MEMORANDUM

December 30, 2003

To: Students in Spring 2004 Comparative Constitutional Law Class

Re: Course Information/Syllabus

Comparative Constitutional Law

COURSE INFORMATION

FALL SEMESTER 2002

MEETING ROOM: 032B
MEETING TIME: Tuesdays, Wednesdays, 1:00 - 1:50 P.M.

OFFICE: Curtilege 214
TELEPHONE: 240-5243
E-MAIL lcbl1@psu.edu
CONFERENCE HOURS: Mondays, Tuesdays & Thursdays 1:00 P.M. TO 2:00 P.M., AND BY APPOINTMENT

FINAL EXAM DATE: TAKE HOME EXAM
Purpose and Focus of Course:

Comparative Constitutional Law is meant to build on the materials covered in the first year required course in American Constitutional Law, broadening the analysis to consider other approaches adopted by national systems abroad. The benefits of a course in Comparative Constitutional Law have been nicely summarized by Professors Jackson and Tushnet:

Being able to think systematically about different structures for organizing a government, and different approaches to establishing just, effective, and stable forms of government while providing the flexibility for the future that is required to meet changing needs and ensure continued stability are general benefits of studying these materials. Further, the better informed a person is about the world, the more he or she can bring to the legal profession . . . Comparison also provides opportunities to discover that aspects of the system with which our students are most familiar are not inevitable. 1

Professor Donald Kommers has described four principle benefits of the comparative study of constitutional law: (1) it can provide valuable insights into the experiences of other constitutional democracies; (2) it can be helpful in working through issues of what the ‘perfect’ constitutional order would look like, and in this matter inform local constitutional thinking; (3) it can enrich the study of comparative politics; and (4) it enriches the study of American constitutional law by providing a richer critical perspective for understanding US constitutional jurisprudence.2

Course Materials:

REQUIRED:


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1  Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law (Foundation Press, 1999)

RECOMMENDED:


Course Information and Rules:

This Comparative Constitutional Law course will meet twice a week, on Mondays, and Wednesdays from 1:00 P.M. through 1:50 P.M. in Room 032B. I **will not be in the country for the first regularly scheduled week of class. Make up classes will likely be scheduled for Fridays and video taped so that if you can’t make class you can view the video at your convenience.**

- I am generally available to talk with you during regular office hours, or, otherwise, by appointment. Otherwise, feel free to call or e-mail me.

- Required readings will be announced in class from time to time. Substantially all such readings will be drawn from the Jackson/Tushnet Text. Further readings may be added or substituted throughout the semester.

- Understand that there is no guarantee that we will be able to cover in class all material assigned for reading for that class session, or that we will get through Chapter 20 by semester’s end. Anticipate, therefore, that there may be occasions when you will have read ahead. Do not panic; do not become irritated; do not conclude that there is something amiss; humor me and assume that there is a reason for the pacing of the course. If in doubt, please be sure to see me.

Attendance and Class Participation:

The Law School’s policy imposes on students the obligation to attend class regularly and punctually. I will take attendance. You will be required to sign in at each class session. While failure to attend class will not result in a lower grade, it might help both you and me explain poor performance on the exam. Also, I remind you that material not in your readings and for which you will be responsible will likely be covered in class from time to time during
Class participation is required.

the course of class discussion (and may find its way into the final exam).

All students are expected to be prepared for each class session (that is, to have carefully read the material assigned). Please note that I do not intend to make this a lecture course. All of you will find yourselves participating in at least some of the discussion. It is my policy to call on students at random. However, at the end of each class session, I may designate two or more students to act as discussion leaders for the next class session. Any student who is called on and is unprepared (whether or not a discussion leader) will be expected to act as discussion leader for the next two class sessions. Discussion leaders who fail to show up for class will serve as discussion leaders for the following two class sessions. Students unprepared for class sessions may have their grade lowered.

To make seat selection somewhat less arbitrary, the seat you choose on the second meeting day of class will be your assigned seat. I will circulate a seating chart for you to fill in.

I will try not to make this a lecture course. I hope you will develop your understanding of the materials through Socratic dialogue and class discussion. I hope to begin to teach you not only the substantive rules and approaches to problem solving in Comparative Constitutional law, but also how to think like a lawyer, and how to argue and defend a position before your peers (just like you'll have to do in court or at a meeting). To that end, you should understand several things:

- There are few answers in Comparative Constitutional Law; what I will teach you and what you should attempt to derive from the course is an understanding of the various approaches that have guided the courts and each political
community as it tries to develop a relationship between politics and law. Those of you looking for easy answers, for an exam ‘how to’ course should look elsewhere.

- Do not expect to agree with me on everything, especially substantive conclusions. Much of what I will do will be to play devil’s advocate. Let your values, logic, etc. guide you to whatever substantive conclusion your heart desires.

- You will be spending a lot of time learning to read cases. Reading these involves approaches and skills different from those you have learned from reading cases in common law courses, or even American law. Prepare to relearn what you might have thought you had mastered.

- As you get bogged down in details always go back to the big picture. Ask yourself: (1) why am I reading this now? (2) How is this reading related to what came before (3) how does the case highlight particular problems and solutions to issues of Constitutional Law (4) how do the notes and materials that follow the case help me frame the issues I am expected to master.

Understand that one of my goals for this year is to teach you how to defend your answers, and present your analysis, even under aggressive questioning. **Don't take it personally.** As the semester progresses, ask yourself often the following two questions: (1) what substantive rules am I learning, and (2) how am I being taught to go about understanding the substantive rules and the process of applying them creatively in a context in which a client will not accept from you any response that begins: "You cannot do that."

You should anticipate being challenged on every answer you give and every question you ask. You will be expected to learn to work in an environment in which you are dealing with senior members of your firm, clients and opposing counsel on issues that can potentially expose your client or firm to large expense.

**Grading:**
The course grade will be based on a take home final exam. I will advise you of any changes.

The take home final examination will be open book. You will have 24 hours to complete the exam. All other rules relating to the exam will be distributed to you during the semester.

Conferences

I try to maintain an open door policy. I encourage you to see if me should you have any questions or concerns. While face time is important, it is not the exclusive means for communicating with me. There is little excuse at the dawn of the 21st Century for the complaint – ‘he is not available’ – when communication is possible by telephonic and electronic means.

Feel free to e-mail me. My address is lcb11@psu.edu.
SUMMARY SYLLABUS:

The course starts with an introduction to the issues and methodologies of comparative constitutional law. For those who want to plan ahead, I provide the following syllabus. In addition to the readings in the TEXT, be sure to read any additional materials provided. The focus of class will be on constitutions. We start with a general consideration of the nature and character of constitutions – what are they, how do they differ from statutes or other laws. We then add the issue of interpretation – who ought to enforce and interpret constitutions, should it be a judicial function, a political function, or a political function of a judiciary. We then turn to a consideration of constitutions in action, looking first at the way constitutions resolve the issue of allocations of powers between different levels of government (federalism). Time permitting, we then cover the treatment of fundamental rights (including the right to die, abortion, sex, and drugs) and the relationship between the state and religious liberty.

As a result, we will be moving around the book a bit. We will NOT be covering the materials in the order they appear in the TEXT.

I What is a Constitution? (Chapter 1)

2. What is Constitutionalism? TEXT 10-16.
3. Constitutionalism and the Rule of Law. TEXT 16-30
4. Constitutional Models:
   Written/Unwritten Constitutions and Different Types of Constitutional Systems TEXT 30-47
5. Constitutional Models:
   Constitutions Beyond the Nation State TEXT 47-71
6. Birth, Alteration and Revision of Constitutions TEXT 71-98

II Judicial Enforcement of the Constitution and Models of Constitutional Adjudication (Chapter 2)

1. Place of Constitutional Adjudication TEXT 99-113
2. Principle Models of Constitutional Adjudication TEXT 113-139
3. Constitutional Interpretation: Typology, U.S., Germany, France TEXT 139-157
5. Constitutional Interpretation:
   Originalism, Balancing, Proportionality, Use of Foreign Law TEXT 189-211

III. Federalism and Vertical Separation of Powers (Chapter 4)

1. Forms of Federal Organization: U.S., Germany, Switzerland TEXT 350-372
2. Forms of Federal Organization: India, Canada, Belgium TEXT 372-386
3. Decentralization Models: France, Spain TEXT 386-396
4. Determining the Boundaries of Power TEXT 396-420
5. Exclusive and Concurrent Powers TEXT 421-454
6. Federal Commandeering, Cooperation, Accommodation TEXT 454-488

IV. Dignity, Privacy, and Personal Autonomy (Chapter 5)

1. Protecting Fundamental Rights TEXT 489-497
2. Death Penalty TEXT 497-520
3. Sources of Privacy Rights TEXT 520-526
4. Abortion TEXT 527-556
5. Right to Die TEXT 556-569
6. Drugs TEXT 569-576
7. The Right to One’s Own Identity TEXT 576-597
8. Families and Sex TEXT 597-616

V. The Constitution, Freedom of Religion and Belief (Chapter 8)

1. Free Exercise/What is Religion TEXT 922-942
2. Religious Practices TEXT 942-958
3. Accommodation TEXT 958-973
4-5. Church and State TEXT 973-1015
6-7. Secular Education and Denominational Schools TEXT 1015-1042