

Globalization, Human Rights, and American Public Law Scholarship — A Comment on Robert Post

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INTRODUCTION

Robert Post's work in constitutional theory is engaging in an exceptional way: it always forces one to rethink and reconsider the basic tenets of the field.¹ In his article *The Challenge of Globalization to American Public Law Scholarship*, Post discusses American public law and human rights scholarship in the age of globalization. In this comment, I will make a few remarks on some of the points raised in the article.

I. ON PUBLIC AND PRIVATE LAW

At the outset of his article, Post states that discussing the issue of "public law" is somewhat problematic for the American scholar. He argues that American law, following the legacy of legal realism and unlike civil law jurisdictions, does not tend to make a clear distinction between public and private law. I would like to suggest a qualification to this claim and inquire as to whether the arena of human rights does not show us that notwithstanding the realist legacy, American law — at least in the area of constitutional law — actually does draw a much more distinct line between public/private than its European counterparts do. The doctrinal manifestation of this distinction is, of course, the state action requirement under American constitutional law: a petitioner must show state action in order to invoke the human rights protection of the Constitution. This public/private distinction was, indeed, challenged by the

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¹ See, e.g., Robert Post, *Constitutional Domains — Democracy, Community, Management* (1995).

realists and collapsed by the Supreme Court in *Shelley v. Kramer*,² but this case is usually described as highly controversial. The tradition from which the state action doctrine emanates has strong roots in the individualist concept of liberty, an important feature in American constitutional law. The concept of the private sphere as one that should be free of government intervention is still strong, notwithstanding the legacy of legal realism.

The reservations to the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") entered by the United States when it ratified the Convention in 1994 clearly demonstrates how American law is at odds with international human rights in thus conceiving the private sphere. Consider, for example, the reservation to Article 2.1 of the Convention. The Article sets forth that

State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

...

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;....³

The U.S. reservation was as follows:

[T]he Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other

2 334 U.S. 1 (1948).

3 The text of the Convention may be found in Basic Documents on Human Rights 148-61 (Ian Brownlie ed., 3d ed. 1992); available also at http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.⁴

This reservation illustrates the strict dividing line drawn in American civil rights law between "public" and "private," with the latter conceived of as beyond the reach of civil and human rights.

The discussion in the U.S. Senate around the possible ratification of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW") similarly manifested the American approach to the relationship between human and civil rights and the private sphere.⁵ While ratification never happened in the end, when it was considered in Senate, the Committee on Foreign Relations suggested that the Convention be ratified subject to a few reservations. One of these proposed reservations read as follows:

[T]he Constitution and the laws of the United States establish extensive protection against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2,3, and 5.⁶ The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.⁷

Hence, the U.S. reservation to Article 2.1 of CERD and above proposed reservation to CEDAW demonstrate how in a world seeking to combat "private" as well as "public" discrimination, it is in fact the United States that prefers to preserve the public/private distinction, despite the influence of realism in American doctrine.

This point may be further illustrated by comparing the American case of

4 http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

5 The text of the Convention may be found in Basic Documents on Human Rights, *supra* note 3, at 169-81; <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>.

6 Article 2 contains the prohibition on discrimination against women in all forms.

7 See Henry Steiner & Philip Alston, *International Human Rights in Context — Law, Politics, Morals* 207 (2d ed. 2000).

*DeShaney v. Winnebago County Department of Social Services*⁸ with the decision of the European Court of Human Rights in the case of *X. & Y. v. The Netherlands*.⁹ In *DeShaney*, the U.S. Supreme Court deliberated the case of Joshua DeShaney who was beaten by his father so severely that he suffered permanent brain damage. Social workers had received reports about the situation but took no action. Joshua DeShaney sued the county department of social services, claiming that the respondent authorities had deprived him of his liberty. The Court rejected his petition, holding that nothing in the due process clause of the Constitution requires the state to protect the life, liberty, and property of its citizens against invasion by private actors. The harm in case, stated Chief Justice Rhenquist, was inflicted not by the state but by Joshua's father. Justice Blackmun, in dissent, referred to the plaintiff as "Poor Joshua" and stated that it is a sad commentary on American life, and constitutional principles, that Joshua DeShaney now is destined to live out the remainder of his life profoundly retarded.

Compare this case with *X. & Y. v. The Netherlands*. In the latter case, Y. was a mentally handicapped young woman who had been living in a privately-run home for mentally handicapped children. When she was just over 16 years old, she was raped by a relative of the home's directress. Y.'s father tried to file a complaint with the police, but Dutch law allowed a parent to file a complaint on behalf of his or her child only until the child reaches age 16. The European Court found that Y.'s rights had been violated by her inability to file a complaint with the police.

X. & Y. v. The Netherlands is illustrative of the European readiness to invoke human rights even when no direct state action is involved. In this case, although the violence against the child had been "private," the court viewed it as a human rights matter.

Even beyond cases like *X. & Y. v. The Netherlands*, where it could be claimed that the state was implicated as a party by its inaction, European jurisprudence sometimes applies the *dritwirkung* doctrine, as it is referred to in German law, under which human rights can be invoked even in the relationship between private actors and not only between the individual and the state. Human rights are considered, to use the terminology of the German Constitutional Court, part of the objective order of values.¹⁰

In sum, in the comparison between American constitutional law and

8 489 U.S. 189 (1989).

9 Series A, No. 91, 8 Eur. H.R. Rep. 235 (1985).

10 See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 48- 49 (2d ed. 1997). See also Lüth Case, BverfGE 7, 198; for the English translation, see Kommers, *supra*, at 361-69.

international and European human rights law, the former emerges as far more adherent to public/private distinctions. This could be a possible starting point for a learning process — which leads me to my next point.

II. AMERICAN PUBLIC LAW VERSUS INTERNATIONAL AND COMPARATIVE LAW

The main purpose of Robert Post's article is to examine the problematics that arise in the encounter between American public law and the application of international law. According to Post, American public law scholarship regards constitutional law as purposive and expressive of identity and commitment. In contrast, international law seems devoid of any author in this respect: Which identity and whose commitment does it express? It is not surprising that Post regards this as a problem for American public law scholars, especially in light of the fact that he has, more than once, made the point that value is embodied in social systems taken as a whole¹¹ and that democracy is prized because of the value of collective self-government.¹² Given this theory of constitutionalism, the democratic deficit of European law and of international law in general is problematic to Post. To him, this lack of democratic grounding hinders comparative analysis. I want to focus on this hindrance to comparative analysis and connect it to Post's point that American public law scholarship will respond to the serious issues presented by international legal institutions by, *inter alia*, a reinvigorated focus on substantive rights. Hopefully, Post's predictions will be proved to be accurate and American public law will focus on substance and, moreover, on the field of comparative law, looking to both international and foreign domestic law. I believe American law can benefit greatly from comparative analysis to other legal systems.

In Post's article, one can sense the American suspicion that international declarations of rights are rhetorically overblown and under-enforced. But I think it would be taking the easy way out for American scholars to dismiss the relevancy of comparative or international law based on these claims alone. Of course, international human rights law does suffer from these deficiencies. However, this field of law, in conjunction with comparative analysis, may, nonetheless, be very instructive and illuminating for American public law,

11 Post, *supra* note 1, at 16.

12 Robert Post, *Democracy, Popular Sovereignty and Judicial Review*, 86 Cal. L. Rev. 429, 438 (1998).

perhaps revealing how in certain matters, the American norms diverge greatly from those of most of the other members of the democratic world, from a substantive point of view. Furthermore, an analysis of international human rights norms as applied in the European Court of Human Rights and in the domestic jurisprudence of such countries as South Africa and Canada, respectively, should show that these norms are not always under-enforced.

American constitutional law is infamous for its isolationism in terms of international and foreign law. However, scholars such as Mark Tushnet¹³ and Annelise Riles¹⁴ have pointed to the beginning of some change in this attitude.¹⁵ Also noteworthy is the fact that Lawrence Tribe, in the most recent, third edition of his *American Constitutional Law* (2000), included some references to comparative law. But it seems that this still amounts to only a rather modest change, usually only manifested in the lone dissents of Supreme Court Justice Steven Breyer. The 1998 visit by Justices O'Connor, Kennedy, Ginsburg, and Breyer in European courts, with Justices O'Connor and Breyer's comment at the end of the tour that they might cite European Court opinions in the future, is still the "exception" and, thus, "hot legal news."¹⁶ Generally the rule is still as described in 1997 by Bruce Ackerman: "The typical American judge would not think of learning from an opinion by the German or French constitutional Court. Nor would the typical scholar...."¹⁷ As recently as 1999, we could still witness clear American isolationism in this regard, when on the very same day that the International Court of Justice issued a temporary order against the execution by the United States of Walter LeGrand, a German citizen who was not read his "consular Miranda rights," the U.S. Supreme Court decided to ignore the order and allow the execution, with only Justice Breyer dissenting.¹⁸ And in the recent case of *Knight v.*

13 Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999).

14 Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 Harv. Int'l L.J. 221 (1999).

15 For the growing interest in comparative law, see also the symposium *New Approaches to Comparative Law*, 1997 Utah L. Rev. 255-663.

16 See Riles, *supra* note 14, at 222 n.3.

17 Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771, 772 (1997) (footnote omitted). For similar observations, see Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998).

18 ICJ: Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Mar. 3, 1999, http://www.icj-cij.org/icjwww/idocket/igus/igusorder/igus_iorder_19990303.htm; Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

Florida,¹⁹ Justice Breyer found himself almost apologetically explaining why it is legitimate to turn to the law of other countries for support of the argument that the execution of prisoners who have spent a long period of time on death row amounts to "cruel and unusual punishment," prohibited under the U.S. Constitution. As Breyer commented,

This Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards ... willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a "decent respect to the opinions of mankind."²⁰

What is noteworthy is that Justice Breyer's dissent is not only a dissent, but also quite a rarity in American Supreme Court jurisprudence.

Why does this matter? What is the relevance of non-American standards for American law? Why is turning to comparative and international human rights law important? The answer may lie precisely in the two death-penalty related examples described above: for reasons of substance. Indeed, on a variety of human rights issues, American law diverges greatly from the doctrines accepted today in most other democracies, and the detachment from international and comparative law blocks the possibility of pointing to this gap and to this *substantial democratic deficit* of the United States in failing to recognize certain human rights. Accepting the relevance of comparative and international law to the American constitutional discussion may uncover existing flaws in this discussion.²¹

The fact that the United States diverges on certain issues from international human rights standards was conspicuous in the 1998 *United States of*

19 120 S. Ct. 459 (1999).

20 *Id.*

21 Such a move to substance is likely to raise the difficult questions discussed by Professor Post, questions that clearly stem from his conception of constitutionalism and democracy. This forum does not allow me to fully address these questions, but I believe that my point fits in with his discussion of the likely move from process to substance. As Frank Michelman has shown, Frank Michelman, *Brennan and Democracy — The 1996-7 Brennan Center Symposium Lecture*, 86 Cal. L. Rev. 399 (1998), clearly the substance theories of constitutionalism do not lack problems themselves. But in my opinion, the move to substance should include, at the very least, a discussion of the justifications for limitations on decisions of the majority in the form of rights. And if our conclusion is that there are some essential rights that are necessary for guaranteeing certain important values related to individual autonomy, equality, dignity, and so on, then the American constitutional order will be found lacking.

America — Rights For All report issued by Amnesty International.²² The report pointed to many significant violations of human rights in the United States, but for the purpose of this discussion, I will focus on a few issues where the human rights problems are connected to currently prevailing constitutional doctrine.²³ A major issue dealt with in the report, which I have already mentioned in another context above, is the death penalty. Amnesty's report states that whereas international human rights standards seek to restrict the death penalty, forbid its use against juvenile offenders, and demand the strictest legal safeguards in capital trials, in the United States, the death penalty is applied in an arbitrary and unfair manner and is prone to bias on grounds of race and economic status. The United States, the report shows, is currently one of a tiny group of nations responsible for the vast majority of the world's judicial killings. Against the global tide towards abolition, the United States has relentlessly increased its rate of executions and the number of crimes punishable by death.²⁴ The report discusses in detail the race bias in the imposition of the death penalty²⁵ and the practice of executing juvenile offenders in the United States, a clear violation of international law under article 6(5) of the International Convention on Civil and Political Rights.²⁶ The United States has reserved the right to impose the death penalty on minors, even though it is expressly forbidden under the Convention, and has executed eight juvenile offenders since 1990, more than any other country. Indeed, the only other countries known to have executed juvenile offenders since 1990 are Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.²⁷

Another matter addressed by the Amnesty report is the issue of gay rights. As stated in the report, "In 39 states, gay men and lesbians can be legally dismissed from their jobs because of their sexual orientation Twenty states have anti-sodomy laws which criminalize consensual sexual acts between adults in private."²⁸ The report then points to the U.S. Supreme

22 Amnesty International, *United States of America — Rights for All* (1998) [hereinafter *Rights for All*].

23 The issues discussed in the Amnesty report that I focus upon are often discussed in the context of the problematics of American civil rights law. In addressing these issues in the context of this discussion, I wish to show their relevance to international human rights law, especially given the fact that they have been brought to the fore by a leading international human rights NGO.

24 *Rights for All*, *supra* note 22, at 99-101.

25 *Id.* at 108-12.

26 The Convention may be found in *Basic Documents on Human Rights*, *supra* note 3, at 125-43; also available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

27 *Rights for All*, *supra* note 22, at 112-14.

28 *Id.* at 8-9.

Court decision in *Bowers v. Hardwick*²⁹ which held that such statutes are not unconstitutional.

This issue is another area in which American human rights law lags far behind the law of other countries. Both the UN Human Rights Committee³⁰ and the European Court of Human Rights³¹ have held that anti-sodomy statutes — the kind that exist in some states in the United States and have been upheld by the U.S. Supreme Court³² — are a violation of human rights. Moreover, many democratic states have legislated some form of anti-discrimination measure against discrimination based on sexual orientation; in some countries that had failed to do so, the courts adopted and enforced such norms.³³ In addition, the European Court of Human Rights recently ruled that the ban on gay men and lesbians serving in the British military is a violation of human rights.³⁴ As is well-known, in the United States, a de facto ban still exists — its supposed replacement by the "Don't Ask Don't Tell Don't Pursue" policy did not improve the situation for gays and lesbians.³⁵ Moreover, this de facto ban has been held constitutional by federal courts.³⁶ Thus, from the perspective of international and comparative human rights standards, the United States is infringing on human rights in its treatment of gays and lesbians. True, at the state level, some courts have handed down decisions promoting human rights in the area of gay rights;³⁷ but, as the Amnesty report indicates, all in all, the U.S. is violating what are today considered the human rights standards of the democratic world with regard to this matter.

These two issues of gay rights and the death penalty and the gap they

29 478 U.S. 186 (1986).

30 *Toonen v. Australia*, 1 Int'l Hum. Rts. Rep. 97 (1994).

31 *Dudgeon v. United Kingdom*, Series A, No. 45, 4 Eur. H.R. Rep. 149 (1981); *Norris v. Ireland*, Series A, No. 142, 13 Eur. H.R. Rep. 186 (1991); *Modinos v. Cyprus*, Series A, No. 259, 16 Eur. H.R. Rep. 485 (1993).

32 478 U.S. 186 (1986). At this point, however, such statutes exist in less than the twenty states referred to in Amnesty's report; *Rights for All*, *supra* note 22, at 8.

33 See in Canada, for example, *Vriend v. Her Majesty the Queen in Right of Alberta*, [1998] 1 Canada S.C.R. 493.

34 *Smith v. United Kingdom*, App. No. 33985/96, 29 Eur. H.R. Rep. 493 (1999), *Lustig-Prean v. United Kingdom*, App. No. 31417/96, 29 Eur. H.R. Rep. 548 (1999).

35 See Janet Halley, *Don't — A Reader's Guide to the Military's Anti-Gay Policy* (1999).

36 See, e.g., *Able v. United States*, 155 F.3d 628.

37 E.g., *Baker v. State of Vermont*, 744 A.2d 864; 1999 Vt. LEXIS 406 (1999). *Romer v. Evans*, 517 U.S. 620 (1996), the pro-gay-rights decision given by the United States Supreme Court, did not actually advance gay rights, but only voided an anti-gay-rights measurement.

reveal between international standards and American constitutional law are connected to a more central problem. As the Amnesty report notes, while the United States has been central to the development of international human rights standards and while successive United States governments have used international human rights standards as a yardstick for judging other countries, the U.S. has not consistently applied those same standards at home.³⁸ The United States has also been found lacking in ratifying human rights treaties. It is one of only two countries that failed to ratify the UN Convention on the Rights of the Child; it has not ratified the Convention on the Elimination of All Forms of Discrimination against Women, nor the Convention on Social and Economic Rights, an issue that is most decidedly neglected in the United States.³⁹

In short, despite the United States' leading role in establishing an international human rights system, it has been reluctant to accede to international human right laws and to apply the minimum standards that it demands from other states to its own conduct.

The problems addressed in the Amnesty report are symptomatic of what I termed the "easy way out" claim that international human rights law is too broad and under-enforced. To be sure, scores of human rights violations occur daily across the globe, but it seems that some democratic states do try to take international human rights norms seriously and that there is some correspondence between international standards and the constitutional law of these countries. I am of course not suggesting a "naive" reading of international human rights law as effective or useful outside the contexts of interest and power, but I am saying that this body of law — with all of its internal problems — has become the standard by which we judge countries and to which some countries aspire. This does not seem to be the case with the United States, which continues to treat *human rights* as a "foreign affair." The strong distinction drawn in United States discourse between *civil rights* — "our" problem — and *human rights* — "their" problem — is telling in this respect.

American public and constitutional law can clearly benefit from being open and amenable to international and comparative human rights law, which should help to rid U.S. human rights law of its isolationism. The significance of such a move may be that it will force the United States to recognize that some of the things it sanctions under law are in fact regarded as human rights violations under international law and the law of

38 Rights for All, *supra* note 22, at 123-34.

39 *Id.* at 128-30.

other democracies, that a commitment to human rights values necessitates a change in substance.

The tactic of comparative law I am suggesting here may fall under the form of comparative law Mark Tushnet (following Claude Levi-Strauss) has termed "bricolage":⁴⁰ the assembly of something new from whatever materials discovered. Tushnet compares this method to two other types of comparative law methods: functionalism and expressivism. I will not discuss the latter two methods here, but I will note that Tushnet describes Post's approach to comparative constitutionalism as expressivist,⁴¹ i.e., holding that constitutions express a nation's distinct character. Such a reading of Post explains the questions he raises with regard to the encounter between American public law and international law. But if Post were to accede to some of Tushnet's critique and endorse bricolage as a method of comparative constitutional law, then perhaps his article and this comment could be better reconciled.

I would like to conclude with a final argument in support of applying comparative law in American constitutional law. Annelise Riles very astutely noted that comparativists all share the following: "a *passion* for looking beyond, an *empathy* for differences but also for similarities, a *faith* in the self-transformative task of learning, and an interest in the *form* of knowledge itself."⁴²

If we do, indeed, share the passion, empathy, and faith described by Riles and believe that they should be present when issues of human rights are decided, then we should value the use of comparative law and understand why it may assist in reaching better results in rights cases. These three elements, if applied in the constitutional arena, will shape constitutional decisions, which then themselves will embody passion, empathy, and faith.

III. ON GLOBALIZATION

In conclusion, I wish to briefly address the relationship between the discussion of "globalization" and that of "human rights" in Professor Post's article. Post discusses both international human rights and institutional manifestations of globalization such as the WTO and North American Free Trade Agreement and their arbitration procedures. When he asks who is

40 Tushnet, *supra* note 13. See also Annelise Riles' discussion of comparison as collection. Riles, *supra* note 14.

41 Tushnet, *supra* note 13, at 1274-81.

42 Riles, *supra* note 14, at 229.

the author of international law, he asks this both in respect to international human rights and to the global marketplace of the WTO.

Following Jean Baudrillard, I would like to suggest that perhaps it is necessary to distinguish between the "universal" human rights order and the "globalized" market order which are often conflated. Baudrillard talks of the fact that what has triumphed in the post-1989 world is not capitalism or democracy, but, rather, "the global":

In the global, all differences fade and de-intensify, giving way to a pure and simple circulation of exchanges. All liberties fade before the mere liberation of exchange. Globalization and universality don't go together. They might be said, rather, to be mutually exclusive. Globalization is the globalization of technologies, the market, tourism, information. Universality is the universality of values, human rights, freedoms, culture, democracy. Globalization seems irreversible. The universal might be said, rather, to be on its way out.⁴³

I am not certain that I agree with Baudrillard that "the universal" is "on its way out." But perhaps a cultural understanding of the international human rights regimes and their aspirations vis-à-vis the regimes of the global economy, such as the WTO, and an examination of the position of American public law vis-à-vis each of these regimes will be facilitated by distinguishing the universal from the global along the lines of Baudrillard's distinction and by examining the difference in contexts in the encounter between American law and these international regimes. Perhaps we will find that some of the problems addressed by Post take on a different dimension in each of the two regimes: that in their interaction with U.S. law, it is mistaken to consider human rights law and trade law as one and the same; that for the reasons pointed to in this comment, American law in the area of human rights can gain unique insights from interacting with comparative and international human rights law, differently from what emerges from its interaction with international trade law.

⁴³ Jean Baudrillard, *Paroxysm — Interviews with Philippe Petit* 11 (Chris Turner trans., 1998) (1997) (original in French).