to refrain from seeking the death penalty. Soering was extradited, convicted, and sentenced to two life terms for the Haysom murders.

b. The Relevance of Comparative Constitutional Law in Generating Philosophical or Social Scientific "Hypotheses"

Comparative constitutional law shows different mid-level institutional arrangements designed to deal with enduring problems of social order. Philosophers and social scientists address those problems in their own ways. Comparative constitutional law might be able to illuminate their discussions. For example, Chapter IX presents an argument that federalism may be an institutional arrangement that contributes to the development of the overlapping consensus that philosopher John Rawls claims is essential to having stable liberal societies. Similarly, Chapter IX presents an argument that found systems have a tendency to centralize rather than disperse power over time. Neither argument may be correct, but both may help people think about the more general questions concerning liberalism and centralization that they deal with in other settings.

c. Dispelling the Sense of False Necessity and Learning About Other Cultures

As noted earlier, comparative study can help dispel the sense of false necessity about the existing constitutional arrangements in one's home country, although it may be difficult on further reflection to distinguish false from true necessities within different systems of constitutionalism. Apart from the possibility of dispelling one's sense of "false necessity" about familiar legal arrangements, the study of comparative constitutional law may be justified on the basis that it exposes students to different ways of doing things, and thereby enhances your general education. But consider Frankenberg's critique of unreflective foreign travel.

3. CONSTITUTIONAL "BORROWING" AND OTHER TRANSNATIONAL INFLUENCES

Judge Guido Calabresi, noting that several post-1945 constitutions were modeled explicitly on the U.S. Constitution, has argued that experience with judicial review in those systems could inform our judgment about how judicial review should operate in the United States: "Wise parents," Judge Calabresi wrote, "learn from their children." United States v. Then, 56 F.3d 464, 469 (2d Cir.1995) (Calabresi, J., concurring). And as Justice Scalia noted in Printz, the framers of the U.S. Constitution considered various models of government organization in deliberating on a constitutional framework for the United States. To what extent can constitutional solutions be "borrowed" from one system to another? Consider these observations:

penalty domestically to extradite a defendant to face the death penalty in another jurisdiction.

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SECTION B

Comparing Legal Decisions

Borrowing constitutional ideas from other countries has its hazards... Planting a proposition in a different cultural, historical, or traditional context may lead to results quite different from those one finds in the country from which the proposition was borrowed... Liberal reformers in early nineteenth century Latin America... often tried to copy the experience of the United States. Those transplants failed because the soil in which they were planted was simply not congenial; the conditions for constitutional democracy were not yet in existence. The limits of imitation are suggested by an observation penned by Juan Bautista Alberdi, the father of Argentine constitutionalism:

All constitutions change or succumb when they are but cultures of imitation; the only one which does not change, the only one which moves and lives with the country, is the constitution which that country has received from the events of its history, that is to say, from those deeds which form the chain of its existence, from the day of its birth....

Alberdi... seems to have underestimated the value of borrowing... There are many examples of successful constitutional adaptations from one country's experience to another... When India achieved its independence and drafted a constitution, there seemed widespread agreement on the Euro-American constitutional tradition as a source both of principles and often of specific provisions. But Alberdi's statement is still useful as a cautionary note: a constitution is unlikely to succeed if it is drafted without regard for a country's history, traditions, and political culture.

Diverse or contending parties may well agree, in general, on the usefulness of a foreign model when they are at work drafting their own country's constitution. Such agreement, however, may only mask the essential ambiguity of the model to which they seem jointly to aspire... Even among those countries sharing notions about constitutionalism, specific norms may play out quite differently, depending on the cultural assumptions that qualify a norm's interpretation. Consider, for example, freedom of expression. Every post-communist constitution has guaranteed for freedom of speech and press. One who examines the actual contours of free expression in those countries, however, will find striking differences between the way those principles are perceived in the United States, on the one hand, and in the emerging democracies, on the other.


Howard also asks why constitutional drafters borrow from other countries:

One reason for borrowing... is convenience: why reinvent the constitutional wheel when there are so many constitutions
already available on which to draw... Beyond masters of convenience stand other imperatives. Drafters of constitutions may be seeking—indeed, may feel compelled—to adopt principles found in international documents... A country’s leaders may see a new constitution as the means of achieving international acceptance... Similarly, a country may hope to achieve admission into a regional arrangement... Moreover, a country, hoping to shore up its security interests, may seek to curry the favor of a powerful country or patron... Drafters might also see a constitution as a way of attracting western trade and investment.

Howard, at 405–06.

a. Outside imposition? Sometimes constitutions are imposed on nations. West Germany’s Basic Law (now the constitution of Germany) was the result of negotiations between German constitution drafters and the western occupying powers after World War II (and particularly with representatives of the U.S. armed forces). The Japanese post-war constitution was essentially written under the direction of General Douglas MacArthur and his staff. Most analysts regard the German and Japanese constitutions as “exceptions.” In light of Alberdi’s observations, what might account for that?

There are varying forms of foreign imposition, ranging from the unilateral imposition of self-interested terms by an occupying or colonial power, see, e.g., U.S. Dept. of State, Office of the Historian, The United States, Cuba, and the Platt Amendment, 1901, http://history.state.gov/milestone?1899–1913(1998) (describing the Platt Amendment on Cuba, of the “Platt Amendment” requiring that the Cuban Constitution include provisions allowing future U.S. interventions), to multilateral interventions under U.N. auspices, as has occurred with some frequency in recent years in post-conflict situations (see Christine Bell, Peace Agreements: Their Nature and Legal Status, 100 Am. J. Int’l L. 373 (2006) (describing use of constitutional agreements as part of peace-making processes).


c. Transnational Incentives: Hungary. The Hungarian Constitutional Court may have held the death penalty unconstitutional at least in part because Hungarian political and legal elites believed that doing so was a precondition for entry into association with the European Union, as the concurrence in Soering would suggest. For discussion, see George P. Fletcher, Searching for the Rule of Law in the Wake of Communism, 1992 Brigham Young U. L. Rev. 145, 159. In what ways might the motives for development of constitutional doctrine (e.g., constructing constitutional law in part to gain admission to international organizations, or other benefits) be important? Would the presence of such external motives suggest the possible instability of such constitutional law, the possibility of expanding real commitments to particular doctrines through external incentives, or both? For recent developments in Hungary, and the possible role of European institutions in constraining constitutional changes towards authoritarianism, see Chapter IV, below.
of the increasing role of “outsider interpretation” of domestic constitutions in efforts to influence insider behavior, see Rosalind Dixon & Vicki O. Jackson, Constitutions Inside Out: Outsider Interventions In Domestic Constitutional Contests, 48 Wake Forest L. Rev. 149, 159, 176–78, 194 (2013).

e. Transnational Subsidies: Ireland. In A, B, and C v. Ireland, App. no. 25679/05, Eur. Ct. Human Rights (Grand Chamber) (Dec. 16, 2010), the Court relied, in part, on the right of pregnant women under the Irish Constitution to leave the country for abortions elsewhere, in upholding Ireland’s strict prohibition of abortions except in exceptional circumstances. Do the more relaxed abortion laws of surrounding countries, then, provide subsidies for Ireland’s more restrictive practices, lowering the human cost of adhering to its abortion regime, given the mobility of its population and ease of access to affordable abortions in England?

f. Ethno-centricity? In general, consider whether the preceding analyses of borrowing constitutions are subject to Frankenberg’s criticisms of comparative constitutional law as potentially ethnocentric.

g. Inevitability of borrowings? Consider also Professor Alan Watson’s work suggesting, in the context of comparative law generally, that borrowings (not always in the sense of conscious transplantation but also in the sense of influences) are pervasive and perhaps inevitable. See Alan Watson, Legal Change: Sources of Law and Legal Culture, 131 U. Pa. L. Rev. 1121 (1983) (summarizing his earlier work on comparative law and emphasizing the extent of “legal transplants”). Is there a reason to think that constitutional law would differ from private law in this regard?

h. Comparative experience and public opinion. (i) One study of the worldwide experience with abolishing capital punishment concludes that “[a]ccession and sustained abolition has never been the result of great popular demand,” and that “[i]n this context public opinion is invariably led, not followed.” The authors conclude, “However, and whenever, the death penalty is abolished in the United States, that step will be taken with limited popular support and will be contrary to the manifest weight of public opinion.” Franklin E. Zimring & Gordon Hawkins, CAPITAL PUNISHMENT AND THE AMERICAN JURY, at 38 (1991). Would this information, if accurate, reveal to you that the Supreme Court’s decision in Stanford? in Atkins? in Roper? Should it be relevant to the Court itself? In 1986 Zimring and Hawkins asserted that “[w]hen democratic countries cease to execute and subsequently repeal death penalty legislation, this is accomplished by institutions of representative democracy.” Since they wrote, the constitutional courts in South Africa and Hungary have held the death penalty unconstitutional and have held it unconstitutional to execute someone in Canada if a death sentence may be imposed. If, as at all, do these events affect your evaluation of their argument about the importance of political leadership in successful abolition campaigns? Is it still too early to tell whether abolition in these countries will be “successful”? Do constitutional courts, in some settings, act as institutions of “representative democracy” in leading public opinion?

Consider the extent to which the idea of constitutional law is associated with national state sovereignty. Is the association merely historical? Is it necessary that a polity be regarded as a sovereign state in the international community for the polity to have something we call constitutional law? Do transnational influences on domestic constitutional law affect, positively or adversely, a nation's status in the international community? How bound up with a polity's status in the international community are its constitutional arrangements?

Although this book concentrates primarily on constitutions and constitutionalism within particular nation states, it occasionally includes material relating to supranational constitutional issues and design, including decisions of the European Court of Human Rights, the European Court of Justice (now the Court of Justice of the European Union) and commentary on the design and operation of the European Union. In so doing, we implicitly acknowledge the possibility that some treaties or conventions operate as "constitutions" and/or that constitutionalism operates as constraints on the exercise of power at the international as well as at the national level. Consider whether recognizing constitutional aspects of international or supranational decision-making unduly expands the "category" of constitutions and constitutionalism. Consider whether a failure to include such materials would unduly constrain the appropriate category in an age of economic and political globalization.

b. Comparative constitutional law for domestic law purposes: Constitutions may direct interpreters to examine the laws of other countries. The Interim Constitution of South Africa s. 34 (1993) provided that in interpreting its provisions, courts shall "have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." The Constitutional Court cited this provision in explaining its extensive consideration of international and foreign constitutional decisions when it held the death penalty unconstitutional. State v. Makwanyane, Case No. CCT/33/94 (June 6 1996). The Final Constitution (1996) similarly provides in s. 30 that when interpreting the Bill of Rights, courts, tribunals and other forums "must consider international law and may consider foreign law."


Professor John Bell describes as elements of the "external environment" of law (1) "inputs" from national legislatures to alter preexisting law and (2) the impact of surrounding countries on issues of concern to both, as in transboundary pollution, and "the trend of opinion." Commenting that the EU and European Convention "show a formal distinction between public law and private law," and are "supranational sources [which] introduce an element of legal pluralism," he argues: "No longer are the sources of law simply found within the national legal order either directly or by incorporation to the national legal order. Rather there is a plurality of sources from which legal standards are derived, some national and some supranational." Bell, supra, at 238-240. In this regard, note the strong influence of decisions of the European Court of Human Rights not only on the 47 European countries in which the decisions have binding legal effect but also in those countries that do not have authority in other courts.

In light of Professor Tushnet's argument that as functional comparisons become more accurate they also become more "expressivist," consider the treatment of U.S. caselaw by the South African Court in Makwanyane, the death penalty case. The South African Constitutional Court noted the "large numbers of countries that formally or practically forbid the death penalty. After a lengthy discussion of U.S. law, the South African Court concluded that its "jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments but also ... contemplates that there will be capital punishment. The acceptance by the majority of the U.S. Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation.... The difficulties that have been experienced in
following this path... persuade [the Court] that we should not follow this route. 154. In Professor Tushnet's analysis, does this form of reasoning "omit variables" that importantly distinguish among different countries with respect to the constitutionality of the death penalty?

5. THE UNITS OF COMPARISON: THE IRISH EXPERIENCE WITH REPRODUCTIVE FREEDOM AND POPULAR INITIATIVE

Ireland's laws, influenced by the nation's Catholic heritage, made abortions generally illegal.1 In one widely reported 1983 case, a celebrated trial judge instructed a jury considering a criminal charge against a person who performed an abortion that a physician was required to perform an abortion if carrying the pregnancy to term would leave the woman a "physical and mental wreck." The jury then acquitted the defendant, who had performed the abortion on a fourteen-year-old rape victim. The "physical and mental wreck" standard might have made it relatively easy to obtain a legal abortion in Ireland. But Irish women disagreed over whether the jury instruction accurately described Irish law, and Irish doctors almost uniformly refused to perform abortions. They adhered to Roman Catholic interpretations of contraception and abortion. They viewed the principle of double effect, and would not perform abortions where the destruction of the fetus was the intended effect.

In 1974 the Irish Supreme Court decided the counterpart to Griswold v. Connecticut, holding that married persons had a constitutional right to privacy encompassing a right to obtain contraceptive devices. McGee v. Attorney General, [1974] Irish Rep. 284. The Irish Supreme Court's decision referred to Griswold and other U.S. cases. Those references alerted Irish pro-life groups to what they thought might be a real threat, even though the Irish Supreme Court clearly implied that the contraceptive case implicated different interests from abortion. Pro-life groups feared that, just as the U.S. Supreme Court had expanded the right to privacy announced in Roe v. Wade, so too the Irish Supreme Court might extend its decision in McGee.

After several years of organizing political support, pro-life groups in Ireland put a "right to life" constitutional amendment on the ballot. With 54% of those eligible voting, the Irish electorate approved the referendum in 1983 by a margin of approximately 2-1, thereby adding the referendum in 1983 by a margin of approximately 2-1, thereby adding the Eighth Amendment (Article 40) to the Irish Constitution: the Eighth Amendment (Article 40) to the Irish Constitution:

The State acknowledges the right to life of the unborn and, due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right.

According to Kelly, "enactment of this paragraph was a unique example, in the Irish experience, of a constitutional amendment being proposed and passed outside the party political system... [and] that the old device of initiative... designed to allow the electorate to promote proposals for legislative and constitutional change."

Because few Irish doctors had been performing abortions, the right-to-life amendment had no immediate direct effects. But Irish women had been able to obtain abortions by flying to Great Britain, where abortion was legal and available. Some estimates indicate that each year in the 1980s between five and ten thousand Irish women traveled to Great Britain to have abortions. A number of groups, many serving university communities, offered information about the availability of abortions in Great Britain. Pro-life groups, led by the Society for the Protection of the Unborn Child (SPUC), saw the amendment as an opportunity to restrict the operation of these counseling centers. Closing them down would "defend" the right to life of unborn Irish children, as Article 40 required.

The SPUC went to court and got orders requiring the counseling services to stop "assisting" abortions by making travel arrangements for women or by giving information about the availability of abortions at specific clinics outside Ireland. The counseling services then moved the controversy outside Ireland as well. They called on European international courts to overturn the Irish decisions.

The European Convention on Human Rights, which Ireland has signed, protects a right of freedom of expression regardless of frontiers. The counseling services went to the European Court of Human Rights, claiming that the injunction against distributing information about abortions in Great Britain violated this guarantee. A majority of that court agreed that the injunction violated freedom of expression. Most of the judges relied on the technical view that freedom of expression is violated when courts issue injunctions without a specific statute authorizing them to do so; they believed that Article 40 itself was not specific enough. Some of the judges, though, said that limiting freedom of expression regarding abortion information was excessive, even if the government had a right to prevent abortions. They pointed that telling people not to distribute information was likely to be ineffective unless those who received the information could be barred from leaving Ireland. A few years later the court adopted that position, noting that information about abortions could be obtained not only from counseling services but from magazines and telephone directories. Barricading counseling services from providing information was, the court said, ineffective in protecting unborn life.

Another European court also disapproved Ireland's policy, as a member of the European Community (the Common Market, now known as the European Union), Ireland may not interfere with the provision of commercial services across national borders, or with international travel. The counseling services argued that banning distribution of information interfered with the commercial operations of abortion providers in Great Britain. This claim went to the European Court of Justice. The counseling services lost on technical grounds. The Court of Justice agreed that injunctions against providing information interfered with commerce.

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1. Ireland's Constitution has been described by leading jurists as essentially "Christian" in content. See Gerard Sheedy, The Right to Abortion in the Irish Tradition of the Common Law, in HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOR OF IAN WALSH 21 (James O'Reilly ed., 1996).