

A Modest Experiment in Pedagogy: Lessons on Comparative Constitutional Law

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In 2002, when I joined the founding faculty at the Florida International University College of Law, I had been teaching constitutional law for over two decades. I prided myself on being an innovative teacher who was willing to try new and different approaches.¹ Like many American law professors, however, I was agnostic about comparative and international law. I had grown accustomed to teaching a traditional course, using a traditional casebook, following a traditional approach with only an occasional filigree.² My no-nonsense syllabus promised:

Our course goal is to achieve the basic understanding of modern constitutional law that is necessary to be a successful law student, an able lawyer, and a good citizen. The objects of our study are the Constitution and the Supreme Court. This is a course in “con law for lawyers”—we will read, analyze, and argue about constitutional law the way lawyers and judges do.

As its name suggests, the University I joined was originally chartered to promote international understanding.³ Its stated mission is to be “an urban, multi-campus, research university serving South Florida, the state, the nation and the international community [that] impart[s] knowledge through excellent teaching, promoting public service, discovering new knowledge, solving problems through research, and fostering creativity.”⁴ FIU has long been committed to the idea of globalism and has achieved considerable distinction in the social sciences and the international realm, through its programs, centers, and institutes.⁵

The College of Law is contributing to that institutional prominence.⁶ We understand that our students will practice law in an increasingly globalized professional reality—their “real world” will be the “entire world.”⁷ Our College’s mission statement provides, in part:

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¹ See, e.g., Thomas E. Baker, *A Law Student's Responsibility for a Liberal Education*, 20 TEX. TECH L. REV. 1153 (1989); Thomas E. Baker & James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 IOWA L. REV. 739 (1991); Thomas E. Baker, *Teaching a Course on the Constitution—Finding and Using Founding Documents; Casebook and Supplement; Internet Sites Can Make a Web-Based Course, Using Quizzes, Opinion Writing Assignment*: entries in *TEACHING THE LAW SCHOOL CURRICULUM* (Steven Friedland & Gerald F. Hess eds. 2004).

² See generally Thomas E. Baker, *Mastering Modern Constitutional Law*, 21 SEATTLE U.L. REV. 927 (1998) (describing some of the filigrees I add to Rotunda’s MODERN CONSTITUTIONAL LAW).

³ *Florida International University—Millennium Strategic Plan* at 12 (May 28, 2002) (<http://www.fiu.edu/oir/docs/msp.pdf>).

⁴ *Florida International University Mission Statement* (http://academic.fiu.edu/docs/provost_mission.htm).

⁵ See generally *supra* note 3, *Millennium Strategic Plan* at 12-16.

⁶ Thomas E. Baker, *Reflections on Law Schools and the Idea of the University*, 1 FIU L. REV. 1 (2006).

⁷ See generally Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65 (1996); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553 (2007); Laurel S. Terry, et al., *Transnational Legal Practice*, 43 INT’L LAWYER 943 (2009); John E. Sexton, *Curricular Responses to Globalization*,

The College of Law offers a curriculum that prepares students for ethical and effective practice of law in an increasingly global and multicultural world. The curriculum includes a full and faithful presentation of the courses traditionally offered at nearly all U.S. law schools. In addition, building on the parent university's distinction in its international programs, the curriculum incorporates important developments in the globalization of both public and private law. The academic program takes a pervasive approach to international and comparative law, incorporating these perspectives into all domestic law classes, and includes a required introductory course and a rich array of upper level electives in international, transnational and comparative law.⁸

We have kept each of these curricular promises. First, we created a hybrid course that is unique in American legal education: "Introduction to Comparative and International Law," a three-hour required first-year course offered in the spring semester.⁹ Second, like most other American law schools, our curriculum presents a menu of advanced, elective courses in international and comparative law.¹⁰ Third, the faculty have committed to "globalizing, internationalizing, trans-nationalizing, and comparativizing" the legal education we provide our students in every course we teach.¹¹ Our Faculty Bylaw on teaching

20 PENN. ST. INT'L L. REV. 15, 17 (2001); *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267, 286-92 (2006).

⁸ *FIU College of Law Faculty Bylaws*, Part I. at 5 (Mar. 2, 2007).

⁹ The course catalogue description reads:

This new course introduces students to public international law, international economic law, and comparative law. Exposure to the law of nations in the international component of the course poses critical jurisprudential questions on the nature of law, the role of enforceability, and the prospects for constructing an international society. The comparative component compares and contrasts the common law system that prevails in the United States to civil law systems, especially as they have evolved in Latin America. Together the course provides the foundation for later advanced study in these and other topics as part of the upper level curriculum.

For an account of the curious conceptual origins of this course, see generally Leonard P. Strickman, *A New Law School: An International Curriculum*, 43 S. TEX. L. REV. 641, 643-44 (2002).

¹⁰ A sample list of these courses includes: Admiralty Law; Caribbean Law and Development; Comparative Business Law; Comparative Constitutional Law; Comparative Criminal Law; Comparative Environmental Law Urban Issues; Comparative Family Law; Comparative Law; Comparative Law: Constitutions and the Judicial Process; Comparative Perspectives on the Regulatory State; Conflict Management Practice-Comparative Perspective of Mediation; Conflict Management Practice-Comparative Perspectives of Negotiation; Conflict Prevention and Community Improvement; Conflicts of Law; Cross Cultural Communication in International Dispute Resolution; Environmental Health Law and Policy; European Union Law; Foreign Relations and National Security Law; Immigration and Human Rights Clinic; Immigration Law; International and Comparative Sales; International Antitrust; International Banking; International Business Transactions; International Commercial Arbitration; International Criminal Law; International Environmental Law; International Human Rights Law; International Intellectual Property Law; International Litigation; International Organizations; International Taxation; International Telecommunications Law; International Trade Law and Policy; Introduction to International and Comparative Law; Latin American Private Law; Law and Politics in Latin America; NAFTA and Other Regional Trade Agreements; Ocean and Coastal Law; Payment Systems; Profesión Jurídica Comparada (Comparative Legal Profession); Public International Law; Refugee and Asylum Law; and Transnational Commercial Law. See http://law.lawnet.fiu.edu/index.php?option=com_content&task=view&id=64&Itemid=613.

¹¹ M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property*, 54 J. LEGAL EDUC. 183, 186 (2004).

requires: “Each faculty member must be committed to excellence in fulfilling teaching responsibilities, and, consistent with the mission of the College of Law, devote a minimum of one class hour per course credit hour to coverage of relevant international and comparative law materials in their domestic law classes, except seminars.”¹²

In the rest of this paper, I will explain how I meet this obligation in my first-year, first semester four-hour required course on constitutional law. The general advice I would offer others would be to repeat the same expert advice that I have benefited from following. First, my approach was “selective and modest”—a tentative effort to expose my novice students to my own novice comparativist perspective.¹³ After all, my students are enrolled in an introductory survey course on American constitutional law, not an advanced comparative law course, and I myself am not a comparativist. Second, I sought to “identify practices or doctrines in other stable democracies that are different from those in the United States, and ask: ‘They do things differently there. What reasons might they have for adopting their practices or doctrines? What reasons might there be that caution against our adopting those practices or doctrines?’”¹⁴ Finally, I set out to explore with my students some interesting examples of a phenomenon Justice Breyer so aptly but obliquely once described: how and why “[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances.”¹⁵

After consulting some of the excellent teaching resources available,¹⁶ I developed four “Lessons on Comparative Constitutional Law.” Each is a self-contained unit consisting of a brief introduction, some general discussion questions, links to assigned readings, and a list of recommended further readings. In the manner of a *bricoleur*,¹⁷ I assembled the readings for the Lessons, other background materials including video recordings of relevant programs and lectures, and links to relevant documents and accompanying sites for my students to access on the user-friendly West Educational Network (“TWEN”).¹⁸ Given the Conference’s length limitation for this paper, I can only briefly summarize the Lessons here. (My Lessons admittedly are derivative of the work of others; I would be pleased to share copies with anyone who sends me an email request at thomas.baker@fiu.edu.)

¹² *FIU College of Law Faculty Bylaws*, Part III. B (1) at 10 (Mar. 2, 2007).

¹³ Neil S. Siegel, *Some Modest Uses of Transnational Legal Perspectives in First-Year Constitutional Law*, 56 J. LEGAL EDUC. 201, 201 (2006) (“Selectivity and modesty are warranted.”).

¹⁴ Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 674 (2005).

¹⁵ David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 661 (2005) quoting Stephen Breyer, *The Supreme Court and the New International Law* (ASIL Annual Meeting Apr. 4, 2003).

¹⁶ *E.g.*, GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW (Vikram David Amar & Mark V. Tushnet eds. 2009); MICHAEL LOUIS CORRADO, *COMPARATIVE CONSTITUTIONAL REVIEW: CASES AND MATERIALS* (2005); NORMAN DORSEN, *et al.*, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006); *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds. 2002); BRIAN LANDSBERG & LESLIE JACOBS, *GLOBAL ISSUES IN CONSTITUTIONAL LAW: CASES AND MATERIALS* (2007); FRANCOIS VENTER, *CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA & SOUTH AFRICA AS CONSTITUTIONAL STATES* (2000).

¹⁷ See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1229 (1999).

¹⁸ *E.g.*, A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer, American University (Jan. 13, 2005) (<http://www.wcl.american.edu/secl/founders/2005/050113.cfm>); Center for Comparative Constitutionalism (<http://ccc.uchicago.edu/links.html>); Comparative Constitutions Project (<http://www.comparativeconstitutionsproject.org/>); Concourts.net – comparative constitutional analysis (<http://www.concourts.net/>); Constitution Finder (<http://confinder.richmond.edu/>); International Constitutional Law Project (<http://www.servat.unibe.ch/icl/info.html>).

Lesson I: Judicial Review. After covering the introductory chapter with the traditional cases on the power of judicial review and its limitations, students first read a traditional descriptive account of how judicial review spread throughout the world, especially in the second half of the 20th century,¹⁹ and then read Ran Hirschl's critique of that development from the perspective of critical theory.²⁰ Discussion questions include: What difference has the power of judicial review made in the constitutional history of the United States and other countries? What explains a country's attitudes towards its judicial institutions, *i.e.*, courts, judges and the exercise of judicial review? Can other institutions of government besides the judiciary define and protect individual rights? What are the relative advantages and disadvantages of the traditional three branches—Legislative, Executive and Judicial—for interpreting the Constitution? How have different countries sought to adjust for the “counter-majoritarian” difficulty of the doctrine of judicial review?

Lesson II: Transnational Interpretation. Law students today are familiar with the concept of globalization and how transnational influences transcend national boundaries and influence matters of culture and economics. Certainly, the popular culture of the United States is a significant influence around the world. Indeed, the phenomenon of “Americanization” has been derisively dubbed “McWorld.” Students are asked to apply these ideas to constitutional law. Can it be imported and exported from one country to another or is a particular country's fundamental law unique—exclusive and self-contained to that country? The required readings include an article by now former Puisne Justice L'Heureux-Dube of the Supreme Court of Canada, in which she criticizes the Rehnquist Court for not engaging in the international judicial dialogue on comparative constitutional law,²¹ and a case in which the Justices argue over the propriety of importing constitutional law into the United States.²² This Lesson comes after students have been exposed to the deep structure of the constitution, *i.e.*, separation of powers and federalism, and after they have carefully parsed judicial opinions self-consciously examining constitutional hermeneutics.

Lesson III: Affirmative Action. After completing their study of the Equal Protection Clause, students read about “special measures” referenced in the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Elimination of All Form of Discrimination Against Women*.²³ In the United States, “special measures” are usually called “affirmative action” or “reverse discrimination.” In the European Community, the term is “positive action.” The programs are known in India as “compensatory discrimination.” Students are asked to consider whether these government programs are permitted under the various international treaties and the domestic constitutional law of the relevant country. Students are expected to respond comparativistically: first from the perspective of the United States—

¹⁹ William E. Nelson, *The Worldwide Spread of Judicial Review* in WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 104-13 (2000).

²⁰ Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000). See also RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

²¹ Clair L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. J. 15 (1998).

²² *Knight v. Florida*, 528 U.S. 990 (1999).

²³ See generally Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

based on their course study—and second from the different perspective of another country of their choosing based on their reading from an extensive list of country-specific articles.²⁴

Lesson IV: Reproductive Rights. After we cover fundamental rights, including the right to privacy and sexual autonomy,²⁵ students read the line of high court cases on abortion from either Canada²⁶ or Germany.²⁷ The obvious comparison, of course, is with the line of cases in U.S. REPORTS that includes *Griswold*,²⁸ *Roe*,²⁹ and *Casey*.³⁰ We then discuss a hypothetical state Zero Population Growth Act, patterned after China's "One Child Rule," which would impose a two-child limitation on families for the stated purposes of preserving the quality of life in the state, slowing increased demand for state government services, and reducing environmental degradation.

As I remind my students, their study of comparative constitutional law helps them better understand U.S. constitutional law, not unlike how reading a concurring opinion or a dissenting opinion helps them better understand a majority opinion. Their engagement with the materials during class is gratifying. Preparation is evident. Participation is animated. Discussion often goes over the allotted class time and typically spills out into the hallway.

My students' engagement with the comparative constitutional law readings is part of their evaluation in the form of an essay paper, worth 10 percent of their final course grade. Having been exposed to the ongoing debate among the current Justices of the Supreme Court of the United States whether comparative constitutional analysis is an appropriate and a legitimate aspect of American judicial review,³¹ they are required to take a side in this debate and write an essay to justify their position within the American judicial tradition. They are expected to consider and respond to the opposing arguments, as well, in a balanced and measured essay with examples.³² Their thoughtful

²⁴ E.g., THE GENDER OF CONSTITUTIONAL JURISPRUDENCE (Beverley Baines & Ruth Rubio-Marin eds. 2005) (comparing the constitutions of Australia, Canada, Columbia, Costa Rica, France, Germany, India, Israel, South Africa, Spain, Turkey, and the United States); *Symposium on Affirmative Action: An International Perspective on a Global Dilemma*, 36 CONN. L. REV. 649-877 (2004) (articles about the United States, South Africa, India, Brazil, and international human rights law).

²⁵ Cf. Martha F. Davis & Bethany Withers, *Reproductive Rights in the Legal Academy: A New Role for Transnational Law*, <http://ssrn.com/abstract=1410182> (2009) (forthcoming J. LEGAL EDUC.).

²⁶ *Morgentaler, Smoling and Scott v. The Queen*, 1 S.C.R. 30 (1988) (Supreme Court of Canada), redacted in VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 74-110 (2d ed. 2006).

²⁷ JACKSON & TUSHNET, *supra* note 26, at 110-40 (redacting the 1975 West German Abortion Decision and the post-unification 1993 decision invalidating the subsequent statute the Bundestag enacted in 1990).

²⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of marital privacy).

²⁹ *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy/abortion).

³⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*).

³¹ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (Kennedy, J., for the Court; O'Connor, J. & Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Kennedy, J. for the Court; Scalia, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (Rehnquist, C.J., dissenting); *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring; Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring; Breyer, J., dissenting); *Printz v. United States*, 521 U.S. 898, 921 n.11 & 976 (1997) (Scalia, J., majority; Breyer, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830-32 & 869 n.4 (1988) (Stevens, J., for the Court; Scalia, J., dissenting).

³² Discussion Questions include: Are constitutional provisions arbitrary political constructs that are idiosyncratic to a particular country and a particular era or are there background normative principles that are universal for all peoples and constant over all time? How is the constitution of a nation related to more general and fundamental cultural traditions, i.e., does the constitution shape the culture or does the culture shape the constitution? How is

essays are further evidence of how they have begun to appreciate a comparative constitutional law perspective.

Thus, by the completion of my introductory course on U.S. constitutional law, my 1L students have begun to understand intuitively how “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.”³³ That is enough for me.

your view of the proper role of a constitutional court reflected in your analysis? Does your argument depend on the nature and the content of the particular clause, *i.e.*, is comparative analysis more appropriate for some clauses than for other clauses? Does your argument apply transnationally, *i.e.*, would you treat comparative constitutional arguments the same whether you were a member of the Supreme Court of the United States dealing with the constitutional law of another country or whether you were a member of the constitutional court of some other country dealing with the constitutional law of the United States? See generally Christopher A. Whytock, *Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy*, 41 LOY. L.A. L. REV. 629 (2008).

³³ Ruth Bader Ginsburg & Deborah Jones Merritt, *supra* note 23, at 282.