

Princeton-Humboldt Strategic Partnership
Large Grant Proposal

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Teaching and Research Initiative
Constitutionalism under Stress: Comparative Perspectives (CONSTRESS)

Lead Applicants at Princeton University

Jan-Werner Müller
(Department of Politics)

Kim Lane Scheppele
(Woodrow Wilson School, Program in Law and Public Administration, University Center for Human Values)

Lead Applicants at Humboldt Universität zu Berlin

Silvia von Steinsdorff
(Institute of Social Sciences, Berlin Graduate School of Social Sciences)

Anna-Bettina Kaiser (Law Faculty)

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1. Abstract

The Princeton-Humboldt Teaching and Research Initiative “Constitutionalism under Stress: Comparative Perspectives (CONSTRESS)” aims at further strengthening and broadening the already existing collaboration between the two universities at the intersection of social sciences and constitutional law. It establishes a sustainable co-operation between the Institute for Social and Political Sciences, including its doctoral program, the Berlin Graduate School of Social Sciences (BGSS) at Humboldt-Universität zu Berlin, the Law Faculty at Humboldt-Universität zu Berlin, and the Department of Politics, the Program in Law and Public Affairs (LAPA) as well as the University Center for Human Values at Princeton University. The current application takes the successful concept of the “Princeton-Humboldt Initiative for the Study of Law in Context”, funded from 2013 to 2015, as a starting point and enhances it in several important ways: All lead applicants have agreed to collaborate on a clearly defined topic and to engage in analyzing and discussing questions of common interest from different disciplinary, methodological and geographical angles. Thus, CONSTRESS is a genuinely interdisciplinary endeavor, bringing together political scientists, political philosophers, sociologists and lawyers, as well as practitioners. The main arena for this exchange are jointly taught seminars and international research workshops, open to MA- and PhD-students from different disciplines (political science, sociology, and public law) at Princeton and Humboldt. Hence, CONSTRESS very much realizes the overall goal of the strategic partnership program, that is, to engage students and faculty across disciplinary and geographic borders, enabling them to gain a more diverse perspective on the subjects of their study. All proposed activities are tied together by the common research interest in “constitutionalism under stress”: Since the global boom of democratic constitution-making and constitutional reform in the 1990s, a broad legal and political debate centered around the crucial importance of constitutional law as a means of protecting transnational fundamental rights and promoting democracy. In recent years, however, the flip side of this “new constitutionalism” has also become visible: If the political context changes in an unfavorable (i.e. illiberal or populist) direction, constitutions, it seems, can in fact be used as tools to re-establish and strengthen authoritarianism. Besides, constitutions may come under stress where different levels of constitutional politics (national, sub- and supra-national) overlap and sometimes contradict each other. These dangers have been visible both in Europe and the Americas, crying out for a careful comparative approach.

2. Academic and Institutional Aims: Sustainable Interdisciplinary Cooperation

The Princeton-Humboldt Teaching and Research Initiative “Constitutionalism under Stress: Comparative Perspectives” (CONSTRESS) builds on the existing collaboration between the two institutions which was established in the framework of the Princeton-Humboldt Strategic Partnership in 2013. It takes the successful concept of the “Princeton-Humboldt Initiative for the Study of Law in Context”, funded from 2013 to 2015, as a starting point and enhances it in several important ways. The main purpose of the former initiative was to establish a network of scholars from both institutions engaged with similar topics at the intersection of public law and political science. To pursue this goal, the Program in Law and Public Affairs (LAPA) at Princeton University (PU) collaborated with scholars from the Law Faculty at Humboldt-Universität zu Berlin (HU) under the general heading “Law in context”. Jointly taught seminars offered an opportunity to bring together PhD students as well as additional scholars from both sides and to find out which precise topics could be of interest for future collaboration. The current application directly results from this endeavor: Over the last two years, colleagues from both sides met on several occasions, taught together and exchanged ideas about future research plans. Thus, the current lead applicants came to develop a detailed plan how to create a sustainable intellectual exchange and co-operation, based on jointly taught seminars and research workshops, open to MA- and PhD-students from different disciplines (political science, sociology, and public law) at Princeton and Humboldt, concentrating on a clearly defined topic: constitutionalism under stress.

Under this heading – constitutionalism under stress – all project participants will engage in analyzing and discussing questions of common interest from different angles. Since the global boom of democratic constitution-making and constitutional reform in the 1990s, a broad legal and political debate centered around the crucial importance of constitutional law as a means of protecting transnational fundamental rights and promoting democracy. In recent years, however, the flip side of this “new constitutionalism” has also become visible: If the political context changes in an unfavorable (i.e. illiberal or populist) direction, constitutions, it seems, can in fact be used as tools to re-establish and strengthen authoritarianism. Besides, constitutions may come under stress where different levels of constitutional politics (national, sub- and supra-national) overlap and sometimes contradict each other.

Whereas constitutions largely fall into the area of expertise of legal scholars, they are increasingly also part of political and social science research. All contributing partners of CONSTRESS have focused in their research and teaching on constitutions and constitutional politics. Hence, they contribute their different views, methods, and approaches to the project. We are convinced that we will learn much from each other, and that students in particular will find it highly stimulating to be exposed to different disciplinary perspectives and academic cultures. The written and oral feedback we received from students who participated in the seminars during the 2013-15 initiative

gives us every reason to believe that PhD students found the experience highly rewarding.

While interdisciplinary perspectives were only partly included during the first period of Princeton-Humboldt co-operation on “Law in Context”, the new project expands this approach in a more systematic way. Both lead applicants at PU, who already participated in the first project, are engaged in the study of law within the social sciences and humanities. Jan-Werner Müller is professor at the Department of Politics and directs the Project in the History of Political Thought at the University Center for Human Values. Kim Lane Scheppele is the Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values and an Executive Committee Member and former Director of the Program in Law and Public Affairs at Princeton University (LAPA). Their specific interdisciplinary expertise, combining political theory, sociology, and comparative constitutionalism, is matched by the complementary disciplinary backgrounds of the new lead applicants at HU: Silvia von Steinsdorff is a political scientist at the Institute of Social Sciences (ISW) at HU, working in the field of comparative politics and transition studies. She currently also directs the Berlin Graduate School of Social Sciences (BGSS). Anna-Bettina Kaiser is a professor for public law and foundations of law at HU’s Law Faculty; she is also one of the directors of HU’s interdisciplinary Law & Society-Institute (LSI). Furthermore, all cooperation partners have complementary profiles in area studies, reaching from Germany, Western Europe, and the US to Eastern Europe, the Post-Soviet countries, and Turkey.

This disciplinary diversification and broadening will benefit the joint research and teaching initiative in two respects. First, the academic exchange among participating scholars – including experts from Germany, other European countries and the US to be invited to the research workshops (see part 3 of the application) – offers a perfect opportunity for co-operation and the development of common research projects, cutting across disciplinary and geographic borders and matching the specific academic resources of PU and HU in the field of comparative constitutionalism in a productive way. Second – and this is even more important – the interdisciplinary opening of CONSTRESS further enhances the program’s attractiveness for students and junior researchers at both institutions. As all proposed joint seminars on “constitutionalism under stress” fit into the curricula of several MA-programs at PU and HU in political science, sociology, and the equivalent programs in law, they will be open to students from all these disciplines and can be taken as regular classes (including the attribution of credit points in the German / European system). Moreover, the internationally and interdisciplinary oriented graduate school (BGSS) at the ISW offers an ideal setting for participating PhD students from both sides to network with peers from many countries, interested in similar topics. Eventually, this joint teaching initiative may even lead to joint supervision of MA and/or PhD students on both sides. At the very least, students will get valuable input from faculty at another institution for the Master’s theses or dissertations. In the case

of the seminars and workshops taught at HU, the students and PhD researchers will also have opportunities to interact with German policy-makers whose expertise is relevant for a particular course.

Another facet of interdisciplinary exchange is added to CONSTRESS by the planned collaboration with the proposed new partnership on the "Impact of the Multiplicity of Crises on Political Development in the European Union" (EUROCHAIN), led by Andrew Moravcsik, Sophie Meunier, Rafaela Dancygier, Konstantin Vössing, Ellen Immergut, and Anette Fasang. We view these initiatives as complementary and as having important synergy effects. The initiatives are complementary because they pursue different, but related research topics and address different groups of students. EUROCHAIN focuses on the Multiple Crises of the European Union and their institutional and political repercussions, and is focused on cooperative summer research by undergraduates, with some additional research opportunities for PhD students. CONSTRESS, by contrast, deals with the legal and political debate on "new constitutionalism" as a means of protecting transnational fundamental rights and promoting democracy, as well as with the recent turn towards "authoritarian constitutionalism" within and beyond Europe. This interdisciplinary project focuses on joint teaching by the principal investigators from social sciences and law at the MA and PhD level in a series of one-month courses held alternately at Princeton and Humboldt.

The two projects will also generate synergy effects, as we can rely on some common institutional structures, and indeed strengthen those structures through our cooperation. First, the regularly occurring workshops on both sides provide a framework for advising the independently conducted research projects. Cross-project cooperation will be especially helpful for the PhD students, who can benefit from the Berlin Summer School, the Princeton Annual Workshop on European Integration, the Berlin Annual Workshop on European Integration and the final international workshops planned for each of the CONSTRESS seminars. Not just the PhD students, but also the EUROCHAIN BAs will benefit from the involvement of faculty and PhDs from the proposed cooperation in the field of comparative constitutionalism, who may be able to offer additional advice on their projects. Second, on a practical level, cross partnership cooperation has already proved very effective, and indeed has stimulated our new proposals. EUROFORT, the predecessor of EUROCHAIN, was able to organize a forum and organizational support for Jan-Werner Müller's Princeton Global Seminar on 'Memory, Democracy, and Public Culture: Berlin and Its Pasts,' which was held for six weeks in the Institute of Social Sciences at HU last summer. Thus, through their leading role in both Strategic Partnership Programs, the Institute for Social Sciences and the Berlin Graduate School of Social Sciences at Humboldt have the potential to become permanent strategic hubs for undergraduate, graduate, and faculty research and teaching cooperation and exchange with several partner institutions at Princeton.

In order to achieve this aim, we are determined to use the two years of funding under the

Princeton-Humboldt Strategic Initiative to set up a sustainable format of collaboration between the researchers as well as the institutions involved at both ends. First elements of such a strategy do already exist: The expanding interdisciplinary “Law and Society Institute” (LSI) at HU with its research focus on “law and crisis” (for which Anna-Bettina Kaiser is mainly responsible) is just the right place for a consolidation of the co-operation between HU and PU with regard to the topic “Constitutionalism under Stress”. Besides, the “Research Hub Turkish Studies”, financed by Stiftung Mercator (2016-2019), is currently established at the ISW under the direction of Silvia von Steinsdorff. As one branch of this research center is focusing on constitutional politics in Turkey, CONSTRESS will profit from the expertise of the international scholars and students involved as well as from some financial support.¹ Additional synergies are to be expected from the “Research Network Constitutional Politics in the Post-Socialist States of Central and Eastern Europe“ at the ISW. Based on a grant within the framework of the HU Excellence Initiative, this network of young scholars has formed since 2013 and includes country experts for all 20 countries in the post-social sphere of Central and Eastern Europe. On the Princeton side, beyond the Department of Politics as main sponsor², the University Center for Human Values has committed its support (including funds for workshops³), as has the Program in Law and Public Affairs⁴ (LAPA). We will also reach out selectively to regional studies programs for participation in workshops with a strong regional focus (such as authoritarian constitutionalism in Russia and Turkey).

3. Research Focus: Constitutionalism under Stress

After 1989, constitutionalism (admittedly an ambiguous term) appeared to go on a triumphant global march. Constitutionalism seemed inextricably linked to democracy in an overall package with the label “liberal democracy.” It was good for business; a global industry flourished to promote it and the rule of law. Not least, political and social theorists – especially critical theorists who had not been particularly concerned with law previously – invested constitutionalism with great normative hopes.

A quarter century later the picture looks rather different. Democratic constitutionalism remains a prized possession, which is without alternative for the stable and sustainable organization of democratic political systems. But what can pass for constitutionalism appears to have changed dramatically; and the directly proportional relationship between constitutionalism and liberal democracy has been put into doubt. The somehow naïve attempt to develop stable democratic systems by means of “constitutional engineering” has been deeply disappointed. And, what is even more worrying, authoritarian regimes seem to have developed a form of constitutionalism that

¹ 5000,00 €/year are already included in the budget (cf. attached budget plan).

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³ 5000,00 \$/year are already included in the budget (cf. attached budget plan).

⁴ 2500,00\$ for the entire period of the project.

scholars have found hard to understand and to criticize; many of the traditional heuristic tools to detect domination and lack of pluralism do not seem to work well. Moreover, in some contexts, constitutionalism is even accused by some politicians and analysts to develop into the very enemy of democracy. In the European Union, for instance, the inclusion of “debt brakes” in the constitutions of the Eurozone countries has conjured up the specter of an “authoritarian liberalism”, where constraints on popular will formation in a range of policy areas are so tight that the existence of democracy itself can be called into question. In sum, constitutionalism has not in any obvious sense “failed” and is certainly not disappearing – but, we argue, it is under stress, sometimes severe stress, and it is important to understand the different ways its functions and normative promises have been put into doubt across the globe.

Only the combination of normative, legal, and social scientific research – as proposed by CONSTRESS – will allow us to develop a more nuanced understanding of constitutionalism’s contemporary crises and its possible shortcomings in certain political situations. Especially in cases where authoritarians seem to have successfully captured constitutions (or at least the language of constitutionalism), it is crucial that we work on new heuristics – since, after all, the authoritarians have also been learning from previous mistakes and are now much better skilled at trying to game institutions such as Freedom House or the Council of Europe’s Venice Commission.

In order to develop a better analytical understanding of these growing stress-symptoms on various aspects of democratic constitutionalism, the specific transatlantic comparative perspective of CONSTRESS will be extremely enlightening. For a long time, EU scholars (especially, but not only, lawyers) fastened on the claim that the EU was entirely *sui generis* and that, in particular, comparisons with the US were not helpful. While it is true that the EU is not a federal state, some of the challenges of multi-level governance are actually very similar to ones the US has gone through in the past or is even going through now. Moreover, both in Europe and the US there are very serious questions about constitutional crises because of polarization and anti-liberal populism.

4. Structure: Thematic Units, Jointly Taught Seminars, Research Workshops

CONSTRESS will be organized along four thematic units, each under the responsibility of one of the four principal investigators named in this application. A unit consists of a seminar with 5-8 MA- and/or PhD-students from each side and a subsequent research workshop. Scholars from both participating universities will commonly teach all seminars, two organized at PU and two at HU. To this end, the responsible professor of each unit will invite scholars, preferable of complementary disciplinary background, to participate in the development of the syllabus, to co-coach participating students and to co-teach the classes. Among the colleagues who have already signaled their interest are Georg Nolte, Christoph Möllers, Philipp Dann (all HU Faculty of Law), Dorothee de

Nève (Justus-Liebig Universität Gießen), Hans-Henning Schröder (formerly FU Berlin; Osteuropa-Institut Berlin) as well as Stephen Macedo, Paul Starr, Paul Frymer, and Keith Whittington from the Princeton side. Additional support in the preparation and organization of the seminars and workshops will be provided by junior researchers (PhD or postdoc-level) participating in CONSTRESS. Students and instructors will meet regularly during three to four weeks for classes of at least 18 hours (the equivalent of a half graduate course at Princeton). Additional preparatory meetings and conferences via video and/or skype will be organized according to the individual needs of students and professors.

3-4 day workshops will take place in the last week of each seminar period. They serve the double purpose of offering the students an opportunity to present their commonly developed projects to a broader audience of experts and of involving interested scholars from other disciplines, universities, and national backgrounds in a more research-oriented exchange on the seminar topic. To this end, the professor in charge will invite 3-5 international researchers and a common workshop program will be elaborated. This will create a unique learning environment for the students, helping them to insert themselves early on into an academic network and exposing themselves to different sets of knowledge, disciplinary approaches, methodological skills and academic cultures.

In the following, the topics and approaches of the four envisaged units of CONSTRESS are briefly sketched out. Detailed syllabi as well as the workshop schedules and the list of external scholars to be invited will be developed after the start of the project.

4.1 Too Much Law? Competing Legal Orders in the EU and the US **(Unit 1: Kim Lane Scheppele)**

Advanced constitutional democracies often contend with multiple layers of legality in daily governance. Federal systems balance national and subnational government; states within dense transnational organizations must find ways to incorporate transnational law into national systems. In both Germany and the US, federalism requires cooperation across levels for joint tasks and a recognition of the jurisdiction of the other as each level accomplishes its solo tasks. But Germany also must integrate European Union law and European human rights law into its legal order. These different levels of law are often developed without reference to each other and must be harmonized by courts after the fact. There is no requirement in EU law to respect the nationally specific boundaries of the German constitution; European human rights law is not within the EU and may be developed without reference to EU law. In some systems, there are supremacy clauses that sort out the conflict (e.g. in the US, the federal constitution dominates state law; in the EU, EU law is supposed to dominate state law in its areas of competence). But the fact of the

formal legal rule does not mean that the coordination is easy. For example, the supremacy of EU law over German constitutional law is a proposition that has generated dissent from the German Federal Constitutional Court). Can there be too much law, especially where systems overlap? In this seminar, we will examine the dynamics of complex interdependent legal orders and look at how these systems do and should sort out the conflicts.

The seminar will be co-taught with Philipp Dann from the HU Law Faculty.

4.2 European Values under Stress? Tendencies of (Re-)Autocratization in Constitutional Politics (Unit 2: Silvia von Steinsdorff)

Democratic constitutions have become the sine qua non condition of modern government and state organization in Europe and beyond. A state and a government based on the rule of law (Rechtsstaat) and the guarantee of fundamental human rights belong to the basics of every modern political system. However, the recent conceptualization of “authoritarian constitutionalism” / “constitutional authoritarianism” emphasizes that not only in democratic and liberal societies constitutions play an important role: authoritarian leaders have written and still write constitutions to preserve their rule. Furthermore, authoritarian rulers often attempt to capture judicial review bodies, which might turn into adversaries when it comes to political changes affecting the constitutional order. On the other hand, we see some authoritarianisms respecting (or better: instrumentalizing) the rules of a constitutional regime, in particular concerning the basic organizational structure of a political system. This is so for the simple reason that constitutions, as realizing the vision of a state under the rule of law, increase the legitimacy of a regime. The threat for constitutional politics coming from authoritarian practices can hence be understood as one factor putting constitutionalism under stress.

The seminar will analyze the problematic interplay between basic principles of rule of law and democracy, set up in the current constitutions, and massive attempts at changing the character of these meta rules by “politicizing” them and making them an issue of day-to-day politics to be observed in some of the younger EU member states, such as Hungary, Bulgaria or Poland. The subtle but steady autocratization of some of these states, as well as the openly publicized stabilization of authoritarian constitutionalism in some countries on the fringe of EU-Europe – in particular Turkey and Russia –, clearly reveal some of the the political and institutional stress-factors, dominating the current discussion on the future of democratic Europe. These developments not only bring up the very concrete question of how to deal with states that are part of the EU but act against the basic values and laws of the Union. They also demonstrate how vital Ernst-Wolfgang Böckenförde’s fundamental insight (formulated as early as 1976) is, according to which the liberal, secular state is dependent on conditions that it cannot guarantee itself.

The seminar will be co-taught with Kim Lane Scheppele.

4.3 Constitutionalism: Normative Challenges (Unit 3: Jan-Werner Müller)

This course sits at the intersection of political theory, public law, and comparative politics. It takes at its starting point the observation that many apparent attacks on constitutionalism are today justified with reference to democratic values. This is true of attacks from both the right and the left: on the right – for instance in Poland – the constitutional court is criticized for obstructing the “people’s will” (or what the ruling party takes to be the genuine national interest); on the left, the constitutionalization of certain economic policies, for instance, is said to disable possibilities for democratic decision-making about the economy. To assess when criticisms of constitutionalism in the name of democracy are valid, we need a proper understanding of the normative relationship between constitutionalism and democracy. More specifically, we also need to examine the legitimacy of different forms of judicial review. A US-German comparison (with side glances at the UK and examples of “weak form judicial review” from Commonwealth countries) will help us to illustrate various institutional options of realizing constitutional constraints and their normative justifications. The German case will also be particularly interesting because it makes some parts of the constitution entirely un-amendable (which has no equivalent in the US); whereas the US example is particularly important because of the wide-ranging debate about “popular constitutionalism” (a debate which Germans, still very much in awe with their constitutional court, are yet to have). One underlying question of the course, then, is also whether the US still serves as the best example of a constitution as a creation by popular will, whereas European constitutionalism is about the recognition of rights by the people – and whether these different conceptions can lead to constitutions coming under particular forms of stress.

The seminar will be co-taught with Christoph Möllers from the HU Law Faculty.

4.4 State of Exception (Unit 4: Anna-Bettina Kaiser)

The fourth seminar will deal with the constitutional institute of the “state of exception”. The seminar deals with the question whether states of exception are still exceptional. One might doubt it if one looks at current debates and institutional developments: existential governmental crises and states of exception have become buzzwords. But what is behind these buzzwords? This seminar aims at exploring the topic “state of exception” by looking at it through different lenses: historical, legal, comparative, and policy lenses will allow us to make sense of the larger picture in a truly interdisciplinary fashion. The legal perspective will comprise both a doctrinal and a socio-legal perspective; the comparative perspective will link back to the historical one: it will be both

synchronic and diachronic, i.e. comparative over time; and the normative one will help us address basic questions about fundamental rights and how to protect them in times of heightened security threats.

Specifically, the seminar will address questions about the origin of the state of exception as a legal instrument, its development in 19th century France and Prussia, and its grave abuse in Weimar Germany, where emergency decrees finally lead to a permanent state of exception during the Nazi period. With a specific normative focus, the seminar will analyze the respective requirements of the U.S. and current French and German constitutions (Notstandsverfassung) for dealing with states of exception. How do the aforementioned constitutions cope with modern threats such as terrorism? What role do courts play? And how do rules emanating from the conception of militant democracy (Wehrhafte Demokratie) interact with the instrument “state of exception”?

Seminar participants will form interdisciplinary and international teams of two to jointly work on a presentation. The seminar will be supplemented by an optional workshop which will feature a number of experts from law and political science and which will take place immediately after the final seminar session.

The seminar will be co-taught with Jan-Werner Müller.

5. Provisional Timeline

Months	Milestones
February – May 2017	Planning of Unit 1 (including video conferences, travel of junior researchers)
June 2017	Unit 1: Seminar and International Workshop “Too much Law?” at HU Berlin (Responsible PI: K.L. Scheppele)
July – September 2017	Planning of Unit 2 (including video conferences, travel of junior researchers)
October/November 2017	Unit 2: Seminar and International Workshop “European Values under Stress?” at Princeton (Responsible PI: S.v.Steinsdorff)
February – May 2018	Planning of Unit 3 (including video conferences, travel of junior researchers)
June 2018	Unit 3: Seminar and International Workshop “Constitutionalism: Normative Challenges” at Berlin (Responsible PI: J.-W. Müller)
July – September 2018	Planning of Unit 4 (including video conferences, travel of junior researchers)
October 2018	Unit 4: Seminar and International Workshop “State of Exception” at Princeton (Responsible PI: A.-B. Kaiser)
	Wrap-up and further planning (in the framework of Unit 4 at PU)