

Principle or Ideology? A Comparativist Perspective on The U.S. Controversy Over Supreme Court Citations to Foreign Authorities

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Summary

Constitutions are typically deeply embedded in national psyches and cultures making comparisons hazardous. For example, similarly phrased free speech provisions have resulted in widely diverging scopes of protection. Yet, in spite of these difficulties, there has been an increasing *use* of comparative constitutional materials over the last couple of decades both by constitution-makers and constitutional adjudicators. The South African Constitution goes so far as specifically empowering courts to consider foreign constitutional law when interpreting the country's Bill of Rights. But even in the United States, with its strong strains of constitutional exclusivism and exceptionalism, the Supreme Court has referred to foreign authorities in cases involving highly contentious issues such as the death penalty and the rights of homosexuals.

The debate among scholars concerning the legitimate scope of comparative work in constitutional law centers around three broadly defined positions. Proponents of the first of these maintain that both the problems of constitutional law and their solution are, or ought to be, essentially the same across the spectrum of full-fledged constitutional democracies. Advocates of the second position agree that the problems of constitutional law are the same for all, but are convinced that the solutions to these problems are likely to differ from one constitutional polity to the next. Finally, partisans of the third position are persuaded that neither the constitutional problems nor their solutions are likely to be the same for different constitutional democracies. The first position tends towards constitutional universalism, and turns to comparative constitutionalism to elucidate the proper standards and to spotlight deviations from the latter. The second position is poised to highlight differences and to place them in their proper context, thus shedding light on how different one constitutional system is from the next, and why such constitutional systems -- including the comparativist's own system -- differ from one another. The third position leads to the conclusion that comparisons are most likely to be ultimately arbitrary, and that the comparativists choices and analyses are bound to be driven above all by ideology.

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If the issues confronting most constitutional polities are essentially the same, and if the resolution of these issues is, or ought to be, largely the same for all, then the comparativist can play a key role that is both constructive and critical. That role would involve three distinct tasks: distill essential similarities from contingent differences; elaborate a constructive account of relevant constitutional experiences in polities that have developed a jurisprudence on a given issue for use in polities that first confront the issue in question; and provide a critical assessment of the actual handling of a constitutional issue in ways that thwart the achievement of attainable similarities in outcome.

For those comparativists who maintain that constitutional issues are largely the same across the board, but that their resolution ought to differ from one polity to the next, the principal task is to establish and explain relevant differences. Like their counterparts who emphasize similarities, the comparativists who concentrate on differences must deal with the dynamic between identity and difference. But unlike their counterparts, the comparativists of difference do not regard identity as essential and difference as contingent. They regard the identity of issues and problems as providing a common baseline for analysis, and the differences in the various solutions given to the same problem as the key to understanding the uniqueness of each constitutional polity. Consistent with this understanding, the principal role of the comparativist of difference is also multifaceted. Above all, such a comparativist is in an optimal position to contribute to an understanding of how each constitutional jurisdiction – and perhaps most importantly her own – is unique. Moreover, although from the standpoint under consideration, difference looms as prior to identity certain constitutional cultures bear closer similarity to one another than to others. Accordingly, by providing a proper accounting of differences, the comparativist can illuminate when and how similar solutions to the same problem across constitutional boundaries may be appropriate. Finally, just as the comparativist of identity plays a useful critical role, so too can the comparativist of difference. In the latter case, the critical role will be primarily geared to pointing to misunderstanding or improperly accounting for relevant differences.

Certain critical theorists have emphasized that the crucial task confronting the comparativist is that of properly evaluating the import of the similarities and differences encountered in the course of comparing constitutional jurisprudences. However, in the view of these theorists, such proper evaluation may well be beyond the reach of the comparativist because of unavoidable ideological biases. Under this view, the comparativist inevitably imposes the biases of his or her own constitutional culture on all materials from other cultures that are slated for comparison.

All three positions are at least in part persuasive, and a dynamic conception of the interplay among them provides a credible insight into the true potential of comparativism. It is reasonable to reject the highly implausible hypothesis that comparison in the realm of constitutional law is either altogether impossible, or that its findings are bound to be utterly irrelevant. It follows from this that any hypothesis concerning the utility and the potential of comparison in this field must recognize that there must be both identities and differences among systems, and that these are relevant for comparison even if the exact relevance of

particular identities or differences or concerning what ultimately ought to count as a relevant similarity or difference remains in dispute.

There is one bias, the national one, that does seemingly set the comparativist apart. Regardless of internal domestic ideological divisions, scholars, judges, politicians and citizens within the same country may share a national bias that sets them apart from their counterparts in other countries. The American ideology and legal culture is thus different from the French, German or Russian one, and the American scholar will most likely be unable to shed his national identity when dealing with foreign legal materials. This seemingly inevitable national bias may even be stronger when dealing with constitutional law, which is likely to be closer to the core of national identity than other fields, such as a commercial law.

The key question concerns the importance rather than the existence of this national bias. This bias is not as important as it may at first appear for two principal reasons. First, the national bias is one among many that spread across borders and that may be equally relevant from the standpoint of the comparativist. Second, once aware of the national bias, one can take steps to mitigate it even if it can never be eradicated. One can explore the political and cultural context in which foreign constitutional law is embedded, read the foreign country's domestic scholarship, enter into dialogue with foreign comparativists, domestic constitutional law scholars, etc. In short, the comparativist is like a person who needs to learn and use a foreign language to function in an alien land. The person in question will never dominate the foreign language as she does her native one or shed her non-native accent in her newly acquired language. Nevertheless, she will be understood and will in turn be able to learn much about her hosts and their way of life.

The American controversy over citations to foreign authorities is primarily among judges and it has arisen in cases dealing with highly divisive issues such as the death penalty for juveniles or the mentally impaired and the rights of homosexuals. These issues have long divided American judges and the larger polity along moral, political, religious, ideological and constitutional grounds. The more recent controversy over citations to foreign authorities, on the other hand, arose as a consequence of certain historical changes. Most notably, after the fall of the Berlin Wall in 1989, constitutionalism promptly spread throughout the formerly communist polities in Europe followed by rapid expansion into other polities throughout the world, including South Africa, much of South America and many countries in other parts of the world. Moreover, this trend not only brought constitutional democracy to an ever-increasing number of polities, but it also led to the proliferation of constitutional adjudication by courts extending to all corners of the world.

These developments had two salient consequences for American constitutionalism. They put an end to American constitutional hegemony and they yielded a rich and varied judicial constitutional jurisprudence available to be mined for various purposes involving either identification or differentiation between American and non-American approaches and results with respect to similar issues.

Concurrently with the spread of constitutionalism, and particularly after the United States became the only superpower upon the dissolution of the Soviet Union in the early 1990s, there was an intensification of the divide among the respective proponents of two opposing visions of America. The first of these is the exclusivist vision. In the exclusivist view, the United States is a country with a unique destiny, exemplary values and ideals, and it serves as a model for the rest of the world. Under the second, universalist view, on the other hand, the United States is a diverse cosmopolitan nation which is as much influenced by trends and developments coming from abroad as the rest of the world is influenced by it.

In their current incarnations, the exclusivist view is mainly held by political conservatives; the universalist, by progressives. Moreover, for the exclusivists the United States Constitution must remain purely American and free from foreign influence or contamination. For the universalist, in contrast, there is a convergence of norms and values, at least among advanced constitutional democracies, which makes constitutional cross-fertilization attractive and often useful.

The question of the legitimacy of comparison divides exceptionalists and universalists. For the exceptionalists, at the extreme, consistent with American originalism, which confines legitimate constitutional interpretation to discovery and implementation of the framers' intent, comparativism is downright illegitimate, a position embraced by Justice Scalia. Universalists, in contrast, may well find foreign authorities and common traditions shared with foreign polities legitimate interpretive resources in the elaboration of a legitimate constitutional jurisprudence. The broader the framing of the issues, and the more they are conceived as evolving, the greater it would seem that comparative considerations would be fruitful.

In the last analysis, comparativism in constitutional adjudication can play an important positive role. This is *because* there are enough similarities, differences and ideological issues with respect to constitutional adjudication and constitutional scholarship, and *because* these are contested and contestable. Paradoxically, were similarities, differences and ideological biases obvious and fixed, there would be less of a need for comparativism. But because the interplay between identities and differences and the irruption of ideological bias are constantly in a state of flux, the relationship between one's turf and the broader universe of which it is a part must constantly be reexamined. Comparativism is thus essential not only to keep abreast of how we relate to others and of what we may profitably learn from them, but also to better understand ourselves so as to forge a better constitutional path for our own polity.