

COPYRIGHT NOTICE:

Mark Tushnet: Weak Courts, Strong Rights

is published by Princeton University Press and copyrighted, © 2007, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: permissions@pupress.princeton.edu

Why Comparative Constitutional Law?

RECENT SUPREME COURT opinions mentioning constitutional decisions by courts outside the United States have generated a strong—and grossly overstated—critique by conservative commentators.¹ The thrust of the critique is that these opinions portend inroads on the sovereign ability of the American people to govern ourselves, and the embedding in the U.S. Constitution—through judicial interpretation—of the values of a cosmopolitan elite that could not persuade the American people to adopt those values through purely domestic legal processes.

Only a brief comment on these “arguments” is appropriate here.² First, Supreme Court mention of decisions by courts outside the United States is no recent development, but at most a revival of an earlier tradition that had been submerged for perhaps a decade or two.³ Second, *mention* is the right word. Only one recent opinion relies on the substance of a decision by a non-U.S. court to support a proposition that played some role in the Court’s reasoning.⁴ Other references to such decisions have been in the form of factual observations about what other courts have done. Third, the idea that references to non-U.S. decisions might somehow produce decisions that would not be reached by using other materials for interpreting the Constitution is quite implausible. It seems to require that some justice who would not otherwise be

¹ The most prominent are Robert Bork and Richard Posner. See Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003); Richard A. Posner, “Foreword: A Political Court,” 119 *Harv. L. Rev.* 31, 85–88 (2005). Probably the most extended analysis is Roger P. Alford, “In Search of a Theory for Constitutional Comparativism,” 52 *UCLA L. Rev.* 639 (2005).

² For my more extended observations, see Mark Tushnet, “Transnational/Domestic Constitutional Law,” 37 *Loyola L.A. L. Rev.* 239 (2003); Mark Tushnet, “When Is Knowing Less Better than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law,” 90 *Minn. L. Rev.* 1275 (2006); Mark Tushnet, “Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars,” 35 *Balt. L. Rev.* 299 (2006).

³ For a compilation of materials showing how long the tradition is (with some effort to massage the characterization of the tradition to establish the novelty of recent references to non-U.S. law), see Steven G. Calabresi & Stephanie Dotson Zimdahl, “The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision,” 47 *Wm. & Mary L. Rev.* 743 (2005).

⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003), referred to a 1981 decision by the European Court of Human Rights to show the inaccuracy of an assertion made in 1985 by then chief justice Warren Burger that “condemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (Burger, C. J., concurring).

persuaded by those other materials would nonetheless change his or her mind when confronted with the non-U.S. materials. That might happen, someday, for one justice perhaps, but surely not on a large enough scale for anyone to care about. Fourth, the concern about sovereignty seems equally misplaced. The U.S. Supreme Court is, after all, a domestic lawmaker no less than is, for example, the U.S. Senate, which ratifies treaties limiting what the U.S. government as a whole can do. That is, a domestic institution would impose any restrictions on U.S. lawmaking by references to non-U.S. court decisions. There is no impairment of sovereignty in that. And, finally, the concerns about self-government expressed by critics of these Supreme Court decisions are valid ones—when made about judicial review itself. There is nothing, though, that distinguishes non-U.S. decisions from anything else the Court might rely on to limit self-government through judicial review.

This recent tempest in a teapot has placed the question of the value of comparative constitutional study on the table. Why study comparative constitutional law? For a scholar, of course, the value seems obvious: more knowledge is generally better than less. Others have a more instrumental interest. They might want to know whether studying comparative constitutional law might improve our ability to make domestic constitutional law. Responding to that inquiry requires some examination of how we can actually *do* comparative constitutional law.⁵

I confine my attention to questions implicated in doing comparative constitutional law *as law*. There is, of course, a large field of comparative studies of governmental organization, conducted by political scientists as well as lawyers, and some of that field overlaps with the field of comparative constitutional law. There is, though, one large difference between the fields. Comparative constitutional law involves doing law. And, as I have learned, it is quite difficult to be comfortable in doing law in more than one legal system. Even when language barriers do not intervene, legal cultures do. For example, I have been persuaded—despite my initial skepticism—that Australian constitutional culture is far more formalist than U.S. constitutional culture. It is less open to what seem to me the inevitable intellectual challenges from those influenced by American legal realism and its legacy. As a result, constitutional doctrines in Australia, such as those dealing with the allocation of authority between the national and the state governments, are more stable than similar doctrines in the United States, even doctrines framed in language that seems

⁵ There is a large literature on the methods of comparative law generally. The more general field, though, has included discussions of matters that I personally find not terribly interesting, such as the classification of legal systems into families and the phenomenon of borrowing by one legal system or tradition from another. For examples of writing in comparative constitutional law on the latter topic, see *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin & Albert Rosenthal eds., 1990); *Symposium on Constitutional Borrowing*, 1 *Int'l J. Con. L.* 181–324 (2003).

parallel to that used in the Australian cases. These and other differences in constitutional cultures complicate the task of doing comparative constitutional law, perhaps to the point where the payoff in any terms other than the increase of knowledge is small.

AN OVERVIEW OF METHODS IN COMPARATIVE CONSTITUTIONAL LAW

I think it useful to identify two ways of doing comparative constitutional law, as a preliminary to criticizing and deepening them to suggest a third method. Without insisting that they are sharply different, I call the first two methods *normative universalism* and *functionalism*.⁶ These two methods involve efforts to see how constitutional ideas developed in one system might be related to those in another, either because the ideas attempt to capture the same normative value or because they attempt to organize a government to carry out the same tasks. I call the third method *contextualism*. This method comes in two variants, which I call *simple contextualism* and *expressivism*. Simple contextualism insists that constitutional ideas can be understood only in the full institutional and doctrinal context within which they are placed. Expressivism takes constitutional ideas to be expressions of a particular nation's self-understanding. Both methods raise questions about the coherence of the idea that constitutional ideas can migrate (without substantial modification) from one system to another.⁷

UNIVERSALISM AND FUNCTIONALISM

Normative universalism emerges primarily from the dialogue between those who study comparative constitutional law and those who study international human rights. The idea is simple: constitutionalism itself entails—everywhere—some fundamental principles. Some of those principles involve human rights: the protection of some universal human rights, such as rights to political participation, to equal treatment under the law, to freedom of

⁶ There is a sense in which normative universalism and functionalism are variants of a more general universalism, as will become clear later. I have been unable to devise labels that preserve a parallelism in formulations, though.

⁷ It may be worth noting that legal scholars attracted to normative universalism are likely to be influenced by normative jurisprudence and political theory, that those attracted to functionalism are likely to be influenced by political scientists, and that those attracted to contextualism are likely to be influenced by anthropologists. And here yet another complexity intrudes. Not only will the scholar of comparative constitutional law have to be comfortable in more than one constitutional system, but he or she may think it helpful to be comfortable with the discipline other than law that seems likely to illuminate comparative constitutional questions in the way the legal scholar finds useful.

conscience and expression, and, for many human rights advocates, much more. Others involve structures of government. Here the list is typically shorter: independent courts for sure, perhaps some version of the separation between law enactment and law execution (another aspect of the separation of powers), and probably little more.

Universalists study comparative constitutional law to identify how particular constitutions instantiate those universal principles. By comparing different versions, we can better understand the principles themselves. Then we might be able to improve a domestic system's version of one or another principle by using that enhanced understanding to modify it.

Three examples from free speech law, two controversial, the other not, illustrate the universalist method in comparative constitutional law. The uncontroversial one is the law of sedition, a criminal offense consisting of criticism of existing government policies. Over the past century, the United States Supreme Court has grappled with the problem of reconciling the law of sedition with the First Amendment's protection of free expression. Its sustained attention to the problem has yielded two conclusions. The first is widely accepted. Government efforts to suppress speech critical of its policies must be treated with extreme skepticism, captured variously in formulations like "clear and present danger" or "intended to and likely to cause imminent lawless conduct."⁸ The latter formulation indicates the second conclusion we can draw from the U.S. sedition cases. The problem of seditious speech, analysis has shown, is only one aspect of a broader problem—how can governments regulate speech that, they fear, will cause people to break the law?

Governments around the world have confronted the problem of seditious speech, and all governments must deal with the problem of speech that increases the risk that laws will be broken. Comparative constitutional study allows us to examine the different ways in which they deal with the problem. And, most scholars and many constitutional courts believe, something like the U.S. approach is the best one available.⁹ The European Court of Human Rights, for example, has dealt with cases arising out of Turkey's often violent confrontation with the Kurdish separatist movement there. One, decided in 2000, involved a newspaper article by the president of a major labor union, in which the author said that "not only the Kurdish people but the whole of our proletariat must stand up against" the nation's anti-Kurdish laws and policies.¹⁰ The Court wrote that "there is little scope [in the applicable international human rights law] for restrictions on political speech," but that governments could limit free expression when a speech

⁸ *Dennis v. United States*, 341 U.S. 494 (1951) (the most recent version of the "clear and present danger" test in the United States); *Brandenburg v. Ohio*, 395 U.S. 444 (1968) (the "imminent lawless conduct" test).

⁹ I return to the problem of sedition law in chapter 3.

¹⁰ *Ceylan v. Turkey*, 30 EHRR 73 (2000), ¶ 8.

“incites to violence against an individual, a public official or a sector of the population.”¹¹

The law of personal libel provides a second example. Here the United States has adopted a notably stringent rule restricting the circumstances under which a person the Supreme Court calls a public figure can recover damages for the publication of a false statement that injures his or her reputation. The category of public figures is a large one in the United States, including leaders of large private corporations and prominent football coaches and celebrities as well as politicians.¹² Public figures can win only actual damages, which are usually relatively small, and even then only if they show that the false statements were made by someone who knew they were false or at least made a conscious decision to forgo any effort to find out whether they were true or false.¹³

Not surprisingly, other constitutional courts regularly confront libel cases brought by public figures. They have reached a range of conclusions, but none is nearly as restrictive of recovery as is the United States. For example, Australia uses a test of reasonableness. One major formulation was offered in a case brought there by a member of New Zealand’s parliament who had been that nation’s prime minister:

[A] defendant’s conduct . . . will not be reasonable unless the defendant had reasonable grounds for believing that the imputation [of something that damages reputation] was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant’s conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response (if any) made except in cases where the seeking or publication of a response was not practicable.¹⁴

Many in the United States find our domestic law of libel unsatisfactory.¹⁵ Universalist scholars of comparative constitutional law suggest that looking at the solutions that other constitutional democracies have come up with would help us develop a better law of libel.

¹¹ *Id.*, ¶ 34.

¹² See Barbara Singer, “The Right of Publicity: Star Vehicle or Shooting Star?” 10 *Cardozo Arts & Ent. L. J.* 1, n. 1 (1991).

¹³ The term the Supreme Court uses is that the false statements must be made with malice, but the decisions make it clear that the term refers not to some mental state like *having it in for the public figure*, but rather to knowledge of the statement’s falsity or willful disregard of its truth or falsity.

¹⁴ *Lange v. Australian Broadcasting Corp.*, (1997) 189 CLR 520 (Aust. High Ct.) (opinion of Brennan, C. J.).

¹⁵ See David A. Anderson, “Is Libel Law Worth Saving?” 140 *U. Pa. L. Rev.* 497 (1991); see also James Penzi, “Libel Actions in England, a Game of Truth or Dare? Considering the Recent *Upjohn* Cases and the Consequences of ‘Speaking Out,’” 10 *Temp. Int’l & Comp. L. J.* 211 (1996) (comparing English and U.S. libel laws).

The most controversial example involves the regulation of hate speech. Proponents of more extensive regulation of hate speech in the United States often refer to transnational constitutional norms—the existence of hate speech regulation in Canada,¹⁶ the existence in some international human rights treaties of a *duty* to regulate hate speech¹⁷—in defending the proposition that hate speech regulation should not be treated as unconstitutional under the First Amendment to the U.S. Constitution.¹⁸ They argue, quite rightly, that the fact that modern liberal democracies do in fact regulate hate speech without descending into totalitarian tyrannies where the government engages in extensive thought control shows that hate speech regulation in itself is compatible with a system that respects general norms of free expression. They conclude that hate speech regulation in the United States could be adopted without risking anything other than making the United States more like Canada—not, in their view, an obviously bad thing.

Again, this exemplifies the universalist use of comparative constitutional law. According to universalists, general principles of free expression and human dignity come into play when someone makes a speech castigating a racial, religious, or national group. Examining how a number of nations have worked out accommodations between those principles might be useful in developing the contours of any nation's domestic law dealing with hate speech.

The functionalist approach to comparative constitutional law is similar to the universalist one to the extent that it tries to identify things that happen in every constitutional system that is the object of study. So, for example, every democratic nation has to have a mechanism in place for going to war or for dealing with domestic emergencies that threaten the nation's continuing existence. But, the functionalist analysis goes, democratic nations should be careful about going to war, and about determining that a truly grave emergency exists. Functionalists believe that examining the different ways in which democratic nations organize the processes of going to war and declaring emergencies can help us determine which are better and which are worse processes.

As the example of war-making and emergencies suggests, functionalists tend to focus on issues of government structure. With respect to federalism,

¹⁶ See, e.g., *Regina v. Keegstra*, [1990] S.C.R. 697.

¹⁷ International Covenant on Civil and Political Rights, art. 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4(a) (States Parties “[s]hall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination”).

¹⁸ See, e.g., Mari Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” 87 Mich. L. Rev. 2320, 2341–48 (1989) (describing the development of international human rights law in connection with hate speech); John R. Powell, “As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society,” 16 *Law & Inequality* 97, 147–50 (1998) (discussing *Keegstra*).

for example, a functionalist might ask: What forms of federalism best accommodate the diversity in a nation's regions? Can federalism be adapted to deal with diversities that are not tied closely to geography? Belgium's experiment with an incredibly complex set of federalist institutions—some geographic, some linguistic—layered on to each other might provide some insights into these questions.¹⁹ Drawing on work by political scientists, functionalists consider whether presidential or parliamentary systems are better vehicles for achieving the goals a nation's people set for themselves.²⁰

Both the universalist and functionalist methods are flawed, though. Put most generally, their difficulty is that they operate on too high a level of abstraction. We can assume that there *are* universal principles of liberty and justice, for example, but we can be reasonably confident that such principles are not fully captured in general terms such as *free speech* or *equality*. The free speech principle, whatever it is, is likely to be extremely complex, sensitive to the circumstances presented by particular problems. The law of freedom of expression must deal with forms of expression that involve words alone, words coupled with symbols, symbols alone, and actions whose social meaning is understood to be communicative. It must deal with expression that is thought to cause harm by persuading listeners of the rightness of the claims made, by structuring the environment in which listeners evaluate *other* claims, or by triggering responses without engaging a listener's cognitive capacities. It must deal with harms ranging from assaults on dignity to threats to national survival. And, of course, it must deal with political speech, commercial speech, sexually explicit speech, and many other varieties of expression. With so many variables going into the structure of the free speech principle, it may well be that a nation's experience with the cases thrown up in its own history will be substantially more illuminating of the underlying principle than other nations' experiences with their histories.

A parallel point holds for issues of government structure. Consider, for example, the question of going to war. Separation-of-powers systems might be leery of giving a president the power to initiate substantial military engagements, because, as William Treanor has pointed out (drawing on the views held by the framers of the U.S. Constitution), a single person may be reckless in seeking to obtain honor in military operations.²¹ Members of the legislature,

¹⁹ For a description, now somewhat outdated, see A. Alen, B. Tilleman, and F. Meerschaet, "The State and Its Subdivisions," in *Treatise on Belgian Constitutional Law* 123 (André Alen ed., 1992).

²⁰ Bruce Ackerman, "The New Separation of Powers," 113 *Harv. L. Rev.* 633 (2000). For an extraordinarily unpersuasive attempt to respond to Ackerman, flawed precisely by its failure to understand the functionalist approach, see Steven Calabresi, "Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution," 18 *Const. Comm.* 51 (2001).

²¹ William Michael Treanor, "Fame, the Founding, and the Power to Declare War," 82 *Corn. L. Rev.* 695 (1995).

in contrast, gain little individually from authorizing military operations, and so may be more cautious than a president. Clearly, though, this argument depends on the precise structure of a nation's separation-of-powers system, and in particular on the relation between the president as party leader and the president as commander in chief.

CONTEXTUALISM AND EXPRESSIVISM

Contextualism, a third approach to comparative constitutional law, emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and that we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists. Contextualist comparative studies come in many forms—ethnographic and historical, for example. My concerns in this book lead me to present contextualism in a relatively thin way.

For present purposes, I limit my discussion of the contextualist approach to its focus on the *institutional* and *doctrinal* contexts of specific doctrines.²² Constitutions combine substantive norms, such as commitments to free speech and equality, with institutional arrangements, such as federalism and parliamentary government. The substantive norms are implemented within the institutional arrangements, and particular institutional arrangements are sometimes more compatible with some interpretations of the substantive norms than with others.²³

The hate speech issue provides a good example of why institutional contexts matter.²⁴ The arguments for hate speech regulation operate on the level

²² For a somewhat more complete description of the effects of these contexts, see Mark Tushnet, "Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action," 36 Conn. L. Rev. 649 (2004), from which the next paragraphs are drawn.

²³ My thinking about this question has been influenced by my colleague Vicki Jackson, and in particular her argument that federalism might consist of discrete packages of institutional arrangements. See Vicki C. Jackson, "Narratives of Federalism: Of Continuities and Comparative Constitutional Experience," 51 Duke L. J. 223 (2001); Vicki C. Jackson, "Comparative Constitutional Federalism and Transnational Judicial Discourse," 2 Int. J. Con. L. 91 (2004). I emphasize that my observations are only influenced by her analysis, that she has not indicated whether she agrees with my observations, and that I actually disagree with aspects of her argument about federalism.

²⁴ As Daniel Halberstam has shown, failure to attend to institutional contexts is a major flaw in one of the important references to comparative constitutional law in U.S. adjudication, Justice Stephen Breyer's attempt in *Printz v. United States*, 521 U.S. 98 (1997), to enlist German federalism to explain why the U.S. Supreme Court's "anti-commandeering" principle is not compelled by the existence of a federal system. 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* 213 (Kalypso Nicolaidis & Robert Howse eds., 2001).

of principle—free expression and equality. Those arguments typically overlook the institutional context within which hate speech regulations are implemented. One principle—among many—that (everywhere) guides the interpretation of constitutional protections of free expression is that those protections are designed to counteract a tendency on the part of government officials to overreact to perceived threats to order. Criminal law enforcement is much more highly centralized in other constitutional systems than it is in the United States. Great Britain’s hate crime statute requires that prosecutions be authorized by the attorney general, a single official.²⁵ Even in Canada’s federal system, criminal law enforcement is centralized in each province’s attorney general.²⁶ The risk of abusive prosecutions for hate speech may be reduced by this centralization and the attendant responsibility for, and public visibility of, decisions to prosecute. Compare the United States, where thousands of local district attorneys have the power to initiate and carry prosecutions through.²⁷ The way the U.S. federal system is organized, that is, may increase the risk that clearly inappropriate prosecutions for hate speech will be brought. And, finally, that risk is relevant to determining whether a domestic constitutional provision protecting free expression should be interpreted to permit or prohibit criminal hate speech regulations. The institutional context of criminal law enforcement in the United States and elsewhere must be taken into account in determining how to interpret the *substantive* commitment to free expression.²⁸

The doctrinal context matters as well. Here we can reconsider the earlier example of libel law. Cast in the most general terms, libel law provides the structure for accommodating interests in speech with interests in reputation, the latter an aspect of human dignity. Note, though, that in the United States the interest in speech is of constitutional magnitude, whereas the interest in reputation is merely one of policy.²⁹ The accommodation of interests in the United States *must* give greater weight to the interest in speech than to the

²⁵ Race Relations Act 1965, sec. 6(3).

²⁶ Constitution Act, 1867, § 92(14) (allocating criminal law enforcement to provinces); Can. Rev. Stat., ch. C-34 (1970) (giving provincial attorneys general primary law enforcement authority).

²⁷ In general, state attorneys general lack the power to displace local prosecutors except in highly limited circumstances.

²⁸ My argument deals with criminal enforcement of hate speech regulations. Other contexts involve much more decentralized decision making even in Canada and the United Kingdom—for example, in connection with hate speech regulations by school boards and government employers. It might be, then, that Canadian and British commitments to free expression might permit criminal hate speech regulation but ought not be interpreted to authorize noncriminal regulations.

²⁹ That is, as a matter of U.S. constitutional law, a state could abolish its tort of libel entirely, leaving people with no recourse whatever for damage to reputation caused by entirely false statements of fact.

interest in reputation. In contrast, in Great Britain and Australia, neither the interest in speech nor that in reputation is of constitutional magnitude. There the common law can develop in ways that give “appropriate” weight to both interests. And, finally, in Germany both the interest in speech and the interest in reputation as an aspect of human dignity are of constitutional magnitude. The balancing of interests in Germany will necessarily be different from that in the United States because the underlying constitutional provisions differ.

As I have described contextualism to this point, it simply insists on taking an appropriately wide view of the field in which constitutional law operates. Expressivism is a different, perhaps even more comprehensive version of contextualism. For an expressivist scholar, constitutional law—doctrines and institutional arrangements—are ways in which a nation goes about defining itself. Preambles to constitutions may be particularly useful for an expressivist. So, for example, the preamble to the Irish Constitution of 1937 is an especially rich text for these purposes. The preamble states:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.

The preamble’s opening words and its later reference to Jesus Christ identify the nation with Christianity, and its use of the terms *final end* and *prudence, justice, and charity* show that the nation is specifically Roman Catholic. The document also looks backward in a powerful way, with its references to *centuries of trial* and a *heroic and unremitting struggle*. And, finally, the formulation “give to ourselves” states a relationship of self-donation and acceptance between the people of Ireland and their constitution that embeds the 1937 document in the nation’s ongoing identity.³⁰

An expressivist approach to comparative constitutional law would contrast the self-understandings found in the constitutional documents of different nations. For example, such an approach might point to the differences in self-understanding expressed in Canada’s *Burns* decision and the *Stanford* decision

³⁰ One could engage in a similar analysis of the preambles to the constitutions of the United States and South Africa, and of the “post-amble” of the interim Constitution of South Africa, with its discussion of “national unity and reconciliation.” Interim Constitution of the Republic of South Africa, Act 200 of 1993, ch. 15, final paragraphs.

in the United States. In the former, the Canadian Supreme Court significantly modified a prior holding to impose rather severe restrictions on the power of the national government to extradite a fugitive from the United States charged with a capital crime, unless the government obtained assurances that the death penalty would not be imposed.³¹ The theme that the Canadian government had taken the lead in international discussions and implementation of human rights ran through the Court's opinion. So, for the *Burns* court, Canada's self-understanding as a leader on human rights led to the constitutional doctrine the court articulated. In *Stanford*, the U.S. Supreme Court applied a constitutional standard referring to "evolving standards of decency" in the context of the death penalty by insisting that the relevant standards of decency were those of the people of the United States, not those of the wider international community.³² An expressivist analysis could use these cases to distinguish between the outward-looking self-understanding of Canada and the inward-looking one of the United States.

My discussion of what we can learn from comparative constitutional law offers some cautionary notes, not knock-down arguments against its use in domestic constitutional interpretation. Sometimes it is said that comparative law can bring to mind possibilities that might otherwise be overlooked or thought too utopian to be considered as part of a real-world constitution. Comparative law, the thought is, can help us rid ourselves of ideas of "false necessity," the sense we might have—grounded in our own experience because that is the only experience we have—that the institutions and doctrines we have are the only ones that could possibly be appropriate for our circumstances.

Combining contextualism with the insight that comparative study can raise questions about whether some arrangements that seem necessary to us are actually false necessities may have more subversive implications for the comparative enterprise than it might seem initially. The difficulty is that contextualism might lead us to see that the arrangements are indeed necessary, given the complete context within which they are set. The question is the extent to which the constraints imposed by a nation's legal institutions and arrangements, by its doctrinal history, by its legal culture, and so on down the list of constraining factors intersect in a way that reduces the set of choices (be they institutional, doctrinal, or whatever) to one—that is, to the one that is actually in place.³³ I doubt that this question can be answered

³¹ *United States v. Burns*, [2001] 1 S.C.R. 283.

³² *Stanford v. Kentucky*, 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

³³ Notice that this concern is entirely compatible with the proposition that no single set of constraints is all that constraining. Doctrine can be flexible and substantially open, for example, and institutional arrangements in themselves might not place strong limits on the possibilities. Rather, the concern is that adding one loose set of constraints to another, and to yet another, reduces the options substantially.

in the abstract, or generally.³⁴ I believe, though, that the comparative inquiry must be sensitive to all the contexts to which contextualism directs our attention.³⁵

More precisely: contextualism in both its versions raises challenges to the idea that comparative study can help identify false necessities. The first version suggests that these institutions and doctrines might not be “false” in some strong sense because they may be so tightly integrated that no significant changes are possible. Expressivism suggests that a nation *has* a (single) self-understanding that its constitution expresses. Yet, these challenges should not be given more weight than they properly bear. Everything we know about the doctrines and institutions of law tells us that doctrines and institutions can accommodate much more change than we might think. We have discovered that we can tinker with a wide range of doctrines and institutions without transforming in the short run what we regard as constitutional fundamentals. And, as time goes on, our understanding of what those fundamentals are can itself change, sometimes in response to prior tinkering. This observation will play a large role in my discussion of forms of judicial review in chapter 3.

Similarly, it is a mistake to think that a nation has a single self-understanding. Doctrines and institutions might seem true necessities to an expressivist who says, “Well, this is the way we (or they) are.” But, even within a nation’s constitution and constitutional traditions, “who we are” is often—perhaps always—contestable and actively contested. In contrast to the inward-looking self-understanding articulated in *Stanford*, for example, there is another, outward-looking self-understanding that can be found in U.S. constitutionalism.³⁶

³⁴ Although I must note that my intuition is that the answer will quite frequently be that the cumulative constraints are indeed quite substantial.

³⁵ And that many comparative exercises are not sufficiently sensitive to all those contexts.

³⁶ The currently favored way of making the point is to refer to the self-understanding expressed in the passage of the Declaration of Independence stating that, under some circumstances, “We the People of the United States” have a duty (perhaps prudential, perhaps principled) to show “a decent respect to the opinions of mankind” by explaining to the world the reasons for our actions. This view of the Declaration is reinforced when the Declaration is read in light of Scottish moral theory that was part of the Declaration’s intellectual background, as to which see Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* (1978). Amartya Sen quotes a relevant passage from Adam Smith’s *Theory of Moral Sentiments*:

We can never survey our own sentiments and motives; we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them.

Amartya Sen, “Elements of a Theory of Human Rights,” 32 *Phil. & Pub. Aff.* 315, 350 (2004). For a slightly more extended discussion, see Mark Tushnet, “‘A Decent Respect to the Opinions of Mankind’: Referring to Foreign Law to Express American Nationhood,” 69 *Alb. L. Rev.* 809 (2006).

Contextualism's challenge to the comparative enterprise, though serious, need not be fatal. The challenge does suggest that the study of the migration of constitutional ideas must be done with great caution—more caution, I think, than can be found in much of recent literature on “borrowing” constitutional ideas. Perhaps the true object of study should be the way in which those constitutional ideas that do migrate are transformed as they cross the border, or, alternatively, the way in which ideas that seem to have migrated have deeper indigenous roots than one might think, deeper even than the prevalence of citations to nondomestic sources would indicate.

CONCLUSION

I can begin to wind up this chapter by turning to an exchange between Justice Antonin Scalia and Justice Stephen Breyer. Justice Breyer has referred—probably mistakenly—to experiences with federalism in Germany to explain why it might be thought compatible with U.S. federalism to allow the national government to “commandeer” the executive resources of state governments to carry out national policy. Justice Scalia responded that Justice Breyer’s approach, and perhaps reliance on comparative constitutional experience more generally,³⁷ was “inappropriate to the task of interpreting a constitution, though it was quite relevant to the task of writing one.”³⁸ Justice Scalia’s distinction between constitutional interpretation and constitutional design is not as sharp as he suggests, though. Consider the issue the next chapters take up—whether strong-form or weak-form institutions of judicial review better accommodate the competing interests in constitutionalism and self-government. That issue presents a question of constitutional design. Today, constitution drafters may well write provisions into their constitutions that make it clear that they have adopted a strong-form system or a weak-form one. The drafters of the U.S. Constitution did not include such provisions. Indeed, they did not write anything about judicial review into the

³⁷ Elsewhere Justice Scalia has relied on the claim that particular constitutional provisions do not license U.S. judges to refer to constitutional experience elsewhere. *Stanford v. Kentucky*, 492 U.S. 361, 369 n. 1 (1989) (“We emphasize that it is *American* conceptions of decency that are dispositive” of claims that imposing the death penalty on those who were under the age of eighteen when they committed their offenses was barred by the Eighth Amendment’s ban on cruel and unusual punishment.). I think it a fair inference from Justice Scalia’s position here and in other cases that he does not believe that the U.S. Constitution licenses judges to rely on comparative constitutional experience in any context, but he has not so stated in any of his opinions. In a speech to the American Society of International Law, Justice Scalia did state his “view that modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of the U.S. Constitution.” *Quoted in* Anne Gearan, “Foreign Rulings Not Relevant to High Court, Scalia Says,” *Washington Post*, April 3, 2004, p. A-7.

³⁸ *Printz*, 521 U.S. at 921.

Constitution. The design issue of how to structure judicial review, that is, is entirely a question of interpretation in the United States.

It is not out of the question, of course, that that design issue has been entirely resolved over the course of U.S. constitutional history. In theory, the Constitution's drafters may have understood that they were creating a strong-form or a weak-form structure. Or, equally in theory, an unbroken line of precedent might have resolved that structural question.

As it turns out, though, those possibilities are indeed only theoretical. The Constitution's drafters had diverse views about the structure of judicial review. Departmentalism, for example, was one widely held view. Thomas Jefferson was not, strictly speaking, a drafter of the Constitution, but obviously he was a person whose thinking about the Constitution was and remains important. Jefferson's version of departmentalism implied that judicial review, to him, had a structure quite similar to that of modern weak-form review.³⁹ Courts could express their views on what the Constitution meant, but the president and Congress were entitled thereafter to continue to act on their own views even if those views were different from the courts'.

Precedent is a somewhat larger barrier to reimagining judicial review in the United States as weak-form. The contemporary Supreme Court certainly regards judicial review as having the strong form, and much of the public appears to agree.⁴⁰ Exactly when we got strong-form judicial review is unclear, though. Something like strong-form review seems to have been the target of James Bradley Thayer's famous 1893 essay, "The Origin and Scope of the American Doctrine of Constitutional Law,"⁴¹ but Thayer's position in support of a weaker version of judicial review continued to have substantial support in Congress, the presidency, and even the Supreme Court through the middle of the twentieth century. The modern articulation of strong-form judicial review is provided in *Cooper v. Aaron* (1958), where the U.S. Supreme Court described the federal courts as "supreme in the exposition of the law of the Constitution," and inferred from that a duty on legislatures to follow the Court's interpretations.⁴² *Cooper v. Aaron's* articulation of strong-form judicial review itself remains moderately controversial; contemporary conservatives continued to be attracted to some version of departmentalism, for example.⁴³

³⁹ For a recent discussion of departmentalism, including some aspects of Jefferson's version, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 106–11 (2004).

⁴⁰ See chapter 2.

⁴¹ James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129 (1893).

⁴² 358 U.S. 1, 18 (1958).

⁴³ For example, Attorney General Edwin Meese provided a moderate departmentalist view in a widely noted speech in 1987. For citations to the speech and some reactions to it, see Kathleen Sullivan & Gerald Gunther, *Constitutional Law* 25–26 (14th ed., 2001).

In the end, I think the best assessment is that the question of what form the U.S. system of judicial review has is a design issue left incompletely resolved by the Constitution's text, by understandings about judicial review at the time of the Constitution's adoption, and by the precedents built up since then. If comparative constitutional law is relevant to designing the structures of judicial review, it is relevant to "interpreting"—really, figuring out—the structure of judicial review in the United States.⁴⁴

Justice Louis Brandeis's observation, "If we would guide by the light of reason, we must let our minds be bold,"⁴⁵ may provide the best defense for doing comparative constitutional law. Or, as Claude Lévi-Strauss notably put it, ideas, like food, are "good to think."⁴⁶ For scholars, that probably should be enough. Those who address themselves to policymakers, including judges, and the policymakers themselves, should be appropriately cautious about what they believe they can learn from the study of comparative constitutional law.⁴⁷

⁴⁴ The case for regarding the question of social and economic rights as equally open to interpretation illuminated by comparative constitutional law is more complex, and so I defer it until part 3.

⁴⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁶ Claude Lévi-Strauss, *Totemism* 89 (1963). I note that Lévi-Strauss almost certainly deliberately omitted the word "with" that most readers seem unconsciously to insert in his phrase.

⁴⁷ Konrad Schiemann, reflecting on his experience as a judge in England, observes, "Where I felt that the traditional approach led to a result which appeared to me unsatisfactory, I would turn to foreign law to see whether my hesitations found any echo elsewhere and whether some stimulus to my own thinking could be found." Konrad Schiemann, "A Response to *The Judge as Comparatist*," 80 *Tulane L. Rev.* 281, 283–84 (2005). This seems to me the appropriate stance to take to the comparative enterprise in which I am engaged here.