

SOME MODEST USES OF TRANSNATIONAL PERSPECTIVES IN FIRST-YEAR CONSTITUTIONAL LAW

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INTRODUCTION

To be clear, I write and teach about U.S. constitutional law and federal jurisdiction. I am not a comparative constitutional lawyer, nor do I aspire to be one at this point. Yet I was unable to persuade Mark Tushnet and Tom Rowe that I might not be well suited to serve on this panel! After reflecting on how I teach first-year students, I may have a better understanding of what I can contribute. Even professors who remain focused on U.S. constitutional law find it useful to incorporate transnational legal perspectives in their instruction.

In this brief essay, I identify several types of uses of transnational perspectives in a first-year class in constitutional law, and I illustrate those uses with examples from doctrinal areas that I cover in my course. I conclude with a qualifier to put into perspective my integration of transnational outlooks in teaching constitutional law.

I. PEDAGOGICAL COMPARISONS TO PRACTICES IN OTHER COUNTRIES

Comparing constitutional practices in the United States with those elsewhere gives students the sense that the American constitutional structure is not inevitable or necessarily best. Such comparisons can thus stimulate normative discussions about which approaches to constitutional questions are most desirable and why one approach was adopted and not another.

In the area of separation of powers, for example, I draw from foreign legal experience in teaching the bedrock question of judicial review in *Marbury v. Madison*.¹ In my experience, many students come to law school believing that U.S.-style judicial supremacy constitutes a logical entailment of a written constitution that imposes meaningful limits on the exercise of government power. Alexander Hamilton's defense of judicial review in *Federalist 78* and Chief Justice Marshall's reasoning in *Marbury* solidify – and may be partly responsible for – that impression. I have found that I can motivate

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¹ 5 U.S. 137 (1803).

students to think critically about the functional advisability, as opposed to logical necessity, of judicial supremacy by stressing that no other democracy in the world has a high court with as much authority to resolve constitutional questions as the U.S. Supreme Court. The idea that “it couldn’t be otherwise” becomes more difficult to sustain if it *is* otherwise elsewhere.²

When my course turns to federalism, I find it instructive to compare the U.S. Supreme Court’s view of commandeering with that of the European Union. The general view of the member states of the European Union on the issue of commandeering versus preemption is the opposite of the U.S. Supreme Court’s position; member states would rather be commandeered (they use the term “directives”) than preempted (they refer to “regulations”).³ Among other things,⁴ their judgment is that directives leave them with more regulatory power.

In an expression of comparative interest on the Supreme Court, Justice Breyer’s dissent in *Printz v. United States*⁵ flags that view of commandeering on the other side of the Atlantic:

At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle

² Mark Tushnet offers a pedagogically useful example: “[T]he Canadian ‘notwithstanding’ mechanism . . . allows a legislature to override specific constitutional provisions by majority vote, in legislation that sunsets after five years, a period that necessarily encompasses an election in which the voters can decide whether they approve of the legislature’s action.” Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 675 (2005) (citing Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33).

³ See, e.g., Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 800, 801 (2004) [hereinafter “*Of Power and Responsibility*”] (arguing that the Tenth Amendment decisions “stand in striking contrast to the analogous doctrines of the European Court of Justice,” and exploring some of the “reasons for welcoming ‘commandeering’ in the European Union but not in the United States”); Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 214 (Kalypso Nicolaidis & Robert Howse eds., 2001) [hereinafter “*The Issue of Commandeering*”] (“In the European Union, by contrast, the subject of concern is not Union action that ‘commandeers’ Member State legislative or administrative bodies, but EU legislative activity that has direct effect in the legal systems of the Member States. Member States tend not to welcome Community regulations, which have immediate legal force for individuals within a Member State, and instead prefer that the Community pass directives, which command a Member State to regulate in a particular area and thus require further Member State legislative action to become fully effective within that state. So, too, ‘commandeering’ is a basic feature of German federalism . . .”) (footnote omitted). See also ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 236 (2000) (discussing the difference between directives and regulations in EU law).

⁴ Halberstam stresses that “the United States Supreme Court treats the various levels of government as permanently hostile adversaries that have reached a bargain in a historically situated arms-length deal, whereas the European Court of Justice views the various actors as fundamentally joined in a common enterprise.” Halberstam, *Of Power and Responsibility*, *supra* note 3, at 801.

⁵ 521 U. S. 898 (1997) (relying on an anticommandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act, which required state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks).

that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body. Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *Am. J. Comp. L.* 205, 237 (1990); D. Currie, *The Constitution of the Federal Republic of Germany* 66, 84 (1994); Mackenzie-Stuart, *Foreword, Comparative Constitutional Federalism: Europe and America* ix (M. Tushnet ed. 1990); Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 *Md. L.Rev.* 1658, 1675-1677 (1995). *They do so in part because they believe that such a system interferes less, not more, with the independent authority of the “state,” member nation, or other subsidiary government, and helps to safeguard individual liberty as well.*⁶

Writing for the majority, Justice Scalia declined Justice Breyer’s invitation to look abroad, deeming “such comparative analysis inappropriate to the task of interpreting a constitution.”⁷

To be sure, dabbling in comparative law by contrasting legal regimes briefly at a high level of abstraction does not put students in a good position to offer sophisticated assessments of the wisdom of current Tenth Amendment doctrine. Justice Breyer rightly recognized that “we are interpreting our own Constitution, and not those of other nations, and there may be relevant political and structural differences between their systems and our own.”⁸ Indeed, Daniel Halberstam’s searching analysis of the institutional dynamics in the United States and European Union helps to account for their opposite approaches to commandeering:

The US anti-commandeering rule exists in the context of a federal system marked by independently constituted, independently competent levels of governance that coexist . . . with a powerful federal government whose sphere of influence has proven difficult to contain by other means. Here, the anti-commandeering rule may be viewed as a consensus-forcing device by separating independent tiers of governance and requiring federal and State decision makers to reach agreement before working together. . . . [T]he EU and Germany have both preserved . . . limitations on central government expansion and mechanisms of component State control over central government norms. Constitutional provisions and practical realities

⁶ *Printz*, 521 U.S. at 976-77 (Breyer, J., dissenting) (emphasis added).

⁷ *Id.* at 921 n.11 (opinion of the Court).

⁸ *Id.* at 977 (Breyer, J., dissenting).

in both the EU and Germany make the central governing structure in both systems dependent on the component States for administrative services. And in both systems, component States are represented in their corporate capacities in the central governing institutions. Thus, . . . commandeering is embedded within a system of consensus-forcing governance with structural limitations on the expansion of the central government. . . . [C]ommandeering may be viewed as a further mechanism to maintain the dependence of the central government on the component States *and to preserve a sphere for additional component State input* while carrying out central commands.⁹

Professor Halberstam sheds important light on the question of why the governing views of commandeering are so different on each side of the Atlantic. Note, however, that his analysis supports Justice Breyer's claim that the European "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."¹⁰ Justice Breyer's view that commandeering tends to afford states greater regulatory control than does preemption is corroborated by Halberstam's comparative exploration of commandeering in Europe.

Turning from constitutional structure to individual rights, I ask my students to consider the potential relevance of the fact that many European countries restrict access to abortion to a much greater extent than the U.S. Supreme Court has allowed,¹¹ yet those communities provide more explicit and robust protection of other privacy rights.¹²

⁹ Halberstam, *The Issue of Commandeering*, *supra* note 3, at 249-50 (footnote omitted) (emphasis added).

¹⁰ *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

¹¹ In the recent juvenile death penalty case, Justice Scalia charged the Court with indefensible inconsistency given its inattention to foreign law in abortion cases:

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. See Larsen, Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L.J. 1283, 1320 (2004); Center for Reproductive Rights, *The World's Abortion Laws* (June 2004), http://www.reproductiverights.org/pub_fac_abortion_laws.html. Though the Government and *amici* in cases following *Roe v. Wade*, 410 U.S. 113 . . . (1973), urged the Court to follow the international community's lead, these arguments fell on deaf ears. See McCrudden, A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court, in *Law at the End of Life: The Supreme Court and Assisted Suicide* 125, 129-130 (C. Schneider ed. 2000).

Roper v. Simmons, 125 S. Ct. 1183, 1227 (2005) (Scalia, J., dissenting). See also generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (analyzing continental abortion law).

¹² For example, Germans enjoy robust protection of personal "dignity" (Article I) and the "right to the free development of . . . personality" (Article II), together with provisions protecting the "[p]rivacy of letters, posts, and telecommunications" (Article 10) and the "[i]nviolability of the home" (Article 13), in their Constitution. BASIC LAW for the Federal Republic of Germany, at <http://www.psr.keele.ac.uk/docs/german.htm> (visited Dec. 1, 2005).

The point of the example is not to suggest an inconsistency within the European view, but to underscore a strong contrast with U.S. constitutional law. That contrast encourages U.S. students to consider whether cases like *Roe v. Wade*¹³ necessarily follow from a broad conception of privacy rights. The comparison is independently useful as a pedagogical device to clear the ideological air – that is, it illustrates that appeals to transnational legal perspectives can be used to support both liberal and conservative constitutional commitments.

II. THE RELEVANCE OF INTERNATIONAL LAW IN U.S. CONSTITUTIONAL CASES

Transnational perspectives also inform my teaching of the U.S. Supreme Court's decisions in the "war on terror." In treating decisions like *Hamdi v. Rumsfeld*¹⁴ and *Hamdan v. Rumsfeld*,¹⁵ I expose my students to some of the substance of the international law of war and the content of the Geneva Conventions. Justice O'Connor's and Justice Souter's opinions in *Hamdi* draw from those sources of law.¹⁶ In addition, the experiences of other nations are often relevant in normatively evaluating the strength of the government's purported interests in prosecuting the current war. The United States has come to grapple with such constitutional questions as the indefinite, incommunicado detention (or torture) of terror suspects more recently than have, for

That is a more extensive right to privacy than Americans possess, particularly because the right has been used to protect personal data and privacy from invasions by the press and market. *See, e.g.*, Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 186 ("The German courts have decided several cases addressing the balance between the right to 'informational self-determination' and 'freedom of the press.' The courts' analysis, of course, depends upon a constitutional context quite different from ours: the privacy right is expressly protected by the German Constitution and applies to relationships among citizens, not simply between the citizen and the state.").

¹³ 410 U.S. 113 (1973) (holding that the right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and protected by the Due Process Clause of the Fourteenth Amendment embraces a right to abortion).

¹⁴ 542 U.S. 507 (2004).

¹⁵ 415 F. 3d 33 (D.C. Cir. 2005), *cert. granted*, --- S. Ct. ---, 2005 WL 2922488 (Nov. 7, 2005) (No. 05-184). *See infra* note 16 (discussing *Hamdan*).

¹⁶ For example, Justice O'Connor wrote that "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §§ 1-6 (1997)). Army Regulation 190-8 was adopted to implement the Geneva Convention. It specifies the procedures that administrative military tribunals must follow in determining a detainee's prisoner-of-war (POW) status. *Id.*; *see also Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (suggesting that the Government was violating Army Regulation 190-8 because the President, not a competent tribunal, had determined the POW status of Taliban detainees, including Hamdi). This past summer, the U.S. Court of Appeals for the District of Columbia Circuit considered the Government's appeal of a district court ruling adopting Justice Souter's reasoning and applying it to the detainees at Guantanamo Bay, Cuba, *see Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (Robertson, J.). On July 15, 2005, the D.C. Circuit reversed the district court's judgment, holding that, *inter alia*, Congress had authorized the military commissions at Guantanamo Bay, the Geneva Convention gave detainees no right to enforce the treaty's provisions in court, and the Guantanamo military commissions satisfied Army Regulation 109-8's "competent tribunal" requirement. *See supra* note 15.

example, the United Kingdom and Israel.¹⁷ We are thus better situated to learn the lessons of their history, rather than to teach the world our own.

III. THE SUPREME COURT'S INVOCATIONS OF FOREIGN LEGAL PRACTICES

Finally, the debate among the Justices themselves regarding the citation of foreign legal authority in their opinions has made it important to consider the relevance of transnational legal perspectives in teaching foundational issues of constitutional interpretation. Among other questions, it is not clear what independent work the majority's invocation of foreign legal authority is doing in the majority opinions in *Atkins v. Virginia*,¹⁸ *Lawrence v. Texas*,¹⁹ and *Roper v. Simmons*.²⁰ Nor is it clear what is the weighty objection to invocations of such authority, but not law review articles, the Bible, or Blackstone.

Perhaps most fundamentally, this debate raises profound questions for proponents of the view that the meaning of the Constitution changes over time.²¹ To what extent does the authority of the Constitution as ethos – as an evolving instantiation of collective identity²² – encompass not just an overlapping consensus on contemporary American values, but those of the world as well? Whatever one's answer to that question, transnational legal perspectives facilitate its formulation, and asking it implicates the nature and legitimate scope of the U.S. Supreme Court's exercise of judicial review in constitutional cases.

CONCLUSION

I do not mean to overstate the case for transnational perspectives in first-year constitutional law. I introduce my students to outlooks in other countries because I believe they are both important in their own right and pedagogically useful in prompting

¹⁷ See, e.g., Brief *Amicus Curiae* of Comparative Law Scholars and Experts on the Laws of the United Kingdom and Israel in Support of Respondent, *Rumsfeld v. Padilla*, No. 03-1027 (filed Apr. 12, 2004), at 3 (stressing “how dramatically the indefinite, incommunicado detention to which Petitioner has subjected Jose Padilla departs from the minimum procedural protections that other democracies provide detained suspected terrorists”); H.C. 5100/94, Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) P.D. 817, reprinted in 38 I.L.M. 1471 (prohibiting aggressive methods of interrogating terror suspects because they had not been legislatively authorized).

¹⁸ 536 U.S. 304 (2002) (holding that the execution of mentally retarded persons is prohibited by the Eighth and Fourteenth Amendments).

¹⁹ 539 U.S. 558 (2003) (holding that a Texas law making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment).

²⁰ 125 S. Ct. 1183 (2005) (holding that the execution of persons who were under 18 years of age at the time they committed their capital crimes is prohibited by the Eighth and Fourteenth Amendments).

²¹ See, e.g., *Roper*, 125 S. Ct. at 1205 (Stevens, J., concurring) (“that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text”).

²² See generally Robert C. Post, *Theories of Constitutional Interpretation*, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 23-50 (1995).

students to resist the normative power of the actual constitutional arrangements with which they are most familiar.²³ But a first law-school course in U.S. constitutional law is just that – a class focused on the U.S. Supreme Court’s exercise of judicial review in constitutional cases. The transnational dimension, in other words, constitutes a relatively minor part of my overall course.

To be sure, times change and thus so does the content of U.S. constitutional law. Transnational perspectives arguably matter more in a post-9/11 world, where the U.S. Supreme Court continues to confront the legal limits of Presidential power in the war on terror. But class time remains a scarce resource that must be husbanded with care, and coverage tradeoffs abound that must be negotiated with discipline.²⁴ U.S. constitutional law, moreover, is a difficult subject for beginning law students to master when studied on its own terms; routinely adding other legal systems to the course discussion can cultivate confusion, not clarity. Finally, one must confront the daunting reality that accounts for my original reticence to participate in this event: It often proves difficult for teachers who are not comparative constitutional lawyers to construct transnational examples that are both intellectually serious and pedagogically tractable.²⁵ For all those reasons, I would suggest that transnational legal perspectives are best cast in a modest, supporting role in first-year courses in constitutional law.

²³ I am grateful to my friend and Federal Courts instructor, Paul Mishkin, for teaching me about “the normative power of the actual” in law and life.

²⁴ *Accord* Tushnet, *supra* note 2, at 672 (“[T]he more of one thing one does in a class, the less one can do of something else. Each teacher will have to decide whether the trade-offs attendant to adding references to non-U.S. materials are worth it.”).

²⁵ *Id.* at 671 (“[T]he task of incorporating non-national material in a nationally oriented course is not an easy one. Facile comparisons are easy; serious ones difficult. Differences in culture, in legal traditions, and in institutional arrangements other than the one being compared at the moment all require great caution in suggesting to U.S. law students that they can become better lawyers by knowing a little bit about non-U.S. law.”).

