stages of pregnancy; no such consensus exists between pro-life and pro-choice advocates in the United States, Donald P. Kommers, The Constitutional Law of Abortion in Germany: Should Americans Pay Attention? 10 J. Contemp. Health L. & Pol’Y 1, 28 (1995). Is Kommers correct about the U.S. consensus or lack thereof? If so, how is that relevant to evaluating constitutional decisionmaking?"}

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CHAPTER II

WHAT IS COMPARATIVE CONSTITUTIONAL LAW?

Our readings so far present several basic questions: What do we do when we "compare" decisions? What does the subject "comparative constitutional law" consist of? And why study comparative constitutional law?

Why study comparative constitutional law? Standard arguments involve the claim that more knowledge of other legal arrangements enhances one's general understanding of the world, and that understanding how other constitutional systems work may reveal as obvious aspects of one's own legal system that appear simply to be "natural" or "necessary" practices. In addition, comparative study may help generate hypotheses about the structures of governance, and their effects in different settings, that are then testable. As the materials that appear below on the Stoerig and Burns cases suggest, moreover, understanding something about comparative constitutional law may affect lawyers' practices, both before our domestic courts and in international law settings.

What does the subject consist of? In many nations today domestic constitutional law cannot be insulated from various forms of non-domestic law, including treaty-based international, regional, and bilateral law and customary international law, and so the study of comparative constitutional law—or constitutional law in a general sense—requires some attention to these sources of law as well.

These sources can affect both rights and structures. Decisions by institutions such the European Court of Human Rights deal primarily with questions of rights, but even they can sometimes have implications for structures. That court, for example, has issued decisions casting doubt on the acceptability of a system, widely used in civil-law systems, in which a public official, sometimes called an "advocate," participates in pre-decision discussions by adjudicators, Borgers v. Belgium, 314 Eur. Ct. H.R. (Ser. A) 22 (1991); Michel Lasser, The European Patterization of French Law, 90 Cornell L. Rev. 955 (2005). It also has held that the arrangements for rotation of Bosnia's presidency among only three ethnic groups—to the exclusion of members of other groups such as Roma and Jews—violated individual rights, Sejdic & Finci v. Bosnia and Herzegovina, ECHR 27960/06 & 34956/06 (Grand Chamber 2009). The decision has clear structural implications. The break-up of the Soviet Union in 1989-91 led to the development of criteria for recognition under international law that include "respect for . . . the rule of law, democracy, and human rights." Recognition is important enough in international relations that the newer criteria may have a real effect on the domestic constitutions of entities seeking recognition. Further, though stated as criteria for recognition, these requirements may be developing into criteria for statehood as well, beyond the traditional ones—effective control of a territory with a fixed
bound opinions and conventions of a particular political community." Kommers also argues that by having to meet the challenge of responding to arguments found persuasive by other constitutional courts on similar issues, the quality of U. S. constitutional jurisprudence will be improved.

Günter Frankenberg offers a more skeptical view about the possibilities of comparative law in general. Knowledge about other legal systems, he argues, is always understood in categories formed by the perceivers' embeddedness in their own social and legal realities, creating obstacles to achieving critical understandings; efforts at objectivity can be no more than a "tenuous neutrality" which "destabilizes" the influence and authority of the comparativist's own perspective... Frankenberg suggests that problems both of false neutrality and muddle relativism can be overcome by comparativists accepting that they are inevitably "participant observers," and thus have to be prepared to question all of the categories—including "law"—with which they approach comparative study. He seeks a "liberating distance," that "takes nothing for granted, least of all the forms and rationality of law..."

In the third selection, John Bell argues for the distinctiveness of comparative study of public law, which he defines as law that "serves both to define and control power in the hands of government." For Bell, the distinctive feature of public law, including constitutional law, is that legal and political institutions develop over time in different countries. "Public law arrangements," he writes, "are designed as much in dialogue with the past as with the future, and that past is likely to be nationally specific." Even the nature of fundamental rights will be affected by different national and distinct institutional contexts. If Kommers emphasizes the importance of "complete familiarity with methods of constitutional interpretation," for Bell, to understand a public law system one must understand deeply the particular social and political history out of which its institutions of governance emerge.


Since the end of the Second World War, several nations have created courts of judicial review... judicial review, once regarded as a unique mark of the American governmental system, has been explicitly provided for in the written constitutions of several newly independent nations, although in many of these places it has not evolved into a living principle of judicial democracy...

Yet it is possible to suggest that nations do differ to such an extent in the details of their political structure, legal culture, or the wording of their constitutions that no meaningful comparison of constitutional law across national boundaries is possible. That caveat might be made even in connection with the German and American abortion cases. Perhaps this matter should be addressed for a moment, using West Germany and the United States as examples. True, the structure of their governments differ. West Germany, following the parliamentary model, unites legislative and executive authority in a government with a

chancellor, elected by Parliament, as its head. The United States follows the presidential model, with a popularly elected executive separated from the legislature. Judicial review also differs in operation... Finally, the German Court's organization differs from that of the U.S. Supreme Court. Whereas the latter is a single collegial body of nine justices with life-time appointments, the former is divided into two senates with mutually exclusive jurisdiction; the eight justices on each senate are elected by Parliament and serve for a single, non-renewable term of twelve years.

But these differences would seem to be of minimal value in explaining variations in constitutional doctrine...

Perhaps a more crucial explanation of variations in constitutional doctrine across national boundaries than any feature of governmental structure are the general philosophical values and historical traditions that inform the meaning of constitutions. Constitutional interpretation in West Germany and the United States would seem to depend more on these values and traditions than on any variation in the textual content of their constitutions. For instance, there was nothing inexorable about the abortion rulings in Germany and the United States; they might have gone the other way. The German Constitution states that "everyone shall have the right to life and to inviolability of his person... But whether "everyone" within the meaning of the Basic Law includes unborn persons is a point of heated contention among German constitutional lawyers. The United States Constitution is less explicit about the right of persons to life. In addition, there is dispute over whether the fifth and fourteenth amendments impose an affirmative duty upon government to protect persons against encroachments upon their life or liberty by private individuals and institutions. The U.S. Supreme Court could very easily have found that the unborn fetus is a person... The point to be emphasized here is that the constitutions of the countries we would want to include in studies of comparative constitutional law are all adaptable to changing circumstances and flexible enough to spur the mind and imagination of creative judges.

In the final analysis, what really makes West Germany... and the United States... fit subjects for the study of comparative constitutional law is their commitment to political democracy and constitutional government, especially in the area of civil liberties and human rights. Equally relevant is the fact that these countries are similar political cultures; they are technologically sophisticated and pluralistic societies; socially, they are advanced societies faced with similar problems of political order... That... Germany and the United States are also federal systems of government powered by competitive political parties is a further reason why these two countries along with Australia, Canada, and perhaps India, are particularly good candidates for the study of comparative constitutional law. In addition, each of these countries features courts with authority analogous to the U.S. Supreme Court... and these courts are producing a large body of jurisprudence...
can provide Americans with valuable insight into the experience of other constitutional democracies, including that of non-Western cultures. Scrambling the line between jurisprudence and political theory, this body of case law has much to say about notions such as consent, contract, equality under law, justice, representation, and fraternity, elements all inherent in the principle of constitutionalism. Men who call themselves free ought to be acquainted with the range of human experience expressed by those ideas in order to provide them with a greater sense of the community they share with the peoples of other constitutional democracies.

Second, comparative constitutional law can be helpful in the quest for a theory of the public good and right political order. It can represent a disinterested quest for a public philosophy and a statement of the rights and duties that would be assigned in a more perfect constitutional polity. Constitutional courts are reflective institutions. In a very real sense, they represent political men writing large and thinking about where to draw the troublesome line between liberty and order. It would therefore be interesting to know what constitutional values and ideas about man and his relationship to the state are commonly shared across national boundaries. Thus, the study of comparative constitutional law can be a search for principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community. As such, it can lead men to the attainment of truth and a better understanding of man’s political condition.

Third, comparative constitutional law can enrich the study of comparative politics. It could restore the linkage of constitutional norms to political ideologies, intra-governmental relations, and public policies. In examining the values that inform the constitutional law of various nations, students might begin to explore the reasons for the similarities and differences in constitutional rulings. By scrutinizing the conditions and historical circumstances out of which these rules emerge—some rulings may not represent long-range solutions to problems of governance, but rather temporary adjustments of conflicting interests—students might also begin to appreciate which constitutional doctrines or policies can be transferred across national lines and which cannot.

Forth, the comparative perspective can enrich the study of American constitutional law. Such a perspective will provide critical standards for reviewing the work of the U.S. Supreme Court. It will require the student to come to terms with the force and merit of arguments found in the opinions of foreign constitutional courts. [1] In looking at constitutional problems through the eyes of foreign courts, the student is able to draw upon traditions, insights, and values that transcend the American experience. In the absence of comparable traditions, the German Court frontally addressed and forthrightly answered questions—important questions of value—which the American Court consciously avoided. That the highest standards of two nations equally respectful of the humanity and basic freedoms of their people have decided the question of the unborn child’s right to life under their respective constitutions differently would give him pause for reflection. Upon reflection he might deepen his understanding of what the constitutional problem or issue is all about. For some this would be an intellectually liberating experience, challenging conventional wisdom and bringing into question old and new assumptions and preconceptions. For others, the comparative perspective would lead to a deeper appreciation of the meaning and wisdom of American constitutional values and practices.

Finally, the comparative perspective can contribute to the growth of American constitutional law. In light of a full generation of constitutional governments in other countries, perhaps Americans can now in turn learn from these related constitutional experiences. Many German justices have a close familiarity with American constitutional law. Indeed, a full set of the United States Supreme Court Reports is available in the library of the West German Federal Constitutional Court. Perhaps one day this manifest interest in our constitutional jurisprudence will be reciprocated by U.S. Supreme Court Justices.

Obviously, many German constitutional rulings could not be assimilated into American constitutional law. But in some areas, such as the right to vote and to political representation, German and American constitutional principles and theories could be blended fruitfully and seasonably to produce more equitable balances between rights and duties within the American political order. The day may possibly dawn when the high constitutional tribunals of the world’s major industrial democracies will be citing each other’s opinions and drawing from each other’s jurisprudence with increasing frequency. The academic study of comparative constitutional law may hasten the arrival of that day.


This essay will argue that because of comparative legal scholarship’s faith in an objectivity that allows culturally biased perspectives to be represented as “neutral” the practice of comparative law is inconsistent with the discipline’s high principles and goals. Instead, a critical approach that recognizes the problems of perspective as a central and determinative element in the discourse of comparative law [should be adopted].

I. Distance and Difference

Comparative Law is somewhat like traveling. The traveler and the comparison are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown. Traveling promises opportunities for learning both about one’s own country and culture and about other countries and cultures. Going places and gazing at a strange world do not, however, automatically open up new horizons. . . . As long as we understand foreign places as like or unlike home, we cannot begin to fully appreciate them, or ourselves. We travel as if blindfolded: visiting only landmarks of our past, that restore confidence and banish fear. Only close attention to detail—variety and
WHAT IS COMPARATIVE CONSTITUTIONAL LAW?  
CHAPTER 11

heterogeneity—can prevent our leveling others in images taken from our visions of the order of our own world.

Comparative law offers the same opportunities and risks...

The dialectic of learning requires at least two operations that prevent the old categories and ways from being merely projected onto the world and that allow the new to speak for itself. These operations I call “distancing” and “differentizing.” Distance is needed to gain a vantage on who we are and what we are doing and thinking. Distancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance. From a distance old knowledge can be reviewed and new knowledge can be distinguished as it is in its own right. Distance de-centers our world-view and thus establishes what might be called objectivity.

More distance, however, neither opens our eyes nor makes us see clearly. As long as foreign places only look like or unlike home, ... as long as they are treated as same or other, they do not speak for themselves. In order to break the unconscious spell that holds us to see others by the measure of ourselves without abandoning the benefits of criticism, traveling as well as comparison has to be an exercise in difference. By differentiating we not only develop and practice a sharp sense for diversity and heterogeneity but, more importantly, we make a conscious effort to establish subjectivity, that is, the impact of the self, the observer's perspective and experience, is scrupulously taken into account. Differentiating calls into question the neutrality and universality of all criteria: it rejects the notion ... that the categories and concepts with which new experiences are grasped, classified, and compared have anything whatsoever to do with the socio-cultural context of those who see in terms of them. Differentiating is necessary to prevent the observer-comparatist from confusing the present content of (Western) ideas and concepts with the criteria of a universal truth and logic....

* * *

... The dilemma of understanding foreign (legal) cultures and of transcending the domestic (legal) culture can neither be resolved by "going rational" nor by "going native." The rigorous rationalist who relies on conceptual or evolutionary functional universals is prone to give her/his world view and norms, her language and biases only a different label. In the end, she may bring home from her comparative enterprise nothing but dead facts and living errors, the progeny of ethnocentrism. The rigorous relativist, who naively deludes herself into believing that cultural baggage and identities can be dropped at will, is prone to oscillate between ventriloquism and mystification. As a cultural ventriloquist she would reproduce ethnocentrism under the guise of a pseudo-accurate understanding. As a cultural immigrant she might over-identify with the mystified new way and thereby be unable or unwilling to relate anything her sympathetic eye happens upon in travel to what she learns at home.

Both universalism and relativism tend to reproduce the dichotomy between the self and other; they are non-dialectical in the sense that they either come up with "hot" abstractions or with no abstractions at all. Comparison never presupposes that one abstract from a given context... The problem then is how to produce "good," that is, non-ethnocentric abstractions.

Frankenberg also describes efforts by comparative law scholars to achieve "cognitive control," which he asserts "is characterized by the formalist ordering and labeling and the ethnocentric interpretation of information, often haphazardly gleaned from limited data."

Dichotomies measure the object in terms of inclusion in the category of one or the other extreme of two opposed terms, such as the civil law versus common law dichotomy constituting the 'relevant' legal world. This dichotomy implies the existence of less relevant or even irrelevant law, as well as legal or non-legal worlds. This dichotomy can be related to the dichotomy between the law in cultures sharing a "common core" and the law in radically different cultures. This second dichotomy overlaps somewhat with the Western/Eastern dichotomy and the mature/immature, developed/developing modern/primitive, parent/derivative dichotomies. Such dichotomies simplify complexity and almost invariably put the Western legal culture at the top of some implicit normative scale. Threatening the comparatist's claim to non-ethnocentric impartial research... The comparatist always returns to the original and prior conception, which is never exposed to criticism from the vantage the new conception allows. The foreign law is conceived of as like or unlike, derivative or opposite. ...

Underlying these distinctions is the notion that law exists first and foremost as written text. ... [The law is located "out there." ... [Law as a series of discrete legal events is given a life of its own. ... Though considered interdependent with other spheres of social life, the legal is analytically isolated from, and later added to, the non-legal reality of society and its sub-systems. This apartheid of law allows for situating it in a social vacuum and for utilizing it as a prism, allegedly enabling the legal scholar to look through it at reality and to detect and normatively criticize political ideologies.

Defining law as an additive to and not (as I shall later propose) as a cognitive element of social reality confirms the domination of the text (dead or alive) over social experience and makes it difficult if not impossible to analyze legal ideologies and the rituals pervading social life.

Positioning the comparatist as pure spectator, objective analyst, and disinterested evaluator is the final mechanism of cognitive control...

... The fictitious neutrality stabilizes the influence and authority of the comparatist's own perspective, and nurtures the good conscience with which comparatists deploy their self-imposed dichotomies, distinctions and systematizations. The objective posture allows the comparatist to pretend and represent her own assumptions and what she observes in a scientific logic... concealing [her] complicity with both selection of the units on the scale and the objects to be measured...

Consequently, comparison is not open-textured and infinite, self-critical and self-reflective, but a way of getting it straight—"it" being the "true" story of similarities and dissimilarities between legal...
John Bell, Comparing Public Law, in COMPARATIVE LAW IN THE 21ST CENTURY (Andrew Harding & Bain O’Riordan eds., 2002)

Bell argues that public law, notably constitutional law, "has a number of institutional features that make it a significantly different activity compared with private law," and that comparative public law should be understood not so much as a "search for general principles of law," but rather as an exploration of the structure of law and legal systems, one that focuses on the institutional setting in which the activity of public law is performed. Public law is distinctive, he argues, because:

- Public law serves both to define and control power in the hands of government. In defining the power of government, the law also serves to legitimate the exercise of power, particularly discretionary power in the hands of politicians and officials. By authorizing action, the law sends a signal to society that the actions of certain individuals should be respected and be considered as legitimate in the political society. The law then also sets out the conditions for the control of the power it has legitimated. It may set down procedures before decisions are made, and it may also set out mechanisms and grounds for the review of decisions that are taken.
- Now this function of public law in defining and controlling the use of power may seem to be broadly similar to the function of private law. Private law defines the powers of individuals and sets out grounds of control, as well as duties of reparation when powers are exceeded or have unacceptable consequences. But there are important differences. Much private power is not a creature of the state. Within the family, in commerce, in private relationships, private power pre-exists the law. The law is concerned to control the exercise of that power, and uses legal authorization to achieve this purpose. Of course, the law also creates institutions to facilitate individual endeavours and desires, such as the institution of wills or marriage or, more recently, the Pacte Civil de Solidarité (a civil union less than marriage). But this does not deny the importance of pre-existing private power.
- The distinctiveness of public law in individual countries seems to me to involve predominantly around institutions which arise not only from deliberate design (typically from the national legislator or national legal professions), but also from history and underlying social problems such as religious and linguistic diversity.
- History not only explains the development of legal and governmental institutions, it often provides points of reference for problems with which public law has to deal. I would argue that public law is particularly influenced by historical contingencies.

In terms of history, René David rightly wrote that "established ways of working" might well constitute barriers to convergence of legal systems. I would not see this as a negative feature, but rather as a recognition that routine is part of the life of any society. In public law, the routine of both law and administrative practice combine to ensure that activities occur in a regular way despite changes in political and administrative personnel.

Take a simple example of David’s view that different countries have become used to different institutional ways of dealing with a problem, which they would not seek to alter. Every country needs to ensure that public money is properly spent. Every country therefore has systems in place both for the authorization of public expenditure and the scrutiny of accounts. In the United Kingdom, this process has, for central government expenditure, developed in the form of parliamentary scrutiny through the Comptroller and Auditor General, the National Audit Office, and the Public Accounts Committee. The French system has developed as a judicial and administrative process under the Cour des Comptes, and the separate civil service corps of the Inspection Générale des Finances.

The French idea that there should be a Treasury official in every government department who is the sole person to authorize expenditure would appear bizarre to British administrators. Well-established systems of this kind have become embedded in administrative practice. They will be very hard to shift, and their existence becomes something taken for granted in administrative design and in developing the law.

The impact of history on political institutions is very significant in public law. How many constitutions are written to deal with problems that occurred in the past? Take a very simple example, art. 54 of the 1984 French Constitution provides that the President or the Prime Minister (and now 60 deputies or senators) can refer a treaty to the Constitutional Council for a ruling whether it is compatible with the Constitution before the treaty is ratified. Now this was introduced explicitly because the Gaullists were unhappy about the way in which the Treaty of Rome was ratified in 1957, which they considered to be a breach of national sovereignty. The German Constitution’s provisions on the appointment of the Kanzler [chancellor] were an attempt... (to) rectify the problems that occurred in Weimar. Our public institutions in the U.S. are marked by our own history and experiences, which create a distinctiveness in terms of the organisations and procedures which we have and the reason which we have. Martin Loughlin captures this well in his comment:

The journey of finding effective, enlightening and liberating conditions of government is a journey through history and on tracks formed within specific cultural traditions. The maps drawn by societies other than our own are undoubtedly of...
innate interest—... as guides on the journey they must be
treated with circumspection. 27
Public law arrangements are designed as much in dialogue with the
apast as with the future, and that past is likely to be
nationally specific.
A major feature of the history will be the various conqueite and
state succession. Unification of areas elsewhere has been
achieved by the power of the sword. Thus France, through Henri IV, Louis XIV, the Revolution of
1789 and Napoleon, developed a centralized country. The UK has
undergone a similar gradual process. By contrast, Germany and Italy
were much more fragmented and remained so even after unification
in the nineteenth century. As a result, we have very different forms of
governmental federalism in Germany and Italy. In other countries,
notably Belgium and Spain, language plays a significant role. The
federalism established in the past 20 years in those countries recognizes
the importance of linguistic and cultural divisions as part of the identity
of social groups. The complexity of the Belgian situation results from a
recognition of the underlying social division that has given rise to a
range of political parties. By contrast, the French resist any recognition
of different social or linguisitc groups. Everyone is French and speaks
French...

My point is that the institutions of government with which public
law is concerned develop in very specific ways. There is not just a
generic social function to be performed. There are specific, national or
regional functions, which are involved in governing this country at this
time. In consequence, the institutions and processes of government and
administration have to be designed and operate to reflect these
situations. This regional or national institutional setting provides a
context in which the activities or functions of law have to be performed.
There are not generic social functions, which the law serves, but there
are institutionally situated functions...

In structural terms, attachments to fundamental rights have a
different resonance in different legal traditions. In the English common
law, rights-talk has traditionally been downplayed. There is a basic
right to do anything that the law does not prohibit, but this has not led
to positive statements of rights until the Human Rights Act 1998. For
all their willingness to state fundamental rights in constitutions and
legal texts, the French have traditionally treated them as political
ideals, rather than as binding legal norms. By contrast, the Germans
have been more willing to treat these norms, especially after the
enactment of the Basic Law in 1949. Underlying these differences have
been different roles assigned to the judges within institutions of
government. But there are also differences very simply in the
understanding of even a single common value. Thus the freedom of
expression in art. 11 of the Declaration of the Rights of Man of 1789
is concerned with freedom of publication and dissemination of ideas,
especially the refusal of government censorship. The German art. 5 of
the Basic Law is concerned with access to a plurality of information and
freedom of artistic and scientific opinion. If anything, freedom of
expression in the UK has been concerned with the freedom to
demonstrate.

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Section A: The Value of Comparative Constitutional Study: Competing Perspectives

Each of the preoccupations reflects a different background and set of
issues which freedom of expression is designed to deal with. While
there are undoubtedly similarities and common values, there are
important differences, which we should not overlook. A classical notion
is that of the "secular state": Freedom of religion and tolerance of
religious minorities are broadly accepted ideas in Western Europe
countries, but they are matters of considerable dispute in some others.
In France and the United States, the requirement that the State should not appear to side with any religion is very strong.
In France, it has led to serious problems about whether to allow Muslim
women to wear headscarves (the chador) in schools or Jewish boys to
wear the kippah. By contrast, the Germans, the British and Belgians,
cheerfully subsidize religious schools as part of the state system; the
issue of the Muslim headscarves is far less an issue in these countries.

The activity of implementing common values stated in general
terms has to be set in a context of the preoccupations of a particular setting in a particular country. The extent to which the common values
have a common impact in different legal systems depends on the
institutional settings of the different countries that one is examining...

Bell argues that a number of features shape public institutions
that must be examined in understanding comparative public law,
including public law's connection to national political processes; the
desentralization of state power, whether the state provides services or
regulates; whether the public sector is competitive; the distinctive
status of public employment; and distinctive legal traditions in what
form and legal status (e.g., constitutional or statutory) controlling
norms have. In returning to his claim that comparative public law is
distinctive from comparative private law, Bell concludes:

A more fundamental point is the extent to which branches of
domestic law are so constrained by the institutions that exist within a
specific society. I can only offer a provisional answer here. I do not think
that there are nation-specific forms of civil liability insurance. There
are accidents. But there are nation-specific forms of social and private
insurance, as well as health care, which could mean that it is right to
give tort compensation in one country and to refuse it in another for a
similar accident, given the insurance and welfare context in which it
occurs. There are not so many nation-specific contracts, but there are
regimes of public regulation of publicity and redress within which the
private contract is set, for example for consumer, family and personal
life and now very similar (even as to the rates of divorce in European
countries), but the redress function of the law often has to take account
of different nation-specific institutions, for example the Pact Civil de
Solidarité for cohabitation. I think labour law and commercial law also
have their own institutions. The role of collective agreements and
national and local bargaining, as well as employment inspectors,
can grow rise to different forms of regulation of employment. The different
forms of company and regulation of commercial transactions are also
important institutional settings.

The suggestion that an institutional setting is important to
understanding what a social function really entails seems to me to be
an important qualification to the argument of Zweigert and Kötz that
there is a similarity of functions between legal systems. Although it may also be true in respect of other branches of law, it is certainly the case that the institutional setting of public law is likely to be distinctive. Public law is anchored firmly in a national setting, whatever wider trends also impinge on it. Public law operates in a constitutional and administrative setting, which dialogues as much with a nation’s past as with the future. There are particular dynamics of the system that are specific.

QUESTIONS AND COMMENTS
1. Consider the extent to which our earlier discussion of the treatment of the abortion issue is subject to criticisms like Frankenberg’s.
2. Consider whether the “units” of comparing abortion rights should include more, or different, materials on (a) public financial support for abortion and for childbirth and (b) public financial support for child-care, upbringing, health care and education.
3. Does Bell’s position suggest a need to know more about the institutional and historical context of the U.S., Canadian and German abortion decisions than was presented in Chapter I in order to understand their meaning? Does Bell’s position suggest the impossibility of the kind of generalized knowledge that Kemeny argues can be obtained from comparative study?
4. In reflecting on the implications of Bell’s argument for the limitations on comparison, consider Professor Tushnet’s argument:
   Functional analysis is possible when a few “case studies” are placed in a more general theoretical context. Then, of course, the theory rather than the case studies does the analytic work. Still, examining a few cases—comparing the U.S. with foreign experience—may alert us to some theories about which we might want to think, and the comparison may suggest that something that seems initially to be a purely local phenomenon . . . actually exemplifies some more general trends. This is not everything that a strong functionalist would claim for comparative analysis, but it is not nothing either.
   The “omitted variables” critique of functionalism has prepared the way for a consideration of the expressivist approach to comparative constitutional law. As an analyst introduces one new variable after another, she comes close to treating each constitutional system as the unique expression of the particular values each variable takes on. In this sense, expressivism might not be different from a full-blooded functionalist, except that expressivism abandons the language of science in which functionalism is usually clanked.


SECTION B

5. Engaging in comparison of different legal systems runs the risk of error or misunderstanding, even on the level of vocabulary. “We all know, some of us through experience, that bilingualism is difficult to achieve; biculturalism is even harder.” Vicki C. Jackson, Methodological Challenges in Comparative Constitutional Law, 28 Penn St. Int’l L. Rev. 319, 319 (2010). Professor Jacob Zumhoff has argued, for example, that even though increasing numbers of constitutional systems apply “balancing” or “proportionality” analyses to resolve constitutional problems, the appearance of a common vocabulary may be an illusion: “One significant difference between U.S. and European practices seems to hinge on the source and the scope of application of ‘fairness’ in constitutional adjudication. In U.S. constitutional law terms such as ‘fairness’ and ‘proportionality’ surface primarily in three specific areas of constitutional law: [the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment prohibition of cruel and unusual punishment]. . . . In much of European law . . . fairness and proportionality are accorded the status of ‘general principles,’ applicable to all cases involving fundamental rights, and with a radiating effect throughout the legal order. Appeals to fairness and proportionality, in the context of judicial balancing in Europe, must be read against this comprehensive background. This setting imbues such invocations with a very specific meaning, not found in the U.S. context.” Jacob Zumhoff, Balancing, the Global and the Local, Judicial Balancing on a Problematic Topic in Comparative Constitutional Law, 31 Hastings Int’l & Comp. L. Rev. 555, 577–78 (2008).

6. Professor Zumhoff also describes “one of comparative law’s most vigorously contested dilemmas: the question of similarities and differences among legal cultures. Successive waves of comparative law scholarship have debated this question to such an extent that for some modern authors, the division between the proponents of similarity-oriented and those of difference-oriented comparision constitutes ‘the most viable methodological cleavage in contemporary comparative law’ [quoting Michel Desser, Judicial Deliberations: A Comparative Study of Judicial Transparency and Legitimacy 146 (2004)]. The similarities/differences debates, in turn, be seen as a reflection of two fundamental issues at stake in comparative research: (a) the question of what to compare (objects of comparison), and (b) the question . . . of what and how much context to include (scope of comparison).” Zumhoff, supra, at 560–61. What decisions on the question of objects and scope of comparison appear to be reflected in the choice of materials in Chapter 1?

B. COMPARING LEGAL DECISIONS

1. THE DEATH PENALTY IN THE EUROPEAN UNION, CANADA AND THE UNITED STATES

The constitutionality or legality of the death penalty has engaged the attention of courts and legislatures in the United States and elsewhere for several decades. One of the persistent questions, at least to the U.S. cases, has been the relevance of comparative practice. In both the European Court of Human Rights (ECHR) and the U.S. Supreme Court decided important cases about the constitutionality of the death penalty. The ECHR found a violation of the European Convention on Human Rights to arise from extraditing a defendant, 18