif v. Federation of Pakistan, Supreme Court
- Poland: Decision 2/1995, Constitutional Tribunal
- Hungary: Decision 48/1991 AB, Constitutional Court

Classes 8 and 9: Judicial Review (Halmai)

Required reading:

- US: Marbury vs. Madison, US Supreme Court
- European Model of Constitutional Review: Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (Oxford University Press, 2000), 31-60.,
- Wojciech Sadurski: Twenty Years After the Transition: Constitutional Review in Central and Eastern Europe, Sydney Law School, Legal Studies Research Paper No. 09/69, 2009, http://ssrn.com/abstract=1437843
- Germany: Federal Constitutional Court, in Kommers-Miller, The Constitutional Jurisprudence of the Federal Republic of Germany, 3rd Ed. (Duke University Press, forthcoming 2012.)
- France: Federico FABBRINI, Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation, German Law Journal, 2008/9, 1297-1312. http://www.germanlawjournal.com/pdfs/Vol09No10/PDF_Vol_09_No_10_1297-1312_Articles_Fabbrini.pdf
- Israel: United Mizrahi Bank Ltd. V. Migdal Village, Supreme Court
- Hungary: Gábor Halmai, The Hungarian Approach of Constitutional Review, in Wojciech Sadurski (ed.), Constitutional Justice, East and West, Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective. Kluwer International, The Hague – London – New York, 2002. 189-211.

Classes 10: Federalism (Scheppele)

Required reading:

- Celine Auclair, Federalism: Its Flexibility, Principles and Limitations. Pamphlet of the Forum of Federations (2005), available at http://www.forumfed.org/en/libdocs/Federations/V5N1SEen-int-Auclair.pdf.
- Daniel Halberstam, Of Power and Responsibility: The Political Morality of Federal Systems, 90 Va. L. Rev. 731 (2004).
- Donald Horowitz, The Many Uses of Federalism, 55 Drake L. Rev. 953 (2007).

Class 11: Transnationalism and Constitutionalism: The Case of the European Union (Halmai)

Required reading:

- Germany: Maastricht Treaty Case, Federal Constitutional Court
- Germany: Lisbon Treaty Case, Federal Constitutional Court
- France: Maastricht I Decision, Constitutional Council
- France: Treaty of Amsterdam Decision, Constitutional Council
- European Court of Justice: Costa v. ENEL

Class 12: International Law in Domestic Courts (Scheppele)

Required reading:

- Gábor Halmai, Domestic Courts and International Human Rights, in SAGE Handbook of Human Rights, forthcoming 2012.
- Maximo Langer, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, 105 American Journal of International Law 1-49 (2011).
- United States: Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

PART II: RIGHTS

In the second part of the course, we will take up specific human rights themes and examine the way that high courts around the world have dealt with these topics.

Class 13: Rights in Comparative Perspective: Similar Concepts, Different Cultures (Scheppele)

Required reading:

- Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 European Journal of International Law 655 724 (2008)
- James Q. Whitman, Two Western Cultures of Privacy: Dignity v. Liberty. 113 Yale L.J. 115-1221 (2003-2004).

Right to Life and Human Dignity:

Class 14: Abortion (Scheppele)

Required reading:

- US: Roe v. Wade, 410 U.S. 113 (1973)
- US: Planned Parenthood v. Casey, 505 U.S. 833 (1992).
- Germany: Abortion Case I and Abortion Case II, Federal Constitutional Court, pp. 335-356 in Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY.
- Canada: R. v. Morgentaler, Supreme Court of Canada [1988], 1 S.C.R. 30.
- Ireland: The Attorney General, Plaintiff v X and Others, Defendants [1992 No 846P].
- Hungary: Abortion Decision 48/1998. AB, Constitutional Court.

Class 15: Punishment (Halmai)

- US: Gregg v. Georgia, 428 U.S. 153 (1976)
- US: Roper v. Simmons, 543 U.S. 551 (2005).
- South Africa: The State v. Makwanyane, Constitutional Court Case CCT/3/94.
- Germany: The Life Imprisonment Case, Federal Constitutional Court, pp. 306-313 in Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany.

• Hungary: Decision 23/1990, On Capital Punishment (with Sólyom concurrence) in László Sólyom and Georg Brunner, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, pp. 118-138.

Recommended readings:

 For a history of the death penalty in America, see http://justice.uaa.alaska.edu/death/history.html

Class 16: Torture (Scheppele)

- Israel: Judgment on the Interrogation Methods applied by the GSS, Supreme Court of Israel (1999).
- UK: A (FC) and Other (FC) v. Secretary of State for the Home Department, 2005 UKHL 71 (Law Lords).
- ECHR: Case of Gäfgen v. Germany, Grand Chamber, European Court of Human Rights, 1 June 2010.
- US: Memo, August 1, 2002: To John Rizzo from Jay S. Bybee. Re: Interrogation of an al Qaeda Operative, available at http://fas.org/irp/agency/doj/olc/zubaydah.pdf

Free Speech and Its Edges

Class 17: Free Speech (Halmai)

- US: New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
- Germany. Lüth Case, Federal Constitutional Court
- Hungary: Decision 36/1994 AB, Constitutional Court
- European Court of Human Rights: Lingens v. Austria (1986)

Class 18: Falsehoods, Hate and Insult (Halmai)

- US: Gitlow v. New York, 268 U.S. 652 (1925).
- Germany: Holocaust Denial Case and Tucholsky Case from Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, pp. 382-395.
- Hungary: Decision 30/1992 on the Freedom of Expression from László Sólyom and Georg Brunner, Constitutional Judiciary in a New Democracy, pp. 229-238.
- European Court of Human Rights: Jersild v. Denmark
- UN Human Rights Commission: Faurisson v. France

Class 19: Informational Rights: Data Protection and Freedom of Information (Halmai)

Required readings:

- Germany: Privacy of Communication Case (Klass Case), Federal Constitutional Court
- Hungary: Decision 15/1991 AB, Constitutional Court
- Czech Republic: Lustration Case, Constitutional Court
- Hungary: Decision 60/1994 AB, Constitutional Court
- European Court of Human Rights: TASZ v. Hungary

Equality Rights

Class 20: Discrimination (Scheppele)

- Germany: Susanne Baer, Equality: The Jurisprudence of the German Constitutional Court, 5 Colum. J. Eur. L. 249-280 (1998-1999).
- Canada: Claire L'Heureux-Dube, It Takes a Vision: The Constitutionalization of Equality in Canada, 14 Yale J.L. & Feminism 363 (2002).
- South Africa: Evadné Grant, Dignity and Equality, 7 Human Rights Law Review 299-329, available at http://hrlr.oxfordjournals.org/content/7/2/299.full.pdf.

Class 21: Sexual Orientation: LGBT Rights (Scheppele)

- Hungary: Decision 14/1995: On the Legal Equality of Same-Sex Partnerships from László Sólyom and Georg Brunner, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, pp. 316-321.
- Canada: Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79.
- South Africa: Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), 2005 SACLR LEXIS 34.
- European Court of Human Rights: Case Study: Transsexual Rights Cases in the European Court of Human Rights (Materials compiled by Scheppele on the line of cases from *Rees v. the United Kingdom* (1986) to *Christina Goodwin v. the United Kingdom* (2003)).

Class 22: Social Rights (Scheppele)

- Kim Lane Scheppele, Social Rights in Constitutional Courts: Strategies of Articulation and Strategies of Enforcement, Working Paper.
- India: Public Interest Litigation (PIL) jurisprudence summarized in M.P. Jain, "The Supreme Court and Fundamental Rights." pp. 1-100 in S.K. Verma Kusum (ed.), FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH (Oxford University Press, 2001) pp. 76-86.
- Hungary: Decision 43/1995 On Social Security Benefits, from László Sólyom and Georg Brunner, Constitutional Judiciary in a New Democracy, pp. 322-332.
- South Africa: Government of the Republic of South Africa v. Grootboom, 2001 (1) SALR 46, 63-64 (CC).
- South Africa: Treatment Action Campaign (TAC) v. Minister of Health, 2002 (4) BCLR 356 (T), 2001 SACLR LEXIS 123.

Classes 23: The War on Terror: The Constitutionality of Emergency Measures (Scheppele)

Shooting down Hijacked Aircraft

Germany: Aviation Security Act case, BVerfG, 1 BvR 357/05 (2 February 2006, Decision of the Federal Constitutional Court, available at http://www.bundesverfassungsgericht.de/en/decisions/rs20060215_1bvr035705en.html.

Indefinite Detention

- UK: R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another, Court of Appeal, Civil Division, [2002] EWCA Civ 1598, [2002] All ER (D) 70 (Nov).
- US: Boumediene v. Bush, 553 U.S. 723 (2008).

Retroactive Law

 Indonesia: David Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No. 013/PUU-I/2003' 6(2) Aus. J. Asian L. 1 (2004), available at www.federationpress.com.au/pdf/AJAL6(2)%20Butt.pdf.

Class 24: Militant Democracy: Freedom of Expression, Assembly, Association (Halmai)

- Germany: Socialist Reich Party Case, Federal Constitutional Court
- European Court of Human Rights: Rekvényi v. Hungary
- European Court of Human Rights: Vajnai v. Hungary
- European Court of Human Rights: Bukta v. Hungary
- European Court of Human Rights: Refah Partisi v. Turkey