

## The Use of International and Comparative Sources in a Domestic Constitutional Law Course

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Law schools in the United States have begun to recognize the need to provide global perspectives in so-called domestic law courses.<sup>1</sup> Broadly speaking, the goals of globalizing the curriculum are to prepare for the practice of law in an era of increasing globalization, improve understanding and application of domestic law, and provide leadership in the global community.

This recognition extends to Constitutional Law.<sup>2</sup> Nonetheless, the case books commonly used to teach Constitutional Law in law schools contain almost no comparative or international materials.<sup>3</sup> The most obvious reason is that the case books already have more pages than a conscientious professor can cover in the time allotted. Some of the most popular U.S. Constitutional Law case books run to between 1600 and 1900 pages of very dense and difficult material. It is unrealistic to expect students to give careful attention to all this material, so faculty must almost always make hard choices as to which material to cover and which material to skip.

Thus, many U.S. law professors are torn between the need for coverage of basic domestic concepts and our felt need to also introduce global perspectives, which can be invaluable in illuminating the U.S. Constitution. In addition, of course, international law is a direct source of constitutional law. Moreover, exposure to foreign constitutional law helps

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<sup>1</sup> . See, e.g., Mathias Reimann, *From the Law of Nations to Transnational Law*, 22 Penn. St. Intl.L.R. 397 (2004) and *Making Transnational Law Mandatory: Requirements, Costs, Benefits*, 23 Penn. St. Intl.L.R. 787 (2005); Franklin A. Gevurtz, et al, *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 Pac. McGeorge Global Bus. & Dev. L.J. 267 (2006). I discuss Pacific McGeorge School of Law's experience in teaching global issues in my paper, *Globalizing the Curriculum Through the Introduction of International, Transnational And Comparative Law Issues into Traditionally Domestically Oriented Required Courses*, <http://www.law.georgetown.edu/cle/documents/GLS/03FINALLandsberg.pdf> , from which some of the points in this paper are drawn.

<sup>2</sup> See, e.g., Neil S. Siegel, *Some Modest Uses of Transnational Legal Perspectives in First-Year Constitutional Law*, 56 J. Legal Ed. 201 (2006); Mark Tushnet, *How (And How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 St. Louis U.L.J. 671 (2005).

<sup>3</sup> *But see*, Donald Kommers, *American Constitutional Law: Cases, Essays and Comparative Notes* (Rowman & Littlefield, 2d ed. 2004), which "stands alone among all American constitutional law casebooks for the amount and excellence of its treatment of comparative constitutional issues." David Fontana, The George Washington University Law School., <http://www.rowmanlittlefield.com/Catalog/Reviews.shtml?command=Search&db=^DB/CATALOG.db&eqSKUdata=0742563669> . Rowman & Littlefield, however, directs its publications to a wide range of university courses rather than to law school texts.

prepare students for practice in a globalized society. Limited exposure will not lead to understanding of other constitutions, but will both whet the interest and create awareness that more study is needed if one engages in a global law practice. Deeper understanding can be fostered in courses in International Law and in the newer discipline of Comparative Constitutional Law.<sup>4</sup> Finally, exposure to foreign constitutional cases can help students understand the debate over the use of foreign law as persuasive authority in American constitutional cases.

U.S. law schools have adopted a variety of approaches to globalizing the curriculum. At my law school, Pacific McGeorge School of Law, we are experimenting with the pervasive approach, incorporating global perspectives into many domestic courses, including Constitutional Law.<sup>5</sup> Pacific McGeorge's Professor Franklin Gevurtz has edited a series of "Global Issues" books for West Publishing Company, which has grown to eighteen titles, covering most of the core curriculum and some other courses. While Pacific McGeorge School of Law has not generally required its professors to go global, many of us have been using these books in our required classes, and others have been incorporating international and comparative materials without assigning these books.

Two books in the series cover constitutional law.<sup>6</sup> These books are designed to help constitutional law professors who wish to provide some exposure to global perspectives but are concerned about detracting unduly from core coverage. The amount of comparative and international law material available is overwhelming. Our object was not to write comprehensive books but to give faculty a modest menu of comparative and international materials from which to choose. The books are relatively short, to minimize the need to cut some domestic coverage in order to add comparative and international coverage. The materials are keyed to the major themes of most constitutional law courses: constitutionalism, judicial review, separation of powers, federalism, individual rights, the tensions between the right to speak and the harms that some speech may cause, and the tensions between the free exercise of religion and the separation of church and state. Some professors may feel comfortable assigning the entire book, while others will wish to pick and choose.

Professors who teach domestic constitutional law courses may not have a sophisticated knowledge of international law or the constitutional law of other countries. We believe that, with the help of a good teachers manual,<sup>7</sup> they can nonetheless use global issues in their

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<sup>4</sup> For very fine case books, see, e.g., Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer, *Comparative Constitutionalism: Cases and Materials* (2003) and Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (2d ed. 2006).

<sup>5</sup> For a helpful survey of methods, see James R. Maxeiner, *Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums*, 32 *Fordham Int'l L.J.* 32 (2008).

<sup>6</sup> Brian K. Landsberg and Leslie Gielow Jacobs, *Global Issues in Constitutional Law* (Thomson West 2007); Alan Brownstein and Leslie Gielow Jacobs, *Global Issues in Freedom of Speech and Religion* (West 2009).

<sup>7</sup> Here is an example from the teachers manual for *Global Issues in Constitutional Law*: "**Systems of Constitutional Review**. The question this section poses is whether the surface differences among the various systems it describes substantially affect judicial review in practice. This section both shows the impact of *Marbury v. Madison* on other legal systems and also shows that other methods of constitutional review are possible. Note 2-4 asks the students

courses. Not only will their students gain greater understanding, but the professors also will gain deeper knowledge. Use of these supplements is likely to lead to increased interest in comparative and international law, both by faculty and students. This has proved to be the case for our faculty and, to a lesser extent, our students.

Overall student reactions have been positive, even though use of the material may have lengthened some reading assignments. Many students recognize the growing force of globalization in the law and are hungry to learn more. Student comments in spring 2008 about use of the Global Issues book in my Constitutional Law class ranged from very positive to very negative.<sup>8</sup> In a broader survey of 496 students in spring 2009 about the use of global issues in their required classes, a majority of the students reported that they found the materials

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to reflect on the common statement that English courts may not review constitutional issues, because England lacks a written constitution. The rise of the administrative state, the development of European Union law, and generational changes require re-assessment of that view. Note 2-5 calls attention to features of Canadian constitutional review. The *Amax Potash* case has obvious parallels with U.S. jurisdiction stripping cases. Section 52(1) of the Canadian Constitution resembles the U.S. Supremacy clause but does not explicitly provide for judicial review, while Section 24(1) explicitly creates judicial review of claims under the Charter of Rights and Freedoms. Section 33, which allows temporary legislative override of constitutional decisions, can be the springboard for a useful discussion of the relationship between judicial review and a democratic system. Note 2-6 contrasts the German Basic Law's description of constitutional review jurisdiction with Article III simple arising under language. The notion of the court as exercising a referee like function and the practice of issuing admonitory decisions also stand in contrast to U.S. notions of judicial review. Although South Africa adopted the German model of creating a Constitutional Court, the jurisdiction of lower courts over constitutional issues is treated differently. Finally, Note 2-7 examines the French and Chinese systems, which seemingly turn constitutional review over to non-judicial bodies. This note underscores that constitutional review of the validity of statutes may be treated differently than constitutional review of administrative decision making and executive action."

<sup>8</sup> Five liked the book. Seven said to get rid of it. Three said we should get rid of it unless we were going to have more classroom discussion of it. Here are the few comments in spring 2008 course evaluations [out of 46 responses]:

Can global issues book.

Don't like global issues

Global issues should be taken away

Like your book

Global book is good

Global issues reading was POINTLESS unless we are going to be tested on it by the bar

Spending a little more time with the "Global Issues" would be nice

The global issues book was X helpful

The global issues book was better [than the main text]

I only read the first few assignments from the global issues book. I didn't find it that helpful, honestly

Global issues reading is not helpful when not discussed in class

I liked the global issues book. I thought it brought some very interesting perspective.

Not assign global issues unless there is more intent on discussing it

We should get rid of the global issues book. Con Law is confusing and complicated as it is. No need to compare and contrast con law with foreign confusing constitutional cases.

I didn't think global issues was necessary

The global issues book added some interesting perspectives

interesting, including 10% who found them very interesting. About half the students even said the materials were more interesting than their domestic law materials, and about half also said that their exposure to global materials made them more likely to take international electives. A slight majority also said that the materials aided their understanding of law, and three quarters of the students said that the global materials helped them to see alternate approaches to legal problems, and three quarters also felt more alert to issues that may arise in an era of increased globalization.

Student criticisms of the global materials focused on two issues: the utility of the materials and the ways in which the materials were used. Some students thought the materials were not useful, because they would not be tested in their classes, would not be tested on the bar, or because the student felt that their future law practice would be purely domestic. Some students felt the materials were not discussed enough in class, were a confusing distraction, or that the professors needed to cut back on readings of domestic materials if they were adding global materials. Professors using global materials can minimize these student concerns by explaining the increasing globalization of domestic law practice, including assigned global materials in classroom discussions of constitutional law, using global issues in some exam questions, and exercising judgment as to the size of assignments.

Positive comments tended to note the way that global materials helped put domestic law into perspective, asked for even more exposure to international materials, and noted the globalization of economies and work forces.

The Global Issues series is meant to supplement domestic law case books. The need for such materials is highlighted by the fact that students are much more likely to be exposed to global materials when a Global Issues book has been published. However, the Global Issues series is not the ideal. Major publishers have flooded the market with at least twenty major course books in U.S. Constitutional Law. While every case book is drafted as a unitary resource, Global Issues books must be written for use with a wide variety of domestic texts. I believe the quality of the Global Issues Constitutional Law books is high, but they are no substitute for incorporating global materials into the domestic Constitutional Law case books. Ultimately, we, as the persons who are selecting what books to use in our domestic law courses must exert pressure on authors and publishers to add global materials to their books.

One possible criticism of the pervasive technique is that it necessarily oversimplifies global issues. Occasional reading and discussion of international, transnational, or comparative cases and materials fails to put them into context. A second criticism is that these materials are irrelevant to the future law practice of many graduates. Both critiques suggest that students who are interested in global issues should take global courses and that students who are not interested in them need not take them. I believe that these critiques misconceive the purposes of introducing global materials into domestic courses. The materials are not a substitute for classes in international, transnational or comparative law. They serve separate pedagogical and utilitarian purposes: to enhance understanding of domestic law and to prepare students for the globalization of legal practice.