

HOW (AND HOW NOT) TO USE COMPARATIVE CONSTITUTIONAL LAW IN BASIC CONSTITUTIONAL LAW COURSES

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Law faculties seem increasingly interested in figuring out how to incorporate non-U.S. legal materials in basic courses.¹ Doing so may increase students' sophistication about the different ways societies have for organizing themselves—their rules of property, torts, contracts, and (of course) constitutional law. It may also prepare them for working with lawyers trained in other national traditions, whose sensibilities about what law should look like and how courts should behave may be very different from those of students trained in the U.S. Yet, as anyone who has even dabbled in comparative law knows, the task of incorporating non-national material in a nationally oriented course is not an easy one. Facile comparisons are easy; serious ones difficult. Differences in cultures, in legal traditions, and in institutional arrangements *other than* the one being compared at the moment all require great caution in suggesting to U.S. law students that they can become better lawyers by knowing a little bit about non-U.S. law.²

I begin this Essay by briefly describing good and bad ways of incorporating non-U.S. law in a basic course on Constitutional Law.³ The remainder of the Essay works through a number of examples of doing so in a

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1. For example, the Association of American Law Schools will hold a one-day workshop at its 2006 Annual Meeting on integrating non-U.S. materials into first-year courses. AALS Calendar, at <http://www.aals.org/aalscal.html> (last visited Mar. 5, 2005).

2. I refer here to *non-U.S. law* to indicate that my methodological concerns go to efforts to incorporate international public law, and particularly customary international law, in the basic Constitutional Law course, although I will not discuss that sub-topic in this essay.

3. Teachers in the field know that basic Constitutional Law courses come in a number of variants. My discussion of substantive areas indicates that my comments are applicable to all the variants—the comprehensive survey dealing with both issues of structure and issues of individual rights (in either a one-semester or two-semester version) or separate courses on structure and individual rights (the latter sometimes divided into courses on due process, equal protection, and the First Amendment).

good way.⁴ At the outset, I have to make the obvious point that the more of one thing one does in a class, the less one can do of something else.⁵ Each teacher will have to decide whether the trade-offs attendant to adding references to non-U.S. materials are worth it. This is particularly important for someone with a deep comparativist sensibility, who will want to ensure that references to non-U.S. materials come with a sufficiently full account of the institutional, cultural, and legal-tradition background to be accurate descriptions of those materials. As a general matter, I suggest that the sacrifices in coverage of U.S. material that a fully comparativist sensibility would require is rarely likely to be worth it. I will therefore suggest what I think of as “light” ways of referring to non-U.S. materials in teaching basic Constitutional Law courses.

Unfortunately, the Supreme Court’s recent references to non-U.S. materials may induce teachers to use such materials badly. In discussing the Eighth Amendment’s requirement that punishments reflect “evolving standards of decency,”⁶ the Court has mentioned that many jurisdictions outside the United States treat infliction of capital punishment on persons with mental retardation as inconsistent with fundamental human rights norms.⁷ This was only a mention, but it was enough to provoke a substantial reaction, including a legislative proposal to make judicial reliance on non-U.S. materials in the interpretation of the U.S. Constitution ground for impeachment.⁸

The Court’s mention of non-U.S. law, while arguably appropriate in the precise doctrinal context of the Eighth Amendment, can be used to illustrate a

4. The organization of topics tracks that in GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (4th ed. 2001), and most of the examples are drawn from material in VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

5. An additional preliminary point is that many of the questions I raise here by referring to non-U.S. law could be raised by referring to decisions under *state* constitutional law in the United States. See, e.g., Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999). Teachers who know more state constitutional law than I do might well choose to refer to that body of law rather than to comparative materials. They would have the advantage of not facing skepticism about cultural differences that might make such references irrelevant to the law of the United States Constitution. The downside of referring to state constitutional law is that it does not connect the domestic constitutional law course to wider interests in “globalizing” the law school curriculum.

6. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (Warren, C.J., plurality opinion).

7. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

8. See Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004).

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.

Id. See also *id.* § 302 (stating that engaging in an activity prohibited by § 201 “shall be deemed to constitute” an impeachable offense).

common, but undesirable, use of non-U.S. materials in U.S. constitutional law. I call this use “nose-counting on bottom-line results,” which involves doing nothing more than counting up the number of jurisdictions in which a particular rule—usually, one different from a U.S. rule with which the person doing the nose-counting disagrees—has been rejected. The thought appears to be that the very fact that so many other jurisdictions do things differently is a reason for adopting their rule as ours. There are a number of difficulties with nose-counting on bottom-line results. It is not clear to me, for example, why the counting rule is Westphalian—each jurisdiction, no matter what its size or global importance, counts equally—rather than weighted by population or in some other way. Nose-counting also is entirely insensitive to differences in constitutional language, and, more broadly, to differences in constitutional traditions. And, more concretely, nose-counting is insensitive to the institutional arrangements by which constitutional doctrine is implemented.⁹

Two intuitions might lie behind nose-counting. One is that certain components of constitutionalism are universal—normatively desirable no matter what the language of a nation’s constitution says, no matter what its traditions are, no matter what its institutional arrangements are. If so, the fact that a large number of jurisdictions has converged on a particular doctrine or practice might indeed provide support for the proposition that that doctrine or practice is one of the components of constitutionalism as such. Yet, such a claim about universalism, controversial in itself, is unlikely to be at all illuminating about any particular constitutional issue in U.S. law. The reason is that *particular* issues arise at a level of detail as to which general propositions provide little purchase. Constitutionalism may require that judges be independent of direct political control, for example, but does that mean life tenure, long nonrenewable terms, or something else? Constitutionalism may require the protection of freedom of expression, but does that mean that hate speech must be allowed—or prohibited? An instructor who wants to include reference to non-U.S. material in the basic Constitutional Law course might want to note, briefly, the universalist intuition lying behind nose-counting, but she should not make much of it.

The other intuition behind nose-counting is more defensible, although in the end nose-counting in the sense of toting up the number of jurisdictions that do things one way rather than another is not what the intuition is about. The second intuition is this: Among the world’s stable democracies, many do things differently from the way we do them in the United States.¹⁰ Students

9. For a discussion of the latter problem in connection with constitutional questions about the regulation of hate speech, see Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004).

10. The restriction to stable democracies is one feature that distinguishes this approach from nose-counting, where the nature of a jurisdiction’s regime has no bearing on whether its nose gets

often have a sense that the only—or, less strongly, the most—defensible way to organize a democracy is the way the U.S. government is organized. The fact that other stable democracies are organized differently can be used to raise questions about this sense.

In the terms used by comparativists, noticing that things are done differently elsewhere might raise for students the question of whether their sense that things have to be the way they are is simply the product of a limited imagination—a sense, in the jargon, of false necessity. It is important to emphasize even at this point, though, that this is simply a *question*, to which the answer might be “no,” indeed it is not the product of a sense of false necessity, because on reflection, the way we do things here is indeed necessary, given who we are, how we do other things, and the like.” Consider, for example, the issue of cruel and unusual punishment. Sanford Levinson has suggested that, to the extent we—or theorists of criminal punishment—believe that one justification for inflicting punishment is expressive,¹¹ the fact that the United States uses capital punishment more readily than other jurisdictions do and uses it on offenders who are not subject to capital punishment even in jurisdictions that authorize the practice, may be diagnostic of who we are, a way into figuring out what it is we are expressing through our practices that people elsewhere either do not express or express differently.¹²

The best use of non-U.S. materials in a basic Constitutional Law course would rely on the second intuition lying behind nose-counting. One would identify practices or doctrines in other stable democracies that are different from those in the United States, and ask: “They do things differently there. What reasons might they have for adopting their practices or doctrines? What reasons might there be that caution against our adopting those practices or doctrines?” The remainder of this Essay provides a catalogue of topics as to which this sort of reference to non-U.S. materials might be profitably made, with some attention paid to topics as to which it would probably not be profitable.

I. JUDICIAL REVIEW

To begin at the beginning: There is a package of issues associated with the very idea of judicial review. Until recently, the practice of judicial review of legislation had to be contrasted with systems of parliamentary supremacy,

counted. The restriction is important, as well, to put to one side the natural reaction to reference to practices of unstable regimes, or undemocratic ones, that the regime with the practice being examined is so unattractive that its practices are presumptively undesirable.

11. The proposition that expressivism can justify inflicting punishment is controversial among those who think systematically about issues of punishment.

12. See Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353 (2004).

which are sufficiently far from the experience of U.S. law students to make comparisons extremely difficult. Recent innovations in the institutions of judicial review provide opportunities to ask students to defend the U.S. system of judicial review more carefully (or to think seriously about whether the U.S. system *should* be redesigned). Stephen Gardbaum has described these innovations as the “new Commonwealth model” of judicial review.¹³ For pedagogic purposes, the Canadian “notwithstanding” mechanism is the easiest to describe. That mechanism allows a legislature to override specific constitutional provisions by majority vote, in legislation that sunsets after five years, a period that necessarily encompasses an election in which the voters can decide whether they approve of the legislature’s action.¹⁴ Instructors could ask about the suitability of an override mechanism for the United States.¹⁵ The nation’s size, the discipline (or not) of our politicians, and much more might come up in the discussion, thereby illuminating the reasons for choosing or rejecting the form of judicial review presently employed.¹⁶

A related question that comes up early is that of life tenure for judges. Recent controversies over Supreme Court nominations and Senate filibusters of appellate court nominations can be used to suggest some problems associated with life tenure, such as the incentives it gives to propose and oppose relatively young nominees. Other systems of ensuring judicial independence exist, and students might be asked to think about the benefits and disadvantages of such practices as long but nonrenewable terms for judges or a mandatory retirement age (and/or minimum age requirements), which are employed in other stable democracies with judicial review. This seems an appropriate point to note the obvious: Some of the issues raised by bringing in non-U.S. materials can be raised by asking whether it would make sense to amend the Constitution, for example, to substitute long nonrenewable terms for life tenure. What the non-U.S. material can do is offset one common mode of fighting the hypothetical, which involves claiming that amending the Constitution in that way would be fundamentally inconsistent with deep ideas

13. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

14. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. It might be worth noting for students that Robert Bork offered a similar proposal for the United States. ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 117 (1996).

15. This could be done early in the course, when basic issues of the relationship between democratic self-governance and judicial review arise, or later, in connection with the interpretation of Section Five of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), might have been read to allow Congress to override at least some constitutional interpretations offered by the Supreme Court; the Court rejected this “substantive” reading of *Katzenbach* in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

16. This discussion could also include some consideration of the difficulty of enacting amendments to the U.S. Constitution and of the ways in which easier amendment rules could be a substitute for provisions like the Canadian override.

about democracy and the rule of law. The fact that stable democracies reject life tenure for constitutional court judges shows that *that* concern can be put to one side, making it easier to address the other questions associated with life tenure.

II. JUSTICIABILITY

Something similar can be said about using non-U.S. materials on adjudicatory procedures—particularly standing—to raise questions about U.S. justiciability requirements. Here, I think, a valuable way of using non-U.S. materials would be to set up and motivate the discussion of U.S. standing doctrine. Before discussing the U.S. standing cases, an instructor could describe the Canadian reference procedure, which allows the government to seek an opinion from the Canadian Supreme Court on constitutional questions,¹⁷ or the practice of *a priori* review of enacted but not yet legally effective legislation in France and elsewhere. The discussion could explore the advantages and disadvantages of such procedures as a prelude to examining U.S. standing doctrine. That examination will bring out ideas such as the desirability of a concrete case to focus attention on the real-world consequences of legislation. The instructor could then describe “fast-track review” procedures in U.S. law, such as the one used to ensure relatively quick Supreme Court consideration of the constitutionality of the McCain-Feingold campaign finance legislation,¹⁸ or more typical procedures of *ex parte* temporary restraining orders used to enjoin the enforcement of recently enacted legislation, followed by preliminary and permanent injunctions that seek to prevent any real enforcement case from ever arising. The instructor can return to the non-U.S. material to ask whether, in light of U.S. standing doctrine in its full development, there is enough left to the arguments for a distinctive “case or controversy” approach to support the proposition that, as a matter of good constitutional design and decent constitutional interpretation, the United States should not and could not adopt reference or similar procedures.¹⁹

17. The reference procedure has been used, for example, to ask whether a single Canadian province can secede unilaterally. Reference re Secession of Quebec, [1998] 2 S.C.R. 217. At this writing a reference on the constitutionality of laws denying marriage to same-sex couples is pending. Tonda MacCharles, *Same-Sex Shift Significant; Ottawa Backs Couples' Claim Suit Filed in Newfoundland*, TORONTO STAR, Dec. 16, 2004, at AO8.

18. 2 U.S.C.A. § 437h note (West Supp. 2004).

19. I doubt it would be productive in a basic course to introduce non-U.S. materials on political-question-like ideas. Such materials raise the question of whether there is a significant difference between political-question dispositions and holdings on the merits that give substantial, even near-total, deference to the decisions of the political branches. Answering that question, though, probably requires a detailed examination of the actual results and holdings of the non-U.S. cases that would not be worth the sacrifice of coverage it would entail.

III. FEDERALISM

Next, instructors could use Justice Breyer's foray into the comparative constitutional law of federalism to point out some of the difficulties of using non-U.S. material as support for interpretations of the U.S. Constitution. In *Printz v. United States*, Justice Breyer referred to German federalism in explaining why, in his view, the Court's anti-commandeering principle was not compelled by the exigencies of federalism as such.²⁰ German federalism, Justice Breyer pointed out, was founded on commandeering, that is, the administration of national law by state-level officials.²¹ He argued that German constitutionalists believe that such arrangements provide more robust protection for state-level interests than does the administration of national law by national-level bureaucracies.²² Justice Breyer's characterization of the German system was accurate, but the lessons to be drawn from German arrangements are less clear than he suggested. The reason, as Daniel Halberstam has pointed out, is that the German *länder* have a higher degree of direct representation in the German policy-making process than U.S. states do in our national policy-making process.²³ Or, put in terms that students should know, the political safeguards of federalism are stronger in Germany than in the United States. Justice Breyer's comments on German federalism can be used to enter a note of caution about relying on bottom-line results without paying attention to the larger institutional surrounding and to press home the importance of political safeguards in evaluating constitutional federalism.²⁴

IV. SEPARATION OF POWERS

The federalism issue raised by Justice Breyer's reference to German constitutional law, and the problems with that reference, suggest another cautionary note: The details of institutional structure play a large role in questions of basic constitutional design, such as choices about federalism and

20. 521 U.S. 898, 976–78 (1997) (Breyer, J., dissenting).

21. *Id.* at 976.

22. *Id.* at 976–77.

23. Daniel Halberstam, "Comparative Federalism and the Issue of Commandeering," in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213, 235–38 (Kalypso Nicolaïdis & Robert Howse eds., 2001).

24. My sense is that the dormant Commerce Clause is playing a decreasing role in basic Constitutional Law courses. Full coverage of the topic is difficult because of its doctrinal intricacy. Even in a stripped down version, though, the dormant Commerce Clause materials introduce students to the distinction between regulations of trade that are intended to impair out-of-state economic interests and those that, though arguably adopted for nondiscriminatory reasons, have a disproportionate adverse impact on out-of-state interests. An instructor might point out that the same distinction has come to play a large role in international trade law. That would provide a helpful introduction for students who go on to take a course in international trade law, but I doubt that doing much more than mentioning the parallels is worthwhile.

the separation of powers. Reference to non-U.S. materials may not be terribly helpful to the extent that the U.S. and non-U.S. constitutional law on those subjects requires one to understand the important details. It is hard enough to be sure that one's students have a firm grasp on the structures of the U.S. government and of course even harder, probably impossible, to be confident that they will have any real understanding of the structures of government elsewhere.

Even so, a sufficiently "light" use of non-U.S. materials might help frame discussion of some aspects of the U.S. law of separation of powers. In teaching the separation of powers materials, I focus primarily on the relationship between Congress and the President and spend relatively little time on questions relating to the judicial role in specifying the constitutional contours of that relationship.²⁵ The re-introduction into the basic Constitutional Law course of issues relating to the exercise of power in a time of national emergency does provide the opportunity to draw lightly on non-U.S. experience, particularly because other reasonably stable democratic societies have confronted questions of the threat terrorism poses to national security over a longer term than the United States.

There are two questions here, both of which arise in *Hamdi v. Rumsfeld*.²⁶ First, to what extent may the executive act without legislative authorization? Second, what substantive limits does a nation's constitution place on actions taken either on the executive's sole authority or on the authority given the executive by the legislature? There are numerous cases from around the world that address these issues, but an interesting recent one is the decision of the Israeli Supreme Court dealing with aggressive methods of interrogating those suspected of participating in terrorist activities.²⁷ That court held that the use of such techniques was illegal because it was unauthorized by any parliamentary legislation, but it refrained from determining whether the use of those techniques violated the substantive protections afforded people by the nation's basic law.²⁸ This decision can be characterized as adopting a separation-of-powers approach to the use of emergency powers rather than a substantive approach. *Hamdi* can be framed similarly, with its first part adopting a separation-of-powers approach in finding that Congress had authorized Hamdi's detention and its second part adopting a substantive

25. My reason is that, like federalism, this too seems to me an area where the political process is the primary (albeit not exclusive) mechanism by which the Constitution determines the relationship. Having used the federalism materials to discuss the judicial role in an area where the political process is primary, I find it unnecessary to repeat the discussion in the separation of powers area.

26. 124 S. Ct. 2633 (2004).

27. H.C. 5100/94, Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) P.D. 817, reprinted in 38 I.L.M. 1471.

28. *Id.* at 1485.

approach to the procedures to be used to determine whether Hamdi's continued detention was predicated on the grounds for which Congress authorized detention.²⁹ Students can be asked to think about the advantages and disadvantages of the separation-of-powers and substantive approaches by comparing the Israeli interrogation decision with *Hamdi*. The non-U.S. material at least thickens what is otherwise a thin, purely domestic, "database" on these questions.

V. INDIVIDUAL RIGHTS—FREE SPEECH

I turn now to issues of individual rights, again noting the pitfalls of making universalist assumptions about what abstract "human rights" are when they are specified in particular cultures and institutional arrangements. As I indicated earlier,³⁰ I believe that this is a real difficulty with many references to non-U.S. law in U.S. scholarship on freedom of expression. It may be interesting for students to learn that many constitutional systems appear to have adopted a rule that governments can penalize statements critical of government policy only if rather stringent conditions are satisfied. Knowing that, however, does not help students understand the distinction between the clear-and-present-danger test and the *Brandenburg* test, a distinction important in U.S. law but not attended to closely in the non-U.S. decisions, nor—perhaps more important—whether, as Staughton Lynd put it, *Brandenburg* provides a free-speech test "for all seasons,"³¹ that is, for all problems of freedom of expression.

Perhaps the best, and perhaps the only good, vehicle for introducing non-U.S. law in the free expression context is the law of libel. A line or two in class observing that many common law jurisdictions have criticized the U.S. version of libel law after *New York Times Co. v. Sullivan*³² for many of the reasons domestic critics have provided may induce students to give the domestic critics a fairer hearing than otherwise. A brief observation that the German Constitutional Court, in constructing that nation's libel law, treats the interest in human dignity that is impaired by libelous statements as one of constitutional magnitude may help students understand what is truly at stake in libel law, when their vision might be obscured by the egregious facts of the *New York Times* case.

29. *Hamdi*, 124 S. Ct. at 2633.

30. See *supra* note 9 and accompanying text.

31. Staughton Lynd, Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151, 190 (1975).

32. 376 U.S. 254 (1964).

VI. INDIVIDUAL RIGHTS—SUBSTANTIVE DUE PROCESS

For obvious reasons, the issue of the constitutional regulation of abortion plays a large role in nearly every basic Constitutional Law course. There is a large and accessible literature on the comparative constitutional law of abortion, and supplementing the U.S. materials with short excerpts from that literature can be quite productive. Mary Ann Glendon's analysis of continental abortion law, while now dated, still can provide a helpful conduit into a discussion of whether some approach to the constitutional issue, one, in Glendon's terms, more amenable to compromise, might have been (or might still be) more desirable than the approach the U.S. Supreme Court has taken.³³ And, of course, that discussion would allow the instructor to raise questions about whether compromise on constitutional questions is desirable in general, or within U.S. legal culture.

More complicated, and arguably not worth the trade-offs in coverage, is the current position of the German Constitutional Court on the issue of abortion. Briefly, in Germany, abortion must be made a criminal offense, but there are many circumstances in which it is inappropriate, and therefore unlawful, to prosecute a woman or an abortion-provider for having or performing an abortion.³⁴ The government must set up a system in which women thinking about obtaining an abortion receive directive counseling aimed at discouraging them from doing so.³⁵ In addition, the government must provide a rather extensive system of social support for mothers and their young children, to reduce the likelihood that the prospect of straitened economic circumstances will lead pregnant women to seek abortions.³⁶

Some forms of directive counseling, although seemingly milder than those required in Germany, are permissible under current U.S. law.³⁷ If time permits, an instructor could point out that the German Constitutional Court relied on the requirement for directive counseling as a reason for holding that actually penalizing those who obtained or performed abortions would be inappropriate; doing so, the Court said, would drive abortion provision underground, to be performed without directive counseling, and so might actually increase the incidence of abortion. This raises interesting questions about the trade-offs in constitutional policy that U.S. doctrine makes. Alternatively, one could use the German material to raise questions about the

33. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

34. *Id.* at 10-63.

35. *Id.*

36. *Id.*

37. *See* *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 881 (1992) (finding constitutional a requirement that physicians inform pregnant women of the availability of state-prepared printed materials "describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion").

notions of choice and coercion that underlie the U.S. position on directive counseling: Would more forceful directive counseling than that upheld in *Casey* impose an “undue burden” on the woman’s right to choice? Is the German form of directive counseling inappropriately coercive or burdensome? Addressing those questions might allow the class to see whether or how notions of choice and coercion can vary from one society to another.

VII. SOCIAL WELFARE RIGHTS

The German requirement for significant social support for mothers and their children is obviously connected to another issue that arises in U.S. constitutional law; that is, whether social welfare rights—including rights to education, housing, and social support—are judicially enforceable. My experience in teaching cases such as *Rodriguez*³⁸ and *Dandridge v. Williams*³⁹ is that students are extremely skeptical about the feasibility of judicial enforcement of social welfare rights because of their polycentric nature and in particular because of their effects on government budgets and priority setting.

Some comparative materials might be helpful in displacing the sense that social welfare rights cannot be enforced judicially.⁴⁰ The *Grootboom* decision of the South African Constitutional Court has been particularly influential in discussions of enforcing social welfare rights.⁴¹ There, the court rejected the argument that that nation’s constitutional guarantees of social welfare rights created substantive entitlements to what the court called a “minimum core” of social provision, but it upheld a claim that South Africa’s system of providing housing—which was guaranteed by the constitution—was unconstitutional because it failed to include a component that would guarantee housing for the desperately needy.⁴² What makes *Grootboom* so interesting is its holding on the remedy required given the constitutional violation. The case required the government, not to provide housing for the desperately needy right away, but to develop a plan for building houses for them, a plan that would presumably be subject to judicial review for its adequacy.⁴³

Grootboom suggests that social welfare rights might be enforced in ways other than through orders directly affecting government budgets or policy setting. The *Grootboom* remedy appears to be an example of a larger class of emerging remedies in constitutional cases, including some in the United

38. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

39. 397 U.S. 471 (1970).

40. These materials could also be connected to earlier discussions, if any, of forms of judicial review weaker than the form we are accustomed to in the United States. See *supra* text accompanying notes 13–16.

41. *Gov’t of the Republic of South Africa v. Grootboom*, 2001 (1) SALR 46, 69–70 (CC).

42. *Id.* at 66, 79.

43. *Id.* at 86.

States.⁴⁴ My own judgment is that it is important, simply as a matter of basic education, to make sure that our students know of the existence of these new remedial mechanisms. Beyond that, discussing such remedies can help students think about what they think it means to say that a person *has* a constitutional right. Is it inconsistent with the U.S. idea of constitutional rights to deny immediate effect to orders finding constitutional violations? This question can be raised as well in connection with the remedy applied in *Brown v. Board of Education*⁴⁵ and can be linked to any prior discussion of whether constitutional compromises on the issue of the right of reproductive choice are consistent with U.S. understandings of constitutional rights.⁴⁶

VIII. STATE ACTION

Constitutional courts around the world have confronted the problem addressed in the United States under the heading of state action. The typical solution is to give constitutional provisions what those courts call indirect horizontal effect, that is, to use constitutional provisions as a basis for interpreting and developing non-constitutional law. The discussions of the state-action problem in other constitutional systems are extremely interesting, but I doubt that it would be useful to refer to them when teaching the U.S. state action cases. For one thing, those cases are hard enough on their own; introducing other ways of addressing the problem would probably distract students from the task of understanding the U.S. doctrine on its own terms. In addition, the structure of U.S. constitutional law, which commits the development of ordinary law to state legislatures and courts, makes unavailable the prevailing solution of indirect horizontal effect. Still, it might be worth mentioning to students that the state-action problem is pervasive in modern constitutional systems, arising from the difficulty of maintaining a line between private activities and public regulation in a world where public regulation is pervasive even if not all-encompassing.

IX. CONCLUSION

Of course the foregoing examples do not constitute a comprehensive list of topics where comparative references might enhance the basic course in constitutional law. Other teachers could find materials on affirmative action, gay rights, the rights of women, the rights of indigenous peoples, and more that they could include in the basic course. I do think it important to stress once again that including these references entails some trade-offs, and that faculty and student concerns about coverage counsel in favor of what I have called relatively “light” uses of comparative materials. An instructor could introduce

44. State court decisions on education funding and adequacy are examples here.

45. 349 U.S. 294 (1955).

46. *See supra* text accompanying notes 33–36.

many of the examples I have provided with a few sentences in class, or in a handout of no more than a page.⁴⁷ We should not claim too much for such references, but I believe that they would enhance our students' education.

47. My sense is that, of the examples I have given, only the Israeli General Security Services case, the German abortion example, and *Grootboom* would require handouts of substantial length.