

Comparative Constitutional Law: The Seventh Inning Problem

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Schmooze Colleagues: I have several cases I thought about writing up for the discussion of the comparative constitutional law canon. Instead, and perhaps unfairly, I've sought to move the discussion to a different set of problems. I'll come armed with some cases for discussion, however.

The rapidly expanding field of Comparative Constitutional Law has a problem. Too much of the literature is focused on traditional questions of doctrine, debating when and how it is appropriate for judges to borrow from each other. In part this problem is dictated by and responsive to the high profile debate in the United States Supreme Court about whether or not it is appropriate to borrow. Justices have staked out high profile and clashing positions on this question.¹ But scholarship need not follow the courts slavishly, and the amount of ink spilled on problems of constitutional borrowing dwarfs the real-world impact of the debate. Of course judges will borrow. But this is hardly the most important question in comparative constitutional studies.

Let me make the point by analogizing to a baseball fan who pays overly felicitous attention to the seventh inning. Imagine yourself as a fan going to watch your favorite team. You arrive very late, at the top of the seventh. You see which team is batting and so can deduce who is the home team, which will have to bat in the bottom half. You look at the scoreboard and see the score, so can ascertain who is winning and losing. But you do not know how the score came to be that way. You proceed to watch the seventh inning. As baseball innings go, the seventh is fairly important—not just in the top ten but somewhat higher. Sometimes a team will score a decisive comeback run; other times a team will shut out the other side and close in on victory. Furthermore, as entertainment, the inning has some structural or theatrical advantages. The inning is always accompanied by a rousing ritual of community, in which the stadium joins in the classic song “Take me out to the ballgame.” You find this experience stirring and entertaining.

Imagine that you as a fan watch the inning as it plays out with great excitement. One team scores some runs, perhaps taking the lead from the other. The fans cheer. The inning ends, and then—you leave. Perhaps you hear the final score of the game on your car radio on the drive home. Perhaps you don't. But either way, you don't observe the outcome first hand.

¹ *Printz v United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J. dissenting) (“comparative analysis [is] inappropriate to the task of interpreting a constitution”); Sarah Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 417-23 (2003)

The absurdity of this example is not too far from where we are as a discipline. Focusing too much on court cases in the constitutional “game” has precisely the same structure as the baseball fan who watches only one late inning. It means that we miss many of the most important questions—where does constitutional order come from? How does the court have the power it does? And what is the impact of the decision on real outcomes? These questions can only be examined by broadening our temporal and conceptual frame.

The judicial setting presents us with players, one of whom is “losing” in the status quo and so brings a claim. There is a prior “score” in terms of distribution of resources between classes of litigants. The court case involves attempts to secure advantage, and requires litigants and their lawyers to engage in interesting strategic calculations. It is surely important for observers to understand the rules of the legal “game” in order to know how points are scored. But knowing who wins or loses the case is not the end of the game. In many constitutional settings, the politics of enforcement and implementation are at least as complex as those of the judicial settings. The final score is not known until well after the court decision.

Why has the nascent field of comparative constitutional law not adopted a broader frame? There is a two-fold answer. First, in many countries, the study of constitutional law is embedded in broader academic cultures dominated by formalism. The seventh inning problem is really just the old critique associated with legal realism, political jurisprudence, and the law and society movement. One would think that we are all realists now, but that is not the case in most countries. Second, within the United States, part of the problem is that the leaders of the field tend to be Americanists who have become interested in comparative problems rather than comparativists interested in constitutional law.² This leads to an overemphasis on the role of courts.³

The problem is not the focus on courts *per se*, but the possibility of selection bias in terms of what issues, and countries, are deemed important. Countries where judges have grappled with problems close to the hearts of Americans have received more attention than those which have not; countries where courts are prominent have received more attention than those in which they are more marginal. The effort to consider a Comparative Constitutional “Canon” reflects this impulse.

² Sarah Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 410 n.8 (2003)

³ Michael Dowdle, in his co-edited volume *Building Constitutionalism in China* (2010).