

COMPARATIVE LAW
Joyce Lee Malcolm
Spring 2009

Office: 418 Hazel Hall **Office Hour:** Thursday 2:00-3:00pm and by appointment

Required Books

The Civil Law Tradition, John H. Merryman, Rogelio Perez-Perdomo, 3rd ed. (Stanford University Press, 2007) (Merryman)

Comparative Constitutional Law, Vicki C. Jackson, Mark Tushnet, 2nd ed. (Foundation Press, 2006) (J&T)

Please sign up for **TWEN**. Additional reading materials will be posted occasionally and sent through TWEN.

In a world of increasing global interaction it is important for American lawyers to understand the legal systems of other nations. Of course just as learning a foreign language gives us a better understanding of our own tongue, comparing legal practices provides greater clarity of our own. This course will introduce students to comparative legal methods with an emphasis on comparative constitutional law. We will examine the general features of common and civil law systems, their underlying principles, the scope of their constitutional protection and review the Western legal systems that have developed. The class will particularly focus on British and Canadian common law, European civil law, and examine the impact of European Union law on member states.

By analysis and comparison, students can see not only the transient and coincidental symmetries of the law but also its more enduring character, including its contradictions, its limits, its ambiguities, and its changes. Lawyers trained in this knowledge learn to manage uncertainty and thus become better lawyers, more capable of practicing, adjudicating, and reforming the laws.

George P. Fletcher, Steven Sheppard, *American Law in a Global Context*

Requirements: Reading is assigned for every class and should be read in advance in preparation for discussion.

Grading will be based on one short paper (5-7 pages) to be presented to the class (30% of grade), a final exam (60%) and class participation (10%).

Each student will write a short paper designed to supplement the material for a particular class meeting. The paper should explore an aspect of that day's subject in greater depth through focusing on a particular country or countries, on further cases or additional literature. The paper should be emailed (through TWEN) to the entire class two days before the presentation. The presentation itself should take no more than ten minutes.

Readings

January 8 - Different Strokes: The Rule of Law

Merryman, pp. 1-26

George Fletcher & Steve Sheppard, *American Law in a Global Context*, “The Language of Law,” pp. 54-74 [from TWEN]

January 13 - What is comparative constitutional law? The Death Penalty Example

J&T, pp. 143-149; pp. 155-186

January 13 - Civil Law

Merryman, pp. 27-55

January 15 - Civil Law (cont.)

Merryman, pp. 61-67, skim 68-79, read 80-101, 134-142

January 20 - France & the Code Napoleon

J&T, pp. 507-509

http://www.napoleon-series.org/research/government/c_code.html

Select three Titles to examine and report on.

January 22 - French Law

Merryman, pp. 152-160

J&T, pp. 509-525

January 27 - German Civil Law: World War II and Afterward

Michael Stolleis, “Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945”, University of Chicago Law School, 2001.

J&T, pp. 285-286

January 29 - German Basic Law 1949, 1990 and Constitutional Court

<http://www.psr.keele.ac.uk/docs/german.htm>

J&T, pp. 525-546

February 3 - Common Law: English Origins

Magna Carta – <http://www.law.gmu.edu/assets/files/academics/founders/MagnaCarta.pdf>

Sir John Davies, *Le Primer Report des Cases et Matters en Ley Resolues et Aduidges en les Courts del Roy en Ireland* (1615)

Sir Edward Coke, Preface, *The Second Part of the Reports*

Joyce Malcolm, *The Struggle for Sovereignty*, vol. 1, pp. 3-9 (Online)

February 5 - Modern Britain, the Human Rights Act and a Supreme Court

J&T, pp. 365-402

February 10 - America: Reception of Common Law

Blackstone, On Reception, *Commentaries on the Laws of England*

James Otis Case, Kermit Hall, ed., *Major Problems in American Constitutional History*. Vol. I, pp. 67-69 [online];

Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine*, *Rex v. Zenger*, pp. 32-36.

February 12 - American Constitutionalism and Judicial Supremacy

Declaration of Independence

Constitution and Bill of Rights

***Randy Barnett, TBA

J&T, pp. 497-506

February 17 - Separation of Powers: Parliamentary or Presidential?

J&T, pp. 778-824

February 19 - Rights and Bills of Rights: The UN

<http://www.un.org/Overview/rights.html>

J&T, pp. 403-412

February 24 - Canada: Repatriating the Constitution and a Bill of Rights

<http://nesara.insights2.org/Constitution.html>

J&T, pp. 412-435

February 26 - Canada, Freedom of Speech and the Human Rights Commissions

J&T, pp. 1484-1525

March 3 - Constitutional Courts: France and Germany

J&T, 507-546

March 5 - European Union Law

<http://eur-lex.europa.eu/en/index.htm>

Under “Legislation in Force”—Pick two topics and explore

March 17 - Federalism and Democracy: European Union

European Constitution text and outcome, 2005

http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const.htm

European “Treaty”, 2008

http://www.economist.com/blogs/certainideasofeuropa/2007/07/first_sight_of_the_new_treaty.cfm

<http://www.euractiv.com/en/future-eu/treaty-lisbon/article-163412>

March 19 - Federalism: US

J&T, pp. 926-930

Fletcher & Sheppard, *American Law in Global Context*, analysis

McCulloch v. State of Maryland, pp. 150-166

Randy Barnett, “Three Federalisms”, *Loyola University Chicago Law Journal*, Vol. 39, No. 2, Winter 2008.

March 24 - Federalism: Canada

J&T, pp. 930-963

March 26 - Federalism: German and Swiss Law

J&T, pp. 963-983

March 31 - Abortion: United States

J&T, pp. 2-5, 25-40, 55-73

April 2 - Abortion: Canada and Germany

J&T, pp. 74-88, 99-129

April 7 - Emergency Powers: Legislative and Executive

J&T, pp. 840-865

Espionage Act of 1917; *Schenck v. United States* (1919); *Abrams et. al. v. United States* (1919)

April 9 - Emergency Powers: The Courts

J&T, pp. 891-925

April 14 - Freedom of Speech, Press and Association in Europe and Canada

J&T, 1468-1481, 1484-1525

April 16 - Self-Defence: Domestic and International

Fletcher & Sheppard, *American Law in a Global Context*, pp. 526-530, 549-590

Relevant cases: TBA

April 21 - Constitutions: Positive or Negative Rights?

J&T, pp. 1738-1765