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Introduction to Comparative Constitutionalism

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Comparative constitutionalism is an area of legal scholarship with a long history, and it has long been an area in which legal scholars collaborate with scholars in other disciplines, such as political science, philosophy, and sociology. Recently, as globalization has fostered closer relations among nations and as international treaties and agreements have played an increasing role in many nations' understanding of their domestic legal traditions, the need to study constitutional issues comparatively has come to seem even more urgent and the interdisciplinary collaboration involved even more fruitful and exciting.

The symposium on Comparative Constitutionalism centers on Mark Tushnet's article, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*.[1] Tushnet's article displays not only a mastery of traditional techniques of comparative analysis of text and interpretation, but also a sensitivity to the larger social and political forces in societies that affect the understanding of constitutional guarantees. The field of comparative constitutionalism is intrinsically cooperative and interdisciplinary, since it requires a depth of knowledge about comparative political structures that lawyers as such do not typically acquire from their legal education. It is therefore appropriate that Tushnet's commentators include a law professor with philosophical inclinations (Epstein), a law professor who is also a political scientist (Sunstein), and a political science professor who is also a philosopher (Young). Such a cooperative group is needed to shed light on the tangled relations between legislatures and courts, and between both of these and larger social values.

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1. Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 Chi J Intl L 435 (2002).

Why should we look at constitutional provisions comparatively? Traditional courses in constitutional law are not comparative. Comparative courses are becoming more common, but they are not part of the core of required law courses; often, in fact, they are offered by the department of political science, rather than the law school. And yet I would argue that the comparative study of constitutions is an essential part of learning constitutional law, important in all societies, but especially urgent in the United States, whose general culture tends to be unusually inattentive to other nations and their ways of doing things. There are three powerful reasons for making comparative constitutional law far more central in the law school curriculum than it currently is.[2]

First, we do not fully understand our own Constitution and its guarantees until we have thought about other ways of organizing similar material. This is a general point about human understanding: all too often we treat what is familiar as totally unremarkable and "natural," thinking that our way is the way things must be. It is only when we see another perfectly reasonable but very different way of doing things that we begin to recognize that our way is actually one option among many, the result of history and choice rather than necessity. And it is only after we have achieved that recognition that we begin to be able to ask ourselves why our system is the way it is, whether it really has to be that way, and what system, if any, might be better.

The essential importance of comparison for understanding and evaluation is a theme that has deep roots in Western traditions of inquiry. The ancient Greek historian Herodotus, in order to study and ultimately evaluate the ethical and political values of his homeland, traveled around the entire known world, recording the customs and values of Persians, Egyptians, Scythians, and many other peoples. It was only after an extremely lengthy comparative account of many different areas of value and culture that he judged himself to be in a position to evaluate his homeland. In some areas, the result of the comparative inquiry is deflationary: what feels to Greeks like a deeply held ethical conviction is revealed to be a mere habit, with no compelling reasons in its favor. Greeks think that the corpse must be buried, and that it is the most shameful thing of all to allow a corpse to be exposed. But the Persians, by contrast, deliberately expose the corpses of their dead, believing that the birds of prey should do their work, and that such a practice is respectful of the dead, rather than heinous. Herodotus suggests that each is in the grip of a deeply held religious custom, and that neither has good reason to be shocked (as each typically is) by the practices of the other. The challenge of Herodotus' history is to find out whether everything is like this, mere habit without true ethical value. (Herodotus' answer to this question is clearly no. The central political values of the Athenian democracy turn out to be more deeply rooted, with more to be said for them, than customs about burial.)

2. For my general reflections on the need for more international study in legal education, see Martha Nussbaum, *Cultivating Humanity in Legal Education*, 69 U Chi L Rev (forthcoming 2002).

Comparative constitutionalism continues Herodotus' inquiry. When we look at different ways of organizing basic political principles, we are forced to notice that our ways are not the only ones that reasonable people pursuing roughly similar goals might choose, and we are led to ask what reasons we had and have for our own ways. Tushnet's paper prompts such reflection throughout. Looking at the different structures of judical review recorded by Tushnet, and the many different ways courts have of relating to legislatures, we are then required to see that our own style of judicial review, which seems so natural that it looks like the only reasonable way to do things, is not in fact the only reasonable way. We then are forced to ask which ways are good, and, among the good, which are better. Tushnet's paper focuses on the descriptive task, but it ventures into the normative domain when it raises questions of internal coherence and stability. Some systems contain internal tensions that render them unstable; others do not. And some appear to fit well with the overall values of the surrounding society, while others do not. Although Tushnet is not primarily interested in defending social-democratic norms, it is evident that he has considerable sympathy with them, and with the related project of securing to citizens a set of social and economic rights. Thus the question whether a constitutional order that guarantees such rights can evolve a stable and coherent set of legal institutions is itself a question that has normative significance. Comparative study puts these questions on the table, and illuminates them.

But the reasons for studying constitutional law comparatively are not only reasons of self-interest. Comparative study does teach American lawyers a great deal about America, its achievements and eccentricities, its commonalities and its exceptionalism. It helps us ask what we should stick to, and what might possibly be changed. But we should not concede that the only point of legal education, and legal scholarship, in the United States, is to develop an understanding of US law. All nations are increasingly close to one another, through modern communications, through the power of international institutions, agencies, and treaties, and through the global economy, which constructs complex relations of interdependence linking the United States with virtually every other nation. Law students may work for multinational clients; law firms themselves are increasingly multinational. This means that a knowledge of the legal and constitutional systems of other nations, intellectually valuable in itself, is also an urgent necessity, if American lawyers are to deal responsibly and sensibly with clients and associates at a distance. Comparative constitutional law cannot teach the young lawyer all he or she will ultimately need to know about the complex world in which law firms now do business; but it can impart techniques of inquiry and reveal how much there is to learn.

There is another very urgent reason why we should know more about how things are done elsewhere. Our actions affect lives at a distance. In this era of globalization, the decisions made by a lawyer representing Pepsi-Cola, or Hyatt Hotels, may affect the lives of workers in India and South Africa, China and Bangladesh. This suggests that the young lawyer should know a lot more than most

Americans currently do about the world outside America. Of course constitutional law is not the only thing that such a lawyer ought to be learning. In order to represent ethically a firm that has dealings with South Africa, the lawyer should know not only about *Grootboom*[3] but also about the depredations of AIDS. Nonetheless, through the study of a case such as *Grootboom* he or she will in fact learn a lot about the problems of South African society, problems that are not totally unrelated to the actions of companies (for example, pharmaceutical companies) based in the United States.

These are some of the reasons for recommending the study of comparative constitutionalism to law students and legal academics. Tushnet's paper admirably demonstrates some of the benefits such a study can offer to someone convinced by these arguments. But the paper, together with the commentaries, provide more than an example of comparative constitutionalism. They provide, in fact, a menu of issues that scholarship in this area must repeatedly confront and attempt to understand.

The Constitution and the Larger Social Fabric. How is the constitution of a nation related to the more general social traditions of the nation, its values and aspirations, its most pressing problems? Tushnet's paper suggests that this relationship is complex. Social values provide not only the historical context out of which constitutions grow, but also an ongoing fabric of traditions and values that can often be vital in interpreting constitutional provisions. At the same time, there obviously can be tensions between a constitution, as interpreted, and the values of society at a particular time. Many conflicts between legislatures and courts have their origins in such dissonance.

Constitutional Values and Background Ethical Norms. Are constitutional provisions free-standing constructs, or are there background normative principles that good constitution-making ought to respect? Epstein holds that natural rights, prominently including property rights, preexist constitutional provisions and provide a normative standard against which they ought to be assessed. Sunstein might be read as taking the opposite stance, holding that all property rights are simply political constructs.[4] But his position is actually complex, and not incompatible with Epstein's. Taking no stand on the question of whether property rights have a natural prepolitical basis, he argues that as we know them, as meaningful guarantees that actually protect citizens in their holding, property rights require and rest on state action, and on the state's ability to spend the money to support them.

Constitutional Norms and the Socio-Economic Sphere. It has been traditional in Western political philosophy to divide political entitlements into two groups: the political and civil rights, and whatever entitlements to material goods are recognized

3. *Republic of South Africa v Grootboom*, Case No CCT 11/00 (Con Ct S Africa, Oct 4, 2000), available online at <http://www.concourt.gov.za/judgments/2000/grootboom1.pdf> (visited Sept 9, 2002).

4. Such is the position, for example, of Liam Murphy and Thomas Nagel, *The Myth of Ownership* 45 (Oxford 2002).

by a state. The term "first-generation rights" now designates the former, "second-generation rights" the latter. But the papers make it very clear that the two categories are not easily separated. Sunstein insists that the rights in the first group have a material element. They do not come into being on their own, but require the state to allocate money if they are to be effective and real in people's lives. Thus in an important sense all rights are welfare rights. Epstein suggests, by contrast, that we can still make a clear and coherent distinction between some traditional activities of the state, protecting people against force and fraud, and the new activities discussed sympathetically in Tushnet's paper. In his view, the state is ill-advised to venture into the realm of welfare, although he would presumably not deny that the rights he favors do have a monetary cost. Getting clear about these issues, conceptually and practically, is a major future task of work in comparative constitutionalism.

Constitutions and Consequences. A pervasive concern of the papers is with outcomes. Whether or not constitutional provisions and their interpretation have a prepolitical moral basis, they have consequences. And the authors appear to agree that both texts and interpretive traditions can reasonably be evaluated by looking at how they work. Do they produce stability or instability? Do they deliver the welfare that they seek to deliver? Tushnet and Young are sympathetic not only to the goals of social democracy, but also to its choice of means, its use of the political and legal sphere to guarantee a certain level of welfare to all. Epstein believes that government involvement typically makes things worse, and that the best course for government, in South Africa and elsewhere, is to hold back and let private forces solve the problems as best they can.

Implementation. The papers do not focus directly on the topic of implementing rights, but it is a pervasive theme in all of them. One question we may reasonably ask about any constitution, together with its traditions of interpretation, is whether its implementation of rights is real or capable of being made real. Sunstein formerly held (in the earlier paper cited by Tushnet) that social and economic rights were a mistake because they could not be implemented effectively. He now no longer holds this, nor does Tushnet—although Tushnet's paper shows how difficult it is for courts to lay out a path to the implementation of the rights of which they speak. All the papers recognize that both political and economic forces are of primary importance in determining whether rights that exist on paper ever become real. In some nations (though by no means all) courts may give instructions for legislation; but they cannot exactly legislate; nor can they bring about the economic climate within which the problems they are trying to solve will be solved. (Epstein argues, for example, that the solution to the problem of homelessness in South Africa lies far more in the private sphere than in the legal and political spheres.)

There are other social forces, not mentioned in the papers, that are extremely important in determining whether rights become real. One of the most important is education. A nation, half of whose people cannot read or write, is not likely to be a nation of citizens who vigorously claim their rights. One can predict that in such a nation rights will be more real for some people than for others. Even access to the legal

system requires literacy, and meaningful participation in claiming rights requires more than mere literacy.

Another very significant factor is public health. Many nations of Africa are ravaged by HIV/AIDS to an extent that compromises the ability of these nations to support a meaningful regime of rights. In South Africa approximately 25 percent of adults, and in Botswana an astonishing 38 percent of adults, are living with HIV. Such people—especially in the absence of good medical care—are not likely to be effective as citizens in claiming rights; and their inability to work creates massive problems for the delivery of all rights, including the right to housing articulated in the landmark case *Grootboom*.

A third factor that needs sustained study is the interaction between religion and the implementation of constitutional rights. Especially in areas where rights clash with entrenched traditions, religious bodies and their leaders play a very important role in either securing or impeding rights. At the same time, the way a constitution shapes the role of religion has a major impact on the way religion will function either as a deliverer or impeder of rights.

These are only some of the social factors not mentioned in the papers that require study if we are ever to acquire an adequate understanding of comparative constitutionalism. Other such topics are the nature of security, policing, and the protection of bodily integrity; the nature of the family; and the nature of the legal profession and legal education. All these issues are present, so to speak, in the margins of these eloquent papers, suggesting a rich menu of topics for future study in this young and exciting field.