

## **L32 Political Science 519: Comparative Judicial Politics**

Wednesday, 10 AM-12 PM, Lopata House 16

### **Instructor:**

Matthew Gabel; [mgabel@artsci.wustl.edu](mailto:mgabel@artsci.wustl.edu); Siegle 290; office hours: Tuesday 2-4

### **Course Description:**

The goal of this course is to expose students to a variety of research topics related to how judicial and legal institutions shape political and economic life, focusing mainly on democracies. The study of judicial politics in political science is primarily about American law and courts. This research has generated an increasingly sophisticated (both theoretically and empirically) body of research. However, many of the arguments about American institutions are inherently comparative in nature. For example, an argument that public opinion is sufficiently high to provide the Supreme Court with political cover when ruling against legislative majorities implies that if public support were lower the court would behave differently. But we have no observations of such low public support (at least in the modern era), and therefore cannot test this sort of claim with observational data from the US context. Comparative research, however, may provide the necessary variation to test such a claim.

In addition, courts and legal systems vary considerably around the world (e.g., common law vs. civil law), and we can imagine a variety of ways these differences could have important political consequences. For instance, judicial review in some countries is exercised exclusively by one court that can review laws before they are implemented. Other constitutional courts can review laws only after their implementation. This sort of institutional variation may affect how sensitive legislatures are to constitutional courts when deciding legislation. This may also influence how citizens and interest groups decide to employ their resources to affect legal change (e.g., lobbying legislators vs. bringing legal challenges in court).

### **Requirements:**

This is a seminar course and thus attendance is mandatory. Participation in course discussions will account for 20% of each student's grade. For most weeks, each student will write a short (400 words) thought-piece about a question related to the readings each week. These writing assignments represent 30% of the grade.

Students must also write a short literature review concerning the topic of the readings for a particular week. This is worth 20% of the grade. Students can choose for which week they would like to write a paper. The literature review (1600 word limit) should (a) provide a justification for the research question to be addressed; (b) concisely summarize the answers to the question provided by the research for that week; (c) evaluate the quality of the conclusions drawn by the authors, and (d) briefly comment on what issues remain

unresolved. This paper will refer to the broader literature, which includes the required readings but also the results of a literature search. Since the readings for each week may address several questions, students may focus on only a part of the literature. Students are encouraged to consult with the instructors before choosing an exact topic. The literature review is due April 4.

For the remaining 30% of the grade, students are expected to produce an executable research design related to a topic covered in the course. This research design can address theoretical or empirical issues in previous research or propose a novel contribution. There is no fixed length to this paper, but it should fulfill the requirements for the literature review (see items a-d above) and propose a research design. This research design should include both a careful discussion of the theoretical model and specific empirical tests (which requires attention to issues of data, conceptual operationalization, and methods). Students may use their literature review as the basis for this research design. The research design is due May 2.

### **Readings:**

All readings will be made available in electronic format or in paper format for photocopying. Some of the readings are from books that are available in paperback. I encourage students to purchase these books if the topic is of interest to them.

## Schedule

### 1. 1/18. Some preliminaries

#### *Topic:*

Basic definitional and conceptual issues related to comparative judicial politics—e.g., What is a court? What is comparative constitutionalism? What is administrative law? What is public law? Also, the Jacob book provides an introduction to differences in judicial politics across countries.

#### *Readings:*

Jacob, Herbert, et. al. 1996. *Courts, Law, and Politics in Comparative Perspective*. New Haven, CT: Yale University Press.

Dorsen, Norman et al. 2003. *Comparative Constitutionalism: Cases and Materials* St. Paul, MN: West Publishing., pp. 1-16.

Shapiro, Martin. 1981. *Courts*. Ch.1, titled: “The Prototype of Courts.”

### 2. 1/25. Comparative Constitutional Law I

#### *Topic:*

What is a constitution and why does it matter?

#### *Readings:*

Dorsen, Norman et al. 2003. *Comparative Constitutionalism: Cases and Materials* St. Paul, MN: West Publishing., pp.16-66.

Jon Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea," *Public Administration* Vol.71, No.1/2 (Spring/Summer 1993): 169-217.

Elster, Jon. 1995 “Forces and Mechanisms in the Constitution-Making Process. *Duke Law Journal* 45:364-396.

Corwin, Edward S. 1936. “The Constitution as Instrument and as Symbol.” *American Political Science Review* 30(Dec.):1071-1085.

Sartori, Giovanni. 1962. “Constitutionalism: A Preliminary Discussion.” *American Political Science Review* 56(4):853-864.

Carey, John. 2000. "Parchment, Equilibria, and Institutions." *Comparative Political Studies* 33(6/7):735-761.

Hardin, Russell. 1989. "Why a Constitution?" In *The Federalists Papers and the New Institutionalism*. Eds. Bernard Grofman and Donald Wittman. New York: Agathon Press.

Eskridge, William N., and John Ferejohn. 2006. "Super-Statutes: The new American Constitutionalism." In *The Least Examined Branch: The Role of Legislatures in the Constitutional State*. Eds. Richard W. Bauman and Tsvi Kahana. New York: Cambridge University Press.

Michelman, Frank I. 2006 "What Do Constitutions Do That Statutes Don't (Legally Speaking)?" In *The Least Examined Branch: The Role of Legislatures in the Constitutional State*. Eds. Richard W. Bauman and Tsvi Kahana. New York: Cambridge University Press.

### **3. 2/1. Comparative Constitutional Law II**

*Topic:*

Why do constitutions change and what are the consequences?

*Readings:*

Dorsen, Norman et al. 2003. *Comparative Constitutionalism: Cases and Materials* St. Paul, MN: West Publishing., pp. 71-98.

Lutz, Donald S. 1994. "Toward a Theory of Constitutional Amendment" *American Political Science Review* 88(June): 355-370.

Ginsburg, Tom, Zach Elkins, and James Melton. 2007 "The Lifespan of Written Constitutions." Paper presented at the Annual Meeting of the American Law and Economics Association.

Shugart, Matthew S. 1998. "The Inverse Relationship between Party Strength and Executive Strength: A Theory of Politicians' Constitutional Choices." *British Journal of Political Science* 28(Jan.): pp. 1-29

Hirschl, Ran. 2000. "The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions." *Law and Social Inquiry* 25:91-147.

Strauss, David. 2001. "The Irrelevance of Constitutional Amendments." *Harvard Law Review* 114:1457-1505.

Levinson, Sanford. 1995. "How Many Times Has the Constitution Been Amended." In *Responding to Imperfection: The Theory and Practice of Constitutional Amendments* Ed. Sanford Levinson. Princeton, NJ: Princeton University Press.

North, Douglas C., and Barry R. Weingast. 1989. "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England." *Journal of Economic History* 49(Dec.):803-832.

Elster, Jon. 1995. "Equal or Proportional? Arguing and Bargaining over the Senate at the Federal Convention." In *Explaining Social Institutions*. Eds. Jack Knight and Itai Sened Ann Arbor: University of Michigan Press.

Besso, Michael. 2005. "Constitutional Amendment Procedures and the Informal Political Construction of Constitutions." *Journal of Politics* 67(1):69-87.

#### **4. 2/8 Common Law**

Topic:

What is common law, how did it emerge and develop, and how does it affect political and economic life?

Readings:

Barnes, Wayne. 2005. "Contemplating a Civil Law Paradigm for a Future International Commercial Code." *Louisiana Law Review* 65:677-774.

Sellers, Mortimer N.S. 2006. "The Doctrine of Precedent in the United States of America." *American Journal of Comparative Law* 54:67-88.

Milsom, S.F.C. 1981. *Historical Foundations of the Common Law* 2d ed. London: Butterworth Publishers, pp. 1-96.

Rubin. 1977. "Why is the Common Law Efficient." *Journal of Legal Studies* 6(1):51-63.

Goodhart, Arthur L. 1930. "Case law in England and America." *Cornell Law Quarterly* 15(2):173-193.

Pound, Roscoe. 1908. "Common Law and Legislation." *Harvard Law Review* 21(6): 383-407.

Zywicki, Todd. 2003. "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis." *Northwestern University Law Review* 97(4): 1551-1634.

#### **5. 2/15 Civil Law**

*Topic:*

What is civil law, how does it differ from common law, and how does it influence social, economic, and political life?

*Readings:*

Merryman, John, and Perez-Perdomo. 2007. *The Civil Law Tradition*. Stanford, CA: Stanford University Press. Selected passages.

La Porta, Rafael, et al. 2008. "The Economic Consequences of Legal Origins." *Journal of Economic Literature* 46(2): 285-332.

Algero, Mary G. 2005. "The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation." *Louisiana Law Review* 65:775-822.

Lasser, Mitchell. 2009. *Judicial Deliberations*. New York: Oxford University Press. Selected passages.

Oehler, Wolfgang. 1997. "Working with a Code: Is there a Difference Between Civil Law and Common Law People." *University of Illinois Law Review* 711-718.

Berkowitz, Daniel, and Karen Clay. 2005. "American Civil Law Origins: Implications for State Constitutions." *American Law and Economics Review* 7(1):62-84.

**6. 2/22. Organization of Courts**

*Topic:*

How do individual courts differ in their internal organization and the procedures that govern their adjudication? That is, how do intra-institutional rules influence judging on courts; and how does variation in these rules across nations (or variation across courts in a given nation) affect outcomes? How do systems of courts differ? What are the consequences of these different organizational structures?

*Readings:*

Flemming, Roy B., and Glen S. Krutz. 2002. "Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses." *Journal of Politics* 64(2):232-248.

Gabel, Matt. N.d. "The Politics of Decision-Making in the European Court of Justice: The System of Chambers and Distribution of Cases for Decision." Working Paper.

- Hall, Melinda Gann. 2001. "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform." *American Political Science Review* 95(2):315-330.
- Brace, Paul, and Hall, Melinda Gann. 2001. "Haves versus Have Notes in State Supreme Courts: Allocating Docket Space and Wins in Asymmetric Power Cases." *Law and Society Review* 35(2):393-417.
- Hausegger, Lori, and Stacia Haynie. 2003. "Judicial Decisionmaking and the use of Panels in the Canadian Supreme Court and the South African Appellate Division." *Law and Society Review* 37(3):635-658.
- Hoekstra, Valerie. 2005. "Competing Constraints: State Court Responses to Supreme Court Decisions and Legislation on Wages and Hours." *Political Research Quarterly* 58(2):317-328.
- Perez-Linan, Anibal, Barry Ames, and Mitchell A. Seligson. 2006. "Strategy, Careers, and Judicial Decisions: Lessons from the Bolivian Courts." *Journal of Politics* 68(2):284-295.
- Crowe, Justin. 2007. "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft." *Journal of Politics* 69(1):73-87.
- Hilbink 2008 "Agents of Anti-Politics: Courts in Pinochet's Chile." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Tom Ginsburg and Tamir Moustafa, eds., New York: Cambridge University Press.

## **7. 2/29. Judicial Independence**

### *Topic:*

How do we define and measure judicial independence? Why would politicians provide for/maintain/abide an independent judiciary?

### *Readings:*

- Rios-Figueroa, Julio, and Jeffrey K. Staton. 2008. "Unpacking the Rule of Law." Working Paper.
- Gretchen Helmke and Frances Rosenbluth. 2009. "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective." *Annual Review of Political Science*, Vol. 12: 345-366.
- Vanberg, Georg. 2008. "Establishing and Maintaining Judicial Independence." In Whittington, et al (eds). *The Oxford Handbook of Law and Politics*. Chapter 7.

Stephenson, Matthew. 2004. "Courts of Public Opinion: Government Accountability and Judicial Independence." *Journal of Law, Economics, and Organization* 20(2):379-399.

Ferejohn, John. 1999. "Independent Judges, Dependent Judiciary: Explaining Judicial Independence." *Southern California Law Review* 72:353-384.

### **8. 3/7. Judicial Independence and its Consequences**

*Topic:*

What effect does judicial independence have on judicial decision-making?

*Readings:*

Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy." *American Political Science Review* 96(2):291-303.

Ramseyer, J. Mark, and Eric B. Rasmussen. 1997. "Judicial Independence in a Civil Law Regime: The Evidence from Japan." *Journal of Law, Economics, and Organization* 13:341-355.

Ramseyer, J. Mark, and Eric B. Rasmusen. 2001. "Why are Japanese Judges to Conservative in Politically Charged Cases?" *American Political Science Review* 95(June):331-344.

Hanssen, F. Andrew. 2004. "Is there a Politically Optimally Level of Judicial Independence?" *American Economic Review* 94(June): 712-729.

Iaryczower, Matias, Pablo Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1953-1998." *American Journal of Political Science* 46(Oct.):699-716.

Vanberg, Georg. 2000. "Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers." *Comparative Politics* 32(April):333-353.

### **9. 3/21. Judicial Review**

*Topic:*

What is judicial review? How do the institutional and social context of judicial review shape whether and how constitutional courts protect constitutional rights in the face of legislative opposition?



*Readings:*

Carrubba, Gabel, Helmke, Martin, Staton. NSF proposal for comparative courts project.

Dorsen, Norman et al. 2003. *Comparative Constitutionalism: Cases and Materials* St. Paul, MN: West Publishing., pp. 99-133.

Vanberg, Georg. 1998. "Abstract Judicial Review, Legislative Bargaining, and Policy Compromise." *Journal of Theoretical Politics* 10(3):299-326.

Rogers, James R. 2001. "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction." *American Political Science Review* 45(1):84-99.

Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45:346-361.

Rogers, James R., and Georg Vanberg. 2002. "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective" *American Journal of Political Science* 46(2): 379-397.

Stone, Alec. *The Birth of Judicial Politics in France*. Parts I and III.

Whittington, Keith. 2005. "Interpose Your Friendly Hand: ..." *American Political Science Review* 99(4): 583-596.

Carrubba Clifford J. 2009. "A Model of Endogenous Development of Judicial Institutions in Federal and International Systems. *Journal of Politics*.

**10. 3/28. Courts and Democratization/Democratic Process**

*Topic:*

What role do courts play in the process of democratization? Do they affect consolidation and the development of legitimacy? How do courts and their role in law-making affect democratic processes and behavior in established democracies?

*Readings:*

Epstein, Lee, Jack Knight, and Olga Shvetsova. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35:117-163.

Trochev, Alexei. 2008. *Judging Russia*. New York: Cambridge University Press. Chapters 1-3.

- Smithey, Shanon Ishiyama, and John Ishiyama. 2002. "Judicial Activism in Post-Communist Politics." *Law and Society Review* 36(4):719-742.
- Herron, Erik S., and Kirk A. Randazzo. 2003. "The Relationship Between Independence and Judicial Review in Post-Communist Courts." *Journal of Politics* 65(May):422-438.
- Staton, Jeffrey. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50(1):98-112.
- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press. Chapters 1,2, 7,8, 11.
- Ginsburg, Tom. 2003. *Judicial Review in New Democracies*. New York: Cambridge University Press. Chapters 1, 2.

Popova, Maria. 2010. "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine." *Comparative Political Studies*. 43(10) 1202-1229.

Raul A. Sanchez Urribarri, Susanne Schorpp, Kirk A. Randazzo, Donald R. Songer. 2011. "Explaining Changes to Rights Litigation: Testing a Multivariate Model in a Comparative Framework." *Journal of Politics*. 73(2): 391-405.

#### **11. 4/4. International Courts and Tribunals**

*Topic:*

What is international law and what role and influence do international courts have in enforcing and interpreting that law?

*Readings:*

Staton, Jeffrey and Will Moore. 2011. "Judicial Power in Domestic and International Politics." *International Organization* 65: 553-587.

Powell, Emilia Justyna, and Sara McLaughlin Mitchell. 2007. "The International Court of Justice and the World's Three Legal Systems." *Journal of Politics* 69(2):397-415.

Carrubba, Cliff. 2005. "Courts and Compliance in International Regulatory Regimes." *Journal of Politics* 67: 669-689.

Meron, Theodor. 2005. "Judicial Independence and Impartiality in International Criminal Courts." *The American Journal of International Law* 99(April):359-369.

Posner, Eric, A, and Miguel F. P. de Figueiredo. 2005. "Is the International Court of Justice Biased." *The Journal of Legal Studies* 34:599-628.

Tallberg, Jonas. 2002. "Paths to Compliance: Enforcement, Management, and the European Union." *International Organization* 56 (3):609-643.

Voeten, Erik. "The Impartiality of International Judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102(4): 417-432.

Simmons, Beth. 2008. "International Law and International Relations." In Whittington, et al (eds.), *The Oxford Handbook of Law and Politics*. Chapter 11.

#### **12. 4/11. European Court of Justice**

*Topic:*

How has EU law developed and how has the ECJ acquired powers typically reserved for national courts—e.g., judicial review over national laws?

*Readings:*

Alter, Karen. 1998. "Who Are the 'Masters of the Treaty'?": European Government and the European Court of Justice." *International Organization* 52(1):121-148.

Garrett, G., D. Kelemen and D. H. Schulz. 1998. "The European Court of Justice, National Governments, and Legal Integration in the European Union." *International Organization* 52(1):149-176.

Mattli, W. and A. Slaughter. 1998. "Revisiting the European Court of Justice." *International Organization* 52(1):177-210.

Stone Sweet, Alec and Thomas Brunell. 1998. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." *American Political Science Review* 92 (1): 63-82.

Gabel, Matthew, et al. 2012. "Courts and Commerce." Working paper.

Carrubba, Clifford, et al. 2008. "Courts under Constraints." *American Political Science Review* 102(4): 435-452.

Gibson, James L., and Gregory A. Caldeira. 1998. "Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis." *British Journal of Political Science* 28:63-91.

Conant, Lisa. A. 2002. *Justice Contained: Law and Politics in the European Union* Ithica, NY: Cornell University Press., chapters 1-3.

### **13. 4/18. “Borrowing” and the “Transplantation” of Law**

*Topic:* What explains why and when legal ideas, concepts, and rules diffuse from one place to another? How do national constitutional and legal norms in one country (or sub-unit of a country) affect those in another?

*Readings:*

Gianmaria, Ajani. 1995. “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe.” *American Journal of Comparative Law* 43:93-118.

Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard. 2002. “The Transplant Effect.” *American Journal of Comparative Law* 51(1):163-204.

Caldeira, Gregory A. 1985. “The Transmission of Legal Precedent: A Study of State Supreme Courts.” *American Political Science Review* 79(March):17-193.

Boehmke, Frederick J., and Richard Witmer. 2004. “Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion.” *Political Research Quarterly* 57(1):39-51.

Twining, William. 2005. “Social Science and the Diffusion of Law.” *Journal of Law and Society* 32(2):203-240.

Ewald, William. 1995. “The Logic of Legal Transplants.” *American Journal of Comparative Law* 43:489-510.

Keleman, Dan, and Eric C. Sibbitt. 2004. “The Globalization of American Law.” *International Organization* 58(1):103-136

Watson, Alan. “Aspects of Reception of Law.” *American Journal of Comparative Law*. 44:335-352.

### **14. 4/25: What Have We Learned?**

*Topic:* What are the important theoretical and empirical questions we have identified in the study of comparative courts? How would one go about empirically studying them in a rigorous manner?