

# Teaching Comparative Perspectives in the Domestic Constitutional Law Class: A Step by Step Primer ©

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## I. INTRODUCTION

Comparative constitutional law has taken off as a popular subject for U.S. law schools in the last decade. Questions have arisen about whether, and how, to integrate such comparative perspectives into domestic constitutional law classes so that all students are exposed to such approaches, not just those who take upper level seminars. The relevance of international human rights law has also come up. The AALS has held symposia on these topics, and various approaches have been advocated.<sup>1</sup> Professors Brian Landsberg and Leslie Jacobs have written an impressive short book, intended for use as a supplement by American law professors, called *Global Issues in Constitutional Law*. Some scholars, however, have undoubtedly not pursued such avenues given the numerous domestic topics to be covered, and given possible student resistance.

This essay seeks to reduce these concerns by providing a short step by step description of how to integrate comparative perspectives into an American constitutional law survey class with brevity. Law professors in other countries can use this method to integrate American or other perspectives. The key is to raise at least one foreign perspective per major course topic. This essay will also demonstrate that foreign law does not have a “liberal” bias as alleged by some scholars.

## II. STEP BY STEP INTEGRATION

### a. The “structural” Constitution

The typical first American constitutional law course focuses on the U.S. Constitution’s “structural” aspects: judicial review, separation of powers, legislative authority, federalism, and executive power. Most U.S. casebooks start with *Marbury v. Madison*.<sup>2</sup> A professor can readily

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<sup>1</sup> Every issue of Volume 58 of the Journal of Legal Education for 2008 has at least one article addressing comparative perspectives. Moreover, the theme for the 2003 Annual Meeting of the Association of American Law Schools was “Legal Education Engages the World.”

<sup>2</sup> 5 U.S. 137 (1803).

contrast American style judicial review with the United Kingdom (UK), France, and Canada. The UK Westminster system rejected judicial supremacy for parliamentary supremacy. The professor can argue in favor of the UK system by pointing out that many Americans believe that the courts infringe on democracy.

In France, the Conseil Constitutionnel advises Parliament on whether proposed legislation would be constitutional. This role contrasts with the U.S. Constitution's case or controversy requirement. One can support France by saying that a proposed law's constitutionality should be assessed in advance to avoid uncertainty and huge litigation costs. The teacher could also discuss how Canada's "notwithstanding" clause acts as an escape hatch from the "counter-majoritarian" difficulty that obsesses American constitutional law.

To summarize, it is not time consuming to mention at least one alternative in class and get student reactions. All that may be lost is the chance to ask one more "Socratic" hypothetical.

During discussions about the U.S. Supreme Court, one can pose questions regarding the wisdom of life tenure, which is internationally unique, as well as about the U.S. judicial confirmation process. Surprisingly, my students often favor life tenure even when I describe it as unpopular abroad. One can contrast the U.S. confirmation approach with a judicial commission alternative, such as in South Africa, which may arguably reduce politicization. Then there's the issue of whether it's better to have a Supreme Court or a Constitutional Court.

On separation of powers, American law professors can reference the English approach where cabinet ministers sit in Parliament. Then there are the broader questions of parliamentary vs. presidential systems.

Regarding executive power, France's endorsement of broad Presidential immunity (which came up while President Chirac was in office) is a useful counter to the American approach embodied in *Clinton v. Jones*.<sup>3</sup> The *Jones* reasoning that such litigation will not interfere with the President now seems naive. There are also similarities. Executive power in many nations has been boldly asserted because of the "war on terror." Courts throughout the world have therefore had numerous issues to address. Several U.S. Supreme Court cases on the subject, such as *Hamdan v. Rumsfeld*,<sup>4</sup> require discussion of international human rights norms.

Another instructive case is *Missouri v. Holland*<sup>5</sup> where the U.S. Supreme Court upheld a law enforcing a Migratory Bird Treaty. The Court reasoned that Congress may have broader power to pass laws implementing treaties than otherwise. This case allows discussion of monist

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<sup>3</sup> 520 U.S. 681 (1997).

<sup>4</sup> 548 U.S. 556 (2006).

<sup>5</sup> 252 U.S. 416 (1920).

v. dualist approaches to treaties, the relevance of international conventions to domestic law, state's rights, executive powers, etc. One can also discuss whether Congress would have such enhanced power pursuant to a multi-lateral treaty.

Basic sovereignty and federalism questions can be compared internationally. In *United States Terms Limits, Inc. v. Thornton*,<sup>6</sup> the U.S. Supreme Court struck down state imposed Congressional term limits. The Court divided closely on the source of sovereignty in the U.S. – whether it resides with the people or the states. It's amazing that this issue was still debated almost 200 years after *McCullough v. Maryland*,<sup>7</sup> where the Court supported the constitutionality of the Bank of the United States. This American debate can be compared to Canada, which dealt with secession related to Quebec, and to Hong Kong. Hong Kong is labeled a Special Administrative Region of the People's Republic of China (PRC) but it has far more autonomy than any mainland province. Hong Kong has a Bill of Rights, a relatively independent High Court, etc. There is an underlying dispute, however, over whether Hong Kong's sovereignty derives from the British – Chinese Treaty of 1993, or from the PRC Constitution.

Professors interested in teaching about the U.S. Supreme Court's actual use of foreign law in recent constitutional cases can focus on Justice Breyer's dissent in *Printz v. United States*<sup>8</sup> The majority ruled that Congress illegally commandeered state law enforcement officials by enacting a federal law requesting state assistance with background checks on gun purchasers. In dissent, Justice Breyer relied on Switzerland as a system in which local authorities regularly assisted the national government. Yet, several legal scholars convincingly argued that Breyer did not fully appreciate the Swiss system.<sup>9</sup> Even Breyer admitted that he regretted citing a Zimbabwe case in another opinion. Conservatives and liberals can find plenty of ammunition in these cases.

#### b. The "rights" Constitution

On individual rights issues, the U.S. Supreme Court often invokes three levels of scrutiny: rationality, intermediate, and strict. Yet numerous scholars have pointed out that the Court actually employs many scrutiny gradations.<sup>10</sup> In the affirmative action case, *Grutter v.*

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<sup>6</sup> 514 U.S. 779 (1995).

<sup>7</sup> 17 U.S. 316 (1819).

<sup>8</sup> 521 U.S. 898 (1997).

<sup>9</sup> See e.g. Rick Hills, Is Breyer's pro-commandeering argument in *Printz* the worst comparative constitutional law argument ever?, Prawfs Blawg, Sep. 9, 2008 (last visited July 19, 2009), <http://www.typepad.com/services/trackback/6a00d8341c6a7953ef00e554f3feaa8833>.

<sup>10</sup> See e.g. Jeffrey Shaman, *Constitutional Interpretation* 111 (2001)(discussing Randall Kelso's view that the Court has at least six levels of scrutiny); Suzanne Goldberg "Equality Without Tiers," 77 *S. Cal. L. Rev.* 481 (2004).

*Bollinger*,<sup>11</sup> Justice O'Connor claimed she was using strict scrutiny but actually deferred to the university. Moreover, the Court in *Texas v. Lawrence*<sup>12</sup> said it was using rationality review yet struck down the law prohibiting gay sex.

My students usually notice this level of scrutiny problem quickly and are puzzled by it. I therefore ask whether it would be better to have a system of European or Canadian type of proportionality in which the Supreme Court explicitly weighs interests in a more nuanced fashion. Usually my students then backpedal. They say that the American system is better because proportionality gives too much discretion to judges. Again, conservative scholars might be pleased by this pro-American reaction to foreign law.

Of course, there are numerous differences between the U.S. and foreign nations in particular rights areas. Most nations reject the death penalty. On equal protection, many countries endorse substantive equality rather than American formalistic equality. Equality cases in India focus on caste and class, not race.

On religion, many countries are less separationist because their constitutions lack an Establishment Clause. This is another way that foreign law may support American conservative results. Indeed, there is little doubt that U.S. Establishment Clause doctrine is confusing.

Regarding free speech, Internet cases provide a host of opportunities to discuss differing foreign approaches especially on hate speech, pornography, commercial speech (gambling) etc. A professor can discuss the famous case where Bavaria briefly forced the American company Compuserve to remove sexually explicit sites, or the more recent Yahoo! case involving Nazi memorabilia advertised in France. These both address the "race to the bottom" problem.

One can also contrast the U.S. Supreme Court's rejection of socio-economic rights with South Africa's Constitutional Court decisions.<sup>13</sup> Or one can describe how India's Constitution makes such rights "aspirational," though their Supreme Court has gone farther. Similarly one can contrast the U.S. Supreme Court's *DeShaney v. Winnebago Cty. Social Services*,<sup>14</sup> finding no affirmative duty to protect, with provisions in the German Basic Law, or with the South African Constitutional Court's decision in *Carmichele v. Minister of Safety*.<sup>15</sup>

Perhaps the most dramatic comparison involves interpretive method. Originalism has a unique power and significance in the American system which it lacks in other countries. One

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<sup>11</sup> 539 U.S. 306 (2003).

<sup>12</sup> 539 U.S. 558 (2003).

<sup>13</sup> See e.g. *Government of the Republic of South Africa v. Grootboom*, 2000 SA CLR Lexis 126.

<sup>14</sup> 489 U.S. 189 (1989).

<sup>15</sup> 2001 (4) SA 938 (CC).

can offer views from these other countries about why originalism has not taken hold.<sup>16</sup> Inevitably such views delve into the most fundamental questions about different legal systems. Even if particular students will not practice or teach constitutional law, this knowledge of other systems can be beneficial in their international interactions, whether in business, in life, over the Internet, etc.

Lastly, professors can employ a novel teaching technique to help integrate foreign law. During my first class on American constitutional rights, I write a list of possible rights on the front board (ranging from the right to own a gun, the right to freedom of religion, the right to housing, etc.). I then ask the students to break into small groups and rank the rights in importance. During class-wide discussion, I ask the groups to share their justifications. When students mention less common rights, I will highlight their foreign judicial sources. We do this exercise before reading any U.S. Supreme Court rights cases.

In sum, one can integrate foreign law perspectives into domestic constitutional law classes in ways that do not take much time and that benefit the class, especially in this era of globalization. Students painlessly learn about diverse normative possibilities. Moreover, I put the Landsberg, Jacobs book and various comparative constitutional law casebooks (Tushnet & Jackson, Dorsen & Rosenfeld) on reserve for those who may be interested in further reading.

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<sup>16</sup> Michel Rosenfeld, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts," 2 *Int'l J. Const. L.* No. 2 (October 2004).