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COMPARATIVE CONSTITUTIONALISM

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

Texts:

Z. Elkins, T. Ginsburg, & J. Melton, The Endurance of National Constitutions
R. Hirschl, Constitutional Theocracy
G. Jacobsohn, Constitutional Identity
D. Robertson, The Judge As Political Theorist: Contemporary Constitutional Review

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

B. Ackerman, "The Rise of World Constitutionalism"
R. Posner, "The Cosmopolitan Court"
R. Hirschl, "The Rise of Comparative Constitutional Law: Thoughts on Substance and Method"
Richard Albert, "Nonconstitutional Amendments"

D. Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconstruction"
F. Schauer, "Free Speech and the Cultural Contingency of Constitutional Categories"
M. Callahan, "Cultural Relativism and the Interpretation of Constitutional Texts"
K. Scheppele, "Constitutional Ethnography: An Introduction"
A. Scalia & S. Breyer, "A Conversation Between U. S. Supreme Court Justices"
S. Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation"
G. Jacobsohn, "After the Revolution"
G. Jacobsohn, "'By the Light of Reason': Corruption, Religious Speech, and Constitutional Essentials"
H. Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'"
D. Grimm, "Integration By Constitution"
M. Rosenfeld, "The European Treaty-Constitution and Constitutional Identity: A View From America" Constitution: A Critical Reconstruction"
C. McIlwain, Constitutionalism Ancient and Modern"
N. Hashemi, "Religious Disputation and Democratic Constitutionalism: The Enduring Struggle of the Constitutional Revolution in Iran"
G. Sapir, "Constitutional Revolutions: Israel as a Case Study"
A. Gamble, "The Constitutional Revolution in the United Kingdom"
V. Bogdanor, "Constitutional Reform in Great Britain: The Quiet Revolution"
M. Shapiro, "The Success of Judicial Review and Democracy"
G. Whyte, "The Legitimacy of Judicial Activism on Behalf of the Disadvantaged"

CASES

Republic of South Africa v. Grootboom
McGee v. Attorney General (Ireland)
Southwest Case (Germany)
Privacy of Communications Case (Germany)
Abortion I Case (Germany)
Abortion Information Case (Ireland)
Regina v. Keegstra (Canada)
RAV v. City of St. Paul (US)
Prabhoo v. Kunte (India)
Leyla Sahin v. Turkey (ECHR)
Ford v. Quebec (Canada)
Naz Foundation v. Government of India (India)
Retroactive Criminal Legislation Case (Hungary)
Decision on the Illegality of the Communist Regime (Czech Republic)
Reference Re Secession of Quebec (Canada)
United Mizrahi Ltd. v. Migdal Village (Israel)
Deshaney v. Winnebago County (US)
Lawrence v. Texas (US)
Communist Party Case (Germany)

Course Requirements and Evaluation:

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

Course Outline:

I. Comparing Constitutions: Theory and Practice

Aug. 24
A. Scalia & S. Breyer, "A Conversation Between U. S. Supreme Court Justices"
R. Hirschl, "The Rise of Comparative Constitutional Law: Thoughts on Substance and Method"
K. Scheppelle, "Constitutional Ethnography: An Introduction"
McIlwain, "Constitutionalism Ancient and Modern"
Abortion Case I (Germany)

Aug. 31
H. Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'"
D. Robertson, pp. 1-40
M. Callahan, "Cultural Relativism and the Interpretation of Constitutional Texts"
F. Schauer, "Free Speech and the Cultural Contingency of Constitutional Categories"
Regina v. Keegstra (Canada)
RAV v. City of St. Paul (US)

Sept. 7
S. Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation"
R. Posner, "The Cosmopolitan Court"
Naz Foundation v. Government of India (India)
Lawrence v. Texas (US)
G. Jacobsohn, pp. 136-212

II. Constitutions: Identity, Change, Revolution

Sept. 14
G. Jacobsohn, pp. 1-83
R. Albert, "Nonconstitutional Amendments"
D. Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconstruction"
Southwest Case (Germany)
Privacy of Communications Case (Germany)
Abortion Information Case (Ireland)

Sept. 21
G. Jacobsohn, pp. 84-135, 213-356
D. Grimm, "Integration By Constitution"
M. Rosenfeld, "The European Treaty-Constitution and Constitutional Identity: A View From America"
B. Ackerman, "The Rise of World Constitutionalism"

Sept. 28
D. Robertson, pp. 187-225
Leyla Sahin v. Turkey (ECHR)
Ford v. Quebec (Canada)
Reference Re Secession of Quebec (Canada)
Prabhoo v. Kunte (India)
G. Jacobsohn, "'By the Light of Reason': Corruption, Religious Speech, and Constitutional Essentials"

Oct. 5
N. Hashemi, "Religious Disputation and Democratic Constitutionalism:

The Enduring Struggle of the Constitutional Revolution in Iran"
G. Sapir, "Constitutional Revolutions: Israel as a Case Study"
G. Jacobsohn, "After the Revolution"
A. Gamble, "The Constitutional Revolution in the United Kingdom"
V. Bogdanor, "Constitutional Reform in Great Britain: The Quiet Revolution"

Oct. 12 — Z. Elkins, T. Ginsburg, & J. Melton, The Endurance of National Constitutions

III. Dilemmas of Constitutionalism

Oct. 19 — Retroactive Criminal Legislation Case (Hungary)
Decision on the Illegality of the Communist Regime (Czech Republic)
D. Robertson, pp. 83-142, 40-82
Communist Party Case (Germany)

Oct. 26 — R. Hirschl, Constitutional Theocracy

Nov. 2 — Republic of South Africa v. Grootboom
D. Robertson, pp. 226-280
Deshaney v. Winnebago County (US)
G. Whyte, "The Legitimacy of Judicial Activism on Behalf of the Disadvantaged"
M. Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations"

Nov. 9 — D. Robertson, pp. 281-384
M. Shapiro, "The Success of Judicial Review and Democracy"

Nov. 16 — TBA

Nov. 23 — Research presentations

Nov. 30 — Research presentations