Looking Abroad When Interpreting the U.S. Constitution: Some Reflections

SANFORD LEVINSON†

To what extent should those charged with interpreting national constitutions take into account the lessons that might be taught by foreign experience? In asking this question, I do not mean to confine myself to the relevance of such foreign legal materials as cases from other courts; there is no reason to confine oneself to such material if one is seriously interested in learning more about comparative approaches to similar problems.

Obviously, this is a general problem, and the lawyers, academics, judges, and other public officials concerned about adhering to their duties of constitutional fidelity could be members of any of the more than 150 countries with written constitutions who are considering the possibility of looking to the experience of any other given country, near or far. I am interested primarily in the advisability of lawyers, academics, and judges from the United States taking cognizance of the structuring and operation of legal institutions in other countries when interpreting the U.S. Constitution. The principal reason is, of course, that this is the system that I know best; a second reason is that the issue is now the subject of an unusually heated debate among justices of the U.S. Supreme Court. (A third reason, provoked by my having decided to co-teach a course at The University of Texas School of Law on comparative constitutional law, is a degree of perplexity as to exactly why we wish to compare constitutions and what we think the practical payoffs, if any, are likely to be.)

Let me note at the outset that I am not remotely interested in a decidedly different jurisprudential problem, which is the potential authority of non-U.S. law with regard to the decision of American cases, an authority that could derive from treaties entered into by the United States or, most controversially, from the reception of international law into American law. Whether one should feel bound by international legal norms is an entirely different subject from whether an American judge should merely “take into account foreign experience” while making decisions about the shape of American constitutional law. One obviously need not believe that there is an obligation to be bound by that foreign experience—indeed, I know of no one who makes such a foolish argument—in order to believe that it is simply prudent practice to become knowledgeable about such experience and to apply the lessons one finds there to comparable dilemmas facing us here in the United States.

In order to set the stage for the debate here in the United States, it is helpful to look at the practices of at least one other American country, just north of us. In an examination of the citation practices of the Supreme Court of Canada, three political scientists note the frequency with which that court has looked to foreign cases, especially following the adoption of the Canadian Charter of Rights in the early 1980s.† Almost 45% of the 858


cases that were decided between 1984–1995 contained at least one citation to a British case, though some might dispute whether this really counts as a “foreign” citation, given the particular historical relationship of Canada to the United Kingdom. Consider, then, that 30% had at least one citation to a U.S. case, with 58% of these U.S. citations being to cases decided after 1970. This suggests, among other things, an interest in how such courts are confronting similar problems at present. (Another 18% of the citations were to cases decided between 1950–1970; only 24% were to “old cases,” including presumably classic chestnuts of American constitutional law.)

Citations per se obviously provide only limited, albeit suggestive, information. Consider, then, two representative comments from Canadian judges. In a concurring opinion in a case involving self-incrimination and right-to-counsel claims by someone charged with child molestation and sexual assault, Justice L’Heureux-Dube wrote that

... the case before us presents the ideal opportunity to look south and learn from the experience of the United States. . . . [G]iven what appears to me to be the overly cumbersome and obtrusive position which has developed in Canada, the American position might well offer a compromise between the two conflicting rights which is worthy of our attention.

To be sure, in another case Justice LaForest expressed some caution about looking southward:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different nations in different ages and in very different circumstances. . . . American jurisprudence, like the British, must be viewed as a tool, not as a master.

Surely, though, no reasonable person could object to these cautionary notes; Justice L’Heureux-Dube certainly did not believe that American (or any other non-Canadian) law should be put in the position of “mastery.” The very use of the conditional “might well offer a compromise” suggests only the hope that our experiences in the United States might provide a potentially useful “tool” to the solution of common problems.

Canada is obviously not unique in citing foreign, including American, sources. A splendid, indeed seminal, article by Sujit Choudhry, aptly entitled Globalization in Search of Justification, notes the copious use of foreign materials by the South African Constitutional Court. This has been justified in part by such comments as that of Justice Albie Sachs, who calls on South African constitutional jurisprudence to acknowledge “its existence as part of a global development of constitutionalism and human rights.” As part of a global community, Justice Sachs is arguing, South Africa should look to the decisions of courts around the world for the insight that they cast on the solution of common problems. South Africa, to be sure, might be viewed as occupying a very special position

2. Id.
3. Id. at 387.
4. Id.
8. State v. Mhlungu, 1995 (3) SALR 867, 917 (CC) (S. Afr.).
inasmuch as its pre-1996 legal traditions are so dismal concerning issues involving social justice or human rights. Still, there ought to be no country, most certainly including our own, that should regard its own instantiated commitment to social justice or human rights as absolutely pristine, in need of no wisdom that might be provided by external sources. After all, slavery was absolutely legal in the United States until 1865, and a serious commitment to dismantling its successor, the Jim Crow legal system of segregation, did not get underway until after World War II. Indeed, historians increasingly agree that one factor that encouraged both the Truman and Eisenhower administrations to call for the dismantling of segregation was the beating the United States was taking from its Communist enemies abroad because of the patent injustice of American racial practices.  

Thus, from my perspective—and, I suspect, from many of your own—the sentiments expressed above by both Canadian justices about the potential usefulness of looking to the experiences of other legal systems are so obvious as to sound banal. So let us now turn to justices of the U.S. Supreme Court, some of whose comments might allow us to realize how non-banal are our friends from the north.

I begin with the most recent manifestation of the debate, which took place in a recent June 2003 case involving the constitutionality of a Texas statute criminalizing sodomy; Justice Kennedy, in his opinion for the Court striking down the legislation, took into account not only the British Wolfenden Report of 1957, but also, and far more significantly, decisions by the European Court of Human Rights, including 

Dudgeon v. UK. 10 “Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now),” Kennedy wrote, “the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.” 11

I should note, incidentally, that Kennedy was referring primarily to the “premise” enunciated in Chief Justice Burger’s concurring opinion in Bowers. Burger wrote that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” 12 Focusing on Burger’s opinion was a quite brilliant rhetorical move on Kennedy’s part, since he could argue that it was, after all, Burger who opened up the question of “Western civilization”—and “Judeo-Christian moral and ethical standards” and, therefore, allowed the possibility of rebuttal. As a matter of fact, Justice White’s majority opinion did not rely on the general teachings of Western civilization but, instead, argued only that one could not legitimately understand the specifically American tradition of protected spheres of autonomy to include what White repeatedly called “homosexual sodomy.” 13 I shall have more to say about the relevance of the difference between the White and Burger opinions below.

In any event, Kennedy’s reference to European materials led Justice Scalia to respond as follows:

11. Id.
13. Id. at 195–96.
Constitutional entitlements do not spring into existence . . . because foreign nations decriminalize conduct . . . . The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”

This was, of course, not Justice Scalia’s first foray into denunciation of what might be termed jurisprudential cosmopolitanism, i.e., looking abroad for possible wisdom. An earlier exchange took place between Justices Scalia and Breyer on the occasion of Breyer’s dissenting from a Scalia opinion that had ruled unconstitutional the “commandeering” of state officials in order to implement federal policies—in this case “commandeering” the duty of a local sheriff to engage in relatively minimal checks of the possible criminal record of someone wishing to buy a gun. Justice Breyer, who, like Scalia, had taught administrative law at a major American law school before being appointed to the judiciary, pointed to what might be learned by looking at the experience of European countries operating within federal systems.

. . . [T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. 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.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in

16. Id. at 976–77 (Breyer, J., dissenting).
this case the problem of reconciling central authority with the need to preserve
the liberty-enhancing autonomy of a smaller constituent governmental entity.20

All of this was prefatory to Breyer’s altogether correct conclusion that “there is neither
need nor reason to find in the Constitution an absolute principle, the inflexibility of which
poses a surprising and technical obstacle to the enactment of a law that Congress believed
necessary to solve an important national problem.”21

Justice Scalia blithely, almost insultingly, dismissed the relevance of Breyer’s
argument and, more to the point, the evidence on which it was based.

Justice Breyer’s dissent would have us consider the benefits that other countries,
and the European Union, believe they have derived from federal systems that are
different from ours. We think such comparative analysis inappropriate to the
task of interpreting a constitution, though it was of course quite relevant to the
task of writing one.22

Scalia did not deny the obvious truth that “[t]he Framers were familiar with many federal
systems, from classical antiquity down to their own time.”23 But, according to Scalia, the
principal point is that Madison and Hamilton studied these other federal systems only to
reject them. Thus, said Scalia, the principal lesson to be drawn from 1787 is that “our
federalism is not Europe’s.”24 It is, apparently, sui generis, “the unique contribution of the
Framers to political science and political theory.”25 Scalia’s argument appears to be that the
eighteenth century rejection, after full study, of the various models of federalism then
prevalent in Europe entails a similar rejection of even the possibility of learning from
contemporary models of European federalism some two centuries later. I confess that I
find this argument illogical. I simply do not understand why even a hard-core originalist
might not draw from Madison and Hamilton—and their essays in The Federalist—the
message that “experience” is indeed important. One obviously might find the specifics of
foreign experience repellant, as Scalia argues was the actual case, but this scarcely seems to
taunt a permanent closing off from the potential of future enlightenment. That eighteenth
century analysts might have decided, altogether correctly, that most doctors had no idea
what they were doing, and that one therefore was well-advised to stick with self-medication
instead of submitting to the ministrations of quacks and charlatans does not, I presume,
entail that we should be equally dismissive of contemporary medical science.

I turn now to a final quotation from Justice Scalia, this one from his angry dissent in
Atkins v. Virginia, where a five-Justice majority had the temerity to declare that the
execution of the mentally retarded was unconstitutional because violative of the prohibition
by the Eighth Amendment of “cruel and unusual punishment.”26 The key debate between
the majority and the dissenters concerned the presence of a sufficient “national consensus”
to justify limiting the autonomy of states like Virginia (and Texas), who find executing the
retarded perfectly legitimate. According to Scalia,

20. Id. (emphasis added); cf. THE FEDERALIST PAPERS NO. 42, at 268 (James Madison), and No. 43, at 275–
76 (James Madison) (Clinton Rossiter ed., 1961) (both looking to experiences of European countries).
22. Id. at 921 n.11.
23. Id.
24. Id.
25. Id. (emphasis added) (quoting United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J.,
concurring) (citing Henry J. Friendly, Federalism: A Foreword, 86 YALE L.J. 1019, 1019 (1977))).
[T]he Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called “world community,” and respondents to opinion polls. I agree with [Chief Justice William Rehnquist] that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. “We must never forget that it is a Constitution for the United States of America that we are expounding . . . . Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”

It should be obvious from what I have said so far that I am no fan of Justice Scalia. I find his militant provincialism embarrassing; I much prefer the cosmopolitanism expressed by the Canadian justices and by Justice Breyer. This being said, I want to explore in the remainder of my remarks the question of whether there is anything at all to be said for at least some of Scalia’s views, and I think the answer is yes.

I begin by making a distinction that, whatever its theoretical difficulties, is one that we cannot in fact do without: that is, the distinction we commonly draw between facts and values, between empirical and normative arguments. Recall Scalia’s altogether correct emphasis on the fact that other countries, including a quite mythic “world community” may possess “notions of justice [that] are (thankfully) not always those of our people.” Although this is, in form, an empirical proposition based on study of different notions of justice, its real importance is with regard to the fact that “justice” itself is a normative concept. To call something “just” or “unjust” is to evaluate it, as against, for example, describing something as mineral or vegetable. And, of course, the central question of Western philosophy for at least 2500 years has been the foundation, if any, of such evaluations.

One obvious possibility is the presence of “right reason” that teaches us, through disciplined methods of rational analysis, what the truth is as to propositions of morality. Scalia’s own Roman Catholic Church is the primary institutional articulator of such a view. Or, of course, if one is what might be called an anthropological naturalist, one might look to the presence of convergence in the moral views and practices of otherwise diverse communities as evidence of moral truths.

What is interesting about Scalia, though, is that as a justice he almost ruthlessly rejects the legal relevance of Thomism or of any socio-anthropological inquiry into general cultural practices. Indeed, a careful analysis of his comment in Atkins reveals that he is a thoroughgoing conventionalist in terms of deciding what legal norms operate within the United States. Whether or not he would agree with Thrasymachus in The Republic that any given society’s notion of justice is only ideological, reflecting the interests of the strongest within that society, it is clear that Scalia is totally unwilling, in terms of his conception of the judicial role, to adopt what might be called a “critical” stance toward conventional morality. He is, therefore, much like Lord Devlin’s famous passengers in the Clapham omnibus, whose untutored collective views about morality—and, interestingly enough, what sparked the classic debate between Devlin and H.L.A. Hart was precisely the legal rights that should be accorded homosexuals—were more important than any consensus

27. Id. at 347 (Scalia, J., dissenting) (emphasis added) (citations omitted) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J. dissenting)).

that might be present, say, at All Souls College at Oxford, the Sorbonne, or Harvard. Devlin insisted that his version of "the reasonable man" whose views about social morality are entitled to prevail "is not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man in the street—or to use an archaism familiar to all lawyers—the man in the Clapham omnibus." I have no doubt that Scalia would agree with Devlin. In other opinions, indeed, Scalia has sounded like a populist demagogue in his zealous attacks on colleagues he views as dedicated to advancing the philosophy of "elites."

However much I often disagree with Scalia on the particulars of given cases, I think that at one level he is correct in his basic analysis. That is, I do not interpret the American constitutional tradition as one that necessarily privileges the "refined" moral views of professional philosophers over the untutored intuitions of the majority. As a descriptive matter, I certainly do not believe that the Court has ever deviated in any truly significant way from the dominant sensibility. As a normative matter, I find it difficult to argue that the judge should ignore the dominant sensibility and declare that an inchoate notion of "justice" requires something radically different, especially if the notion is derived from what might be termed "purely" philosophical arguments.

One might reject the Clapham omnibus per se as the source of authoritative guidance because one has suspicions of the degree to which that particular bus is representative of the population at large or concerns about their ability to engage in even the most primitive level of analysis of the implications of their ostensible views. But even Ronald Dworkin himself cannot entirely escape some omnibus insofar as his ideal-type Heraclean judge is charged with developing a coherent portrait of the values of his or her own particular society rather than, say, simply interpreting the Constitution to instantiate the teachings of some universalistic system of natural justice. This is why, for example, Dworkin has an embarrassingly difficult time answering the question whether Hercules would necessarily have been an anti-slavery judge or would necessarily validate, as a constitutional matter, Lincoln's taking of private property that we also know as the Emancipation Proclamation.

In many ways, these debates go back to a classic 1798 exchange between Justices Chase and Iredell, in which Iredell sharply rejected the relevance of "natural law" to constitutional interpretation. The Court ought not invalidate legislation, said Iredell,

merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Iredell's argument can be viewed as a rejection of the epistemological ability to comprehend natural law in a sufficient manner to justify legal decisions. Other, more contemporary, critics might be ontological skeptics, i.e., deny the very reality of natural law


30. Id.


in the first place, so that our failure to comprehend them is not evidence merely of our human limitations, but, rather, of the fact that there is literally nothing to comprehend. (It would be like comprehending the internal body parts of unicorns.)

There are, to be sure, critics of such skepticism, the most prominent, like Professor John Finnis, identified with Scalia’s own Roman Catholic Church, though my colleague Richard Markovits has also presented a powerful challenge to such skeptical arguments. As I’ve already suggested, though, one might even agree with Finnis as to the ontological and epistemological reality of norms of natural justice without going on to agree that they are automatically part of the American Constitution. Instead, as Scalia (and many others) would argue, they become part of the Constitution only when affirmatively adopted by “we the people” through legislative action or, even if one accepts the notion of “fundamental rights,” when accepted by enough passengers on the Clapham omnibus to allow us to say that they have indeed become part of the operative consensus of American opinion. This is, of course, simply to reiterate the central tenet of positivism, which is the analytical separation of law and morality. And, as I have argued elsewhere, one can simply not understand a constitutional tradition that includes the legitimacy of chattel slavery as one that privileges morality over legal conventions.

This means, I regret to say, that Scalia may be right when he describes as “irrelevant” “the practices of the ‘world community,’” at least insofar as their “notions of justice are (thankfully [or not]) not always those of our people.” If, obviously, their notions are similar to “those of our people,” they are irrelevant in the specific reason that it makes no difference whether one takes them into account or not, since the outcome is presumably the same. We may be encouraged to learn that other presumably enlightened countries agree with us, but otherwise it is hard to see what difference it would make. Only differences present potentially interesting dilemmas. If, then, others in the world community do indeed behave differently, one must have some theory to explain why their views should count for us, especially if we are engaged in the practice of constitutional analysis and not, say, constitutional design. Constitutional “interpreters” are surely under some duty to enforce what is actually “in” the Constitution (via one’s favorite method of interpretation) and not in effect to amend it at will because they (accurately) believe that it would be an even better constitution as a result. Even with regard to constitutional design, which presumably offers more freedom than (mere) interpretation of an already existing constitution, it is necessary to be reminded that one size does not fit all countries. Would any of us, for example, called upon to advise Iraqis in drafting their own constitution, simply say, “just look at our own Constitution, since we got everything right”? I would certainly hope not.

Although Justice Scalia is famous for emphasizing the importance of the constitutional text, he is not in fact a “pure textualist,” assuming that any such thing were possible. He seems to concede, for example, that state practices that violate what is “implicit in the concept of ordered liberty” are prohibited even if that prohibition is not expressly spelled out in the text. However, as he put it in a 1988 dissenting opinion in a death penalty case:

We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other

democracies, can be relevant in determining whether a practice uniform among our people is not merely a historical accident, but rather so “implicit in the concept of ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.38

Ironically or not, Justice Scalia’s views of the basis of what we call legal “justice” are identical to those expressed by contemporary post-modernists, whom I suspect the Justice would otherwise profess to disdain. In other words, one of the principal assertions of post-modernists (with whom I am often identified), is that our notions of “reality” are “socially-constructed.” As already suggested, there is not anything necessarily chronologically modern about such views; they can easily be traced back to participants in Platonic dialogues, including The Republic and that most legally significant of all dialogues, The Gorgias.

The other way that Scalia overlaps with post-modernism is his adoption of a type of “identity politics.” This term is usually applied to assertions of racial or ethnic community. There is, however, no reason why the analysis does not apply as well to nationalism, which is, after all, the assertion that the world is sorted into separate nations whose separateness is constituted, in part, precisely by commitments to different notions of justice. From this perspective, what distinguishes Albanians from Zimbabweans is not only color, religion, or cuisine; it may also include quite different conceptions of justice as well. And the deepest premise of “separate identity” is that it is indeed impossible to engage in the truly impersonal assessment of one or another aspect of the culture. This would require a “view from nowhere,” but a central premise of much contemporary philosophy is that all of us look at the world from situated perspective rooted in “somewhere.” Scalia the judge roots himself in an America whose values he purports to be able to identify. If the job of the judge is to identify and then apply these distinctive values, why would it be relevant to study how other cultures approach similar questions? To learn that Orthodox Jews put hats on when entering their holy places is totally and utterly irrelevant with regard to what counts as acceptable “hat behavior” when entering Catholic churches.

The same is true with regard to identifying an explicitly American community, as distinguished from a European one. Indeed, it is not clear why anyone interested in describing what constitutes Texas as a distinctive subcommunity within the United States would spend much, if any, time in the study of New Hampshirites or Montanans, except by way of noting that Texans seem to have a taste not only for fajitas and barbecue, but also for putting convicted criminals, including the mentally retarded, to death and stigmatizing non-heterosexual forms of sexual expression. Both of these tastes are now unconstitutional, but only because the Supreme Court has decided that there is a sufficient “American” consensus to trump what is now perceived as a truly idiosyncratic set of Texan values. The possibility that local values will in fact be trumped by national ones is the price one pays for entering into a federal union. This obviously does not entail that one looks beyond the borders of the federal union in order to find out whether what Marshall once called, sincerely or not, a “sovereign State,”39 is subject to constraints because it is, of course, also a member of a nation with its own supreme norms. Justice Scalia is, to be sure, parochial, but it is not clear that that is not required by the presuppositions of the American

legal system insofar as it rejects the existence (or relevance) of natural law or “international human rights” that, in effect, dominate more local norms and cultures.

I end this excursus into the jurisprudential views of Justice Scalia with reference to his dissenting opinion in Locke v. Davey,\(^40\) handed down in February 2004. Perhaps remarkably, it is Justice Scalia who invokes foreign developments by way of criticizing the majority for its seeming disdain of the rights of the religious to full participation in the benefits of the modern welfare state. Says Justice Scalia, “Today’s holding is limited to training the clergy, but its logic is readily extendable, and there are plenty of directions to go. What next? . . . [R]ecall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today.”\(^41\) I must say that this seems to be a quite clear case where the values of France, however understandable in terms of their own rich cultural history of anti-clericalism and concern to maintain a relentlessly secular state, is quite out of line with our own values as a nation committed to a considerably greater degree of pluralism. One suspects, incidentally, that France’s attempt to bar religious attire, including scarves worn by Muslim schoolgirls, will be challenged in the European Court of Human Rights under the terms of Article 9 of the European Convention on Human Rights, which begins with a strong protection of “the right to freedom of . . . religion,” including “freedom to . . . manifest his religion or belief, in . . . practice and observance.”\(^42\) Still, it is possible that the French legislation will be upheld by reference to language in the Convention, immediately following the quoted text, that allows “limitations” with regard to “manifest[ing] one’s religion or beliefs” when they “are prescribed by law and are necessary in a democratic society . . . for the protection of public order, health or morals.”\(^43\) Would any of us disagree with Justice Scalia in regarding it as “irrelevant” if the European Court in fact upheld the law? Would we not say, correctly, that we are part of a distinctly different political tradition? And if we would basically disregard such a decision, then why precisely would it be any more relevant if the Court struck down the French law?

It is worth considering also, at least for a moment, the argumentative practices of Scalia’s presumptively more cosmopolitan opponents. To be sure, they cite foreign materials, especially when they are in accordance with what one suspects are pre-existing views. What seems strikingly lacking, though, is any real analysis of them or explanation, beyond the ostensible force provided by their very existence, of why we should be impressed by them. Edward Rubin coined the wonderful term “puppy federalism” to refer to the infatuation of the present Supreme Court with restoring federalism to its pride of place in the constitutional pantheon.\(^44\) “Like puppy love,” says Rubin, “it looks somewhat authentic but does not reflect the intense desires that give the real thing its inherent meaning.”\(^45\) Within this context, my colleagues Ernest Young and Lynn Baker have insisted, I believe correctly, that the Court, for all of its rhetorical fireworks particularly in the area of sovereign immunities, has scarcely taken a glance at the most important vehicle of the contemporary national government, which is conditional spending.\(^46\) And even its


\(^{41}\) Id. at 1320 (citing Elaine Sciolino, Chirac Backs Law to Keep Signs of Faith Out of School, N.Y. TIMES, Dec. 18, 2003, at A17).


\(^{43}\) Id. art. 9(2).


\(^{45}\) Id. at 38.

vaunted opinions limiting Congress’ power under the Commerce Clause seem, at least so far, to be restricted to essentially symbolic legislation that has relatively little practical import. I wonder if there is something similarly “puppyish” about the invocation of foreign materials by members of the Supreme Court.

As Choudhry’s superb article demonstrates, there are courts elsewhere—South Africa’s apparently being the primary, but not unique, example—that not only cite foreign materials, but also, and far more importantly, actually discuss them and grapple with their arguments, especially when they choose to go in a different direction.47 Justice Kennedy, however, tells us nothing interesting about the European case. The citation is mere ornamentation, like a trill in a cadenza. The only thing we learn is that it exists and that it presumably supports his argument. Should we want to know anything more, we must ourselves go to the library (or log onto the Internet) and track the case down. Justice Breyer is a bit better, but he, too, at the end of the day, does little more than provide some bibliographical help for someone interested in reading about European experience administering modern states or the European Union.

In any event, the challenge facing those of us who self-identify with the cosmopolitanism of Justice Breyer and lament the parochialism of Justice Scalia is to articulate exactly why it is worth becoming genuinely familiar with—which means really discussing and not simply tipping our hats to—foreign materials. This discussion is especially important if we find at all persuasive Scalia’s account of what it means to be faithful to this Constitution, in all of its decided imperfection.

For better or worse, I believe that, with regard to the death penalty and regulation of gay and lesbian sexual expression, one must take Justice Scalia’s position with genuine seriousness at least some of the time. This latter caveat is crucial. It really depends whether one is trying to place such issues within the context of expressing basic social values about the importance of retributive punishment, on the one hand, and condemning “unconventional” sexual expression, on the other. If one is behaving as a legal anthropologist manqué, which is at least one way of understanding the “fundamental values” enterprise, then the central task is indeed trying to figure out what constitutes a particular society’s way of expressing values in the world. It is, almost by definition, this society and not one elsewhere that is the center of our inquiry. One might, of course, say that we are all part of one cosmopolitan, globalized society that operates according to universal norms, but, obviously, this is a highly controversial—and, as an empirical matter, almost certainly false—proposition. And once one grants the pluralistic reality of the world around us, one must always explain why one looks to outside country A instead of some other outside country B for guidance. And even if one can explain why A instead of B, does that mean that one is equally impressed by everything that A does? Perhaps our particular political heritage, for example, might justify our looking to English law more quickly than, say, to German law. But surely we should not be particularly impressed by a notably restrictive British law regarding freedom of the press, whatever our common heritage. Indeed, it is just at such points that one is tempted to point to the fact that the United States is founded in explicit rejection of aspects of its English heritage.

I am, therefore, more in sympathy with Scalia’s arguments than I initially expected to be. However, with regard to the death penalty or suppression of gay and lesbian sexuality, or for that matter, allowing the wearing of religious dress in public spaces, things get far more complicated if we view these not so much in expressive terms, reflecting our basic values, but rather far more instrumentally. Consider, for example, the proponent of capital

47. See generally Choudhry, supra note 7.
punishment who speaks not of revenge but, rather, its deterrent effect and concomitant saving of lives or the opponent of gays in the military who emphasizes the ostensible effects on military cohesion of accepting open gays or lesbians into the armed forces. Given that these latter assertions are entirely empirical in their thrust, they call for an entirely different response from those that are only expressive.

It is Justice Scalia’s failure to appreciate this point that makes his response to Justice Breyer not only (typically) ill-tempered, but almost truly irrational. I interpret the debate between Scalia and Breyer, particularly in Printz, to be far less about norms than about empirical data that might enable us to figure out the most effective way to achieve common norms. There is, after all, something truly mindless about objecting to the “commandeering” of state officials to help implement national programs unless one can present cogent arguments, based on empirical evidence, that such commandeering will in fact be destructive to significant federal interests. And, dare I say it, only in the judiciary or on the political hustings does raw and naked assertion count as “evidence” for one’s argument.

Perhaps ironically, one might look not only to Justice Breyer, but also to Scalia’s usual ally, Chief Justice Rehnquist. In a majority opinion rejecting a claim that the Constitution, correctly understood, protects what has come to be called “assisted suicide”—i.e., the ability of a doctor to provide terminally ill patients with drugs that might be used to end their lives—Rehnquist wrote,

> The State’s assisted suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same way as anyone else’s . . . .

*This concern is further supported by evidence about the practice of euthanasia in the Netherlands.*

He goes on to present some interesting information about those practices in the Netherlands.

One might interpret Rehnquist’s argument as follows: All of us are united by a commitment to valuing “the lives of terminally ill, disabled, and elderly people.” Supporters of assisted suicide believe that offering them practical ways to end their lives, should they wish to, honors their autonomy. Many opponents do not reject the value of autonomy as such; rather, they argue that the actual realities of life make it more likely that assisted suicide will end up dishonoring that value than honoring it. Evidence for this argument is ostensibly found by analysis of what has happened in the Netherlands, the country that has gone furthest to allow assisted suicide as a legal possibility. Among other things, there seem to have been incidents of what can more accurately be described as euthanasia than genuinely autonomous decisions to end one’s life. One may or may not agree with Rehnquist’s interpretation of the data. The point is that it seems impossible to deny that what has gone on in Holland should be of interest to any judge called upon to determine whether the vague contours of the Constitution, which is committed to some notion of autonomy, embrace something like assisted suicide.

Similarly, Justice Breyer, in his Printz dissent, is not attacking the value of federalism per se. Rather, he is arguing that a look at the European experience reveals that federalism can easily be maintained, perhaps even strengthened, by allowing a certain amount of “commandeering” of state officials to enforce national policy. Scalia’s rejection of

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Breyer’s data in toto simply makes no sense, even if one accepts, perhaps reluctantly, the cogency of Scalia’s dismissal of comparative law in Lawrence and Atkins, which can be viewed as debates about fundamental values.

This is not to say that Breyer is necessarily correct and Scalia necessarily wrong with regard to the instrumental relationship between commandeering and preserving the agreed-upon values of federalism, which include, among other things, respect for diversity and the virtues of a less alienated form of popular governance. As Vicki Jackson and my colleague Ernie Young have both suggested, it may be that federalism is actually more robust in Europe than in the United States, so that European states can “afford” some degree of “commandeering.”49 In contrast, American states might lose what little significance they truly possess if courts allow their officials to be commandeered. I personally suspect that Breyer is correct in all respects and that Scalia (and my esteemed colleague) are both too fearful about the health of American federalism. But the point is that at least Ernie and I might agree that facts really count. And the relevant facts, I believe, are not those of eighteenth century federalism, any more than we would particularly be interested in discussing eighteenth century notions of medical care (think of leeches, for example) when trying to figure out what contemporary Americans are entitled to. Instead, they are precisely the experiences of other countries today.

I am more than happy to invoke Madison and Hamilton themselves inasmuch as both emphasized the importance of learning from “experience.” Scalia in fact rejects this most important of all lessons of the Framing generation and instead treats as embedded in amber their highly particular judgments about eighteenth century institutions. It is truly as if we would take seriously a Dr. Madison’s belief that leeches are the sure cure for ague.

There are, of course, many questions that remain even if one accepts Breyer’s (and Rehnquist’s) rejection of Scalia’s know-nothingism. It is obviously difficult to study any given society, especially one that is indeed foreign and, in addition, speaks a different language or organizes itself under a quite different legal system. Law professors especially are tempted by the arrogant belief that they can easily study and analyze just anything, including complex empirical issues. Perhaps the only cure for such arrogance is a self-denying ordinance commanding us to cease from doing any comparative analysis at all. I believe that this particular cure would be worse than the disease. But at least we would be engaged in a cogent conversation, which would be progress.

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