

## COMPARATIVE CONSTITUTIONAL LAW IN CONSTITUTIONAL INTERPRETATION

**By:**

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I. Overview: The debate over using foreign/comparative law in interpreting the U.S. Constitution

A. U.S. Supreme Court debates: *Roper v. Simmons*, *Lawrence v. Texas*, *Atkins v. Virginia*; Scalia/Rehnquist/Thomas dissents in those cases

B. Public debate among the Justices: Breyer versus Scalia in American University debate; Ginsburg, O'Connor, Breyer and Scalia speeches at American Society of International Law meetings

C. Academic debate: Posner's 2005 Harvard Law Review *Foreword* (with commentary by Professors Waldron, Young, Jackson), and his related writings; 2004 American Journal of International Law *Agora* (essays by Professors Alford, Aleinikoff, Koh, Neuman, Ramsey); major articles by Professors Alford (critical) and Cleveland (supportive).

D. Has even gained the attention of Congress: 2004, 2005 hearings

E. Comparative perspective: use by other constitutional courts, South African constitution; David Law's *Generic Constitutional Law*.

II. Although dismissed by some commentators, the debate goes to the heart of constitutional interpretation: how much court should look at foreign practices depends on what one thinks constitutional courts are doing.

A. Scalia: foreign law has little role, because courts should be seeking a fixed historical meaning of the Constitution, or looking to how it applies to modern circumstances in light of unique American traditions. (*Roper*, *Lawrence*, *Atkins* dissents)

B. Breyer: sees judges as pragmatists, looking for solutions; so might embrace foreign laws and practices as a way of testing what works and what doesn't (See David Law's article: constitutional courts face common challenges). Analogy here to U.S. states as laboratories to see what works – why not expand this to foreign jurisdictions as well? (E.g., *Washington v. Glucksberg*, *Printz v. United States* (Breyer, dissenting)).

C. Natural law: not openly embraced by the Court but implicit in some opinions and explicit in some commentary – look for moral consensus, or moral wisdom (or both)

1. search for universal principles, which may be reflected in foreign practice (see Alford, criticizing; Waldron, commentary on Posner, endorsing cautiously; Posner: “To cite foreign decisions as precedents is indeed to flirt with the idea of universal natural law, or, what amounts to almost the same thing, to suppose fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.”).

2. or, “moral vanguardism” (from Posner’s *Foreword*), which Posner associates with Justice Kennedy: “The search for such a [worldwide] consensus is an effort to ground controversial Supreme Court judgments in something more objective than the Justices’ political preferences and thus to make the Court’s political decisions seem less political. Natural law is, in principle, suprapolitical. The problem is that there is pervasive disagreement on its actual content, on how to ascertain it, and on how to resolve disagreements over it. Maybe the answer lies in searching out a global judicial consensus.”

D. Lack of theory – simply citing something that sounds good. (Waldron, commentary on Posner, complaining “that no one on the Court [in *Roper*] bothered to articulate a general theory of the citation and authority of foreign law.”)

E. Foreign law as a counterpoint – rejection of universalist claims, demonstration of other ways of doing things (Ramsey, *American Journal of International Law*)

F. Summary: Debating the use of foreign law demands that one examine what it means to do constitutional interpretation.

III. Debate also points up the challenges of (and skepticism about) comparative law

A. Difficulty of understanding a constitutional practice – ideas of rights or of constitutional structure are hard to grasp in isolation from the rest of a legal system

1. Posner, *Foreword*: “foreign decisions emerge from complex social, political, cultural, and historical backgrounds of which Supreme Court Justices, like other American judges and lawyers, are largely ignorant. To know how much weight to give a decision of the German Constitutional Court in an abortion case, one would want to know such things as how the judges of that court are appointed, how they conceive of their role, and, most important and most elusive, how German attitudes toward abortion have been shaped by peculiarities of German history, notably the abortion jurisprudence of the Weimar Republic, thought to have set the stage for Nazi Germany’s program of involuntary euthanasia.”

2. Breyer, commentary on European federalism in Printz dissent, and Young's Comment on Posner, suggesting that Breyer misunderstood the European model

3. These concerns seem applicable to scholars as well, perhaps with less force, but especially to attempts to make claims about universal, or even widespread, values

B. Even if a practice is understood, what does it mean? Is it good or bad that some other system operates differently? For the pragmatist, how do we know if another system works well, or if it would work well transferred here? (Much harder than assessing U.S. states). For the universalist, how do we know foreign law reflects foreign social values (note some European populations favor death penalty, even though it is outlawed there)? Or if those values are good ones – might the common approach also be wrong (note American Revolution went against common international assumptions)?

C. Problem of selectivity (what Posner calls “promiscuous opportunism”): “If foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's corpora juris to find it.”

1. selectivity within an issue – why look at some countries instead of others?

2. selectivity across issues – why use comparative analysis in some places and not others? (E.g., gay rights but not abortion?).

3. easy to fall into opportunistic use because these questions are so difficult.

D. Summary: Debating the use of foreign law highlights the challenges of understanding foreign law, and the risks of “comparative law lite”

#### IV. Challenges of integrating comparative constitutional law into the 1L curriculum

##### A. Practical issues

1. Court has used foreign law mostly in cases not usually in 1L curriculum (most prominently in death penalty cases)

2. 1L curriculum is typically not much about constitutional theory; although use of comparative law poses great questions for exploring theories of constitutional interpretation, this is likely better done in upper level courses

## B. Danger of shallow, piecemeal integration

1. Failure to develop theory of how comparative materials should be used, due to lack of time, raises problems of opportunism

2. Lack of broad knowledge of foreign legal systems, among both instructors and students, and authors of classroom materials, reinforces danger of selective or shallow use

3. In sum, serious danger that it will lead to failure to think critically or systematically, but only to support pre-existing intuitions, whether of American superiority or American short-sightedness

## C. Thus, suggestion to use modestly:

1. to show how U.S. system is similar to/different from other systems without trying to make normative judgments; show that other systems struggle with similar problems, and sometimes come to different answers (which may be better or worse)

2. avoid comprehensive claims; stick close to well-known systems. E.g., state/local, Britain and British-derived systems as opposed to more exotic ones

3. use to challenge universalist assumptions, that there can be only one way of doing things; by showing alternatives, illustrate substance of choices made by U.S. system, and make those choices seem more real

D. Illustration: unitary executive, in context of cases either trying to split executive power or shift power to Congress – it is helpful for students to consider other systems to see what the debate is about. I use systems that I know well – not always foreign, but state and local, which have very different executive structures (California has multiple independent executive officers; San Diego has an executive/legislative council).

Shows that other systems are possible (for good and bad) without trying to make normative judgments or universal claims, or stretching beyond something I can understand; allows students to see the constitutional debate over executive power in more practical terms.

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