This course will compare the constitutional structure and constitutional law of different countries, including the U.S. European countries, East Asian countries and Muslim countries. It begins by exploring the different ends that might be served by a constitution. It will then explore the ways in which societies constitutional design can help or hinder the project of establishing democratic government and human rights. We will explore the special challenge of creating constitutionalism that is different in divided societies and post-conflict states. The class will conclude by exploring the rights jurisprudence of several countries—highlighting how many different understandings of democracy and human rights have emerged around the world. This section will identify differences between the understandings of rights in “Western” liberal democracies such as the U.S., Canada and Germany, It will then explore further variations in East and Asian and Muslim States.

Reading: Readings will be posted on CANVAS. Although the reading may seem heavier than in some classes, many readings are from secondary sources and you should be able to read them more rapidly than cases. To help guide your reading, I will provide questions to think about as you complete the reading, and that you should be prepared to discuss during the class sessions. This course will be structured around class discussions in which the students are the primary discussants. Class participation will be part of your final grade.

Grading: Class Participation: 15%
Midterm group exercise: 50%
Writing Assignments in 2nd half of course: 35%

Follow-up Seminar: In Spring 2016, I will be teaching a research seminar “Contemporary Muslim Legal Systems.” This 3 credit seminar was initially designed for students who had taken introduction to Islamic Law (an exam class) and wanted an opportunity to do guided research and writing for credit on the subject. Next year, students who have taken Comparative Constitutional Law and wish to write a paper on a comparative constitutional subject may take the course and opt to write a paper on a comparative constitutional subject that does NOT involve a Muslim country. Class reading is minimal. Grading is based entirely on a student presentation of their work in progress and their paper.
SCHEDULE OF CLASSES

Class 1: [Mon Jan. 5] Introduction: Why Constitutions? What Do They Do?

MODULE I: DESIGN OF LIBERAL DEMOCRATIC CONSTITUTIONS

Class 2 [Wed. Jan. 7]: Electoral Systems: How do they improve or hinder the performance of democratic institutions?

Class 3: [Mon Jan. 12]: Separation of Powers: Is it better to have parliamentary or presidential government? Does it depend on cultural and historical circumstances?


MLK Day = Mon. Jan 19

Class 5: [Wed. Jan. 21]: Federalism II: Canadian & German Experience [Prof. Spitzer]

Class 6: [Mon. Jan. 26]: Designing Constitutions for “Divided Societies”


Class 10 [Mon. Feb. 9]: Group Project: Drafting a Constitution for Problemistan

Class 11: [Wed. Feb 11]: Group Project ’Ctd

Presidents Day = Mon Feb. 16

MODULE 2: COMPARATIVE RIGHTS JURISPRUDENCE

Class 12: [Wed. Feb 18] Approaches to interpreting constitutional texts


Class 15: [Mon. March. 2] Rights jurisprudence Part III


Class 17-18: Mon./Wed. March 9-11 “Religious” Constitutions

WRAP-UP

Class 19: Tues. March 11 Wrap-up
DETAILED CLASS ASSIGNMENTS

INTRODUCTION

Class 1: [Tues Jan. 7] Introduction: Why Constitutions? What Do They Do?

Required Reading
- Excerpts from Russell Baker Essay “On Conversation (4 pp.)
- Excerpts: NATHAN J. BROWN, CONSTITUTIONS IN A NON-CONSTITUTIONALIST WORLD (28 pp.)
- Excerpts from Russell Hardin: Why a Constitution (5 pages)

Questions to think about when reading:
- What does it mean to “constitute” something? What is “constituted” by the documents that we call “a constitution?”
- What is “constitutionalism”? Why does Nathan Brown think that a constitution can be anti-constitutionalist? Do you think Brown’s claim makes sense?
- Should we reserve the word “constitutionalism for liberal constitutionalism”? Why or why not?
- Why do some people think of constitutions as a type of contract? (Who do they think the contract is between? What is the consequence of it being a contract?)
- Why does Hardin think that constitutions are NOT contracts? What does he think they do?
- Are Hardin and Brown’s understanding of constitutions consistent with each other?
- What do YOU think constitutions do? What should good constitutions do?

MODULE I: COMPARATIVE CONSTITUTIONAL STRUCTURES & THE CHALLENGE OF DESIGNING LIBERAL DEMOCRATIC CONSTITUTIONS:

Class 2: Introduction to Electoral Systems & How they Promote (or Hinder) Democratically Appropriate Outcomes

Required
- Excerpts from David C. Williams, Constitutional Design for Burma in DESIGNING FEDERALISM IN BURMA (David C. Williams and Lian HJ. Sakhong, eds.) (Chiang Mai: UNLD Press, 2005)
- News accounts and Op-eds about the failed appointment of Lani Guinier in 1993 to be Assistant Attorney General for Human Rights (About 10 pages)

Questions:
- Do you understand how “first past the post” and the different types of “proportional representation” electoral systems work? Do you understand the advantages and disadvantages of each? Does the value of a particular system depend upon the history of the country? The type of government that you are electing (i.e. presidential or parliamentary)?
- What type of electoral system does your country employ? Could you describe it to your classmates? Do you like it? Why or why not?
- If you would prefer a different system, would you like a different system entirely, or would you just like to change some details of the system? How easy is it to change a system?
- What type of voting system does the U.S. use? What types of change did Lani Guinier suggest that the U.S. should consider? Do you think these were good ideas? Why were they so controversial?
**Class 3: Separation of Powers: Parliamentary or Presidential Government?**

**Required:**
- A Brief Overview of the Classical Westminster Parliamentary System (3 pages)
- Excerpts from Steven G. Calabresi, *The Virtues of Presidential Government, why Bruce Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001) (15 Pages)

**Optional Further Reading**

**Questions:**
- How does the “Classic” Westminster system work? What are the advantages and disadvantages?
- If you are from the U.S.: how did the founders depart from the Westminster model? Why did they propose the changes they did? Do you think they were wise? What are the advantages and disadvantages of the system they created? If you are not from the U.S., what type of system does your country employ? Do you like it? Why or why not? If you don’t like it, should it change? How?
- Professor Ackerman argues that the best type of government is one that is a hybrid of the Westminster and American models. What does he call this type of government? How does it work? Why does Ackerman think that it is preferable? Why does Professor Calabresi disagree? What do you think? If you agree with Ackerman, should the U.S. change its system?
- Professors Ackerman and Calabresi agree that the choice of governmental system should affect your choice of electoral voting system. Do you understand why? If this is true, does this mean electoral systems should be constitutionalized? Why or why not?
- Professor Ackerman prefers systems in the following order: Constrained Parliamentarism, American Separation of Powers, Westminster Parliamentarian. Professor Calabresi prefers the following order: American SOP, Constrained Parliamentarism, Westminster. Why do neither like the Westminster system? Why do you think that it has continued so long? Should Britain change?
- If (and only if) you had time to read the recommended reading on Japan, why does the author believe Japan is trying to adopt some features of Westminster democracy?


**Required for Federalism Theory Discussion:** (24 pages total)
- Excerpts from MICHAEL BURGESS, excerpts from Comparative Federalism: Theory and Practice (Routledge 2006) (10 pages)

**Required for Discussion of the Evolution of U.S. Federalism** (40 pages)
- Excerpts from U.S. CONSTITUTION (3 PAGES)
- Excerpts from G. Allan Tarr, In search of Constitutional Federalisms: American Perspectives, Unpublished Paper (2013) [Used w/permission of author] (9 Pages)
Questions:

- What did “federation” mean when the U.S. was founded? Did the U.S. constitution create a “federal” government according to the traditional understanding? After its enactment how did people differentiate between “confederal” states and “federal” states? Is there today a consensus definition of federalism?
- What purposes did the US founders think their new type of “federalism” would serve? Justice O’Connor describes some purposes; Are these the only purposes federalism serves? Is it the only way to achieve them?
- We sometimes refer to separation of executive, legislative and judiciary as “horizontal separation” and separation of national and “state” gov’t as “vertical separation”. Why? Is this useful terminology?
- If you are not from the U.S., is your country “federal”? Would you prefer it be more federal? Less federal?
- Thinking more about the U.S. experience with federalism, we talk about American style federalism. Has the Supreme court actually maintained a consistent understanding of the federal government’s powers vis a vis the states? Does this suggest that there has not, in fact, one single type of American federalism? Or has the country been governed at different times by different types of federalism?
- What limitations does the U.S. Supreme Court set on congressional power in Lopez and Morrison? Do you agree with those decisions? What powers do YOU think the American federal government should have vis a vis the states? Would you prefer that changes be imposed by const. amendment or judicial interpretation?

Class 5: Federalism II: Canada & Germany [Lecture by Prof. Spitzer]

Required re: Canadian Federalism

- CONSTITUTION ACT, 1867 §§ 91-95. (5 pages)
- Rainer Knopff & Anthony Sawyer, Canada, in JOHN KINCAID & ALAN TARR, CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES (2005) pp. 103-142. (35 pages)

Required re: German Federalism


Questions to Consider With Respect to Both Canada and Germany:

- Why did each country opt for a federal rather than “unitary” system of government?
- What’s really different between federalism in Canada and Germany? And between each of those federal countries and the United States? How are national and state/provincial powers allocated in each country? How is this materially different from the United States?
- What constitutional features does each country have that protects national power? State/provincial power? How distinctly divided is it in each country?
- From a practical/political standpoint, how do the states/provinces protect their power within each federation?
- In each instance, how successful is the country’s constitution in terms of (a) longevity and durability, (b) adherence of governments, politicians and courts to its terms, and (c) political and social stability?
**Class 6: Designing Constitutions for “Divided Societies”**

**Reading**

**Questions**
- Please use this class as a chance to make sure you have digested all the material we have read so far?
- What is a “divided society”? Do you understand the fundamental difference in perspective that Liphart and Horowitz bring to the question of designing constitutions for divided societies? Do you understand why each prefers the electoral systems and government structures that they do? Which view do you favor?
- Can you name several divided societies that have drafted constitutions recently. To the extent you know, do you think they did a good job?
- Think of several divided societies that you think are likely to draft new constitutions or amend existing ones in the coming months or years. What advice would you give them?

**Class 7: Is Judicial Review Democratic? Is it Helpful in Promoting Democracy Legitimacy?: Theoretical Issues**

**Reading**
- Steven Gardbaum: Excerpts from *THE NEW COMMONWEALTH CONSTITUTIONALISM* (2013) (8 pp)

**Further Possible Reading**

**Questions to consider**
- In their articles, Waldron and Gardbaum posit a certain type of society. They then argue about whether in these types of societies, judicial review promotes or hinders the state’s democratic legitimacy. Assume that you live in such a society. Whose argument do you find more convincing?
- Now imagine that the society is different from the ones that they posit. Does this change the democratizing potential of judicial review? What types of change would make judicial review more democratic? Which would make it less?

**Class [8]: Varieties of Judicial Review and the Spread of Judicial Review**

**Required Reading**
- Excerpts from scholarship of Merryman and Ginsburg in, *THE CONTEMPORARY CIVIL LAW TRADITION* (Merryman, Clark & Haley, eds.: 2014) Chap. 6 (19 Pages)
- Excerpts from Nathan Brown, *CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD* (19 PAGES)

**Strongly Recommended Further Reading**
Questions to Consider

• Try to answer the questions at the end of the reading in the Merryman, Clark & Haley volume.

• The arguments that we have read for and against judicial review have so far tended to be philosophical. The readings in this section are rooted in political science. Why do these political scientists think that judicial review has been so popular? Do they agree about whether the spread of judicial review is a good thing? If not, what accounts for their disagreement?

• Consider Nathan Brown’s account of the spread of judicial review in the Arab world and its impact: Does his account support the theories of Ginsburg or of Hirschl?

• Brown suggests that judicial review can be constitutionalist. Is it democratic? Do you think the question of whether it is democratic matters in the Arab countries that Brown describes? Why or why not?

• Does it make you support the spread of judicial review? Does it make you think differently about the type of judicial review that is most likely to support liberal democratic values?

• In terms of design, should there be a single constitutional court to hear cases, or should that power be diffused among many courts? Why or why not? How should judges be elected or appointed? Why? Should judges be able to hear cases without a particular person having suffered a particular harm? Why or why not?

Class [9]: New Experiments in the Design of Judicial Review and its further spread:

Required Reading

• Excerpts from S. Gardbaum, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM (2001) (18 pp.)


Questions to Consider

• We have seen that when civil law countries moved away from a system of legislative supremacy and adopted judicial review they developed approaches to judicial review that were different from the American version. They did this in order to prevent some of the anti-democratic features of judicial review. In these articles, we see that some commonwealth countries have also moved from their traditional embrace of parliamentary sovereignty and they too have implemented forms of judicial review that are different from those used in the U.S. Do you understand what the British, New Zealand and Canadian forms of judicial review have in common? How they are different?

• Mark Tushnet believes that these new forms are not, in practice, very different from U.S. style judicial review. Do you agree?

• If you could design a set of institutions to perform judicial review for a new country with a liberal democratic constitution. What type would you prefer? Why?

MODULE 2: COMPARATIVE RIGHTS JURISPRUDENCE

Class [12]: The U.S. System of Judicial Review and Its Method(s) of interpreting constitutional texts:

Required Reading
- TBD
Questions to Consider
- TBD

Class [13]: The German approach to Constitutional Interpretation:

Required Reading
- TBD
Questions to Consider
- TBD

Class [14]: Comparative Free Speech Jurisprudence TBD
Required Reading
- TBD
Questions to Consider
- TBD

Class [15]: Comparative Free Speech TBD
Required Reading
- TBD
Questions to Consider
- TBD

Class [16] [Thurs. Feb. 27] “Positive Rights”
Required Reading
- TBD
Questions to Consider
- TBD

Class [17]: Tues, March 4 “Religious” Constitutions Part 1;
Required Reading
- TBD
Questions to Consider
- TBD

Required Reading
- TBD
Questions to Consider
- TBD

Class [19]: Wrap-up