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ABSTRACT

Promoting change in civic education means rethinking what are the important aspects to teach about the Constitution, law, and democracy to equip students to be effective and affective citizens. The scope of instruction needs to broaden to include specific comparisons between the U.S. federal system of law and constitutionalism with counterparts in oth - nations. The comparative approach offers three functions: (1) creates an awareness of alternatives; (2) allows students to test the relative impact of various social, economic, demographic, political, or intellectual factors on the form of different nation's civic cultures; and (3) permits students to identify common patterns of action and behavior. A discussion of various constitutions and laws provides examples to learn about the advantages and limitations of the U.S. Constitution, law, and policy. The examples show the unique aspects of the U.S. Constitution and law, gives meaning to concepts of globalization, internationalization, and multiculturalism, and provides opportunities to appreciate others. Two proposals promote a modest and a radical view on instruction: (1) the modest proposal combines the multicultural emphasis to a broadened vision of cross-cultural and international studies of law and law-related subjects; and (2) the radical proposal adopts a strongly thematic and value-based approach that would look less at understanding the system and more on appreciating the values embodied in that system. (CK)

The Power of Comparison in Teaching about Constitutionalism, Law, and Democracy

Kermit L. Hall

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H. G. Wells once remarked that history is "a race between education and catastrophe."[1] Today the latter often seems to be winning. Violence, intolerance, and ethnic conflict punctuate our national existence and plague other nations as well. We have, under such circumstances, a right to ask ourselves whether education has a role in solving the great problems of the modern age. The challenge, of course, is not new. Plato pondered 2,500 years ago the fact that while education can make people clever it cannot make them good. And history is replete with examples of peoples and societies that were well educated but evil. Nazi Germany comes immediately to mind. One of Adolph Hitler's chief lieutenants, Martin Borman, once explained that the only purpose of schools was to produce "useful coolies."[2] Joseph Stalin called education "a weapon whose

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[1] As quoted in Tony Augarde, ed., The Oxford Dictionary of Modern Quotations (New York: Oxford University Press, 1991), p. 225.

[2] As quoted in Barry James, "UNESCO Panel to Ponder the Challenge to Education of Creating a New Humanism," International Herald Tribune, February 17, 1993, p. 1.

effect depends on who holds it in his hands and at whom it is aimed."[3] What we teach, therefore, and how we teach it can make a substantial difference in the outcome of Wells's race.

There is no doubt that an important part of winning that race is forging a meaningful link between learning and civic responsibility. John Adams, the second president of the United States, appreciated as much, when he observed in the wake of the ratification of this nation's constitution that "liberty cannot be preserved without a general knowledge among the people."[4]

What is it, therefore, that we should be teaching in order to equip the next generation to become literate in constitutionalism, democracy, and the law? We do not pose this question in isolation. We are part of a worldwide revolution in human rights, federalism, and civic education for democracy. Anyone who reads through the international press during the past three months surely appreciates that the wave of democratic reform sweeping the world has generated unprecedented interest in civic education. In nations as different as Haiti, Poland, the United Kingdom, Russia, the Ukraine, and even China, civic education has become a high

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[3] As quoted in ibid.

[4] As quoted in ibid.

priority.[5] And if any further evidence of interest is necessary, then we need look only to newly elected President Bill Clinton, who has called for the establishment of a volunteer Democracy Corps to nurture democratic development through the promotion of civic education in nations emerging from communism and authoritarianism.

Here at home the ferment has reached a high pitch. So much so that consumer advocate Ralph Nader has come forward with a new how-to book on civic education, titled Civics for Democracy: A Journey for Teachers and Students.[6] Nader claims the time for change has come in teaching civic education because the present curriculum is "built on dull, abstract principles" when it ought to engage students in activities like energy surveys in their schools and educate them in civic action techniques, including staging press conferences and using the Freedom of Information Act.[7]

Nader may or may not be right about his prescription for civic activism. That is not our concern here. Instead, his call for reform merely echoes other

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[5] See, for example, International Herald Tribune, February 17, 1993; The British Broadcasting Corporation: Summary of World Broadcasts, January 4, 1993; and South China Morning Post, December 17, 1992.

[6] Civics for Democracy: A Journey for Teachers and Students (Washington, D. C.: Essential Books, 1993).

[7] As quoted in Sacramento Bee, December 4, 1992.

efforts, such as the Civitas project.[8] The time has arrived for a fresh look at the way in which we go about educating our students for democracy, and doing so is especially crucial given the resurgent interest in most of the rest of the world in that very subject. What gives added urgency to this task is that we live in a time of unrelenting criticism of schools, of public education, of teacher performance, and of what our students understand about law and democracy, some of which Nader would doubtless describe as "dull, and abstract." We hear repeatedly of civic illiterates -- of students that do not know enough to even know how to be good citizens. There must be a problem; everyone, it seems, is telling us that there is.

That problem exists in two dimensions. First, there is not enough teaching about issues of governance, law, and democracy. Second, and of concern to us today, is Nader's charge that much of what is taught is anachronistic and dull. We might add to this list a charge of parochialism rooted, at least partly, in the recently entombed Cold War.

We probably should not waste time quibbling about degrees of failure, although the picture seems a bit too stark to reflect accurately where we are and how we can improve. For the sake of argument, however, let's accept that we

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[8] Charles F. Bahmueller, ed., Civitas: A Framework for Civic Education (Calabasas, CA.: Center for Civic Education, 1991).

should do more teaching and concentrate on the second of these two shortcomings -- what is taught or, to put the matter correctly, what is not taught.

There is a substantial content problem, although it is far more challenging than Nader would suppose. The state of teaching about constitutionalism, democracy, and law reflects not so much the inadequacies of the teachers as the way in which they are prepared to teach these subjects, especially as historical matters. In the universities and colleges where the next generation of teachers is trained, the history of law and legal institutions have taken a back seat to social history, with its emphasis on history from the bottom up, its attention to ethno-cultural, gender, and race issues, and its concern for informal rather than formal means of social control. And if current debates about the need to devote greater attention to ethnicity and race in the schools are any indication, there is little reason to believe that we are likely to see, without some real efforts, more attention devoted to constitutionalism and liberty as important subjects for would-be teachers. Before we start casting stones at what goes on in K through 12 instruction about civics, those of us in higher education ought to take account of our own glass houses.

While many constitutional and legal historians view the ascendancy of social history as a threat, such a reaction is unwarranted on intellectual and pragmatic grounds. The law, legal processes, and legal institutions should be a part of the

social history of America, but the sad fact is that we are not equipping teachers with an integrated view of either. University history departments and colleges of education have some responsibility in this matter, and up till now they have both done a poor job of fulfilling it. Social history and constitutional/legal history are reciprocal and reinforcing; that is the way in which teachers should learn about them. Such an approach is also one of the best ways of demonstrating to students the important lesson that the study of law and society go together -- not apart.

The history of the Bill of Rights and the Constitution, as Nader correctly observes, have for too long been treated as subjects dealing with bearded white men sitting on a distant national court. Do not mistake me; these justices and their Supreme Court have been important. We should, however, do more to stretch the traditional boundaries of law and constitutionalism so that teachers learn about the history of "rights consciousness," "distributive justice," and "total justice," to invoke some of the phrases associated with the so-called new legal history.[9] In sum, until history departments and schools of education offer teachers an integrated view of social and legal history, we are unlikely to be able to make a convincing case that in the zero sum game of education more resources should be directed to instruction about the Constitution, law, and democracy.

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[9] See, for example, Kermit L. Hall, The Magic Mirror: Law in American History (New York: Oxford University Press, 1990), pp. 330-31, 333-36.

Promoting change will also mean rethinking the conceptual base that informs what is taught. What is most important in teaching about the Constitution, law, and democracy is not their content but their meaning and value. Nader is right; we should equip our students to be effective as well as affective citizens. Yet we should also remember, as Nader seems not to, that meaningful social action is always rooted in a clear understanding of the principles -- invariably abstract principles -- at play in any social situation. There is a difference, of course, between teaching dull principles and dully teaching important principles.

The question is, in a world of democratic revolutions, how do we accomplish this goal? Instead of issuing a laundry list of recommendations, let us concentrate on one concrete suggestion. Whether from an historical or contemporary political science/civics/law related education perspective, we need to broaden the scope of what is taught to include specific comparisons between the American federal system of law and constitutionalism and its counterparts in the states and other nations. The task before us is not just to "globalize" our teaching, although that is certainly an important part of the task. We also need to push our students, who will work, live, and compete in the global village, to appreciate, once again, that law is a system of social choice and that different cultures have and do make different choices.

What are the virtues of a comparative approach? It offers three broadly overlapping purposes or functions. First and most basic, comparison creates an awareness of alternatives, showing developments to be significant that without a comparative perspective might not appear so. Second, comparison as a teaching method, serves as a primitive form of "experimentation." The approach allows students to test the relative impact of various social, economic, demographic, political, or intellectual factors on the form of different nation's civic cultures. Third, the comparative approach also allows students to identify common patterns of action and behavior. Comparisons, for example, can teach our students about the vagaries of our federal system (How much, by the way, do you know about your state constitution and bill of rights?) while breaking down the parochialism that has clothed much teaching about civics since World War II.

The comparative approach should start at home. Bear in mind that if we teach little about the national constitutional and legal order we do even less to explain state and local developments. Most teachers, we might conjecture, are simply not equipped to deal with the shift from state-based to nationally centered federalism. Yet the experience of the states in organizing government and distributing and protecting rights has been crucial. State constitutions and state bills of rights have historically filled the gaps created by our incomplete federal Constitution. The

federal document is largely unintelligible without reference to the state documents and, as important, comparisons between federal and state experiences and practices offer an excellent starting point for a general appreciation of constitutional government in the United States.

State bills of right, of course, provided the model for the federal Bill of Rights. State constitutions are the oldest continuous source of constitutional government in the world, with the Massachusetts Constitution of 1780 holding the record today. Until only quite recently, however, these state bills of rights and the constitutions of which they are a part had faded in importance. In their place, the federal Bill of Rights and national protection of liberty had become far more important. One of the reasons that the state bills of rights faded in important was that they, like the constitutions of the Third World that I will shortly discuss, became increasingly codes of law rather than fundamental frames of government. The U. S. Constitution is about 7,500 words, long, even with its 27 amendments; only Vermont today has a shorter constitution. The average state constitution is about 27,000 words long. While there has been only one federal constitutional convention, there have be more than 230 state conventions and more than 8,500 amendments made to these documents. In short, state constitutions have become super-legislation, promising through constitutional law that which could not be

attained through the regular legislative process.[10]

Recently, state constitutions and their associated bills of right have gone through a renaissance, a new federalism. With the due process revolution of the Warren Court era at an end, civil rights lawyers have turned to the state documents to raise the ceiling of liberty above the floor created by the federal Bill of Rights.[11] In light of this revolution in the "new federalism" that is expanding the scope of all of our rights that both teachers and students know practically nothing about these developments.

We can also profitably search for comparisons beyond our own border. We need to remember that different cultures do indeed have different ways of going about making social choices through the law. This insight becomes especially important since there is a revolution underway, and once again we are ill-prepared to deal with it, even though doing so would place our scheme of governance in sharp relief. During the last two decades there has been a world-wide renaissance in federalism and individual rights. There have been sweeping efforts at

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[10] Kermit L. Hall, "Mostly Anchor and Little Sail: The Evolution of American State Constitutions," in Paul Finkelman and Stephen E. Gottlieb, Toward a Usable Past: Liberty Under State Constitutions (Athens: The University of Georgia Press, 1991), pp. 388-418.

[11] Kermit L. Hall, "Floors and Ceilings: The New Federalism and State Bills of Rights," in David J. Bodenhamer and James W. Ely, Jr., eds., The Bill of Rights in Modern America: After 200 Years (Bloomington, Ind.: Indiana University Press, 1993), pp. 191-206.

constitutional reforms in Canada, India, Nigeria, Switzerland, Australia, and, most recently, Eastern Europe and the former Soviet Union.[12] We are not the only nation on earth to have either a written constitution or a bill of rights, yet we invariably teach about both as if that were the case.[13] Our nation is one of the few in the world to rely on judicial interpretation of a relatively brief constitutional text as a means of protecting individual rights. Such a practice, of course, means that we have considerably more lawyers and place a substantially greater premium on the adversarial process than does, for example, a country like Japan. They have one lawyer for every 9,000 people; we have one lawyer for every 235 people. By 1995 we will have 1 million lawyers in the United States. Depending on where you are on the political spectrum this bounty of lawyers is either a disaster or a necessary condition to accommodate unprecedented racial, gender, economic, and technological change sweeping our society.[14] What the figures reveal, in any case, is that it is a distinctly -- indeed, almost a uniquely -- American response to broader issues that beset the entire planet.

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[12] See, for example, E. L. Roy Hunt, "Human Rights in a New World Order," Florida Journal of International Law 6 (Fall 1990): 1-4.

[13] Louis Henkin and Albert J. Rosenthal, eds., Constitutionalism and Rights: The Influence of the United States Constitution Abroad (New York: Columbia University Press, 1990).

[14] Lawrence M. Friedman, Total Justice (New York: Russel Sage Foundation, 1985), pp. 7 - 10.

Much of the explanation for this uniqueness stems from the American approach to rights. We have historically placed tremendous weight on individual rather than group rights, and we have, as a result, turned to courts and lawyers to pursue and defend those rights. Most countries of the developing world and of socialized industrial nations have taken a significantly different approach, one in which they have developed social constitutions. These documents not only give different weight to individual and group rights, but they also are considerably longer than the American federal Constitution.

One need, for example, to consider the social constitutions of the Philippines, Nigeria, and Brazil. The governing documents of those countries offer extensive written guarantees to economic rights, equality for different ethnic groups, and rights of the urban poor.

The Philippine Constitution, for example, declares "Filipino" to be the official language, and it obliges government to promote agrarian land reform, equality for women, better family life, free public education, health care, and urban housing. It even provides that each person has a right to participate in sports which the government is duty bound to promote. In short, the Filipinos ask a great deal of their constitution, although one can look at the history of that nation to understand why these provisions would be included.

Documents such as that of the Philippines contrast sharply with our Bill of Rights, which makes only broad promises and makes those promises legally not politically enforceable. In essence, countries around the world are attempting to use social constitutions for the purpose of radical reform -- they seek through their declarations or bills of right, for example, to invent as well as interpret society. These are, moreover, often lengthy documents -- Nigeria's constitution has 279 articles; Brazil's has more than 400; and the Philippines has almost 200 articles.

Moreover, in each of these countries, the judiciary remains relatively weak, a condition that contrasts sharply with the American experience. In many countries the power of the judiciary to interpret the constitution is often frustrated by military force, by an aggressive legislature, or by a system of government organization that does not allow for what is deemed legal to be conclusive in matters of political dispute.

An interesting variant, is the place of the Charter of Rights in Canada, hardly a developing country. Its new constitution grafted a Charter of Rights and Freedom and judicial review onto a federal parliamentary system, but that constitution contains a novel provision which permits parliament to suspend major individual rights for up to five years. What this means, is that parliament can checkmate the judiciary, should it think that the judges are getting our of control -

- becoming an imperial force. At the same time, the framers of the new charter have provided that both the right to vote and the right to be educated in English or French are exempt from this override provision.

What all of this adds up to is that the American scheme of rights, as set forth in the majestic generalities of the Bill of Rights, is unique for the great reliance it places on judicial review and protection of those rights. The social constitutions of much of the rest of the world are not just wordy, but they guarantee too much without the legal, economic, and political wherewithal to fulfill those promises. When promises go unfilled, people lose faith not just in government, but in the idea of constitutionalism itself. We need only have our students look at events in Eastern Europe today to appreciate the difficulty that political leaders there face in making rights a legal as well as a political reality.

That we do not have social constitutions tells us much about the advantages, as well as the limitations, of our scheme of rights and our practice of protecting those rights through the continuing constitutional convention that we call the Supreme Court. The power of comparison in history is always telling, and an especially strong case can be made for such an approach in teaching about constitutionalism and rights rather than just about the Constitution and the Bill of Rights.

A comparative approach is also helpful because it affirms that there was nothing inevitable about the outcome of the controversies that produced our present constitutional and legal order. At any one of several points events could have taken a different turn. Equally important, it is essential that our students understand that other countries have, when confronted with the same set of circumstances, decided to make social choices quite different from ours.

Take, for example, the matter of hate speech, a subject very much with us today. Why has American law and policy developed in a different direction than in virtually every other country in the world? Most countries prohibit the expression of offensive racial, religious, or ethnic propaganda. According to Human Rights Watch, "The United States stands virtually alone in having no valid statutes penalizing expression that is offensive or insulting on such grounds as race, religion or ethnicity."[15] A report by Article 9, a London-based anti-censorship organization, concluded that on this issue the world could be divided into "the United States and the rest." In the former, it reported, "the balance is

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[15] Human Rights Watch, "Hate Speech" and Freedom of Expression: A Human Rights Watch Policy Paper (New York: Human Rights Watch, March 1992), p. 7. There are, of course, many laws on the books, but they would stand little chance of passing constitutional scrutiny in light of R.A.V. v. City of St. Paul, 60 U. S. L. W. 4667 (June 22, 1992).

unequivocally draw in favor of freedom of speech."[16]

The following examples are offered to drive home the point of how exceptional the American response to hate speech has been. The 1986 Public Order Act in the United Kingdom makes it a crime to use threatening, abusive or insulting words to behavior with respect to color, race, nationality (including citizenship) or ethnic or national origins. The constitution of Brazil declares that propaganda relating to religious, race or class prejudice shall not be tolerated. In Turkey a person faces a prison term of one to three years for publicly inciting people to hatred and enmity on the basis of class, race, religion, sect or region.[17] Germany has a specific law allowing any victim of the Holocaust to bring a legal action against anyone who denies that the Holocaust occurred.[18] Closer to home, the Canadian Charter of Rights and Freedoms balances a guarantee of freedom of expression with the proviso that "reasonable limits" on individual rights may be justified. The Canadian Supreme Court used this rationale to sustain the criminal

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[16] Kevin Boyle, "Overview of a Dilemma: Censorship Versus Racism," in Sandra Coliver, ed., Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination (London: Article 19, 1992), p. 4.

[17] These examples are drawn from ibid.

[18] Eric Stein, "History Against Free Speech: The New German Law Against 'Auschwitz" - and other 'Lies'," Michigan Law Review, 85 (November 1986): 277-324.

conviction of a teacher who made anti-semitic remarks in the classroom.[19] This list of examples, by the way, does not include the several important international human rights declarations, such as the 1966 International Covenant on Civil and Political Rights, that go even further in calling for limitations on offensive speech.[20]

The point of such comparisons is manifold. First, it is important, at least where matters of hate speech and civil discourse are involved, that we appreciate how unique we are. Teachers of American history and culture have long wrestled with the question of American exceptionalism. We know what we are by knowing how others are different or alike. In the case of hate speech, the American response is genuinely unique, but it is also a dramatic affirmation of how much stock we put in individual expression, the ways in which that emphasis deeply complicates are race relations, and how such basic instincts are transmitted through law and legal institutions. Indeed, we might consider hate speech, when viewed in that way, as one of the "costs" of a constitutional democracy. It is for some, at least, a dramatic manifestation of the darker side of our emphasis on protecting individual rights through the law.

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[19] Kathleen Mahoney, "The Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography," Law and Contemporary Problems, 55 (Winter 1992): 77-105.

[20] For a comprehensive collection see Ian Brownlie, ed., Basic Documents of Human Rights, second edition (Oxford: Clarendon Press, 1981).

Second, such comparisons begin to move our students and their teachers toward giving real meaning to the concepts of globalization, internationalization, and multiculturalism. We have given in the last few years considerable attention to the ways in which the American economy functions in the international marketplace. The new economic literacy, to coin a phrase, is distinctly cross-cultural and multi-national. So too must be the new democratic literacy. We have to cease to think parochially about our scheme of governance, about constitutionalism, about rights, and about law, if we are to be fully competitive. There is, in the end, a far richer, more complex, and ultimately more challenging vision of who we are as a people if we are willing to take account of how we compare with other people, in other places, trying to make the same social choices.

Third, the inherent cosmopolitanism of a comparative approach holds the additional promise of elevating the entire educational experience, for both teachers and students. We cannot pretend any longer to be educated people and learn about others through our own language, English. The end of the Cold War has not only liberated us from the military-industrial complex, but it has given us the opportunity to appreciate others on their terms rather than ours.

All of this talk of comparisons, either internal or external, may strike some

as so much pie-in-the-sky. We cannot, the argument runs, get our students to understand the American system, let alone that of another country, even one so close in language, culture, and geography as Canada. One might argue that the absence of a comparative dimension in teaching about constitutionalism, law, and democracy may well explain why students neither appreciate nor understand their own system as well as they might. We tend, after all, to understand best that for which we have a reference point. So, what seems a cute approach on first impression may, in fact, be quite fundamental.

Leaving aside questions of how to teach comparatively, some of us may become upset at the inherent value choices it raises. After all, any student exposed to the way in which hate speech is treated in the rest of world might appropriately ask whether American exceptionalism in this matter is a good thing. Of course, that is exactly what we should be doing with our students: challenging them to think critically about our system of governance and law. The specter of the "Red Menace" has lifted; we can take some comfort in knowing that others may actually have a better way of proceeding in certain matters, such as hate speech. Even if we discover that our present arrangements are best, we will have students who will in fact have greater fidelity to them simply because they have critically explored other possibilities.

In conclusion, two proposals come to mind, one modest, the other radical. The modest proposal would be that we encourage teachers to couple the current emphasis on multiculturalism to a broadened vision of cross-cultural and international studies of law and law-related subjects. We do not have to overhaul the curriculum to do so, we just need teachers who understand that at certain key points in teaching about "our" system of constitutionalism, law, and democracy they can actually achieve more by teaching less about "us" and more about "them."

The more radical proposal would be to shift conceptual gears entirely in teaching these subjects and adopt a strongly thematic and value-based approach that would look less to having students understand our system and more to having them appreciate the values embodied in that system. Hence, any examination of American governance would necessarily raise the question for students of whether absolute free speech is desirable. That discussion would necessarily take place in a comparative dimension, one in which students would learn that other cultures weigh ends and means differently from ours, that they organize to protect rights differently, and that they produce, as a result, a civic culture and a social order that may be more or less desirable than ours. This approach, of course, would require a radical redesign of teaching materials, a more open and accepting

approach to the world around us, and a sophisticated new undergraduate curriculum for future teachers of government, civics, and law in grades K through 12.

Under either proposal, we need to affirm that the history of American legal culture is the history of concepts, ideas, and values -- they are Nader's dull, abstract principles. What we so often miss, however, is that these principles will take on greater meaning when viewed in comparative perspective. Our legal history is one of human choices and decisions, some made for good, others for ill. What students need to grasp is that, as a nation, we long ago committed ourselves to the idea of the rule of law, of limited government, and to a scheme of rights protected through law and safeguarded by judicial power. Hence, students need to know something of the ideas that inform the history of the Constitution as well as the structures through which competing constitutional claims -- by government and by individuals -- have been lawfully reconciled. The framing of the Constitution, the creation of the Bill of Rights, and the subsequent development of both have importance not in and of themselves but as they reveal to us how well (and not so well) they have performed in distributing social costs, allocating power, and granting benefits and rewards.

The passing of the Cold War and the decline of communism is a wonderful

moment to reach out and understand the rest of the world on its own terms, not ours. The comparative approach promises to do what is essential: help our students appreciate that all law is a system of social choice, that such choices are conditioned by underlying social and cultural assumptions, and that as important to understanding the date of the ratification of the Constitution is a grasp of the relationship between social systems and legal regimes.

As H. G. Wells reminded us, our history is a race between education and catastrophe. The value of a comparative approach in this contest is to increase the accuracy of our knowledge about constitutionalism, law and democracy and in so doing to help our students both to make better informed choices at home at the same time that they become an effective part of an ever shrinking world.