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Migration as a new metaphor in comparative constitutional law

SUJIT CHOUDHRY

The politics of comparative constitutional law

Usually judges ask the questions, but on this night the roles were reversed. The occasion was a public conversation between United States Supreme Court Justices Breyer and Scalia, answering questions posed by constitutional scholar Norman Dorsen.[1] The topic was the 'Constitutional Relevance of Foreign Court Decisions' to the Court's constitutional case law. For a court routinely called upon to address the most divisive issues in US public life, judicial citation practices hardly seem worthy of a rare evening with two of its most distinguished members. Yet the auditorium was packed, with hundreds more watching over a live video feed.

Court observers knew that the event merited close attention. The backdrop was the Court's increasing use of comparative and international law – both described as 'foreign' to the US constitutional order – in its constitutional decisions over the previous decade. This practice – which I term the migration of constitutional ideas – has deeply divided an already divided Court, along the same ideological lines which have polarized its jurisprudence. Breyer and Scalia are the leading figures in this ongoing jurisprudential drama, although other Justices have joined the debate. Their initial skirmish, in *Printz*,[2] arose in a challenge to federal attempts to 'commandeer' state officials to deliver federal

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[1] There are two transcripts of this conversation, a verbatim record from American University and an edited version in the *International Journal of Constitutional Law* – I cite both as appropriate. A conversation between U.S. Supreme Court justices (2005) 3 *International Journal of Constitutional Law* 519; Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law, available at http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

[2] *Printz* v. *United States*, 521 US 898 (1997).

programmes. Breyer suggested that the constitutionality of this practice in European federations was relevant to the Court's analysis, while Scalia, delivering the opinion of the Court, declared 'comparative analysis inappropriate to the task of interpreting a constitution'.[3] The battle quickly moved to the interpretation of the Bill of Rights, principally in cases involving the death penalty. In dissenting judgments in denials of *certiorari* to challenges to the 'death row phenomenon' (*Knight*,[4] *Foster*[5]), Breyer invoked the unconstitutionality of lengthy waits on death row in other jurisdictions as 'relevant and informative',[6] 'useful even though not binding',[7] and as material that 'can help guide this Court'.[8] Justice Thomas, speaking for the majority, suggested that the citation of foreign jurisprudence indicated a lack of *legal* support in domestic materials,[9] and equated it with the imposition of 'foreign moods, fads or fashions on Americans'.[10]

Advocates of the migration of constitutional ideas, however, appear to have gained the upper hand. In *Lawrence* v. *Texas*,[11] where the Court struck down the criminal prohibition of sodomy and departed from its earlier holding in *Bowers* v. *Hardwick*,[12] Justice Kennedy's majority judgment cited decisions of the European Court of Human Rights to illustrate 'that the reasoning and holding in *Bowers* have been rejected elsewhere'.[13] Although it is possible to read *Lawrence*'s citation of European jurisprudence narrowly as a refutation of *Bowers*' claim that the prohibition of sodomy was universal in Western civilization, the better interpretation is Michael Ramsey's, who argues that the citation 'suggests that constitutional courts are all engaged in a common interpretive enterprise'.[14] Scalia, now in dissent, stated that the discussion of European case law was 'meaningless dicta'[15] and 'dangerous dicta'[16] because 'foreign views'[17] were not relevant to the interpretation of the US Constitution. And last spring in *Roper*,[18] the debate over the migration of

[3] *Ibid.*, at 2377. [4] *Knight* v. *Florida*, 528 US 990 (1990).
[5] *Foster* v. *Florida*, 537 US 990 (2002). [6] *Knight*, at 463. [7] *Ibid.*, at 528.
[8] *Foster*, at 472. [9] *Knight*, at 459. [10] *Foster*, at 470. [11] 539 US 558 (2003).
[12] 478 US 186 (1986). [13] *Lawrence*, at 2483.
[14] Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing before the Subcommittee on the Constitution, of the House Committee on the Judiciary, 108th Cong., 2d Sess. 568 (2004) (statement of Michael Ramsey); see also M. Ramsey, International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence* (2004) 98 *American Journal of International Law* 69.
[15] *Ibid.*, at 2495. [16] *Ibid.* [17] *Ibid.* [18] *Roper* v. *Simmons*, 543 US 551 (2005).

constitutional ideas was joined again. In finding the juvenile death penalty unconstitutional, Justice Kennedy (for the majority) reviewed a range of foreign sources and declared that they, 'while not controlling our outcome, ... provide respected and significant confirmation for our own conclusions'.[19] Scalia's dissent continued his series of escalating attacks on the Court's comparative turn. He accused the majority of holding the view 'that American law should conform to the laws of the rest of the world' – a view which 'ought to be rejected out of hand'.[20]

The Court's increasingly acrimonious exchanges over the citation of foreign sources had shed more heat than light. Justices advocating the migration of constitutional ideas had failed fully to justify this emergent interpretive practice – that is, to explain why foreign law should count. The evening (after oral argument in *Roper*, but before it was handed down) presented a rare opportunity for clarification. Although Breyer and Scalia both referred to foreign law, their focus appeared to be on comparative materials – that is, either judgments of other national courts, or international courts interpreting treaties not binding on the United States (e.g. the European Court of Human Rights, interpreting the European Convention on Human Rights) – as opposed to international legal materials which do bind the United States. Dorsen raised this issue at the outset, and Scalia rightly responded that the burden of justification squarely rested on the proponents of its use. As he noted, proponents and opponents of the use of comparative law agree that it is not 'authoritative' – i.e., that it is not binding as precedent. But as Scalia noted, the question then is what work foreign law *is* doing: 'What's going on here? ... if you don't want it to be authoritative, then what is the criterion for citing it? ... Why is it that foreign law would be relevant to what an American judge does when he interprets [the US Constitution]?'[21]

Scalia's retort shifted the persuasive onus to Breyer, and highlighted that his colleagues on the Court had offered casual and under-theorized responses to this fundamental question. Breyer did little that evening to advance his case. He began strongly, stating that he 'was taken rather by surprise, frankly, at the controversy that this matter has generated, because I thought it so obvious'.[22] The reason for comparative

[19] *Ibid.*, at 1200. [20] *Ibid.*, at 1226. [21] A conversation, 522–5.
[22] Transcript of Discussion.

engagement was that these materials were cited by advocates before the Court, and 'what's cited is what the lawyers tend to think is useful'. Now this begs the question of *why* these materials are useful. Breyer offered a pragamatic rationale, suggesting that foreign courts:

> . . . have problems that often, more and more, are similar to our own. They're dealing with . . . certain texts, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they're faced not with things that should be obvious – should we stop torture or whatever – they're faced with some of the really difficult ones where there's a lot to be said on both sides . . . If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something . . . [23]

So foreign judgments are a source of practical wisdom to the tough business of deciding hard cases where the positive legal materials run out. As Breyer put it, he was 'curious' about how other courts tackled similar problems.[24] Scalia pushed back, asking why judges should cite such cases, according normative status to their reasoning. Read the cases, 'indulge your curiosity! Just don't put it in your opinions', he said.[25] When faced with this argument on an earlier occasion, Breyer's response was simply to think 'All right'.[26] Having failed to explain why the Court should cite comparative case law, Breyer, by his own admission, became 'defensive' and opined that comparative engagement was about 'opening your eyes to things that are going on elsewhere'.[27] To cite comparative jurisprudence is to demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism. However, demonstrating worldliness is hardly adequate justification for a major shift in the Court's constitutional practice.

A lot is at stake in Breyer's failure to respond to Scalia's challenge. As Alexander Bickel explained over forty years ago, in liberal democracies which have opted for written constitutions enforced by unelected courts, the power of judicial review is a form of political power which cannot be legitimized through democratic accountability and control.[28] So courts

[23] *Ibid.* [24] A conversation, 534. [25] *Ibid.* [26] Transcript of Discussion.
[27] *Ibid.*
[28] *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven, CT, 1986).

must legitimize their power through both the processes whereby they determine whether issues come before the courts and the reasons for their judgments, somehow distinguishing adjudication from other forms of political decision-making. The various features of legal reasoning – *stare decisis*, for example – are more than just the means through which courts arrive at decisions. They define and constitute the courts' unique institutional identity. The very legitimacy of judicial institutions hinges on interpretive methodology. So courts *must* explain why comparative law should count. And if courts do not, judicial review is open to the charge of simply being politics by other means, cloaked in legal language, and subject to attenuated democratic control.

This is not a problem unique to the United States. As Alan Brudner wrote recently:

> . . . those who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions and in how international tribunals interpret human-rights instruments whose language is similar to that of their own texts. This interest, moreover, is a professional one. Comparative constitutional studies are valued, not as a leisurely after-hours pastime, but for the aid they give to judicial . . . interpreters of a national constitution.[29]

In each and every country where the migration of constitutional ideas is on the rise, the demands of justification must be met. This is true even for countries such as South Africa, whose Constitution provides that courts 'must consider international law' and 'may consider foreign law' in interpreting its Bill of Rights.[30] Although international law asserts its supremacy over the South African legal order, the South African Constitution only directs courts to 'consider' it, raising the question of *how* exactly it should be considered. And with 'foreign law' (i.e., comparative law), the additional question is why and under what circumstances courts should engage with it at all.

To be sure, the charge that comparative engagement is somehow undemocratic has gained widespread currency in US legal circles, albeit for an entirely different set of reasons with particular resonance in that

[29] *Constitutional Goods* (Oxford University Press, Oxford, 2004), p. viii.
[30] Constitution of the Republic of South Africa, s. 39(1).

country.[31] Contra Bickel, the argument made is that judicial review *is* a democratic practice in the United States. The constitutional text was popularly ratified, and so as Paul Kahn puts it:[32]

> . . . the primary work of the Supreme Court is to construct and maintain an understanding of our polity as the expression of the rule of law . . . our own Supreme Court . . . [is] engaged in the unique enterprise of maintaining the belief in American citizenship as participation in a popular sovereign that expresses itself in and through the rule of law . . .

To Americans, judicial review is legitimate because they view 'the Court as the voice of the Sovereign People'. Chief Justice John Marshall made this point brilliantly in *Marbury* v. *Madison*.[33] Moreover, federal judges, as Chief Justice Roberts pointed out in his confirmation hearings, 'are appointed through a process that allows for participation of the electorate' since both 'the President who nominates judges' and 'Senators who confirm judges are accountable to the people'.[34] For its opponents, the migration of constitutional ideas poses two threats to the democratic character of judicial review, from within and without the US constitutional order.

First, comparative engagement feeds into fears regarding judicial activism. For Scalia, the democratic character of judicial review not only justifies it, but sets limits on its content and scope. In particular, it counsels originalism, with courts serving as modern-day agents of the constitutional framers. Foreign law – whether comparative or international – on the originalist view, 'is irrelevant with one exception: old English law', which served as the backdrop for the framing of the constitutional text.[35] Now Scalia quickly concedes that originalism is no longer the exclusive method of US constitutional interpretation. The Eighth Amendment, for example, has been interpreted as incorporating 'evolving standards of decency that mark the progress of a maturing

[31] R. Posner, No Thanks, We Already Have Our Own Laws, *Legal Affairs*, July/August 2004.
[32] P. Kahn, Comparative Constitutionalism in a New Key (2003) 101 *Michigan Law Review* 2677 at 2685–6; see also K. Kersch, The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law (2005) 4 *Washington University Global Studies Law Review* 345.
[33] 5 US 137 (1803).
[34] Confirmation Hearing on the Nomination of John G. Roberts, Jr to be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary, 109th Cong., 1st Sess. 158 (13 September 2005) (statement of John Roberts).
[35] A conversation, 525.

society'.[36] Even here, though, Scalia argues that to maintain the democratic character of judicial review, the Court must rely on '[t]he standards of decency of American society – not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views'.[37] To retain its democratic legitimacy, the US practice of judicial review must fix its gaze firmly inward, not outward, taking cues from US political institutions and values.

The only theory of constitutional interpretation which permits comparative engagement, for Scalia, is one where the judge looks 'for what is the best answer to this social question in my judgment as an intelligent person', based on the 'moral perceptions of the justices'.[38] For Scalia, this would mean that constitutional adjudication is no more than the imposition of judicial policy preferences. Scalia sharpened this objection by suggesting that judges working with this theory cite comparative law selectively, such that '[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it'.[39] In his confirmation hearings, Chief Justice Roberts made the same point, testifying that 'looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there'.[40] Citing comparative law permits courts to achieve desired results while pretending they are engaged in a legal enterprise. For example, Scalia suggested that while the Court cited foreign law in *Lawrence* to expand the scope of liberty, it failed to cite comparative materials in its abortion jurisprudence *because* foreign courts have construed reproductive rights more narrowly than have US courts. In sum, the citation of comparative case law 'lends itself to manipulation',[41] or what Judge Posner has referred to as 'judicial fig-leafing',[42] designed to obscure the reality of judicial choice. And although he clearly disagrees with Scalia on the propriety of comparative citation, Breyer accepts that it is wrong for judges to 'substitute their own subjective views for that of a legislature'.[43]

The second objection to the migration of constitutional ideas is that it facilitates the erosion of US sovereignty by the forces of globalization.

[36] *Ibid.* [37] *Ibid.*, 526. [38] *Ibid.* [39] *Ibid.*, 521.
[40] Confirmation Hearing on the Nomination of John G. Roberts, Jr (13 September 2005).
[41] A conversation, 531. [42] Posner, No Thanks. [43] A conversation, 539.

The concern is not about the imposition of the elite social, political, and economic views of the judiciary on the US people. Rather, the fear is that comparative citation turns courts into agents of outside powers – international public opinion, international organizations, and even foreign governments – to thwart the will of the US public. Roger Alford has coined the term 'international countermajoritarian difficulty' to capture this idea.[44] As Alford writes, '[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle – constitutional supremacy – that can trump the democratic will'.[45] By contrast, constitutional adjudication which relies on sources internal to US constitutional culture is for that reason legitimate. As one questioner from the floor at the Breyer and Scalia session put it, 'these [i.e., non-US] legal materials have no democratic provenance, they have no democratic connection to this legal system, to this constitutional system, and thus lack democratic accountability as legal materials'.[46]

An important part of this argument is the elision of the distinction between international law binding on the United States and comparative materials which are not. Although their claims to authority in domestic legal orders are totally different, the two are nonetheless referred to together in the literature as 'international norms', 'international values', or 'international sources'.[47] As Breyer said on an earlier occasion, 'my description blurs the differences between what my law professors used to call comparative law and public international law. That refusal to distinguish (at least for present purposes) may simply reflect reality'.[48] Harold Koh uses the term 'transnational law' to conjoin the international and the comparative.[49] What binds these hitherto distinct bodies of law together is that they are from outside the United States and are viewed as threats to US sovereignty. Into this broad category fall the decisions of United Nations bodies, international treaties (including those to which

[44] R. Alford, Misusing International Sources to Interpret the Constitution (2004) 98 *American Journal of International Law* 57 at 59.
[45] *Ibid.*, 58. [46] A conversation, 540–1.
[47] See e.g. Alford, Misusing International Sources.
[48] S. Breyer, The Supreme Court and The New International Law, speech, 97th annual meeting of the American Society of International Law, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04–04–03.html.
[49] The Globalization of Freedom (2001) 26 *Yale Journal of International Law* 305 at 306.

the United States is a signatory), the decisions of international human rights bodies and tribunals, and the judgments of foreign courts.

Although not part of Scalia's talk, this criticism is central to popular criticism of the Court's turn to comparative sources. Quin Hillyer wrote in the *National Review* that the reference to European case law in *Lawrence* was 'subversive', because it would lead to a loss of US sovereignty.[50] In criticizing this position, Tim Wu describes this fear as the Court '*obeying* foreign commands'.[51] Chief Justice Roberts has picked up on this criticism as well, testifying that '[i]f we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed'.[52]

Opponents of the migration of constitutional ideas have confronted Breyer and his colleagues with a dilemma. They have defined the terms of debate: on one horn of the dilemma, comparative jurisprudence is legally binding. On the other horn, it is not. But either use is illegitimate. If comparative materials are binding, the Court is acting as an agent of foreign authorities. If it is not, comparative citation is window-dressing for judicial legislation. These arguments were the case to meet that evening. Breyer desperately needed to avoid the dilemma by challenging this way of framing the problem, but failed miserably. Even worse, faced with Scalia's objection that the comparative engagement is part of a political agenda, Breyer effectively agreed. One reason for citing the case law of other national courts, said Breyer, was to consolidate judicial review in transitional democracies:[53]

> . . . in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy . . . And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then

[50] Q. Hillyer, Constitutional Irrelevance: Forfeiting sovereignty for sodomy, *National Review Online*, 7 July 2003.
[51] T. Wu, Foreign Exchange: Should the Supreme Court care what other countries think?, *Slate*, 9 April 2004.
[52] Confirmation Hearing on the Nomination of John G. Roberts, Jr (13 September 2005).
[53] Transcript of Discussion.

> go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up ...

Other members of the Court have joined Breyer in offering this crude, over-blown, realpolitik justification. Justice O'Connor thus remarked that citing the case law of other national courts 'will create that all-important good impression. When US Courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced'.[54] Justice Ginsburg pushed this line of thinking even further, suggesting that this interpretive practice promotes comity on other fronts, which is valuable 'because projects vital to our well being – combating international terrorism is a prime example – require trust and cooperation of nations the world over'.[55]

The retreat into realism and the failure of US judges fully to articulate and justify their participation in the migration of constitutional ideas are linked. Judicial realism is fueled by the poor fit between traditional legal categories and the emerging phenomenology of comparative constitutional argument. This is reflected in the difficulty that judges and scholars have faced in simply trying to describe what is taking place. Proponents assert that foreign case law is not 'binding' or 'controlling'[56] but then cannot explain how or why it is used instead. To say that courts 'rely upon' or 'use' foreign jurisprudence because it is 'useful' or 'helpful', or that US courts should 'construe [the US Constitution] with decent respect'[57] for comparative jurisprudence, does not explain why or how such jurisprudence is helpful. Nor, on a deeper level, does it seek to justify the appropriateness of seeking that kind of help.

In short, the practice of comparative constitutional law has outgrown the conceptual apparatus that legal actors use to make sense of it. It is the responsibility of the bench, the bar, and the academy to respond. The failure to do so until now has had severe costs. In a remarkable series of resolutions in the US House of Representatives and Senate, US legislators from the Republican Party have begun to challenge the Court's

[54] S. O'Connor, remarks, Southern Center for International Studies, available at http://www.southerncenter.org/OConnor_transcript.pdf.

[55] R. Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (2004) 22 *Yale Law and Policy Review* 329 at 337.

[56] A conversation, 524, 528 (words of J. Breyer).

[57] H. Koh, International Law as Part of Our Law (2004) 98 *American Journal of International Law* 43 at 56.