

1993

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David Weissbrodt, *Globalization of Constitutional Law and Civil Rights*, 43 J. LEGAL EDUC. 261 (1993), available at https://scholarship.law.umn.edu/faculty_articles/232.

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Globalization of Constitutional Law and Civil Rights

David Weissbrodt

The teaching of U.S. constitutional law is remarkably insular. A quick review of course books reveals few, if any, references to materials from other countries or to relevant international law.¹ Constitutional law courses focus almost exclusively on the U.S. constitutional order. The course books appear to consider as unique this country's balance of power between the national government and the states and its approach to bridging the structural tension among executive, legislative, and judicial branches. One colleague facetiously told me that the only country comparable to the United States is the United Kingdom. Since the U.K. has no written constitution, the U.S. is unique and no other country is worthy of attention.

In the face of such an insular view, I must say that this article has very limited objectives. I do not expect that constitutional law professors will immediately be persuaded to rewrite their course books and revise their classes. Instead, I can hope only to inspire several teachers to experiment with

David Weissbrodt is Briggs & Morgan Professor of Law, University of Minnesota. This article expands a presentation given at the Association of American Law Schools Mini-Workshop on Teaching the First Generation of Global Lawyers, held in San Francisco on January 6, 1993. The author thanks Dan Farber and Phil Frickey for their especially helpful comments on earlier drafts of this presentation, and acknowledges Bill Cohen's thoughtful comments at the workshop. He also thanks Peter-Christian Olivo and Deborah Ellingboe for valuable assistance in preparing this article.

1. See, e.g., Edward L. Barrett, Jr., et al., *Constitutional Law: Cases and Materials*, 8th ed. (Westbury, N.Y., 1991); Gerald Gunther, *Constitutional Law*, 12th ed. (Westbury, N.Y., 1991); William B. Lockhart et al., *Constitutional Law*, 7th ed. (St. Paul, 1991); John E. Nowak & Ronald D. Rotunda, *Modern Constitutional Law*, 4th ed. (St. Paul, 1993); Geoffrey R. Stone et al., *Constitutional Law*, 2d ed. (Boston, 1991). But see Hurst Hannum, *Materials on International Human Rights and U.S. Constitutional Law* (Washington, 1985) (providing international human rights material for use in constitutional law courses); Mauro Cappelletti & William Cohen, *Comparative Constitutional Law* (Indianapolis, 1979). For a discussion of the global impact on the entire law school curriculum, see Michael P. Waxman, *The Comparative Legal Process Throughout the Law School Curriculum: A Modest Proposal for Culture and Competence in a Pluralistic Society*, 74 *Marq. L. Rev.* 391 (1991). As to the need for an examination of the relationship between international human rights and the U.S. version, see Louis Henkin, *Foreign Affairs and the Constitution*, ch. 10 (Mineola, N.Y., 1972); Louis Henkin, *Constitutional Rights and Human Rights*, 13 *Harv. C.R.-C.L. L. Rev.* 593 (1978); Richard B. Lillich, *The Constitution and International Human Rights*, 83 *Am. J. Int'l L.* 851 (1989); Frank C. Newman, *The U.S. Bill of Rights, International Bill of Human Rights, and Other "Bills,"* 40 *Emory L.J.* 731 (1991).

the use of international human rights law and comparative constitutional law materials.²

There are some scholars, the originalists, who appear to reject any legal development that cannot claim its provenance in the text of the Constitution.³ As far as they are concerned, arguments about the evolving meaning of such basic principles as due process, cruel and unusual punishment, and freedom of speech may fall upon deaf ears. If originalism is combined with a textualist fixation upon the words of the document and a refusal to consider the context or legislative history of those words, the result may be a mind completely closed to the usefulness of global influences or sources.

I do not want to rehearse the originalist versus nonoriginalist debate.⁴ My remarks are addressed to teachers who believe that the Constitution is a living document which draws its meaning both from its historical roots and from the needs of contemporary society. I have a sufficient challenge in arguing that international human rights law, on the one hand, and comparative constitutional materials, on the other, are worthy of inclusion in a course in U.S. constitutional law.

This article addresses two issues. First, it discusses the reasons for raising global and international human rights issues in U.S. courses, including constitutional law and civil rights. Second, it focuses on several barriers to globalization and suggests ways to overcome these barriers.

Why Consider Global Sources in Constitutional Law?

Whether one should introduce global sources in a thoroughgoing way or through isolated examples is a question ultimately left to the individual constitutional law professor's experimentation and decision. Regardless of the degree of integration one chooses, several issues of U.S. constitutional law could benefit from a comparative and internationalist viewpoint.

At most law schools and in most of the principal course books, students of constitutional law face issues of federalism, separation of powers, individual rights and freedoms, equal protection, state action, judicial review, and limits on constitutional litigation. The United States is, of course, not the only

2. I advocate that constitutional law teachers consider both comparative constitutional materials and international law. Those two domains, of course, arise from different sources.

Law schools are making more of an effort to introduce comparative constitutional law courses into the curriculum, and some scholars have written extensively on the subject. See, e.g., Hannum, *supra* note 1; Cappelletti & Cohen, *supra* note 1. The basic problem, however, is that very few students enroll in such courses because they were not introduced to comparative law aspects in their first-year constitutional law course. Also, more students can be reached through the first-year curriculum.

3. See, e.g., The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence: Originalist Theories of Constitutional Interpretation, 73 *Cornell L. Rev.* 350, 355, 364 (1988) (contributions by Raoul Berger, Robert Bennett, and Michael Moore); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849 (1989).

4. Compare sources cited *supra* note 3 with Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 *Stan. L. Rev.* 703 (1975); see also Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Review*, 77 *Va. L. Rev.* 669 (1991).

country which has had to wrestle with those issues. Students can learn to appreciate or criticize the U.S. approach by comparing it to the way other nations have solved the same problems.

Here are three examples. One: many countries have specifically addressed the abortion issue—that divisive constitutional and moral question—through their judiciary.⁵ Two: the U.S. approach to judicial review has been criticized as a countermajoritarian aberration in an otherwise democratic system;⁶ that critique might be answered by a comparative review of other democratic systems, which seem generally to consider judicial review a necessity. Three: consider a comparative analysis of the separation of powers. France, for example, adheres to a clear separation between governmental branches,⁷ while in the United States some intrusions by one branch into another's domain are permissible.⁸ Advocating a comparative look at these issues does not necessarily mean the U.S. method is the least favorable; such comparisons simply provide legal scholars with another tool to analyze the various issues presented.

Global comparisons are particularly apt right now because other nations have been rewriting their constitutions and copying various elements of the U.S. Constitution. Indeed, there is growing international interest in the U.S. approach to federalism as a way of dealing with ethnic strife.⁹ If nations adopt federal structures or apply such phrases as “due process” and “equal protection,” we might in turn learn from their experiences.¹⁰ For example, in

5. See Cappelletti & Cohen, *supra* note 1, ch. 12 (comparing constitutional decisions on abortion from Austria, France, Germany, Italy, and the United States).
6. See Alexander Bickel, *The Least Dangerous Branch*, 2d ed., 16-23 (New Haven, 1986). But cf. Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 *Yale L.J.* 2277, 2283 (1991) (debunking notion that domestic application of international law raises countermajoritarian problems).
7. For a look at the French philosophical view of separation of powers, see Montesquieu, *The Spirit of Laws*, bk. XI.
8. To illustrate how much intrusion by one branch into another is permissible, compare *INS v. Chadha*, 462 U.S. 919 (1983), with *Mistretta v. United States*, 488 U.S. 361 (1989). In *Chadha*, the Court held that Congress's retention of veto power over deportation decisions of the executive branch violated the presentment and bicameralism requirements of the Constitution and, hence, the principle of separation of powers. In *Mistretta*, the Court held that Congress's formation of the United States Sentencing Commission within the judicial branch—requiring at least three federal judges to be members—was not a delegation of excessive legislative power or a violation of the separation of powers principle.
9. See, e.g., Nigeria Const. ch. 1, pt. II (adopting federalist system). There may also be a comparison to be drawn between the law which has developed in regard to the relationship between the states and the federal government under the U.S. Constitution and the relationship between the United Nations and national governments under Article 2(7) of the U.N. Charter.
10. See, e.g., Phil. Const., art. IV (Bill of Rights) (“No person shall be deprived of life, liberty, or property without due process of the law nor shall any person be denied the equal protection of the laws.”).

Not only are comparisons appropriate when other countries adopt provisions similar to those found in the U.S. Constitution, but such comparative analysis is also relevant when interpreting those same constitutional provisions as applied in domestic law. E.g., compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that judiciary has

teaching comparative constitutional law during 1992-93 at Minnesota, Professor Harry Groves focused on "affirmative action," and how that concept has been used and misused in India and Malaysia, to shed light on the U.S. debate.¹¹

The case for globalization of the constitutional law curriculum is particularly strong in courses that focus on civil rights and civil liberties. Indeed, international human rights law and the existence of human rights protections in constitutions around the world may be used to support the "natural law" view that rights do not derive only from positive law, but have some more enduring source.

I argued in the human rights course book I coauthored with Frank Newman in 1990 that lawyers might be viewed as not capable of serving their clients ethically in civil rights or civil liberties matters unless they are aware that (1) there may be international institutions to petition after losing in national forums, and (2) there are international law arguments they can raise in U.S. courts.¹² While that comment was intended to be provocative rather than prescriptive, there are more reasons to support the statement today than there were even in 1990.

no power to grant state and local governments immunity from otherwise valid federal commerce clause legislation, effectively giving the federal government unrestrained power over states under the commerce clause), with Peter W. Hogg, *Constitutional Law of Canada*, 2d ed., 439 (Toronto, 1985) (noting that general language of Canadian commerce clause contrasts with more restrictive text of U.S. commerce clause, yet in practice the Canadian clause has "turned out to be a much more limited power than its American cousin") (footnote omitted).

One can also compare the concepts of federalism in various countries. For example, the application of the death penalty varies widely among states, from total abolition to consistent application. This diversity is generally recognized as a permissible exercise of state police power in drafting and enforcing criminal laws, so long as the law does not run afoul of the U.S. Constitution. By contrast, the European Court of Justice has on several occasions considered whether specific European Community measures are consistent with the basic principles of human rights incorporated within Community law and has been very tough on countries whose policies are inconsistent with that law. See Frank Newman & David Weissbrodt, *International Human Rights: Law, Policy, and Process* 438 (Cincinnati, 1990).

11. In India, affirmative action programs have contributed to that country's deteriorating ethnic situation. Although such programs are designed to acknowledge the equal status of Muslims in a predominantly Hindu state, in reality the Muslims still suffer from lower economic and social status. *Midnight Draws Near for India*, *Ottawa Citizen*, Dec. 12, 1992, at A8; see also Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Oxford, 1984), for an analysis of the costs and benefits of India's compensatory discrimination policies.

In Malaysia, however, there has been an affirmative action program that favors the majority over minorities; it has been accompanied by various episodes of repression against minority groups. See Committee Against Repression in the Pacific and Asia, *Tangled Web: Dissent, Deterrence, and the 27th October 1987 Crackdown 1-4* (Haymarket, NSW, Austl., 1988).

For a useful cautionary about such comparative endeavors, see Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 *Cal. L. Rev.* 539 (1990).

12. Newman & Weissbrodt, *supra* note 10, at xv.

In September 1992, the United States joined 114 other nations as a party to the International Covenant on Civil and Political Rights.¹³ In the same month, the U.S. became bound by the Convention Concerning the Abolition of Forced Labor.¹⁴ These two human rights treaties contain several standards that are better or at least clearer than U.S. constitutional law.¹⁵ For example, the Civil and Political Covenant explicitly forbids sex discrimination, while the U.S. Constitution lacks such a prohibition except as to voting. The Covenant ensures “equality of rights and responsibilities of spouses as to marriage.”¹⁶ It expressly protects the right to privacy and family,¹⁷ and protects liberty of movement.¹⁸ There are many other examples in which the Covenant might be cited as influential in interpreting vague protections of the U.S. Constitution.

U.S. scholars and litigants should be aware not only of the language of these treaties, but also of the substantial corpus of jurisprudence that is being amassed by such bodies as the Human Rights Committee under the Covenant on Civil and Political Rights. As the Human Rights Committee issues its General Comments on the treaty provisions and as it expresses views on governmental reports and on the individual cases brought to test treaty violations, the mass of human rights law applicable to the U.S. grows.

Another reason for devoting greater attention to international human rights law is the growing international critique of the U.S. human rights performance. That critique should eventually erode the misconception in this country that the U.S. is nearly always more protective of human rights than other nations. For example, with more than 2,500 prisoners on death row in this country, there is widening international criticism of the U.S. application of the death penalty. In the *Soering Case*,¹⁹ the European Court of Human Rights refused to allow extradition of a German national because he faced a long wait on death row in Virginia before being subject to execution for

13. G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *entered into force for the U.S.* Sept. 8, 1992 [hereinafter Civil and Political Covenant]. The Covenant

establishes an international minimum standard of conduct for all participating governments, ensuring the rights of self-determination; legal redress; equality; life; liberty; freedom of movement; fair, public, and speedy trial of criminal charges; privacy; freedom of expression, thought, conscience, and religion; peaceful assembly; freedom of association (including trade union rights); family; and participation in public affairs; but forbidding torture; “cruel, inhuman or degrading treatment or punishment”; slavery; arbitrary arrest; double jeopardy; and imprisonment for debt.

David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 Minn. L. Rev. 35, 37-38 (1978) (footnotes omitted); see David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 Hum. Rts. L.J. 77 (1993).

14. Convention Concerning the Abolition of Forced Labor (I.L.O. No. 105), *entered into force* Jan. 17, 1959, 320 U.N.T.S. 291, *entered into force for the U.S.* Sept. 25, 1992.

15. See Letter from Aryeh Neier, Executive Director, Human Rights Watch, to Marvin Frankel, Chairman, Lawyers Committee for Human Rights (Mar. 5, 1992) (on file with author).

16. Civil and Political Covenant, *supra* note 13, art. 23.

17. *Id.* art. 17.

18. *Id.* art. 12.

19. 161 Eur. Ct. H.R. (ser. A) (1989).

murder. Similarly, Canada refused to extradite until the U.S. promised not to subject the defendant to risk of the death penalty,²⁰ and the Inter-American Commission of Human Rights has found the U.S. in violation of the American Declaration on the Rights and Duties of Man in executing juvenile offenders.²¹

Another example of international criticism can be found in the July 1992 decision of a working group of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities that the U.S. had committed a gross and consistent pattern of human rights violations both in police beatings in Los Angeles and in the failure to provide remedies for the beatings.²² By the closest vote of 11-10, the Sub-Commission decided not to pursue the case, but that dispute gives an inkling of the growing international criticism of U.S. human rights performance.²³

There appears to be a new recognition in this country of the need to listen to more diverse voices when attempting to understand domestic law—namely, the voices of women and nonwhite U.S. residents. The remainder of the world is largely nonwhite and we should, at the very least, be aware of these other views.

Barriers to Globalization and How They Might Be Overcome

Several major barriers stand in the way of globalization of the constitutional law and civil rights curriculum. Some stem from pedagogical problems, while others derive from the reluctance of U.S. courts to apply international law principles. All of these barriers can be overcome—and must be if we are to train our students to become responsive to an increasingly globalized society.

Pedagogical Barriers

One serious problem arises from the breadth of the subject and the quantity of material. A skeptic might inquire: How can one argue for inserting comparative materials into standard course books when there is not enough time or room for much that is directly relevant to the U.S. Constitution?

In addition, most constitutional law books make no serious effort to inform the reader of the substantive law relevant to many topics. For example, the

20. Canada refused to extradite Lee O'Bomsawin, a Canadian national, to Florida to stand trial for double murder. See John F. Burns, *Canada Wins U.S. Extradition Deal*, N.Y. Times, Feb. 14, 1992, at A3. But see *Kindler v. Canada*, [1991] 2 S.C.R. 779, and *Reference re Ng Extradition v. Canada*, [1991] 2 S.C.R. 858 (Canadian Supreme Court refusing to resist extradition solely on potential of death penalty in United States).

21. Case 9647, Inter-Am. C.H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987); see David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 Am. U. J. Int'l L. & Pol'y 339 (1988).

22. See *Petition for United Nations Assistance Under Resolution 1503*, letter from Diana G. Collier, Director, Communications, International Human Rights Association of American Minorities, to Boutros Boutros Ghali, Secretary-General of the United Nations (Apr. 30, 1992) (on file with author).

23. See Adrien-Claude Zoller, *Analytical Report on the 44th Session of the Sub-Commission*, 17-18 Hum. Rts. Monitor (Int'l Service for Hum. Rts.) 6, 18 (1992).

student may learn about the three Civil War amendments, the constitutional underpinnings of the civil rights statutes, as well as problems of state action. But most constitutional law courses do not attempt to keep abreast of the myriad of state and local ordinances that go far beyond the federal strictures in forbidding discrimination by individuals, in identifying kinds of discrimination unprotected by federal civil rights laws, or in regulating places in which discrimination may occur. In this context, how can one argue for the inclusion of international law which may provide less compelling authority than an applicable state statute or local ordinance?

My principal answer is twofold. First, with the ratification of the International Covenant on Civil and Political Rights, the International Labor Organization's Forced Labor Convention,²⁴ and the Protocol Relating to the Status of Refugees,²⁵ and with other multilateral instruments in the pipeline,²⁶ those treaties will have an impact upon constitutional law and will begin to be cited more frequently by litigants and judges. To the extent that the treaties and the relevant jurisprudence are superior to U.S. law, course books should make reference to international human rights law. Second, U.S. doctrinal developments on some constitutional law topics have not been satisfactorily resolved; international approaches—for example, to freedom of religion—might be helpful, if only by providing a checklist of relevant issues.²⁷

Barriers to Using International Human Rights Law in U.S. Courts

The Bush Administration and the Senate attempted to erect a second barrier to the use of international human rights treaties by attaching several reservations, declarations, and understandings limiting the use of the Civil and Political Covenant in U.S. courts. One declaration makes the Covenant not self-executing in the absence of implementing legislation. Others restrict

24. Convention Concerning the Abolition of Forced Labor, *supra* note 14 (112 states parties).
25. Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967, *entered into force for the U.S.* Nov. 1, 1968 (116 states parties).
26. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 5 I.L.M. 352, *entered into force* Jan. 4, 1969 (134 states parties).
27. Reference might be made, for example, to Article 18 of the Civil and Political Covenant, *supra* note 13, and the U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981). It is worthy of note that the Senate did not attach any reservations to the freedom of thought, conscience, and religion provision in Article 18 of the Covenant. Another example might be found in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), in which the Supreme Court relied exclusively on the First Amendment in rejecting the application of a municipal ordinance, which penalized racial hate speech, to a cross-burning case. Professor Akhil Reed Amar has criticized the Court's analysis for its failure to consider the impact of the Thirteenth and Fourteenth Amendments. See *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124, 125, 151-60 (1992). Along the same line, if the Court had focused at all on international human rights law, it would at least have had to consider the balance between freedom of expression and incitements to racial hatred. See Civil and Political Covenant, *supra* note 13, art. 20 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility of violence shall be prohibited by law."). For further exploration of the use of international human rights law in domestic courts, see, e.g., Richard B. Lillich, *International Human Rights: Problems of Law, Policy and Practice*, 2d ed., 86-163 (Boston, 1991).

the reach of particular clauses; for example, the United States considers itself bound by the Covenant's very broad prohibition of "cruel, inhuman or degrading treatment or punishment" only to the extent that the clause is congruent with the far narrower prohibition in the Eighth Amendment against "cruel and unusual punishment."²⁸

But these limitations should not stop U.S. lawyers and scholars from citing more protective international principles when they work with the vague clauses of the U.S. Constitution—not as binding law, but as useful guidance. It is for the courts and not the Senate to decide whether a multilateral treaty provision is self-executing, that is, enforceable without further legislation.²⁹ Indeed, some of the reservations to the Covenant may be so inconsistent with the object and purpose of the treaty that they could be found invalid.³⁰ Finally, the U.S. was not permitted by the International Labor Organization to attach a similar limitation to its ratification of the Forced Labor Convention.³¹ The limitations do not represent an insurmountable barrier.

Convincing U.S. judges, administrative officials, and scholars that they should pay any attention to international law is, of course, very difficult. The Supreme Court's June 1992 decision in *United States v. Alvarez-Machain*³² makes this clear. In that case, U.S. Drug Enforcement Administration agents arranged for the kidnapping of a Mexican doctor suspected of assisting in the murder of a DEA agent, in Mexico, and forcibly brought him to the U.S. to stand trial. Lower courts held that the kidnapping violated the extradition treaty between the U.S. and Mexico, but the Supreme Court failed this

28. For a transcript of the U.S. reservations, declarations, and understandings to the Civil and Political Covenant, see 138 Cong. Rec. S4783-84 (daily ed. Apr. 2, 1992); 31 I.L.M. 645-61 (1992).
29. See Weissbrodt, *supra* note 13, at 68-69; see also Lori Fisler Damrosch, The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties, 67 Chi.-Kent. L. Rev. 515, 526 (1991); cf. Anne Bayefsky & Joan Fitzpatrick, International Human Rights Law in United States Courts: A Comparative Perspective, 14 Mich. J. Int'l L. 1, 42-47 (1992).
30. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15; see also *Belilos Case*, 132 Eur. Ct. H.R. (ser. A) (1988) (holding Swiss declarations to Convention for the Protection of Human Rights and Fundamental Freedoms invalid as reservations inconsistent with Convention); Henry Bourguignon, The *Belilos Case*: New Light on Reservations to Multilateral Treaties, 29 Va. J. Int'l L. 347 (1989).
31. See Instrument of Ratification, June 7, 1991 (received by the ILO on Sept. 25, 1991); Letter of Michel Hansenne, International Labor Organization, to U.S. Ambassador Morris Abram (Sept. 25, 1991) (on file with author).
32. 112 S. Ct. 2188 (1992). Perhaps the most glaring example of the Supreme Court's refusal to look to international law is *Bowers v. Hardwick*, 478 U.S. 186 (1986). In rejecting the equal protection claims of a homosexual convicted under Georgia's sodomy statute, Chief Justice Burger noted in his concurring opinion that proscriptions against sodomy have very ancient roots and after tracing this history commented, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197. Curiously enough, no mention was made of a 1981 decision by the European Court of Human Rights, which held, in a virtually identical case, that the private life of adult male homosexuals is protected by Article 8 of the European Convention. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (Ser. A) (1992); see also Newman & Weissbrodt, *supra* note 10, at 680.

important test of its respect for international law.³³ Chief Justice Rehnquist, writing for the majority and finding nothing in the extradition treaty that explicitly forbids kidnapping, approved the abduction even though, the Court admitted, it “may be in violation of general international law principles.”³⁴

The Supreme Court also ignored international law principles in its 1989 decision in *Stanford v. Kentucky*.³⁵ In that case, the Court held that the execution of juvenile offenders did not constitute cruel and unusual punishment under the Eighth Amendment. In delivering the majority opinion, Justice Scalia rejected claims that such actions violate international practices, stating that “it is American conceptions of decency that are dispositive, [not] the sentencing practices of other countries.”³⁶

These Supreme Court decisions should not dissuade U.S. lawyers from turning to international law principles. In other instances, U.S. courts have used international practices to guide their constitutional interpretation. The *Stanford* dissent, for example, noted several previous Supreme Court cases, going back to *Trop v. Dulles*,³⁷ in which the Court had found “objective indicators of contemporary standards of decency in the form of legislation in other countries [to be relevant] to Eighth Amendment analysis.”³⁸

One need only look to the history of *Brown v. Board of Education*³⁹ to be convinced that the international perspective is vital to the development of U.S. substantive law. *Brown* revealed the desire of the U.S. and the Supreme Court to avoid appearing uncivilized or unprotective of human rights. In the early 1950s the impact of racial segregation on African diplomats in the U.S. was becoming too embarrassing. The Supreme Court’s decision in *Brown* was at least partially motivated by concerns about the international image of the U.S.⁴⁰ Similar forces are at work today in areas where the U.S. human rights performance is the subject of criticism.

33. For critical analyses of *Alvarez-Machain*, see Keith Highet & George Kahale III, International Decisions (*United States v. Alvarez-Machain*), 86 Am. J. Int’l L. 811 (1992); Michael J. Glennon, State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain*, 86 Am. J. Int’l L. 746 (1992); see also Louis Henkin, Will the U.S. Supreme Court Flunk International Law? Am. Soc. Int’l L. Newsl., Aug./Sept. 1992, at 1. But cf. Malvina Halberstam, In Defense of the Supreme Court Decision in *Alvarez-Machain*, 86 Am. J. Int’l L. 736 (1992).

34. *Alvarez-Machain*, 112 S. Ct. at 2196.

35. 492 U.S. 361 (1989).

36. *Id.* at 369 n.1.

37. 356 U.S. 86 (1958).

38. *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting).

39. 347 U.S. 483 (1954).

40. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 111 (1988); Mark Tushnet with Katya Lezin, What Really Happened in *Brown v. Board of Education*, 91 Colum. L. Rev. 1867, 1908 (1991).

* * * * *

I have suggested some important reasons for globalizing the law school curriculum in constitutional law, civil rights, administrative law, and other subjects. Realistically, I do not expect that all constitutional law professors will undertake this experimental work, but I do hope that several will be interested.