

COMPARATIVE CONSTITUTIONALISM, LEGAL EDUCATION,  
AND CIVIC ATTITUDES: REFLECTIONS IN RESPONSE TO  
PROFESSORS KROTOSZYNSKI AND LAW

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I am grateful to Professor Krotoszynski and the editors of the *Alabama Law Review* for the opportunity to participate in this discussion of the benefits—and challenges—of our knowledge of increasingly transnational sources of law that, on occasion, are being considered by courts in resolving constitutional issues. I will develop three points in this comment.

First, Professor Krotoszynski is absolutely correct in linking legal education to the capacities of lawyers and judges to benefit from knowledge of foreign and international law. He is also correct that a major barrier to acquiring such knowledge comes from the fact—across a realm of endeavors, not merely law—that Americans are far less likely to have language skills in multiple modern languages than are comparably situated Europeans. While scholars elsewhere, notably in Europe, often speak three or four languages, even bilingualism may be difficult for those educated in the United States to achieve, as it is generally not made a priority of early education; and if bilingualism is difficult, how much more so is what I have called “bilegalism.”<sup>1</sup> In agreeing with Professor Krotoszynski on this point, I will make some very modest observations at the margins of his important argument and also comment briefly on Professor Law’s paper.<sup>2</sup>

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1. See Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT’L L. REV. 319, 323 (2010).

2. Although I do not go as far as Professor Law in his view of the inadequacy of the infrastructure for judicial comparativism in the United States, see David S. Law, *Constitutional Convergence and Comparative Competency: A Reply to Professors Jackson and Krotoszynski*, 66 ALA. L. REV. 145 (2014), I do agree with Professor Law that there is much room for improvement. As to the possibility of different aspects of “convergence,” see VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 39 (2010) (noting both “constitutions that require an interpretive posture of convergence with international law, and judges and scholars who would favor transnational convergences in the interpretation of constitutions”); *id.* at 40 (noting different forms in which postures of convergence with international law may be expressed); *id.* at 42 (noting convergence as an

Second, law is a social phenomenon. It is not a physical science. We cannot even imagine an unobserved world of law, as scientists may continue to imagine unobserved worlds of physical reactions notwithstanding Heisenberg's principle; law is purposeful, and it is meant to be observed and responded to. Thus, I want to suggest Professor Krotoszynski's inventive metaphor, involving the Heisenberg Uncertainty Principle,<sup>3</sup> has the potential to mislead us as to the basic character of our discipline and as to the importance of context *regardless* of whether the subject is foreign or domestic influences on law.

Third, the study of comparative constitutional experience draws attention to issues of attitude that are important in sustaining a democratic constitutional culture. It is not easy to sustain a commitment to self-governance in the form of majority rule with the protection of individual and minority rights, or to sustain an effective government that is also limited by law. Where do attitudes of civic courage, of commitment to self-governance and limitations on government, of tolerance, and of military self-denial, needed to sustain over the long haul a constitutional democracy, come from? What supports their development? I will briefly discuss ways in which comparative study may bear on these questions.

#### I. LEGAL EDUCATION, LEGAL KNOWLEDGE, AND CONSTITUTIONAL ENGAGEMENT

The claim that being able appropriately to use and understand foreign law depends on legal education is in a certain sense not contestable. And it is the case that U.S. legal education is, for the most part, about the domestic laws of the United States. It is also the case that lawyers operating in some other parts of the world are more likely to have multiple languages and to have been exposed to international law, if not to forms of comparative law. This is especially so in Europe, where, by virtue of the European Union,

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interpretive posture is distinct from convergence as a fact about law); *id.* at 66–69 (noting the “necessary incompleteness” of convergence as an interpretive posture); *see also id.* at 165–78 (discussing distinctions between foreign law and international law as interpretive sources).

3. To the extent reference to the Heisenberg Principle invokes in readers' minds the existence of a physical world that “goes of itself,” even if human observation may distort our ability to fully measure and comprehend this world, it has the potential misleadingly to suggest a kind of autonomy about “law.” Laurence Tribe has argued, by contrast, that proper understandings of the Heisenberg Principle and other developments in modern physics should lead to appreciation of the highly interactive nature of law and society, in which “the state” and judges making legal decisions help define the contexts and events with which the legal system deals. *See* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 23 (1989) (emphasizing the importance of being aware of how judicial decisions themselves “alter the social reality under adjudication”). Professor Tribe also criticized several Supreme Court decisions for their assumptions of background givens without attending to how those “givens” have themselves been constructed by law. *See id.* at 26–32.

educated adults can expect to travel to countries with other languages and systems and, if lawyers, to have clients with business or personal interests across national boundaries.

But at the same time, one of the attributes of U.S.-educated lawyers is sometimes said to be the capacity, over a professional lifetime, for new learning. As new issues emerge from new products, new technologies, new laws, and new treaties, well-trained lawyers perfect their skills of learning how to master new material. For judges, as well, the “adversary” system assumes that judges can be informed—at least in part—about issues with which the judge is not otherwise familiar through briefing by well-trained advocates.

Now, it may be that the training of American lawyers would lead to a form of overconfident parochialism, thinking that foreign law can be quickly mastered and missing the many challenges to gaining a correct and fair picture of foreign law in its own conceptual, institutional, and historical context. The challenges of doing good comparative work are considerable. It is not enough to know that a particular country takes a particular approach to a contested issue. One wants to know where the norm was generated; what its sources are; how it is implemented; and what are the local debates, if any, about how it is implemented. Researching foreign law should aim for multiple sources, because—as one knows about one’s own system—there are frequently disagreements about the legitimacy or meaning of domestic law.<sup>4</sup>

But to suggest that it cannot be done—that understanding important aspects of foreign or international law necessarily requires a foundation in law school—may be to go too far. If we think about legal education as a lifelong project, one can see many other entry points—through continuing legal education, foreign travel, or new cases brought to a lawyer by a client—that can prompt learning. The skills of reasoning by analogy, of thinking about the logical implications of problems and principles, and of examining problems from another’s point of view may not be as conducive to learning new languages as they are to learning new problem settings, but

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4. As Professor Law noted in 2011 with respect to the Supreme Court of Japan, “the broader scholarly community has mostly lacked . . . an accessible (English-language) collection of scholarship that explores the SCJ in depth . . .” David S. Law, *Decision Making on the Japanese Supreme Court*, 88 WASH. U. L. REV. 1365, 1365–66 (2011). Professor Law’s own work on the Supreme Court of Japan, see, e.g., David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011) and *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009), and the scholarly work he has inspired and brought together are serious efforts to remedy that lack. As more scholarship of this kind is produced on more constitutional systems, courts, lawyers, and scholars will have far better tools for comparative understanding. But I do not mean to suggest that informed and thoughtful judicial comparativism requires comprehensive knowledge of all constitutional systems. On judges’ dependence on scholarly infrastructures, see Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 54, 68 (Michel Rosenfeld & András Sajó eds., 2012).

they are skills that do facilitate learning about foreign legal systems or about international law. U.S. lawyers are on the whole highly mobile—they change jobs and fields, and thus are learning new skills and contexts, to a considerable degree.<sup>5</sup> So the possibilities for legal knowledge being acquired do not end with the end of law school.

Moreover, legal education has moved. A survey of the curriculum of the schools listed as the top twenty rated law schools in *U.S. News & World Report's* rankings in 2014 shows that at least twelve of them—over 50%—had, in the prior three years (i.e., from academic year 2011-12 forward), offered courses in comparative constitutional law or closely related subjects (e.g., constitutional design in countries in transition, at NYU).<sup>6</sup>

And it is quite common for law schools to offer courses in international law—of this same top twenty group, all offered international law, typically multiple offerings, every year of the last three.<sup>7</sup> Some schools now require their first-year students to take an international or comparative law class.<sup>8</sup> And international law may serve as a source of legal comparison, as a form of persuasive if not binding authority, in some of the same ways that foreign law can.<sup>9</sup>

Transnational sources of law importantly include international law, which increasingly American lawyers are being trained in. In many

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5. Recent data from the *After the JD* study indicates that, in their first eleven years after law school, members of the class of 2000 held on average between three and four different jobs since graduation. See Ronit Dinovitzer et al., *After the J.D.: First Results of a National Study of Legal Careers* (Am. Bar Found./The NALP Found. for Law Career Research & Educ.), 2004, at 53–54, available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf> (reporting that one-third of the lawyers in the sample had changed jobs at least once by 2003 (or three years out)); Ronit Dinovitzer et al., *After the JD II: Second Results from a National Study of Legal Careers* (Am. Bar Found./The NALP Foundation for Law Career Research & Educ.), 2009, at 54 (reporting that between 2003 and 2007 AJD lawyers held an average of two different jobs and that 62% had changed jobs at least once between 2003 and 2007); Gabrielle Plickert et al., *After the JD III: Third Results from a National Study of Legal Careers* (Am. Bar Found./The NALP Found. for Law Career Research & Educ.), at 60 (forthcoming 2014) (on file with author) (reporting that 36% of the sample had changed jobs since AJD2). As Professor Wilkins has explained, that means that on average lawyers who were eleven years out had held between three and four different jobs. E-mail from David Wilkins, Vice Dean for Global Initiatives on the Legal Profession, Professor of Law, Harvard Law School, to author (Sept. 23, 2014) (on file with author).

6. Memorandum from Abby Collela, Harvard JD expected 2016, to author (June 2014) (on file with author).

7. *Id.*

8. Harvard does so. Georgetown requires first-year students to take either a course in international or comparative law, or a course in statutory law; in addition, it requires all of its 1L students to take a one-week intensive course, “Week One: Law in a Global Context,” which builds on subjects studied in the first semester to focus in depth on a particular transnational legal problem.

9. See Vicki C. Jackson, *The Supreme Court, 2004 Term – Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 115, 127 n.87 (2005) (noting use of international law as a form of comparative law by the Supreme Court); see also JACKSON, *supra* note 2, at 168–83 (2010) (discussing and comparing foreign law and international law as sources).

countries (though perhaps less so the United States), international law has developed a much closer relationship to domestic constitutional law than it may have had in the past. As I explain elsewhere, the subjects of international and constitutional law, which used to be quite distinct, now have considerable areas of overlap—treating the same subjects, for example, the government’s obligations to recognize certain rights in its people.<sup>10</sup> Moreover, constitutions and international legal regimes have always had “interlocking” relationships insofar as domestic constitutions address issues important in the international law of recognition. Increasingly, domestic constitutions in countries around the world explicitly incorporate human rights treaties as part of their constitutional law; see, for example, the constitutions of Argentina,<sup>11</sup> Colombia,<sup>12</sup> and Mexico.<sup>13</sup> So knowledge of international law may provide tools to help students understand at least elements of foreign constitutional law in some countries.

To return to legal education, taking into account the widespread teaching of international law and the increase—albeit slow and partial—in the teaching of comparative constitutional law, the picture of legal education is perhaps not quite so bleak as readers of Professors Krotoszynski and Law might conclude. At the same time, however, many of the real challenges of doing comparative constitutional law well loom larger in the United States than, for example, in Europe or Canada.<sup>14</sup> Opportunities in the United States to develop serious second- or third-language proficiencies may be in decline, as a number of universities have

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10. See JACKSON, *supra* note 2, at 257–62.

11. Art. 75, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

12. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

13. See Victor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, <http://www.wcl.american.edu/hrbrief/20/1ek.pdf> (describing the 2011 Human Rights Amendments to articles 1, 3, 11, 15, 18, 29, 33, 89, 97, 102, and 105 of the Mexican Constitution, which have the effect of making rights protected in international human rights treaties part of Mexico's Constitution). Article I, as amended in 2011, begins with the following two sentences: “In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself. The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the protection of people at all times.” Political Constitution of the United Mexican States art. 1 (as amended through August 2011), [http://www.codices.coe.int/NXT/gateway.dll/CODICES/constitutions/eng/ame/mex?fn=document-frameset.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/constitutions/eng/ame/mex?fn=document-frameset.htm&f=templates$3.0)

14. On the methodological challenges of comparative constitutional law, see Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 54 (Michel Rosenfeld & Andras Sajó eds., Oxford University Press 2012); Jackson, *supra* note 1, at 323.

eliminated foreign language programs in recent years,<sup>15</sup> despite calls by national leaders for increased study of foreign languages.<sup>16</sup>

A final thought: courts themselves can play a role in improving their own knowledge of international and foreign law in several ways. First, in relying on adversarial briefs, courts can be proactive to assure that briefs (whether by amici or by parties) that address arguably relevant international or foreign law are responded to. It is much easier for judges to find errors in argument about their own system than about foreign systems; courts thus should have an incentive to assure adequate briefing on issues of foreign law, even if it means calling for additional briefing beyond what is normally provided for in briefing rules.<sup>17</sup> Second, judges can participate in and promote judicial education programs on international and/or foreign law, as Justice O'Connor did in working with the American Society of International Law to promote a handbook on international law for federal judges.<sup>18</sup> Third, judges can encourage the development of research tools and access for deepening knowledge of foreign and international law through courthouse libraries and data access.<sup>19</sup> Legal education in law schools, then, should not be viewed alone as responsible for improving the legal community's familiarity with international and foreign law.

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15. See Russell A. Berman, *The Real Language Crisis*, ACADEME (Sept.–Oct. 2011), available at <http://www.aaup.org/article/real-language-crisis#.U66D5KjZXx4>.

16. See Jeremy Hsu, *Fluent in Another Language? The CIA Wants You*, NBC NEWS (March 9, 2011, 3:42 PM), available at [http://www.nbcnews.com/id/41992862/ns/technology\\_and\\_science-science/t/fluent-another-language-cia-wants-you#.U66GkajZXx4](http://www.nbcnews.com/id/41992862/ns/technology_and_science-science/t/fluent-another-language-cia-wants-you#.U66GkajZXx4).

17. For discussion of how accidents of briefing schedules have resulted in the U.S. Supreme Court having one-sided briefing of foreign law questions, see JACKSON, *supra* note 2, at 190–91; cf. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 619–21 (2001) (suggesting the use of experts to determine the content of contested issues of foreign law).

18. See David Bederman, Christopher J. Borgen, & David Martin, *International Law: A Handbook for Judges* (The American Society of International Law, Studies in Transnational Legal Policy No. 35, 2003) (foreword by Justice Sandra Day O'Connor). This handbook was sent to all 1,600 federal judges. FREDERIC L. KIRGIS, THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY 549 (2006) (a publication of ASIL and Martinus Nijhoff).

19. Professor Law's comments on the prohibition on the hiring of non-citizen law clerks, applicable to the Supreme Court and most other federal courts, may be contrasted with the practice of other high courts, as in South Africa and Israel, to employ some non-citizen law clerks. His comments on the richness of the comparative orientation of countries such as South Korea were brought home to me last year when I visited the South Korean Constitutional Court and saw the extensive comparative public law holdings in the Court's library. To be sure, however, the position of courts in relatively new constitutional democracies is different from the position of the U.S. Supreme Court, which has a wealth of its own precedents and those of many lower federal and state courts; the incentives for informed comparativism may thus be higher in newer constitutional democracies, or in high courts in systems with binding legal commitments to comply with international human rights norms in the application of domestic public law, than in a much older constitutional system. Nonetheless, an improved infrastructure in the United States would have significant benefits.

## II. LAW AS SOCIAL PHENOMENON AND NECESSARY LIMITS ON KNOWLEDGE

The Heisenberg Principle might be understood as one about the impossibility of certain and comprehensive knowledge—the idea that the position and the momentum of atomic particles cannot both be measured accurately at the same time—or about the idea of the “observer” effect, that is, as light or other media are used to illuminate a process, or as any observer seeks to elicit information about a phenomenon, the process or phenomenon itself may be affected.<sup>20</sup> But questions of uncertainty, or of “observer” effects, or even of the complex interactions between “background and foreground,”<sup>21</sup> seem quite different in thinking about law than in the realm of physics or chemistry.

At least since *Erie R.R. v. Tompkins*,<sup>22</sup> it has been hard, in the United States, to deny that law is a social phenomenon.<sup>23</sup> It is not, to borrow a phrase from Justice Holmes, a “brooding omnipresence” that exists wholly apart from human agency.<sup>24</sup> It arises in the setting of relations among persons living in some manner that involves dealing or interacting with others. This is not to adopt an entirely positivist view; one may be able to say that a positive law is “not” a law because it is in opposition to fundamental legal values. But what those values are is determined by human reasoning and deliberation.

Regardless of whether one conceptualizes law as arising from a social contract, or from more organic developments of common norms, or as logically deduced from an identifiable ground norm, law exists in the world through social interactions and human deliberation. Law is constantly, then, subject to the possibility of change, as it is created and recreated and understood or applied by human beings. Whether viewed from within or

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20. See Jan Hilgevoord & Jos Uffink, *The Uncertainty Principle*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2014), available at <http://plato.stanford.edu/archives/spr2014/entries/qt-uncertainty/>; John D. Barrow, *Heisenberg's Uncertainty Principle*, in ENCYCLOPEDIA OF SCIENCE AND RELIGION (2003), available at <http://www.encyclopedia.com/doc/1G2-3404200250.html>.

21. Tribe, *supra* note 3, at 20.

22. 304 U.S. 64 (1938).

23. I do not mean to suggest that Professor Krotoszynski thinks otherwise; indeed, his own scholarly work, especially on the idea of freedom of expression, is acutely aware of the very different assumptions and contexts in which this apparently general constitutional idea is understood and implemented in countries like the United States, Germany, and Canada. See RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS CULTURAL PERSPECTIVE* 1–11 (2009). It is the invocation of the “Heisenberg Principle” that led me to consider possibly unintended implications others might draw from its metaphorical use in Professor Krotoszynski’s review.

24. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

from outside a legal system, law is often contested and is only contingently stable.<sup>25</sup>

This social character of law has several implications. It reinforces concerns about the challenges of knowing, accurately, about foreign law. Every system of law experiences gaps between the law as it appears in formal instruments and the law as it is understood, interpreted, applied, and implemented;<sup>26</sup> deeper knowledge is required to appreciate these contextual aspects than can be gained by reading a constitutional instrument alone.

Second, the social character of law raises significant doubts about metaphors of “transplants” or “borrowing” in comparative law; this language has connotations of a discrete and autonomous thing (law) being transplanted, like a vital body organ, from one body politic to another, or borrowed, like a book.<sup>27</sup> Not so. Law will take on to some extent the cast of its society, even as it may seek to control or influence that society. As an example, consider Professor Bomhoff’s recent book illustrating how similarly-worded doctrines of proportionality review can function quite differently in different national settings.<sup>28</sup>

Third, recognition of the inevitably social character of law bears on issues about the ways in which foreign or international law can be used by lawyers and judges. For if law fulfills social functions, judges in implementing law must be attentive to their audiences and to forms of reasoning that will be persuasive to their audiences and accepted as legitimate. Judges must be concerned with both the candor of their

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25. When one considers the view that language itself has meanings only within particular interpretive communities, *see, e.g.*, STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 167–73 (1980), the challenges of translation for comparative legal work loom even larger.

26. For a classical early work, see Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). On gaps between constitutional texts and practices, see Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds., 1993).

27. Alan Watson, a leading scholar for the proposition that much of private law involves “borrowing” or transplanting of legal rules, is also well aware that law may be significantly changed in the course of its movement. *See, e.g.*, Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 345 (1996) (emphasizing creativity in borrowing from law concerning slaves to construct a law concerning monks). For criticism of the possibility of a “transplant” of a legal rule from one country to another, *see, for example*, Pierre LeGrand, *What “Legal Transplants”?*, in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001); Pierre LeGrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 114 (1997). For a persuasive argument for using the concept of “migration of ideas” rather than “borrowing” or “transplant,” *see* Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (S. Choudhry ed. 2006). As colleagues have pointed out, biological science might come to envision transplanted organs as undergoing their own evolution and change in a new body. This may be so. It is the connotation of the metaphors as involving autonomous things that concerns me, not the underlying scientific fact.

28. JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE* (2013).

reasoning and the social legitimacy of their decisions. For this reason, at times of rising distrust or fear of the foreign, judges in the United States may be at pains to limit the significance of foreign law, as the Court did in *Roper v. Simmons*, indicating it was “confirmatory” not “dispositive.”<sup>29</sup> Indeed, it may sometimes be a prudential decision consistent with the judge’s role not to refer to foreign or international law even if the judge was aware of it and it may have informed his or her thinking.<sup>30</sup>

To be sure, candor about reasoning is presumptively the better approach. The legitimacy of judging as an activity, and particularly by life-tenured appointees, depends on judges revealing their reasoning to the public to enable the accountability of critique. And, in some particular areas, notably the Eighth Amendment, the Court has a long course of considering foreign law in evaluating the cruelty or unusualness of a punishment, a sensible implicit reading of the prohibition on “cruel and unusual punishments” that the Court should continue to adhere to.<sup>31</sup> But the way in which foreign or international law is considered and discussed, as a secondary source, confirmatory (or not) of what is found in U.S. law, signals the Justices’ sensitivity to the domestic audience.

That law is a social activity, however, may in other cases lend force to the importance of showing at least awareness of international or foreign law. The audience for domestic decisions of high courts, like the U.S. Supreme Court, includes foreign or “outside” readers. These outside audiences may regard themselves as having important interests at stake in those decisions—for example, to the extent that the decisions concern U.S. treatment of foreign nationals. It is helpful to the national interests of the United States that its decision be understandable to outsiders, especially when it affects their interests, and even when it is anticipated that outsiders will disagree with those decisions.<sup>32</sup> Being aware of how foreign legal

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29. *Roper v. Simmons*, 543 U.S. 551, 554 (2005).

30. See JACKSON, *supra* note 2, at 192–93 (discussing “prudential silences”); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1612 (2006) (noting “silent” or “implicit dialogues” between national constitutional law and international or foreign law).

31. See JACKSON, *supra* note 2, at 194–95 (discussing failure in the Court’s then-most recent Eighth Amendment decision to discuss foreign law).

32. Professor Law has written elsewhere on the fascinating subject of “judicial diplomacy.” See David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2410074](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410074) (discussing judges’ use of foreign law as a form of diplomatic activity). For my own treatment of “judges as diplomats” as part of what I termed “relational” forms of engagement, see JACKSON, *supra* note 2, at 122–24 (noting arguments for judicial engagement from the transnational environment; questioning whether to view judges as diplomats, on competency and perception grounds; and arguing that Justice O’Connor’s concerns for “good impressions” could be understood in a more diffuse way to aim for dispelling perceptions of American indifference).

systems resolve similar issues can improve the Court's explanatory capacities.

### III. CONSTITUTIONALISM, HISTORY, AND ATTITUDES: RESEARCH AGENDAS FOR THE FUTURE

Comparative study, I want to suggest, may cast light on the complex relationships between relatively successful forms of constitutionalism and the civic attitudes and engagement of the people. To be sure, there have for many years been studies by social scientists of public attitudes towards particular institutions, including courts.<sup>33</sup> A good deal of survey research has focused on public attitudes towards institutions, e.g., trust in the press, the Congress, the President, the courts, or relating to values identified as important in democracies, e.g., equality for all ethnic groups.<sup>34</sup> But beyond attitudes towards institutions, there are important questions about tolerance of difference and about courage—the courage to stand up for the minority rights that are often most fragile in democracies and the courage to use constitutional freedoms of speech, or of association, or of voting to stand up against powerful forces whose views are detrimental to society. And on these questions, I am unsure how much useful comparative data exists.

Even if large-scale empirical data is lacking, we should not underestimate the power of particular narratives in shaping public perceptions. In an era of growing mistrust of government, narratives of civic courage and tolerance may have value in combatting the many negative examples of corrupt, cowardly, and disingenuous behavior our culture offers. Does comparative constitutional study help? Bruce Ackerman once proffered a theory by which the leaders of liberal revolutions would have particular characteristics and incentives to take a long-run public view.<sup>35</sup> Are there other conditions that produce the members of polities who combine tolerance for others with the courage to

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33. For a helpful summary of some of the political science literature on public attitudes towards the U.S. Supreme Court, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1551–52 (2010); see also JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009); *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

34. See, e.g., GALLUP, *CONFIDENCE IN INSTITUTIONS*, <http://www.gallup.com/poll/1597/confidence-institutions.aspx>; JULIE NELSON ET AL., *YOUNG PEOPLE'S CIVIC ATTITUDES AND PERSPECTIVES: ENGLAND'S OUTCOMES FROM THE IEA INTERNATIONAL CIVIC AND CITIZENSHIP EDUCATION STUDY (ICCS) (2010)*, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181802/DFE-RR060.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181802/DFE-RR060.pdf); W. SCHULTZ ET AL., *INITIAL FINDINGS FROM THE IEA INTERNATIONAL CIVIC AND CITIZENSHIP EDUCATION STUDY (2010)*, available at [http://iccs.acer.edu.au/uploads/File/Reports/ICCS\\_10\\_Initial\\_Findings.pdf](http://iccs.acer.edu.au/uploads/File/Reports/ICCS_10_Initial_Findings.pdf).

35. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46–57 (1992).

participate in public debate and action based on their convictions that constitutional democracies may require?

In his concurring opinion in the *Youngstown Steel* case, Justice Robert Jackson drew on comparative constitutional experience to suggest a connection between institutional relationships and the capacity to resist Naziism.<sup>36</sup> Jackson argued that the Weimar Republic constitution's provisions for ready exercise of emergency powers by the president, without requiring authorization by the legislature, facilitated Hitler's rise to power; Jackson contrasted the constitutional setting in Weimar Germany with that of France, and especially with that of the United Kingdom, where Parliament—while delegating powers of a “temporary dictatorship” to the government—continued to sit with the capacity to reassert legislative control throughout the war.<sup>37</sup> Are there comparable comparative studies that exist or that could be undertaken about the formation of civic attitudes and maintenance of constitutionalism?<sup>38</sup>

If a democracy cannot exist without at least some democrats, a constitutional democracy cannot exist without at least some constitutionalist citizens and public officials. Does comparative constitutional study offer prototypes of what we might call “pro-constitutional” behavior?<sup>39</sup> Consider a widely discussed example in the United States: that George Washington, like Cincinnatus, retired to his farm after leading a successful revolution, rather than seeking the kind of power that, in other countries, has led to the development of personal despots.<sup>40</sup> Or consider the impact on the first decades of South Africa's

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36. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651–52 (1952) (Jackson, J., concurring).

37. *Id.* at 651. See CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES* 189–96 (1948).

38. Cf. Tom Donnelly, Note, *Popular Constitutionalism, Civic Education and the Stories We Tell Our Children*, 118 *YALE L.J.* 948 (2008) (drawing linkage between civic education and public attitudes towards the Constitution and constitutionalism); AMY GUTMANN, *DEMOCRATIC EDUCATION* (Princeton Univ. Press rev. ed. 1999) (linking education with “deliberative citizenship”). On empirical studies of the effects of civic education, see sources cited in Donnelly, *supra*, at 967–98 nn.90 & 93–103.

39. I develop the idea of a “pro-constitutional” representative in an unpublished work-in-progress, Vicki C. Jackson, *Constitutional Democracy and Pro-Constitutional Representation: Comparing the Obligations of Judges and Elected Representatives* (Oct. 2014) (unpublished manuscript) (on file with author).

40. For an exploration of the creation and construction of George Washington as the power-renouncing Cincinnatus of his time, see GARRY WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* (1984). On narratives about Washington that are re-told and help reinforce civilian over military authority, see *id.* at 3–16; see also George Washington, Mt. Vernon, Newburgh Address (1783), available at <http://www.mountvernon.org/educational-resources/encyclopedia/newburgh-address> (describing Washington's speech at Newburg, NY, persuading members of the army against storming the Continental Congress to insist on their back pay).

new government of Nelson Mandela's personal narrative and behavior, a decisive blend of courage and of tolerance for his former oppressors.<sup>41</sup>

Or consider a narrative, perhaps less well known among constitutional comparativists, from Norway. Norway has the second-oldest written constitution in the world.<sup>42</sup> Its parliament (the "Storting") features a large painting behind the elevated desk where the leader of the body sits during the sessions, depicting a moment from the adoption of Norway's May 1814 Constitution—an expression and adoption of the principle of popular sovereignty—in Eidsvoll.<sup>43</sup> In 1814, in an effort to secure independence, Norway elected a constituent assembly that prepared a constitution for self-governance, as Norway was in transition from being governed as a part of Denmark to becoming a self-governing nation headed, by the end of 1814, by the King of Sweden.<sup>44</sup> The role of the elected constituent assembly in mediating this transition, including the advance towards self-governance, is an oft-told part of the Norwegian history. So too is the successful movement for complete independence that culminated in 1905—with one referendum agreeing to a unilateral dissolution of the ties with Sweden and another referendum on inviting Prince Carl of Denmark to be King of Norway.<sup>45</sup> The impact of this unusual, and early, Norwegian insistence on democratic decision making about its own governance is suggested in the remembrances of this history found in public buildings, especially in this year of the public celebrations of the Bicentennial of the Norwegian Constitution.<sup>46</sup> Could these historical narratives, and their impact on civic

41. See, e.g., ANTHONY SAMPSON, MANDELA 103–78, 512–25 (1999).

42. See GRUNNLOVSJUBILEET, <https://www.stortinget.no/en/Grunnlovsjubileet/In-English/> (last visited Oct. 14, 2014).

43. The author saw this painting, "Eidsvoll 1814" by Oscar A. Wergeland, in the Storting Chamber on a visit to Oslo, Norway, in June of 2014. It is also pictured in the pamphlet, *Grunnlovsjubileet, 1814/2014, The Momentous Year of 1814: Four documents that Shaped Norway*, a publication of the Storting's Bicentennial Exhibit. GRUNNLOVSJUBILEET, 1814–2014, THE MOMENTOUS YEAR OF 1814: FOUR DOCUMENTS THAT SHAPED NORWAY [hereinafter THE MOMENTOUS YEAR OF 1814] (pamphlet provided at Parliament). See also CELEBRATION OF THE CONSTITUTION, (Sept. 18, 2014, 9:50 AM), <http://www.royalcourt.no/nyhet.html?tid=119759>.

44. See, e.g., EIDSVOLL 1814, (Sept. 18, 2014, 9:54 AM), <http://www.eidsvoll1814.no/default.aspx?aid=9078804> (describing how at the beginning of 1814, Norway "was part of the absolute monarchy Denmark-Norway. By the end of the year the country had entered into a personal union with Sweden. In between, Norwegians had mobilised, drawn up the world's most democratic constitution and elected their own king."); THE MOMENTOUS YEAR OF 1814, *supra* note 43. Although a majority at the constituent assembly desired full independence, the Treaty of Kiel of January 1814 had assigned Norway to Sweden; by the Treaty of Moss (August 1814) and amendments to Norway's May 1814 constitution made in November 1814, Norway was declared a "[f]ree and independent realm," that was "united with Sweden under one King." THE MOMENTOUS YEAR OF 1814, *supra*.

45. See Terje I. Leiren, *American Press Opinion and Norwegian Independence*, 1905, 27 NOR-AM. STUD. 224 (1977), available at [http://www.naha.stolaf.edu/pubs/nas/volume27/vol27\\_11.htm](http://www.naha.stolaf.edu/pubs/nas/volume27/vol27_11.htm).

46. See GRUNNLOVSJUBILEET, *supra* note 42; BICENTENARY: NORWEGIAN CONSTITUTION, 1814–2014, (Sept. 18, 2014, 10:50 AM),

attitudes, be reflected as well in the various forms of resistance—including by the judges of Norway’s Supreme Court<sup>47</sup>—to the German occupation in World War II? One would need to know much more than I do now to hazard an opinion, and one would need to take into account as well more troubling aspects of Norwegian constitutional history—including its 1814 Constitution’s explicit condemnation and asserted intolerance of “Jesuits and monastic orders” and its exclusion of Jews from the Kingdom,<sup>48</sup> as well as the active cooperation by some Norwegians (Quisling and his party) in the German occupation.<sup>49</sup>

The point here is that knowledge of comparative constitutional development may raise possibilities for scholarly inquiry about the kinds of social or historical narratives that contribute to behaviors and attitudes tending to sustain democratic constitutionalism. Large-scale empirical inquiries into constitutional longevity are already providing us with more knowledge than we had in the past.<sup>50</sup> Close case studies of particular histories may also produce knowledge relevant to contemporary issues of constitutional design or interpretation and to approaches to the encouragement of public attitudes conducive to the peaceful development of just democratic constitutionalism.

From the founding to the present, framers of the U.S. Constitution and Justices charged with its interpretation (including some, like Robert Jackson, who have made profound contributions to American constitutional law), have understood the benefits to be gained by a close attention to

<https://www.stortinget.no/Global/pdf/Grunnlovsjubileet/maaldokumentengelsk.pdf> (describing importance of the constitution in helping Norway maintain liberal democracy except during the WWII occupation and describing the objectives of the bicentennial celebration); *see also* BICENTENARY SITTING OF THE STORTING, <https://www.stortinget.no/en/Grunnlovsjubileet/In-English/Bicentenary-Sitting-of-the-Storting/> (describing tradition of formal sittings of the Parliament in anniversary years, near May 17, in remembrance of the events at Eidsvoll).

47. *See* OLAV RISTE & BERIT NÖKLEBY, *NORWAY 1940–45: THE RESISTANCE MOVEMENT*, at 20–21 (1970) (6th prtg. 2004).

48. GRUNNLOV [CONSTITUTION] May 17, 1814, § 2 (Nor.). The prohibition on Jews entering the Kingdom was not repealed until 1851, after repeated efforts in the 1840s failed to secure the necessary two-thirds vote. The prohibition on monastic orders was repealed in 1897. The prohibition on Jesuits was not repealed until 1956. *See Norway Ends Ban on the Jesuits*, *CATH. HERALD*, Nov. 16, 1956, *available at* <http://web.archive.org/web/20140112203312/http://archive.catholicherald.co.uk/article/16th-november-1956/5/norway-ends-ban-on-the-jesuits>; *see also* *Jewish Life in Europe Before the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, <http://www.ushmm.org/outreach/en/article.php?ModuleId=10007689> (Sept. 18, 2014, 12:39 PM) (indicating that Jews were not fully emancipated in Norway until 1891, 100 years after they were emancipated in France).

49. *See* RISTE & NÖKLEBY, *supra* note 47, at 9, 39–40.

50. *See, e.g.*, ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009); Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty* (U. of Chi. Coase-Sandor Inst. for Law & Econ., Research Paper Ser. No. 682; U. of Chi. Pub. Law & Legal Theory, Research Paper Ser. No. 472, 2014), *available at* <http://ssrn.com/abstract=2432520>.

comparative constitutional developments in sustaining the project of constitutional and democratically representative self-government.<sup>51</sup> So let me end by joining with Professor Krotoszynski in encouraging a broader comparative perspective in American legal education—in constitutional law, no less than in other fields of inquiry.<sup>52</sup>

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51. James Madison's studies of comparative government are well known. See JACK RAKOVE, *REVOLUTIONARIES* 341–44, 359–66 (2010) (describing Madison's studies of ancient and foreign governments and other analyses in connection with his preparation for the constitutional convention); JACK N. RAKOVE, *ORIGINAL MEANINGS*, at xvi, 55 (1996) (describing Madison as the "crucial actor" in "every phase" of movement that led to writing and ratification of the Constitution and describing Madison's readings in advance of the Convention). Several of *The Federalist* papers reflected the framers' use of their knowledge of foreign governments. See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (noting discussion, in THE FEDERALIST NOS. 18–20, of foreign experiences and quoting passage, "Experience is the oracle of truth' . . .") (quoting THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton)); David J. Seipp, *Our Law, Their Law, History and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1429–30 (2006) (showing that in THE FEDERALIST papers there were over five hundred references to experiences in other countries, including "England and to Britain, . . . Ireland, Scotland, Wales, to Europe in general, France, Germany, Swabia, Bavaria, Westphalia, Hanover, Saxony, Prussia, Austria, Sweden, Poland, Holland, the Netherlands, the Dutch, Zealand, Utrecht, Flanders, the Belgic confederacy, the League of Cambray, Switzerland, Berne, Luzerne, Italy, Savoy, Venice, Greece, Portugal, Spain, Aragon, and twenty-two other place names from the classical world . . . [as well as] to Canada, the West-Indies, Africa, Egypt, Asia, Tartary, the Ottoman empire, Syria, Persia, India, China, and Japan"). Jurists of the founding generation continued to make reference to comparative experience in major episodes of constitutional interpretation, including *Marbury v. Madison*, 5 U.S. 137 (1803). See JACKSON, *supra* note 2, at 74–75 (explaining *Marbury*'s multiple references to British constitutional practice, both to provide a positive model for public law remedies in the United States and also to distinguish the United States from Britain in having a written constitution and judicial review). For further examination of the lengthy history of references to foreign experience in U.S. constitutional adjudication, see e.g., JACKSON, *supra* note 2, at 105–17; Seipp, *supra*, at 1431–33; 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). Thus, U.S. constitutional history and its practices of constitutional adjudication do not support Justice Scalia's claim, in *Printz*, 521 U.S. at 921 n.11, that comparative experience is relevant only in making, but not in interpreting, the Constitution.

52. For suggestions that public law, especially constitutional law, may be particularly uniquely related to particular countries' institutional and historical development, see John Bell, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY*, 235, 235–48 (Andrew Harding & Esin Örüçü eds., 2002). For arguments that comparative constitutional study provides useful knowledge regardless of whether it reveals convergences or divergences in experience, see generally JACKSON, *supra* note 2.