

# Some Modest Uses of Transnational Legal Perspectives in First-Year Constitutional Law

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## Introduction

To be clear, I write and teach about U.S. constitutional law. I am not a comparative constitutional lawyer, nor do I aspire to be one at this point. In light of how I teach my students, however, I may be appropriately situated to contribute to a conversation on integrating transnational legal perspectives into the introductory course in constitutional law. Increasingly, even professors who remain focused on U.S. constitutional law incorporate transnational legal perspectives in their instruction.<sup>1</sup>

In this essay, I identify several uses of transnational perspectives in first-year constitutional law: (1) comparing American constitutional arrangements to those in other countries; (2) teaching international law and foreign legal experiences when relevant to U.S. litigation in the “war on terror”; and (3) examining the U.S. Supreme Court’s invocations of foreign legal practices. I illustrate these uses with examples from doctrinal areas that I

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1. Because the terminology can be unclear and even conceptually unstable, I want to clarify what kinds of law I mean by the term “transnational legal perspectives.” I understand transnational law to encompass the law of other nations, the law governing cross-border legal matters (which is sometimes incorporated into domestic legal norms), public international law, and anything else “legal” that might be relevant to transactions involving contacts between at least two nations. Transnational law is conceptually distinct from “non-U.S. law,” which is used as shorthand for everything “legal” that has not been incorporated into domestic U.S. law. See the discussion of the Supreme Court’s invocations of foreign legal practices; see generally Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 *St. Louis U. L. J.* 671 (2005). Non-U.S. law includes most of what is called transnational law, but not all of it.

cover in my course.<sup>2</sup> While each use serves a distinct pedagogical purpose, cumulatively they underscore the increasing importance of transnational legal perspectives in U.S. constitutional law. I conclude, however, with a cautionary note. Selectivity and modesty are warranted, I suggest, because the course appropriately focuses on the United States, teaching time is scarce, coverage tradeoffs abound, the subject matter is complex, and one cannot easily construct transnational examples that are both intellectually serious and pedagogically tractable.

### 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 neither inevitable nor necessarily best. Such comparisons can stimulate discussions about which approaches to constitutional questions are most desirable in particular institutional and cultural contexts, and can also encourage students to question why one approach was adopted in the United States but not another. In making such comparisons to other nations, students gain a sense of the great extent to which constitutional provisions are a product of the time, circumstances, and culture in which they are adopted. For example, other nations do not have anything like the Third Amendment, nor would the United States if the Constitution were written today or if the British had not engaged in the practice that the amendment proscribes.<sup>3</sup>

#### *Separation of Powers*

In the area of separation of powers, I draw from foreign legal experience in teaching *Marbury v. Madison* and judicial review. In my experience, many students come to law school believing that U.S.-style judicial supremacy is 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 v. Madison* solidify—and may be partly responsible for—this impression. I have

2. Students at Duke Law School take the basic 4.5-credit course in Constitutional Law during their first year. My course covers separation of powers, federalism, incorporation, state action, substantive due process, procedural due process, and equal protection. When time permits, I also teach the power of Congress to authorize private suits against states.
3. The Third Amendment provides that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. Const. amend. III. I reference the Third Amendment at the beginning of my course as an example of the historical contingency of constitutional provisions. The Amendment does not reappear until my students encounter Justice Douglas' controversial opinion in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy...” (citation omitted)).

found that I can motivate students to think critically about the functional advisability of judicial supremacy, as opposed to its self-evident inevitability or logical necessity, by stressing that few other democracies in the world have high courts with as much authority to resolve constitutional questions as the U.S. Supreme Court.<sup>4</sup>

To be sure, use of transnational perspectives is not essential if one wants to encourage students to question U.S.-style judicial review. One could simply interrogate Alexander Hamilton's and Chief Justice Marshall's reasoning—and that of the students who endorse it reflexively. Both Hamilton and the great Chief Justice beg the question of *who decides* whether a particular government action comports with the Constitution when the legislature and the courts disagree on this question. Neither explains why his reasoning does not apply with equal force when the U.S. Supreme Court decides the scope of its own power—as in *Marbury* itself, when the Court declared that it possessed the awesome power of judicial review.

But the transnational dimension constitutes a useful supplement to rigorous analysis of foundational reasoning. Exposure to the practices of other nations tends to free students up to think critically about American institutions.<sup>5</sup> The idea that “it couldn't be otherwise” becomes more difficult to sustain if, in fact, it *is* otherwise elsewhere.<sup>6</sup>

One might question the need to look abroad if the purpose is to unsettle the normative power of the actual in the minds of students.<sup>7</sup> One could also look back, using U.S. constitutional history as a source of comparisons. For much

4. Canada, Germany, South Africa, and Hungary have high courts that exercise robust powers of judicial review in constitutional cases. Regarding the Hungarian experience, see Kim Lane Scheppele, *The New Hungarian Constitutional Court*, 8 E. Eur. Const. Rev. 81 (Fall 1999) (discussing the Court's practice of holding that parliament was acting “unconstitutionally by omission” by failing to pass certain legislation); Donald L. Horowitz, *Constitutional Courts: Issues for Iraq* (2003) (unpublished manuscript) (on file with author) (describing various ways in which “[t]he Hungarian Constitutional Court has been unusually aggressive”).
5. Mark Tushnet offers a 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.” Tushnet, *How (and How Not) to Use Comparative Constitutional Law*, *supra* note 1, at 675.
6. See Horowitz, *Constitutional Courts*, *supra* note 4 (“Constitutional courts are important, but not always indispensable, features of constitutional government. Britain developed a constitutional regime without judicial review of legislation or governmental action for its constitutionality. Parliamentary supremacy did not produce an illiberal regime. Switzerland has had relatively little judicial review and still has no separate constitutional court. Yet there are few more vibrantly liberal democratic countries in the world.”).
7. See Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 71 (1965) (“There indeed exists what Felix Cohen characterized as ‘the normative power of the actual’: that which is law tends by its very existence to generate a sense of being also that which ought to be the law.”).

of the existence of the United States as a nation, for example, the Supreme Court was not nearly as powerful an institution as it is today.

History plays an important role in a constitutional law course. But transnational perspectives and historical comparisons are not mutually exclusive alternatives. And the key point for my current purposes is that transnational outlooks can sometimes unsettle the preconceptions of students more effectively than U.S. history can.

Certain aspects of American history are significantly more foreign to contemporary American students than are the practices of many modern countries—so much so that invoking American history might serve only to reinforce the normative power of current constitutional arrangements in this country. Students might wonder why they should care that early nineteenth-century Americans lived with a relatively weak Supreme Court when they also owned slaves and did not allow women to vote. Because modern Europeans are much more “like us,” their having different structures and extents of judicial review is more salient. In my experience, students intuitively tend to view the world and American history this way, so that the “it wasn’t always this way” point about the historical contingency of constitutional practices falls on relatively deaf ears, while the submission that “it isn’t this way everywhere” has more force.<sup>8</sup>

#### *Federalism*

There is another reason why transnational outlooks can prove more effective than U.S. history in unsettling the preconceptions of students. Looking to American history can be of limited usefulness in reaching students who identify certain structural arrangements with particular ideological commitments. For example, some students view the supposed “virtues” of federalism or “states’ rights” as necessarily a euphemism for the law and politics of racial apartheid. Switching venues to, say, the European Union, can depoliticize the issue, facilitating a functional, normative analysis of the various potential roles of states in a federal system.<sup>9</sup>

When my course turns to federalism, I compare the U.S. Supreme Court’s view of commandeering with that of the European Union and Germany. The general view of member states of the European Union on commandeering is the opposite of the U.S. Supreme Court’s position: member states tend to prefer

8. Cf. Ruth Bader Ginsburg, Assoc. J., U.S., Speech at the Constitutional Court of South Africa, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html)) (last visited Sept. 21, 2006). (“The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, *legal systems with values and a commitment to democracy similar to our own.*” (emphasis added)).
9. The concern here is with student bias, not with an actual paucity of forceful examples in U.S. history that belie the identification of federalism with racism. See, e.g., *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O’Connor, J., concurring in judgment in part and dissenting in part).

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,” to regulations, which “have immediate legal force for individuals within a Member State.”<sup>10</sup> Among other things,<sup>11</sup> the general European judgment is that directives leave member states with more regulatory power.<sup>12</sup> In a relatively rare instance of comparative analysis on the U.S. Supreme Court, Justice Breyer flagged this perceived virtue 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 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. . . . 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.<sup>13</sup>

Writing for the majority, Justice Scalia declined Justice Breyer’s invitation to

10. 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* (Kalypsa Nicolaidis and Robert Howse eds., New York, 2001) [hereinafter *The Issue of Commandeering*] (“In the European Union, by contrast [to the United States], 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 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”).
11. In addition to the issue of regulatory control discussed in the text, 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 10, at 801.
12. Technically, both directives and regulations qualify as forms of “commandeering” under U.S. Supreme Court doctrine—specifically, *Printz v. United States*, 521 U.S. 898 (1997)—because most regulations in the European Union must be enforced by member-state institutions. See, e.g., Halberstam, *The Issue of Commandeering*, *supra* note 10, at 213. Note, moreover, that even if one were to dispute Professor Halberstam’s empirical judgment about the preferences of member states, the key conceptual point would remain that both directives and regulations are clearly legal in the European Union.
13. *Printz*, 521 U.S. at 976-77 (Breyer, J., dissenting).

look abroad, deeming “such comparative analysis inappropriate to the task of interpreting a constitution.”<sup>14</sup>

Dabbling in comparative law by contrasting legal regimes briefly and at a high level of abstraction does not position Justices, let alone students, to offer definitive conclusions about 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.”<sup>15</sup> Indeed, Daniel Halberstam’s 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.<sup>16</sup>

According to Halberstam, the legal and political culture in Europe is markedly different:

[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 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, in the EU and in Germany, 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.<sup>17</sup>

The political safeguards of federalism are more present in Europe than they are here.

Moreover, the directive in European Union law (1) refers only to commandeered *legislation*, not to executive action, as was at issue in *Printz*; (2) is specifically provided for in the European Union Treaty; (3) is the only available instrument

14. *Id.* at 921 n.11.

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

16. Halberstam, *Comparative Federalism*, *supra* note 10, at 249-50 (footnote omitted).

17. *Id.*

in some areas; and (4) is partly justified by the very different doctrinal structures that characterize the legal regimes of member states. Directives enable them to realize given policy goals in a variety of legal systems, a concern less relevant in the United States because differences among state laws are more substantive and less doctrinal (perhaps excepting Louisiana).<sup>18</sup>

Accordingly, there exists a stronger textual basis for legislative commandeering in the European Union than in the United States and a greater need for state-level flexibility. Such wrinkles, however, do not appear to detract from Justice Breyer's suggestion that the European "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."<sup>19</sup> Halberstam's examination of commandeering in Europe seems to corroborate Justice Breyer's conclusion that commandeering tends to afford states greater regulatory control than does preemption.<sup>20</sup>

I ask my students whether they are persuaded by Justice Breyer's analysis of relative regulatory control,<sup>21</sup> and if so, whether his arguments sound not only in public policy but also in constitutional law. The Court's anticommandeering decisions do not discuss the importance of state regulatory control to the values advanced by federalism. Instead, the Court has justified its categorical ban on commandeering by stressing the importance of clear vertical divisions of authority and political accountability.<sup>22</sup> Regardless of whether one believes that the Court's holdings in this area are correct, transnational perspectives from the European Union and Germany can inform a more comprehensive class discussion of the various constitutional values potentially at stake.

#### *An Individual Rights Example: Substantive Due Process*

Turning from constitutional structure to individual rights, I ask my students to consider the fact that many European countries restrict access to abortion to a much greater extent than the U.S. Supreme Court has allowed to date,<sup>23</sup> yet

18. See *id.* at 213-14, 230-31.

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

20. See, e.g., Halberstam, *Comparative Federalism*, *supra* note 10, at 247 (noting that "the anti-commandeering rule might have perverse effects, by prodding the central government to develop the bureaucracy necessary to implement its policy without involving the component States").

21. For further discussion, see Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *Vand. L. Rev.* (forthcoming 2006).

22. In *New York v. United States*, for example, Justice O'Connor wrote for the Court that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished" because "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York v. U.S.*, 505 U.S. 144 (1992).

23. In the recent juvenile death-penalty case, see *infra* notes 43-50 and accompanying text, Justice Scalia underscored the Court's inattention to the international community's greater tolerance of restrictions on abortion:

these communities provide more explicit and robust protection of other privacy rights. Germans, for instance, enjoy protection of personal “dignity” (Article 1) and the “right to the free development of . . . personality” (Article 2), 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.<sup>24</sup> This 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.<sup>25</sup>

The point of the example is not to suggest any inconsistency within the European view. Rather, the purpose is to underscore a strong contrast with U.S. constitutional law. This contrast encourages U.S. students to consider whether cases like *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* necessarily follow from a broad conception of privacy rights, or whether the government’s interest in protecting a fetus suffices to distinguish the abortion question from other privacy issues of constitutional moment. To facilitate this discussion, I inform my students that the West German Constitutional Court declared unconstitutional a statute protecting abortion rights around the same time as *Roe*.<sup>26</sup>

In addition, the abortion comparison helps to clear the ideological air by illustrating that appeals to transnational legal perspectives can be used to advance both liberal and conservative constitutional commitments. To consider another example, Chief Justice Rehnquist invoked the Dutch experience with assisted suicide in *Washington v. Glucksberg* to support the Court’s rejection of a fundamental-rights claim in that case.<sup>27</sup> And in *Cruzan v. Director, Missouri*

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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. Though the Government and *amici* in cases following *Roe v. Wade* . . . urged the Court to follow the international community’s lead, these arguments fell on deaf ears.

Roper v. Simmons, 543 U.S. 551, 625-26 (2005) (Scalia, J., dissenting) (citations omitted).

24. Basic Law for the Federal Republic of Germany, available at <<http://www.psr.keele.ac.uk/docs/german.htm>> (last visited June 20, 2006).
25. 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.”).
26. See Donald P. Kommers, The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?, 10 J. Contemp. Health L. & Pol’y 1, 6 (1994) (citing 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [First Senate] 1.42 (F.R.G.) (1975), translated in 9 J. Marshall J. Prac. & Proc. 551, 605-84 (1976)).
27. 521 U.S. 702, 734-35 (1997). *Glucksberg* illustrates the practice of looking overseas to consider the consequences of a particular rule in order to determine whether the rule is consonant with relevant constitutional values. *Glucksberg* also underscores the care with which such looking abroad should be conducted: the *Glucksberg* Court’s account of the Dutch experience has not



*Department of Health*, he underscored that not only “the States,” but “indeed, *all civilized nations*... demonstrate their commitment to life by treating homicide as a serious crime.”<sup>28</sup>

#### *Entrenchment Provisions*

One more example of comparison that I include in my course warrants brief mention here: entrenchment provisions. The U.S. Constitution is deeply entrenched in its difficulty of amendment, as evidenced by the fact that only seventeen amendments (beyond the Bill of Rights) have been ratified in more than two hundred years. By contrast, some nations—and some states in the United States—have constitutions that are easier to amend.<sup>29</sup> Moreover, Article V of the U.S. Constitution immunizes little from modification via amendment: only certain now-inoperable slavery provisions and the entitlement of states to equal representation in the Senate. But some other nations have more in their constitutions that cannot be changed.<sup>30</sup> I invoke these facts towards the beginning of my course so that students will consider why constitutional change is designed to be more difficult than legislative change, and what an optimal Article V provision might provide in light of its animating purposes.

#### **International Law and Foreign Experiences in the “War on Terror”**

Beyond serving as fodder for comparisons to legal practices in other countries, transnational perspectives also inform my teaching of judicial decisions in the “war on terror.” In covering cases like *Hamdi v. Rumsfeld*<sup>31</sup> and *Hamdan v. Rumsfeld*,<sup>32</sup> which implicate questions of statutory interpretation in addition to constitutional law,<sup>33</sup> I expose my students to some of the international law of

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been replicated here. See *Gonzales v. Oregon*, 126 S. Ct. 904, 912-13 (2006).

28. 497 U.S. 261, 280 (1990) (emphasis added).

29. Both the Indian Constitution and the (unwritten) constitution of the United Kingdom may be amended by a simple majority of the legislature. Robert L. Maddex, *Constitutions of the World* 159, 372 (2d ed., Wash., D.C., 2001). Additionally, several U.S. states—including Arizona, Arkansas, Indiana, Iowa, and Massachusetts—require only a simple majority vote in the legislature to amend their constitutions. Robert L. Maddex, *State Constitutions of the United States* xxxii - v (Wash., D.C., 2006).

30. In Brazil, for example, no amendment may abolish the federal form of government, the direct, secret, universal, periodic vote, the principle of separation of powers, or individual rights and guarantees. Maddex, *Constitutions of the World*, *supra* note 29, at 52. In Chad, amendments may not be proposed if they interfere with territorial integrity, independence, national unity, the republican form of government, the division of powers and security, the freedoms and fundamental rights of citizens, or political pluralism. *Id.* at 69. Germany prohibits amendments to the first twenty articles of its constitution and any change to the constitution that would affect the division of the federation into states or state participation in legislation. *Id.* at 132.

31. 542 U.S. 507 (2004).

32. 126 S. Ct. 2749, 2006 WL 1764793.

33. Statutory interpretation and constitutional law are related because, among other reasons, the

war and the Geneva Conventions. Justice O'Connor's controlling plurality opinion in *Hamdi* relies heavily upon a particular understanding of the law of war in concluding that Congress had authorized the president's indefinite detention of a citizen who was an alleged enemy combatant:

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.<sup>34</sup>

Justice Souter's opinion in *Hamdi* also makes extensive use of the law of war. He, however, comes to an opposite conclusion from the plurality on the question of congressional authorization because he found that the government appeared not "to be acting in accordance with customary law of war and hence to be within the terms of the [AUMF] in its detention of Hamdi":

By holding him incommunicado... , the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." The Government answers that the President's determination that Taliban detainees do not qualify as prisoners of war is conclusive as to Hamdi's status and removes any doubt that would trigger application of the Convention's tribunal requirement. But reliance on this categorical pronouncement to settle doubt is apparently at odds with the military regulation adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual's status...<sup>35</sup>

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outcome of an exercise in statutory construction can determine whether the court must decide a constitutional issue. In *Hamdi*, for example, the plurality avoided the question whether the president possessed inherent Article II power to detain U.S. citizens as enemy combatants by holding that Congress had authorized the President's actions. *Hamdi*, 542 U.S. at 516-17.

34. *Hamdi*, 542 U.S. at 518 (referencing the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), which authorizes the president to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the terrorist attacks of September 11, 2001). Justice O'Connor also wrote, among other things, 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 538 (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. See *id.*
35. *Hamdi*, 542 U.S. at 549-51 (Souter, J., concurring in part, dissenting in part, and concurring

In *Hamdan*, moreover, the Court embraced the position that the Government was not complying with the law of war upon which it was allegedly relying in seeking to try detainees at Guantanamo Bay, Cuba by military commission.<sup>36</sup> One cannot successfully teach these cases without exposing students to the relevant federal statutes, Geneva Convention provisions, and military regulations implementing them.

Such knowledge is also useful in introducing students to other controversial actions that the Executive Branch has defended, at least in part, by invoking the same federal statute at issue in *Hamdi* and *Hamdan*—namely, the Authorization for Use of Military Force (“AUMF”). Of particular relevance is the National Security Agency’s program of warrantless domestic spying. The international law of war does not decisively resolve such legal questions, which turn primarily on issues of statutory construction. But the law of war provides a frame of reference that informs legal arguments about what Congress reasonably can be understood to have intended when it drafted a law authorizing the president to use military force.<sup>37</sup>

Not only is international law important in U.S. constitutional litigation, but the experiences of other nations in dealing with terrorism are also relevant in evaluating the strength of the interests asserted by the government in court. The United States is less experienced at confronting issues involving the detention and interrogation of terror suspects than is, for example, the United Kingdom and Israel.<sup>38</sup> The United States is thus more appropriately situated

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in judgment) (referencing Army Regulation 190-8, §§ 1-5, 1-6).

36. A federal district court adopted Justice Souter’s reasoning in *Hamdi* and applied it to detainees at Guantanamo Bay, Cuba. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (Robertson, J.). The U.S. Court of Appeals for the District of Columbia Circuit reversed, holding among other things that Congress had authorized the military commissions at Guantanamo Bay, the Geneva Conventions gave detainees no right to enforce the treaty’s provisions in court, and the Guantanamo military commissions satisfied the “competent tribunal” requirement of Army Regulation 190-8. 415 F.3d 33 (D.C. Cir. 2005). The Supreme Court recently reversed on the ground that the military commissions violated Articles 21 and 36(b) of the Uniform Code of Military Justice, 10 U.S.C. §§ 821 and 836(b), as well as Common Article 3 of the Geneva Conventions. The Court held that Common Article 3 applies to the conflict with al Qaeda and controlled the litigation because Article 21 conditions the President’s authority to use military commissions on his compliance with the law of war, and the Conventions are incontrovertibly part of the law of war.
37. In discussing international law, I flag for students a potentially significant difference between its role—especially treaties—and the relevance of transnational materials generally. International law may impose direct, rather than merely interpretive, restraints on the Executive. See U.S. Const. art. VI (including treaties as part of “the supreme Law of the Land”). I also note to students that international law normally does not have constitutional status—for example, Congress can override treaties—but can acquire this status if it is incorporated in constitutional interpretation.
38. 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

to learn the lessons of their history, rather than the other way around. And with some such exposure to the trials, tribulations, and resulting policies of other nations, law students are better able to evaluate the Executive Branch's current claims of national security and military necessity.<sup>39</sup>

### The Supreme Court's Invocations of Foreign Legal Practices

Finally, the debate among the Justices themselves regarding the citation of foreign legal sources, both in their opinions and beyond,<sup>40</sup> has made it important to consider the relevance of transnational legal perspectives in teaching foundational issues of constitutional authority and interpretation. Among other questions, I address the following points with my students when covering various approaches to reading the Constitution.<sup>41</sup>

It is not clear what independent work, if any, the majority's invocations of foreign legal authority are doing in the majority opinions in *Atkins v. Virginia*,<sup>42</sup> *Lawrence v. Texas*,<sup>43</sup> and *Roper v. Simmons*.<sup>44</sup> In *Roper*, for example, Justice Kennedy explained for the Court that "[i]t is proper that we acknowledge

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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).

39. The experiential resources discussed in the text constitute more than policy considerations; they inform the doctrinal tests articulated by the U.S. Supreme Court in constitutional cases. See, e.g., *Hamdi*, 542 U.S. at 529 ("Mathews [v. Eldridge, 424 U.S. 319 (1976)] dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process. 424 U.S. at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute safeguards.'" *Id.*).
40. On January 13, 2005, Justices Scalia and Breyer met at American University's Washington College of Law in Washington, D.C. to discuss whether the U.S. Supreme Court should cite foreign judicial decisions in its opinions. Their conversation has since been published. See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *Int'l J. Const. L.* 519 (2005).
41. Because I do not cover the death penalty in my course, I expose my students to this material towards the beginning of the semester, when I teach different theories of constitutional interpretation.
42. 536 U.S. 304 (2002) (holding that the execution of mentally retarded persons is prohibited by the Eighth and Fourteenth Amendments).
43. 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).
44. 543 U.S. 551 (2005) (holding that the execution of persons who were under eighteen years of age at the time they committed their capital crimes is prohibited by the Eighth and Fourteenth Amendments).

the overwhelming weight of international opinion against the juvenile death penalty,” and that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>45</sup> He added that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>46</sup> It is unclear whether Justice Kennedy is implying that the opinion of the world community could also disconfirm a constitutional conclusion that the Court would otherwise accept. It is also not clear why the Court seems to invoke foreign legal authority selectively—that is, regarding only certain legal questions and from only certain countries. One might further query why the same transnational comparisons do not “simply underscore[]” how We the People are different from the rest of the world—that is, how America’s “present-day self-definition and national identity”<sup>47</sup> compel distinct resolutions of similar legal problems.

At the same time, those who criticize the Court’s citations to foreign legal authority in *Atkins*, *Lawrence*, and *Roper* may not have persuasively explained why their objections do not apply with similar force when the Justices cite law review articles, the Bible, or even lower court decisions. All are employed as forms of persuasive authority, nothing more.<sup>48</sup> It may be a stretch to distinguish foreign judicial decisions from other sources by suggesting that reliance on decisions from non-American courts will facilitate “judicial activism” and “making it up” in ways that the other sources cannot.<sup>49</sup>

Accordingly, I ask students whether the objections sound primarily in methodological concerns or in substantive disagreement with the Court’s conclusions in these cases. To those who agree with the Court’s critics, I

45. *Id.* at 578.

46. *Id.* at 578.

47. *Roper*, 543 U.S. at 578.

48. See Ginsburg, *A Decent Respect*, *supra* note 8:

Judges in the United States are free to consult all manner of commentary—Restatements, Treatises, what law professors and even law students write copiously in law reviews, for example. If we can consult those writings, why not the analysis of a question similar to the one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?... Foreign opinions are not authoritative; they set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions.

49. Compare, e.g., the Scalia/Breyer Discussion, *supra* note 40, at 530-31 (Scalia: “It invites manipulation. You know, I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite something.”) with *id.* (Breyer: “But if you are not conscientious, why become a judge? What would be the pleasure or reward in entering a profession that prizes integrity, honesty, doing the job properly?”).

inquire why Chief Justice Rehnquist's opinions in *Glucksberg* and *Cruzan* never caused a legal and political controversy about the Court's reliance on foreign legal perspectives and experiences. I also ask whether a similar tumult would have ensued if the Court had looked across the Atlantic in using *Casey* to overrule *Roe*. There is rich material here for class discussions about the legitimacy of the Court's uses of non-U.S. law in deciding controversial constitutional cases.

Putting aside the politics of constitutional law and questions of consistency, this debate within and beyond the Court focuses the attention of students on theories of constitutional interpretation. I challenge my students to consider which accounts of the legitimate exercise of judicial review render foreign judicial decisions relevant to U.S. constitutional law. Specifically, I suggest that the controversy over citing foreign legal authority raises profound questions for the view that the meaning of the Constitution changes over time.<sup>50</sup> To what extent does the authority of the Constitution as ethos—as an evolving instantiation of collective identity<sup>51</sup>—encompass not just a consensus on contemporary American values, but on values of the world as well? Why should or should not “[t]he opinion of the world community” provide a criterion for constitutional judgment? Whatever one's answer to these questions, transnational legal perspectives facilitate their formulation. By asking such questions to my students, I focus their attention on the nature and legitimate scope of the U.S. Supreme Court's exercise of judicial review in constitutional cases.

### Conclusion: A Cautionary Note

For the reasons explored above, I believe it is important to expose students in my introductory course in U.S. constitutional law to transnational legal perspectives. Indeed, I respectfully appeal to casebook authors to include more transnational material so that instructors are better able to teach it. I also think it is important, however, not to overstate the case for transnational perspectives in teaching a first-year course in constitutional law. Although I support the general enterprise, I avoid comprehensive transnational comparisons in class, just as I have resisted claims of pedagogical necessity in this essay. In my judgment, a first-year course in U.S. constitutional law appropriately focuses on the U.S. Supreme Court's exercise of judicial review in constitutional cases, as well as on the constitutionally relevant conduct of other federal and state

50. See, e.g., *Roper*, 543 U.S. at 587 (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”). Questions about the proper use of transnational perspectives are analytically separable from debates about the meaning of the U.S. Constitution as fixed absent amendment or evolving regardless of amendment. But for proponents of an evolving Constitution, the issue arises whether (and why) this evolution should be responsive to transnational legal perspectives.

51. See generally, Robert C. Post, *Theories of Constitutional Interpretation*, in Robert Post, *Constitutional Domains: Democracy, Community, Management* 23-50 (Cambridge, Mass., 1995).

officials. The transnational dimension, in other words, constitutes a relatively minor part of my overall course.

Of course, times change and so does the content of U.S. constitutional law. Transnational perspectives arguably matter more today than in times past. Globalization continues to make the world a smaller place, the U.S. Supreme Court confronts the legal limits of presidential power in the “war on terror,” and the Justices themselves are invoking (or criticizing invocations of) foreign legal authority.

But in a survey course in U.S. constitutional law, class time remains a scarce resource and coverage tradeoffs must be negotiated with discipline. Moreover, U.S. constitutional law 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, and most importantly, teachers who are not comparative constitutional lawyers must confront the daunting reality that it is difficult to construct transnational examples that are both intellectually serious and pedagogically tractable.<sup>52</sup> One must proceed with care, lest a little knowledge become a dangerous thing and one’s students conclude that they are competent to make useful comparisons without serious study of other legal systems and comparative constitutional law.<sup>53</sup> I therefore suggest that transnational legal perspectives are best cast in a modest, supporting role in introductory courses in constitutional law.

52. See Tushnet, *How (and How Not) to Use Comparative Constitutional Law*, *supra* note 1, 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.”). Yet comparativists might take care not to scare off U.S.-centered teachers by setting impossibly high standards regarding what counts as a responsible transnational comparison. There is a middle ground, one that requires some (but not extensive) transnational expertise on the part of the instructor and that results in illuminating pedagogical comparisons.
53. I am also concerned that teaching a little transnational law in U.S.-centered courses might sap the desire of law faculties to hire comparative lawyers who specialize in teaching comparative law. Such an outcome would be unfortunate, an inexpensive but insufficiently considered way out of the implications of globalization for legal education. The solution is not to minimize student exposure to transnational perspectives in first-year courses, but to continue hiring comparative legal scholars.