2008

Free Speech and the Case for Constitutional Exceptionalism

Roger P. Alford
Notre Dame Law School, ralford@nd.edu

FREE SPEECH AND THE CASE FOR CONSTITUTIONAL EXCEPTIONALISM

*Roger P. Alford**

THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH. By *Ronald J. Krotoszynski, Jr.* New York: New York University Press. 2006. Pp. xvi, 301. $50.

INTRODUCTION

Embodied in the Universal Declaration of Human Rights is the evocative proposition that "[e]veryone has the right to freedom of opinion and expression."[1] Beneath that abstraction there is anything but universal agreement. Modern democratic societies disagree on the text, content, theory, and practice of this liberty. They disagree on whether it is a privileged right or a subordinate value. They disagree on what constitutes speech and what speech is worthy of protection. They disagree on theoretical foundations, uncertain if the right is grounded in libertarian impulses, the promotion of a marketplace of ideas, or the advancement of participatory democracy. They disagree on whether the right should be safeguarded by judicial review or subject to majoritarian legislative values. They disagree on whether the right may be invoked against infringements resulting from private as well as state action. In short, the freedom of expression is a universal value that is fraught with cultural contingencies. It is universal in abstraction and particularized in application.

There are various responses to this ideological pluralism. The two most common are constitutional exceptionalism and constitutional comparativism. Constitutional exceptionalists argue that the variety of unique contextual factors informing each state's domestic constitutional law stymies reliance on foreign law in domestic courts; constitutional comparativists argue that these divergent experiences *are* relevant. But to say that comparative experiences are relevant is to say virtually nothing beyond the bland proposition that they should not be ignored. A more nuanced response would articulate just how the comparative experiences are relevant and forthrightly address the broader goal of the comparative project.

---

* Professor of Law, Pepperdine University School of Law.

1. G.A. Res. 217A (III), art. 19, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

At a minimum, the goal of constitutional comparativists is to promote "transjudicial dialogue" between nations.[2] The stronger form of transjudicial dialogue argues that constitutional courts should "borrow" from one another in their decisions, despite the fact that even the most prominent jurists are woefully uninformed about the most basic differences among and between the various constitutional and international courts.[3] The weaker variant of this dialogue advances the simple proposition that judges should be aware of the jurisprudence of peer constitutional courts and international tribunals.[4]

Ronald Krotoszynski[5] counts himself among the proponents of "weak" transjudicial dialogue:

> Foreign judicial decisions could legitimately serve as a kind of judicial muse—a highly effective foil for contrasting domestic legal understandings; a mirror that reflects not the self, but the other; a kind of grist for reconsidering long-held assumptions about the way things must be (because, in a given country, they have always been thus).[6]

His recent book, *The First Amendment in Cross-Cultural Perspective*, is an effort to promote that transjudicial dialogue.

Krotoszynski's book offers a useful guide to free speech law in the United States, Canada, Germany, Japan, and the United Kingdom. As an initial matter, I question Krotoszynski's conclusions on the value of comparative analysis, and I doubt the feasibility of a comprehensive analysis of comparative free speech law. Nonetheless, in showcasing the divergence in free speech law across five modern democracies, Krotoszynski's book is an important contribution in support of constitutional exceptionalism. Krotoszynski's exposition shows the pluralistic and highly contextual nature of free speech protections. The data—and its limits—are inconclusive as to whether the United States is a free speech outlier and demonstrate that we must respect each country's distinct balancing of countervailing rights and interests in the free speech arena.

I. THE VALUE OF COMPARATIVE ANALYSIS

In his book, Krotoszynski argues that, "when an almost identical legal problem arises, the response to that problem in a different cultural milieu can provide a useful perspective for domestic consideration" (p. 3). What is

---

2. *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 706 (2005); Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 341 (2005); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 213 (2003).

3. Ronald J. Krotoszynski, Jr., *"I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1329–30, 1335–36 (2006) (book review).

4. *Id.* at 1329–30.

5. John S. Stone Chair of Law, The University of Alabama School of Law.

6. *See* Krotoszynski, *supra* note 3, at 1325–26.

refreshing about Krotoszynski's approach is that he embraces comparativism as offering "useful insights" but fully recognizes the "dangers associated with simplistic comparative-law borrowing exercises that [are] utterly insensitive to cultural context" (pp. 3–4). Krotoszynski begins by defending the utility of comparative free speech analysis. He argues that there are "at least three reasons for supposing that a comparative law study of freedom of expression might prove helpful, if not essential, to domestic students of the subject" (pp. 5–6). While each of these points suggests quite interesting justifications, I am not sure that any of them answer the question why comparative analysis of free speech law is helpful, much less essential.

First, Krotoszynski argues that a comparative study of free speech law "provides a useful perspective with which to check one's baseline assumptions about the concept" (p. 6). I agree that comparative experiences shed light on the salient differences between modern democracies and provide a prism for exploring the counterfactual. If, for example, one doubts whether a theory of free speech premised on a Holmesian marketplace of ideas is defensible or desirable, one can reference competing experiences in different countries to highlight the merits and demerits of that approach. Or if one wonders whether subordinating free speech to other values such as equality or human dignity has serious merit, one can find specific instances in which the consequences of that approach are manifest. But that is primarily useful as an interesting academic exercise. For most mature democracies, constitutional jurists are bound by text, structure, history, precedent, and national experience. Each country's free speech "assumptions" are embodied in those interpretive sources. So a jurist's ability to check his or her own basic assumptions by relying on comparative experiences is quite properly subject to those foundational constraints. And as we will see in Part II, these constraints confound useful comparisons between countries.

Second, Krotoszynski argues that "judges routinely borrow across international lines, therefore making some knowledge of foreign legal systems helpful in understanding or predicting the behavior of domestic judges" (p. 6). However, at least in the United States, there is little support for the proposition that, in the free speech context, judges routinely borrow across international lines. They simply don't. One must deeply troll the waters of First Amendment jurisprudence to come up with those rare instances in which the Supreme Court references comparative experiences.[7] I would surmise that most practitioners before the Supreme Court have little, if any, awareness of comparative experiences and almost never reference foreign jurisprudence in their written briefs or oral arguments.[8] In their professional judgment, comparative analysis does not feature in the discussion.

---

7. A careful survey of free speech jurisprudence reveals precious few cases that rely on comparative or international experiences. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 200–06 (1992); Boos v. Barry, 485 U.S. 312, 322–26 (1988).

8. For example, a search of the Supreme Court Briefs database on Westlaw returns over 2100 Supreme Court briefs that have been filed since *Roper v. Simmons* was decided in March 2005. Since that time, just over a dozen Supreme Court briefs have relied on *Roper v. Simmons* (or

Finally, Krotoszynski argues that "to incorporate basic human rights as part of the framework of public international law will require increased attention to and effort in comparative legal scholarship" (p. 6). This point is relevant not for domestic constitutional law but rather for the promotion of public international law. His suggestion is that knowledge of comparative experiences will illuminate the growth and development of human rights law, with domestic jurisprudence percolating up through international law and practice to inform its content. This argument is similar to Melissa Waters' proposition of "norm convergence."[9] She argues that the development of international norms starts with the exporting of domestic norms as constitutional courts articulate a particular domestic norm at the transnational level. The norm is subsequently diffused around the world and becomes part of the international legal discourse. She reasons that "[i]f the norm becomes sufficiently embedded in a large number of other domestic or international legal regimes, it becomes the dominant normative standard on a given issue."[10] In reading Krotoszynski's analysis of comparative law in five modern democracies, there is little evidence of norm convergence in the free speech context. To be sure, there are hate speech provisions in certain international treaties,[11] and there are international prohibitions on incitement to genocide.[12] But even those norms are subject to vastly different interpretations by many states.[13] And beyond the narrow subset of hate speech, there are widely divergent practices between states and little evidence of a con-

---

Lawrence v. Texas) to argue that the Constitution should be interpreted in light of foreign or international law. In other words, less than one percent of the Supreme Court briefs filed since March 2005 expressly rely on the leading cases that support recourse to comparative experiences.

9. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 503 (2005).

10. *Id.*

11. *E.g.*, International Covenant on Civil and Political Rights art. 20(2), *adopted* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."); International Convention on the Elimination of All Forms of Racial Discrimination art. 4, *adopted* Dec. 21, 1965, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195 ("States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form . . . ."). *See generally*, Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996).

12. Convention on the Prevention and Punishment of the Crime of Genocide art. III(c), *adopted* Dec. 9, 1948, S. TREATY DOC. NO. 81-1, 78 U.N.T.S. 277.

13. *See* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006) (discussing hate-speech laws throughout the world, including countries that focus on protection from violence, others that focus on human dignity, and still others that do not substantially regulate hate speech); Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial:* Prosecutor v. Nahimana, 12 NEW ENG. J. INT'L & COMP. L. 17, 47–49 (2005) (discussing divergent practices in Africa regarding hate speech); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003) (comparing and contrasting hate-speech regulation in the United States, Canada, Germany, and the United Kingdom).

vergence of international norms.[14] Krotoszynski's argument of norm convergence is not supported by the very experiences he outlines in his book.

II. FREE SPEECH IN MODERN DEMOCRACIES

While I am not persuaded by Krotoszynski's articulated rationales, his comparative analysis has value in the international pluralism it demonstrates. In order to appreciate this, it is worth briefly summarizing the foreign free speech regimes outlined in the book. Following Krotoszynski's lead, I will focus on the key differences within these four jurisdictions as compared to the United States. I will assume the reader's basic familiarity with the free speech jurisprudence of the United States.

A. *Canada*

One of the primary differences between Canada and the United States is that judicial review of constitutional violations is subject to parliamentary override. Although rarely used, the Canadian Charter authorizes the federal and provincial legislatures to override judicial invalidation of a statute on Charter grounds.[15] As such, the countermajoritarian role of the courts is notably diminished as compared to the United States. The existence of the Section 33 power has led to judicial self-restraint: "[T]he Supreme Court itself sometimes avoids taking steps that would likely provoke a legislative response" (p. 41).

Second, free speech rights are subject to far less protection because government infringements are subject to only rational basis review. Section 2 of the Canadian Charter protects nearly every possible type of expressive conduct.[16] But the Charter balances this broad definition of speech with a deferential standard of review. Section 1 of the Charter provides that the freedoms guaranteed in the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

---

14. *See* Ambika Kumar, Developments, *Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights*, 7 CHI. J. INT'L L. 351, 352–56 (2006) (discussing divergent state practices in light of the International Covenant on Civil and Political Rights' provisions on freedom of expression). The Committee to Protect Journalists has extensive information regarding state practice that curtails the freedom of expression. The executive director of the Committee to Protect Journalists has said that while freedom of speech and the practice of journalism are protected by international law, "these protections increasingly exist in name only." Joel Simon, *Introduction*, *in* ATTACKS ON THE PRESS IN 2006, at 14 (Comm. to Protect Journalists ed., 2007).

15. P. 28. Section 33(1) of the Canadian Charter provides that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter].

16. Its provisions protect "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Canadian Charter, *supra* note 15, § 2.

society."[17] In light of this standard, Krotoszynski notes that the Canadian Supreme Court "almost never invalidate[s] legislation regulating free speech on Section 2 grounds" (p. 43).

A third provision of the Charter imposes still further limits on the scope of free speech. Section 27 of the Charter requires constitutional provisions to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[18] The Canadian Charter thus subordinates free speech protections to the constitutional guarantee of equality. As Krotoszynski puts it, "[t]he Canadian Supreme Court almost never fails to sustain a equality-enhancing law, even if it has the effect of silencing individual speech activity" (p. 51). Consequently, Canada is far more likely than the United States to regulate hate speech in light of this special role that equality and multiculturalism have in its constitutional structure (p. 55).

Krotoszynski is highly critical of the Canadian approach to speech guarantees, particularly as it relates to hate speech (pp. 82–89). But as he suggests, the differences between Canada and the United States really reflect a different accommodation of interests: Canada's approach is far more communitarian and majoritarian. And despite the criticisms, he concludes that perhaps the Canadian model "represent[s] a better balancing of the competing interests—equality and free speech—than the U.S. approach of privileging free speech over most equality concerns" (p. 92).

B. *Germany*

Germany and the United States also have dramatically different approaches to free speech. Most significantly, free speech protections in Germany are subordinated to the constitutional guarantee of human dignity:

> What we find [in Germany] is an inversion of values. The United States Supreme Court routinely subordinates values associated with personal dignity, honor, and reputation in favor of vindicating free speech claims. . . . [But] the German constitutional scheme elevates dignity as the "preferred freedom" and does so quite overtly at the expense of the freedom of speech. (p. 115)

Second, Germany eschews the theories thought to animate free speech guarantees in the United States, including the marketplace metaphor and the democratic self-governance theory[19]:

---

17. *Id.* § 1.

18. *Id.* § 27.

19. The marketplace metaphor embraces a libertarian ethic that citizens should be free to speak and listen as they think best. Trust is served by a free and full competition for ideas. Alexander Meiklejohn's competing theory posits that free speech protections exist principally to facilitate democratic self-governance. This theory recognizes that minority viewpoints should be protected to ensure that citizens hear and consider all relevant viewpoints. Without free speech, democracies cannot generate the kind of open discussion necessary for informed self-governance. Pp. 14–18.

> [The German Constitutional Court has] squarely rejected the marketplace metaphor, not merely endorsing but effectively requiring the government to police speech that transgresses the dignity guarantee and to proscribe and punish speech, speakers, and organizations that advocate the overthrow of the democratic social order. . . . [A]ll ideas are subject to government control not only for their content and viewpoint but, by virtue of the dignity clause, for the manner in which a speaker chooses to express an idea or viewpoint. (p. 130)

This is not surprising given the history of German politics and the cultural norm of protecting personal dignity and honor. Regarding self-governance, the limitations on free speech in Germany only incidentally advance equality: "Their principal purpose and effect is to advance an overarching civility project . . ." (p. 137).

A third major difference between the United States and Germany is that, rather than simply protecting against state infringement of individual rights, the German Federal Constitutional Court imposes a burden on the state to take action to secure individual liberties against private harms (p. 102). This may have the surprising effect of curtailing rather than promoting speech because the state has an obligation to protect other constitutional rights, including the preferred right of human dignity. Thus if a private party makes truthful assertions about a politician that damage his reputation, the politician may make a constitutional claim for violations of his human dignity (pp. 112–14).

Krotoszynski describes the German approach as "seriously flawed in several key respects" (p. 130), but one should not "dismiss Germany's approach to freedom of expression as self-evidently misguided or insufficiently sensitive to the value of free speech in a democratic society" (p. 94). Germany, in contrast to the United States, places a constitutional premium on civility and personal dignity as an overarching norm, subordinating expressive values that take precedence in the United States (p. 137).

C. *Japan*

Again, the Japanese approach to freedom of expression differs markedly from the American. But it also differs markedly from the Canadian and German. First, Japan embraces Alexander Meiklejohn's theory of participatory democratic self-governance. Canvassing political, commercial, sexual, and defamatory speech in Japan, Krotoszynski argues that the Supreme Court of Japan has articulated a clear and coherent vision of freedom of expression that embodies Meiklejohn's approach. He notes that "[t]he Supreme Court of Japan consistently relates free expression to matters of self-governance, not individual freedom or autonomy" (p. 179).

Another key difference is that the Japanese approach to judicial review is a minimalist one, granting the political branches tremendous discretion in regulating speech: "In a fashion consistent with [James] Thayer's maxim, the Supreme Court of Japan simply declines to interpose its will over the will of the Diet absent an extraordinarily compelling reason for doing so"

(p. 180–81). In practice this means that the Supreme Court of Japan rarely strikes down national legislation (p. 144).

Third, the individual right to expression is balanced with the community's interests. In contrast to the unqualified language in the First Amendment of the U.S. Constitution, the Japanese Constitution expressly invites interest balancing,[20] providing "a textual justification for weighing the cost of an individual's or group's exercise of a particular right against the relative cost of such exercise to the community as a whole" (p. 142).

Japan's approach is thus in stark contrast to that of the United States. Japan's approach reflects a deferential, communitarian spirit that rejects a Holmesian marketplace model and embraces a vision of free political discussion to promote democratic self-government. The consequence of this approach is that far more speech goes unprotected, insofar as that speech does not directly further the effort of self-governance (p. 161–62).

D. *United Kingdom*

The absence of meaningful judicial review is the most important hallmark that distinguishes human rights protections in the United Kingdom from the United States. Because there is no written constitution, the doctrine of parliamentary supremacy places the judiciary in the role of interpreting parliamentary action, not overturning it. The Human Rights Act of 1998 does have a degree of judicial relief for free speech violations. But that statutory guarantee limits judicial review to issuing a declaration of incompatibility, not invalidating parliamentary action: "The United Kingdom's extraordinarily weak courts make consideration of human rights law at the constitutional level significantly less important than in Canada, Germany, Japan, and the United States" (p. 187).

In light of this structural difference, the free speech protections in the United Kingdom are rarely countermajoritarian. Indeed, Krotoszynski argues that British free speech laws rely almost exclusively on cultural norms to check abuse of the government's power to restrict or ban expression (p. 187). Notwithstanding the absence of a written constitutional guarantee, however, British citizens enjoy strong free speech protections because of a tradition of respect for free speech: "[T]he absence of a written free speech guarantee need not be fatal to the recognition or vindication of free speech claims against the government" (p. 213). By contrast, Krotoszynski suggests that the U.S. Supreme Court occasionally abdicates its responsibilities to uphold free speech, despite the written guarantee.

Almost in passing, Krotoszynski notes another major distinction between the United Kingdom and the United States: unlike the United States,

---

20. P. 41 ("Article 21 of the Japanese Constitution guarantees to all citizens '[f]reedom of assembly and association as well as speech, press, and all other forms of expression.'"); p. 142 ("Article 12 provides that '[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.'").

the United Kingdom has delegated to an international tribunal the authority to determine the scope of free speech protections in that country. A claim that a clear and unambiguous act of Parliament unlawfully abridges free speech will have no claim of privilege in the British courts, but it may be heard in the European Court of Human Rights ("ECHR") in Strasbourg for alleged violations of the European Convention of Human Rights (pp. 192, 213). Thus in reality, the "constitutional" guarantees of free speech are international treaty rights incorporated by parliamentary action through the Human Rights Act. As a consequence, the United Kingdom's approach to free speech will be shaped to a significant degree by the norms as set by the ECHR.

III. THE CURSE OF DIMENSIONALITY

As is apparent from the above synopsis, Krotoszynski's book offers a useful guide to the comparative experiences of five modern democracies. He outlines the free speech guarantees of each country in light of five contextual factors: text, structure, history, precedent, and national experience.[21] After reading the book, it is quite apparent just how important each factor is in understanding the free speech guarantees of each country.

The book also underscores the difficulties of a truly comprehensive free speech analysis across different countries. In order to refute the claim that the United States is an outlier, comparisons must be done across many different countries and factors, an undertaking that soon becomes unfeasible. Anything less, however, is subject to selection bias and thus the erroneous conclusion that certain nations fall into free speech clusters and others are free speech outliers.

In Krotoszynski's book, the reference point for comparison is the United States. In almost every instance, he compares the United States' approach with that of either Canada, Germany, Japan, or the United Kingdom. Although not explicitly analyzed in this fashion, in comparing the United States to these four countries utilizing five contextual factors, Krotoszynski in effect undertook twenty individual comparisons. His analysis is thus deep but narrow.[22]

It is equally noteworthy that Krotoszynski did not broaden the analysis by doing a country-by-country comparison of all five countries, which would have required ten country comparisons instead of four.[23] Had he undertaken that analysis using the five contextual factors, Krotoszynski would

---

21. Krotoszynski does not explicitly identify each of these as separate dimensions in his comparison, but they are all present in his discussion of each country.

22. By "broad" or "narrow," I mean the number of countries subject to comparison. By "deep" or "shallow," I mean the number of contextual factors used for comparison.

23. The ten comparisons would be (1) United States–Canada, (2) United States–Germany, (3) United States–Japan, (4) United States–United Kingdom, (5) Canada–Germany, (6) Canada–Japan, (7) Canada–United Kingdom, (8) Germany–Japan, (9) Germany–United Kingdom, and (10) Japan–United Kingdom.

have had to analyze fifty individual comparisons instead of twenty. Even with only five countries subject to direct comparison, such analysis could easily have become unwieldy.

Such broader and deeper comparisons are critical to address the common assertion that the United States is an international outlier.[24] It may be true that the United States is different from the other countries subject to comparison; it may also be true that each country is different from the other. Only constitutional comparisons that are done in high dimensional space[25] can reveal whether or not there are free speech clusters and outliers or some other relationship between the countries.

One also cannot resist asking why Krotoszynski only chose those five modern democracies for comparison. Krotoszynski states that he limited his comparisons to countries that observe the rule of law and possess serious commitments to maintaining functional, participatory democracies. All five countries, he states, seek to facilitate democratic deliberation as an essential element of their polities and share similar political values and economic circumstances (pp. 8–9). While that may be true, one suspects the increased complexity of further comparisons of other peer countries also influenced the specific number of countries Krotoszynski examined. A truly systematic approach to free speech guarantees in modern democracies would engage in direct country comparisons of many more countries. If one were to extend the analysis to the thirty OECD countries—countries that have embraced representative democracy and free market economies—it would offer a much more detailed and comprehensive picture of free speech guarantees in modern democracies.[26] But the limits of such an approach are obvious. Assuming the reference point would be the United States, a direct comparison of the United States with twenty-nine other OECD countries using five contextual factors introduces 145 individual comparisons.

If one were to go further and undertake a truly comprehensive analysis of all thirty OECD countries to each other, a country-by-country comparison would require 435 direct country comparisons.[27] And if each country-by-country comparison were done across the five contextual factors of text, structure, history, precedent, and national experience, then this would intro-

---

24. Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1288–89 (2005) (book review); Slaughter, *supra* note 2, at 198.

25. That is, comparisons that analyze multiple countries using numerous speech variants based on several contextual factors. *See infra* text accompanying notes 27–31.

26. This reference could easily be subject to criticism as unduly narrow. Rather than only comparing thirty countries with one another, one could also include additional democracies, such as countries under consideration for full OECD membership, including Brazil, Chile, China, Estonia, India, Indonesia, Israel, Russia, Slovenia, and South Africa. Or one could focus on our common heritage and compare the United States with over fifty countries that are part of the Commonwealth, which more or less comprises the former British Empire.

27. The formula for this calculation is $(n \cdot (n - 1))/2$, with n being the number of countries subject to comparison. As applied to the OECD comparison, the formula would be $(30 \cdot 29)/2 = 435$.

duce 2175 comparisons.[28] Such broad and deep comparisons generate results that are exceedingly difficult to manage.

What I am suggesting is that comparative constitutional analysis suffers from the curse of dimensionality.[29] A comparison of speech in two countries (for example, the United States and Germany) using one contextual factor (say, constitutional text) is easy. A comparison of five countries using five contextual factors is complex. A comparison of thirty OECD countries using those same five factors is exceedingly difficult.

All of the above assumes free speech comparisons at a substantively holistic level of analysis. One could easily deepen the substantive component of the analysis by dividing speech into variants—hate speech, defamation, political speech, pornography, commercial speech—and then doing individual country comparisons of each speech variant.[30] Adding five speech variants to the OECD analysis above would require not 2175 comparisons but 10,875.[31]

This curse of dimensionality raises serious questions about the feasibility of comparative constitutional analysis. A comparison of a few countries is prone to error and selection bias. A comparison of numerous speech variants in many countries using multiple contextual factors offers a far-more-accurate picture of free speech guarantees throughout the world. But as a practical matter, utilizing a large-data-set, high-dimensional methodology is unfeasible. Comparative constitutional analysis is cursed with the inability to conceptually capture rich associations whose relationships are too complex to be appreciated using traditional methods and simplistic comparisons.

As a result, scholars and judges typically opt for narrow and shallow comparisons to overcome these conceptual difficulties. If they do a particularly good job, their analyses might be broad and shallow—or narrow and deep. But because of the curse of dimensionality, scholars—and especially judges—almost never offer broad *and* deep comparisons. I do not question Krotoszynski's serious and scholarly attempt at a narrow and deep comparison of free speech guarantees in five modern democracies. But in other contexts, one cannot help but question the shallow and narrow comparisons made by judges and scholars. For example, Justice Ginsburg's choice of India for comparison of affirmative action;[32] Justice Breyer's choice of Jamaica and Zimbabwe, among others, for comparison of the "death row

---

28. 435 comparisons across five contextual factors introduces 2175 individual comparisons. The equation is $((30 \cdot 29)/2) \cdot 5 = 2175$.

29. I use the term loosely. This term was coined by Richard Bellman to refer to the mathematical problem of exponential growth of volume as a function of dimensionality. RICHARD BELLMAN, ADAPTIVE CONTROL PROCESSES 94 (1961).

30. These variants could be subdivided further, such as dividing defamation into libel and slander or dividing pornography into obscenity and indecency. And of course there are other variants, such as symbolic speech and speech that incites violence.

31. $((30 \cdot 29)/2) \cdot 5 \cdot 5 = 10{,}875$.

32. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 273–77 (1999).

phenomenon;"[33] and Chief Justice Warren's choice of Ceylon and Scotland, among others, for comparison of criminal procedures[34] all seem suspect. So does Chief Judge Kaye's choice of Ontario and Quebec for comparison of New York's same-sex-marriage laws.[35] The resulting dimensionality reductions appear to be random at best or driven by a desired outcome at worst. When a jurist has nearly limitless foreign authority at her disposal, it is all too tempting to canonize some of it as persuasive.

IV. THE CASE FOR CONSTITUTIONAL EXCEPTIONALISM

Accepting the limits of comparing the free speech experiences in just five modern democracies, there are still extremely useful insights from Krotoszynski's work. He recognizes the importance of pluralism in determining the content of free speech rights, and his analysis shows that each country is exceptional in the free speech context. Given this pluralism, constitutional exceptionalism—allowing each nation to decide how best to balance competing rights in accordance with the local situation—is the only way to give effect to countervailing rights that bear on free speech.

Speech law almost always reflects an accommodation of competing rights. One can almost never say that a particular free speech accommodation is more rights enhancing than another: in reality, we are balancing competing goods. The values of civility, privacy, human dignity, equality, security, and liberty compete when one seeks to regulate speech, so questions of regulation of speech are not subject to obvious moral absolutes. One cannot canvass the experiences of modern democracies and articulate a universal approach. There may be a universal consensus that speech should be protected, but there is no universal agreement about the concrete application of that guarantee. Krotoszynski's review of the United States, Canada, Germany, Japan, and the United Kingdom reveals vast differences of viewpoint regarding the scope of the speech right, its theoretical basis, its priority vis-à-vis other, competing rights, and the institution that best serves as its guardian. Countries that value free speech share common questions, but they do not share common answers.

So what is a comparativist to do? One response is to seek normative uniformity, thereby diminishing the need for broad and deep country comparisons. That is often the agenda of international human rights activists. For example, a broad and deep comparison of the juvenile death penalty would be of questionable utility because a multilateral treaty signed by over

---

33. Knight v. Florida, 528 U.S. 990, 995–96 (1999) (Breyer, J., dissenting).

34. Miranda v. Arizona, 384 U.S. 436, 488–89 (1966).

35. Hernandez v. Robles, 855 N.E.2d 1, 33–34 (N.Y. 2006) (Kaye, J., dissenting). For a critique of Chief Judge Kaye's comparison, see Posting of Roger Alford to Opinio Juris, http://www.opiniojuris.org/posts/1152302373.shtml (July 7, 2006 16:59).

190 countries[36] has led to uniformity on that human rights issue. International norm internalization has smoothed out most of the differences between countries.

That approach represents the unusual circumstance in which almost all countries have balanced competing interests and uniformly concluded that a particular government practice must not be pursued. Far more common is the situation—evident in the free speech context—in which one human right is balanced against other competing goods on a country-by-country basis. The precise balance achieved in each country will differ. And the dissonance between countries need not be challenged in pursuit of uniformity. Indeed, in those cases in which the differences reflect an appropriate balance of competing goods, it should be celebrated. Constitutional exceptionalism recognizes and celebrates each country's attempt to optimize its general welfare by balancing competing goods in a manner consistent with its constitutional text, structure, history, precedent, and national experience.

While Krotoszynski does not claim to be a constitutional exceptionalist, he recognizes the importance of pluralism: indeed, that is perhaps the central message of his book. He spends the final chapter addressing the culturally contingent nature of human rights. He emphasizes that the free speech approaches in each of the five countries reflect highly subjective normative value judgments:

> There is nothing intrinsically good or bad about [such subjective, normative value judgments], but such a state of affairs effectively belies any claim to some Platonic idea or Natural Law definition of free speech that judges, regardless of cultural influences, will reflexively identify and intuitively apply to reach largely identical results in cases presenting more-or-less similar facts. (p. 215)

Rather than accepting the common criticism of American exceptionalism in the free speech context,[37] Krotoszynski is suggesting something quite different. He is positing, after a close examination of the free speech experiences of five modern democracies, that each country is exceptional:

> Disagreement seems to arise not so much about the values that free speech advances, but, rather, over the relative importance of these values when measured against other competing social goals and objectives. Thus, the particular implementation of shared concerns about the value of free speech does not allow for predictable results across legal cultures .... (p. 218)

---

36. United Nations Convention on the Rights of the Child art. 37, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 44.

37. *See, e.g.*, Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 30 (Michael Ignatieff ed., 2005) [hereinafter Schauer, *Exceptional First Amendment*] ("[T]he American First Amendment . . . remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 902 (2006) (noting that the free-speech libel law adopted by the U.S. Supreme Court has not been adopted by any country in the past forty years).

The conclusion that each country is exceptional is correct but controversial. Many claim instead that all human rights norms are, or should be, universal. But such claims focus on norm abstractions rather than norm application. The mere recognition of a universal norm does not resolve concrete questions about its observance, including the scope or definition of the right, the priority to be given to a particular right over other human rights, and the circumstances in which abridgement of that right is appropriate for the general welfare.

To illustrate, the Universal Declaration of Human Rights makes broad claims about the obligation of "every individual and every organ of society" to "promote respect for these rights and freedoms" and "secure their universal and effective recognition and observance."[38] But there is an inherent tension at play in balancing the norms set forth in the Universal Declaration. For example, Article 19 guarantees everyone "the right to freedom of opinion and expression."[39] Article 12 safeguards everyone against "attacks upon his honour and reputation."[40] Article 7 guarantees "equal protection against any discrimination . . . and against any incitement to such discrimination."[41] Article 18 guarantees everyone the right to "freedom of thought, conscience and religion," including the right "to manifest his religion or belief in teaching."[42] Article 29 provides "everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing . . . respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[43]

While these are all universal norms, it is uncertain how each country should balance these potentially competing interests. There is normative indeterminacy about how any particular country should balance the right to free speech (however hateful or dangerous) and the right to teach one's religion (however inflammatory or discriminatory) against the right to be free from discrimination or incitement thereof, the right to be free from attack against one's honor and reputation, and the restrictions on rights for the sake of morality, public order and the general welfare. Constitutional exceptionalism accepts that different countries will reach different conclusions about how to balance these universal norms.

The point of constitutional exceptionalism is not to deny the existence or importance of any particular right; rather it is to accept the legitimacy of each country's attempt in its constitutional order to balance competing rights and interests as an expression of its cultural and national identity. Context

---

38. G.A. Res. 217A (III), *supra* note 1, pmbl.

39. *Id.* art. 19.

40. *Id.* art. 12.

41. *Id.* art. 7.

42. *Id.* art. 18.

43. *Id.* art. 29(2).

matters far more than constitutional comparativists are often willing to admit. To give a concrete example, perhaps there really is something different about countries with nonparliamentary, nonproportional representation systems that provides the stability to buffer against antidemocratic forces, thus explaining why such countries will tolerate far more politically dangerous speech than other democracies.[44] How should a comparativist factor that structural component into an analysis of the regulation of political speech?

The common refrain of constitutional comparativists is that foreign experiences offer persuasive authority that may serve as a useful guide to judges in their constitutional decision making. Since all modern democracies are facing the same basic problems and are searching for the same basic answers, why not examine how other constitutional courts have addressed the problem?[45] Jeremy Waldron analogizes citation to foreign authority to scientific investigation: "[T]he law of nations is available to lawmakers and judges as an established body of legal insight, reminding them that their particular problem has been confronted before and that they, like scientists, should try to think it through in the company of those who have already dealt with it."[46] Scientific findings represent a repository of enormous value: it would be unthinkable for any scientific researcher to ignore them.[47] Waldron argues that "legal science" relies "on the idea that solutions to certain kinds of problems in the law might get established in the way that scientific theories are established."[48]

But the scientific method is a poor analogy for the project of global constitutionalism. Such an analogy rests on false assumptions about constitutional decision making. It assumes that one can engage in shallow comparisons without contextualizing in light of a country's text, structure, history, precedent, and national experience. A scientific researcher offers a theoretical hypothesis, tests that hypothesis in the laboratory through experimental study, controls all variables that might alter the results, and reaches a scientific conclusion based on falsifiable tests in a controlled environment.

The constitutional jurist does nothing of the kind in interpreting constitutional norms. The proper analogy is not the sterile laboratory of the scientist but rather the earthy vineyard of the oenologist. Every winemaker starts with the same basic ingredients, utilizes the same basic techniques, and enlists the same chemical reactions of fermentation—all in pursuit of

---

44. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1419 (2007).

45. Stephen Breyer, Réflexions Relatives au Principe de Fraternité: Allocution prononcée au Troisième congrès de l'Association des cours constitutionnelles ayant en partage l'usage du français (June 20, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_06-20-03.html (last visited Feb. 10, 2008) (noting that judges everywhere face the same problems and have the same types of legal instruments to fix them and that differences in language and culture should not matter).

46. Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 133 (2005).

47. *Id.* at 132–33.

48. *Id.* at 144.

the perfect wine for that environment. But the winemaker knows all too well that local conditions such as geology, climate, and culture—what the French call *terroir*—dramatically shape the expression and personality of the wine.[49] The winemaker cannot control for these local variables any more than the jurist can control for the country's text, structure, history, precedent, and national experience.

There is no question that free speech is a universal value that requires and deserves recognition. And perhaps the universality of this norm is part of a country's "macroclimate" that marginally influences the cultivation of the norm.[50] But even so, the free speech norm is given its distinctive personality in different cultures based on the local conditions of that country. The results are greatly influenced, if you will, by a country's constitutional *terroir*.

If one examines the American, Canadian, German, Japanese, and British approaches to freedom of expression, one cannot help but appreciate the impact that local conditions have had on the end product. Legal professionals have spent vast amounts of time and energy cultivating this norm—country by country, region by region. In each region, this norm is expressed in a manner that reflects the distinctive characteristics of the land. While different from one region to another, each approach is nonetheless pleasing in its distinctive way.[51]

CONCLUSION

Constitutional comparativists frequently lament American exceptionalism.[52] We are warned that American exceptionalism is a "Jekyll-and-Hyde"

---

49. *Terroir* has been defined as "the total impact of any given site—soil, slope, orientation to the sun, and elevation, plus every nuance of climate .... Generally viticulturists believe that soil indirectly bestows flavor (and relative quality) only insofar as it is one of the voices in the chorus of *terroir*." KAREN MACNEIL, THE WINE BIBLE 21 (2001).

50. In winemaking, the macroclimate refers to the climate of an entire geographic region. While the macroclimate will influence the wine, it is the mesoclimate (the climate of a specific vineyard site) and the microclimate (the climate of the grape cluster) that give wine its distinctive personality. JONATHAN SWINCHATT & DAVID G. HOWELL, THE WINEMAKER'S DANCE: EXPLORING TERROIR IN THE NAPA VALLEY 112 (2004).

51. It is worth noting, of course, that "Great Wines Don't Come from Just Anywhere." MACNEIL, *supra* note 49, at 12. The same is true of free speech. Countries struggling to attain the status of modern democracies contribute their own distinctive characteristics in the cultivation of the free speech norm. The quality of the norm in that region suffers as a result of that country's poor constitutional *terroir*. For this reason, my discussion of constitutional exceptionalism is limited to modern democracies.

52. For background on American exceptionalism, see, for example, SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996); AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 37; Philip Bobbitt, *American Exceptionalism: The Exception Proves the Rule*, 3 U. ST. THOMAS L.J. 328 (2005); Steven G. Calabresi, *"A Shining City On a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006); Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

specter that threatens our global village.[53] We are advised that American exceptionalism raises fundamental questions about "the very place of the world's most powerful nation inside the network of international laws . . . that regulate a globalizing world."[54]

But if American exceptionalism is seen within the larger environment of constitutional exceptionalism, then the focus shifts. The question is no longer what makes America different but rather what degree of respect we should accord to each country's distinct and varied articulations of human rights norms. The focus is no longer about national sovereignty but rather norm indeterminacy.

At least in the United States, the most salient experience with constitutional comparativism has been with respect to the Eighth Amendment prohibition on cruel and unusual punishment, particularly as applied to the death penalty. Proponents of comparative law have a strong moral claim that little leeway should be given to modern democracies on capital punishment. Death penalty abolitionists attempt to "shame the United States by the dual strategy of highlighting the unsavory character of the rest of the 'death penalty club' while at the same time noting that Europe (and Canada, Australia, New Zealand, Mexico, and many other countries) seem to manage well enough without resorting to executions."[55] Not surprisingly, arguments for constitutional exceptionalism that begin and end with capital punishment find few adherents. Norm determinacy diminishes arguments for constitutional exceptionalism.

The great gift of Krotoszynski's book is to turn our attention to a knottier subject on which there is far less consensus. If modern democracies disagree about the essentials of free speech theory and practice, there is little basis for shaming a constitutional outlier. Of course, one can try to play that game by analyzing a particular free speech variant—say, defamation or hate speech—comparing the United States' practice to a few select countries based on one or two contextual factors, and simplistically declaring the United States a "freedom of expression outlier."[56] But such dimensionality reductions ignore the reality that a careful examination of multiple free speech variants in multiple countries using multiple contextual factors suggests something quite different. Each country is different from the United States, but each country is also different from one another.

For comparativists in search of common constitutional norms, the best maxim may be that the "exceptions prove the rule." That seems apropos for

---

53. Harold Hongju Koh, *America's Jekyll-and-Hyde Exceptionalism*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 37, at 111, 111.

54. Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 37, at 1, 2.

55. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 37, at 57, 59–60.

56. Schauer, *Exceptional First Amendment*, *supra* note 37, at 42; Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157, 2160 n.9 (2005) (book review); *see also* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 182, 243 (2004).

a comparative analysis regarding something like the juvenile death penalty. But in other instances, such as freedom of expression, the better maxim may be that "[a] rule is not proved by exceptions unless the exceptions themselves lead one to infer a rule."[57] Constitutional exceptionalism posits that where the exceptions refute the existence of a common constitutional rule, different answers to common questions are to be celebrated.

57. The maxim is attributed to Lord Atkin. Fender v. St. John-Mildmay, [1938] A.C. 1, 14 (H.L.) (appeal taken from Eng.).