

Remarks on State Courts and Transnational Law: Institutional Constraints and Transformative Opportunities for Economic and Social Rights

By
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Recently, Justice Ruth Bader Ginsburg remarked, “I frankly don’t understand all the brouhaha lately from Congress and even from some of my colleagues about referring to foreign law.” Calling the controversy a “passing phase,” she asked “why shouldn’t we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article from a professor?”¹

The debate referenced by Justice Ginsburg concerning federal judicial citation of transnational law is well-known.² Indeed, the

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¹ Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court and Vice Versa*, N.Y. TIMES, June 15, 1990, at A1.

² For an overview of the controversy, see Diane Marie Amann, *Just Right?: Assessing the Rehnquist Court's Parting Words on Criminal Justice: International Law and Rehnquist Era Reversals*, 94 GEO. L.J. 1319, 1324-30 (2006); Florence Wagman Roisman, *Using International and Foreign Human Rights Law in Public Interest Advocacy*, 18 IND. INT’L & COMP. L. REV. 1, 7-8 (2007) (describing bitter divide in current Supreme Court on use of international opinion when interpreting the constitution). *See generally* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006) (reviewing current

issue recently resurfaced following the nomination of Yale Law School Dean Harold Koh as the State Department's Legal Adviser. Fearing that Koh may be headed toward a future judicial appointment, conservative media and members of Congress expressed concerns that he may be amenable to imposing "foreign" law on domestic litigants.³

This is an important debate with significant stakes. Nevertheless, I would like to put the federal "brouhaha" to one side and instead explore the role of transnational law in state jurisprudence, particularly with respect to economic and social rights. First, I will contrast the institutional context for state judicial decisionmaking with the federal context. Second, I will look at what is actually happening in state courts to determine whether state courts are doing anything differently with transnational law than their federal counterparts. Finally, I will look to the future to predict what we can expect from state courts in the coming decades.

I.

INSTITUTIONAL DISTINCTIONS BETWEEN FEDERAL AND STATE CONSTITUTIONS AND COURTS

There are several institutional distinctions between federal and state courts that cause the courts' perspectives on transnational law to diverge.

First, state court judges are the primary interpreters of state constitutions. State constitutions are significantly different in scope and content from the Federal Constitution.⁴ For example, the Federal Constitution has been construed to not protect a right to education, or a right to welfare, or a right to health or housing. Rather, the Constitution provides a right to be free from

controversy and examining historic uses of international law in constitutional adjudication).

³ Meghan Clyne, *Obama's Most Perilous Legal Pick*, N.Y. POST, March 30, 2009; Joseph Williams, *Obama Nominee Touches a Nerve in Conservatives*, THE BOSTON GLOBE, April 21, 2009; Eric Lichtblau, *After Attacks Supporters Rally around Choice for Top Administration Legal Job*, N.Y. TIMES, April 01, 2009, at A19.

⁴ See generally Martha F. Davis, *The Spirit of our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006).

government interference in certain private matters, and it creates enforceable rights to equal protection of the laws and to fair procedures, including some affirmative procedural rights like the right to counsel in criminal cases.

In contrast, every state constitution, with the arguable exception of Mississippi, protects a substantive right to education. Many state constitutions protect a right to welfare, a right to work, and rights to unionize and to earn a minimum wage. Five states have explicit rights to health. Montana provides a “right to human dignity.” These state constitutional social and economic rights provisions have no analog in the Federal Constitution.⁵

State constitutional provisions reflect the deeply embedded and frequently reaffirmed structural assumption that economic and social rights are within the province of states. For example, many of these state constitutional provisions are quite old, including many that were in place at least at the time of the Reconstruction, if not before.⁶ Some of the provisions date back to the Depression and its immediate aftermath. These provisions also reflect notions of categorical federalism, which require that the state respond to human needs and provide real economic protections for state residents. Article XVII of the New York State Constitution, which requires that the legislature make provision for “aid and care to the needy,” is an example.⁷ A few state constitutional provisions protecting economic and social rights, like Montana's “human dignity” clause, are more recent still. Added in 1972, the Montana provision draws its language indirectly from the Universal Declaration of Human Rights.⁸ As these provisions demonstrate, state constitutions are different from the Federal Constitution in terms of their content and scope. Thus, state courts cannot rely

⁵ *Id.* See also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

⁶ Stephen G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions when the 14th Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008).

⁷ VVTNA ONST. art. XVII, §§ 1-7 (Social Welfare). This provision was added to the New York State Constitution in 1938.

⁸ MONTANA CONST. art. II, § 4 (“The dignity of the human is inviolable”); Vicki L. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004).

wholly on federal courts for guidance in interpreting these provisions.

Second, state constitutions are also different from the Federal Constitution in terms of their status within state governments, and their role in the ongoing interplay between the branches of state government. As one illustration, consider the amendment process. On the federal level, the process for amending the Constitution is very difficult, requiring both heightened Congressional approval and a super-majority vote of the states. The U.S. Constitution is therefore seldomly amended.

In most states, in contrast, amendments are much easier to adopt and therefore occur more frequently. Because of the relative ease with which a state can amend its constitution, a wayward constitutional interpretation issued by a state court can be more readily answered by the other branches of government through a constitutional amendment. Moreover, because of this, there is generally a greater sense of dialogue between the courts and the legislature over constitutional meaning and interpretations on the state level. As compared to the federal system, this ongoing state process allows for more democratic participation in developing constitutional meanings. It also more effectively avoids the charges of counter-majoritarianism that are regularly leveled against the federal courts, since state courts are less likely to have the final word in the absence of broad consensus.⁹

Third, the process of judicial decisionmaking is also different in state courts than in federal courts. Importantly, there is no analog to *Erie v. Tompkins* at the state level to tamp down the development of common law.¹⁰ As compared to federal courts that work only within a narrowly defined area of federal common law, common law reasoning and adjudication continues in full force in state courts. Under the common law system, state court judges who are presented with cases that require them to fill in precedential gaps routinely look to a range of legal sources.¹¹

⁹ Hershkoff, *supra* n. 5; Davis, *supra* n. 4; Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 192 (2002).

¹⁰ *Erie v. Tompkins*, 304 U.S. 64 (1938).

¹¹ Martha F. Davis, *Public Rights, Global Perspectives, and Common Law*, FORDHAM URBAN LAW JOURNAL (forthcoming); Northeastern University School of Law Research Paper No. 30-2009. Available at SSRN: <http://ssrn.com/abstract=1349262>.

Extending this common law tradition, state court judges are more apt than federal judges to engage in comparative exercises in both constitutional and common law contexts. When construing state constitutional law, state court judges routinely survey states with similar state constitutional provisions to determine how they will interpret their own constitutional provisions. State court judges often go through the same exercise when confronting common law questions involving tort or contract.¹² These state courts are ready to build on their shared history with other states by looking to their jurisprudence. It seems clear that judges would not take this approach unless they felt confident that they could determine which “foreign” precedents were relevant and persuasive and which should be disregarded.

These differences between state and federal courts and constitutions suggest that states will be the engines of economic and social rights development in the United States. Clearly, in the United States system, economic and social rights reside primarily with the states. State constitutional economic and social rights protections have no federal analogues. The intent of these state provisions, as well as their construction, has more in common with transnational jurisprudence involving international law protections—whether from UN-made law or from foreign courts, like South African courts’ protections of positive economic and social rights—than they do with federal constitutional law.

Accordingly, one would expect state court judges to be more open to transnational law arguments than are federal courts. As set out above, there is less reason for concern about counter-majoritarian issues since the legislature can more readily act to amend the constitution if the court gets it wrong. Further, as argued above, state court judges are more accustomed than federal judges to comparativism in state constitutional contexts. Finally, in the context of common law adjudication, which also often involves economic and social rights like the right to housing or consumer rights, state judges typically experience few constraints in seeking wisdom across national boundaries.

¹² See, e.g., Shirley Abrahamson, *All the World's a Courtroom*, 126 HOFSTRA L. REV. 273 (1997).

II.

STATE COURTS' RELIANCE ON TRANSNATIONAL LAW

What, then, have state courts actually done with respect to transnational law? Do they draw on transnational law more often than federal judges?

The answer is yes: state courts and state judges do appreciate the differences in their institutional context vis-a-vis transnational law. Although the difference between federal and state court reliance on transnational law is not as dramatic as it might be, it is clear that state courts' references to transnational law are well-accepted and that they have not provoked the kind of "brouhaha" that we've seen on the federal level.

The general trajectory of state courts' transnational engagement over the past few decades is outlined below. Among other things, these cases demonstrate the role that individual judicial leadership plays in encouraging judges in a state to look outside of the country's borders, as well as the way in which judges are influenced by more general political and cultural developments involving transnational exchanges. Foreign law citation by state courts is as long-standing as it is in the federal system. However, because the international legal system first took hold in the 1940s, my birds-eye survey of state court citation to transnational law begins in that decade.

Not surprisingly, the 1940s saw state courts ready to embrace the persuasive significance of transnational law, not only in constitutional and common law contexts, but also as an aid to statutory construction.¹³ After this initial burst of enthusiasm, however, the rate of transnational citation in the 1950s and early 1960s appears to have decreased significantly, even in the realm of common law cases.¹⁴ It seems reasonable to assume that the Cold War chill against all things foreign affected state courts and judges, who may have been expected to avoid international law if possible. From the 1960s through the end of the decade, individual leadership among state court judges was the primary indicator of the state courts' use of transnational law. In California in the late 1970s and early 1980s, for example, courts repeatedly cited the

¹³ Davis, *supra* n. 4.

¹⁴ Davis, *supra* n. 4; Abrahamson, *supra* n. 12.

Universal Declaration and other international instruments.¹⁵ In the 1980s and 1990s, a similar phenomenon occurred in Connecticut, where international law was cited in a variety of cases from divorce to constitutional welfare matters, reflecting the leadership of Chief Justice Ellen Peters of the Connecticut Supreme Court.¹⁶ In more recent decades, several prominent state court judges have written law review articles describing their comparative practices. Shirley Abrahamson, Chief Justice of Wisconsin Supreme Court, has written persuasively about the role of transnational law in the context of common law adjudication.¹⁷ Similarly, Margaret Marshall, Chief Justice of the Massachusetts Supreme Judicial Court, has written about the relevance of transnational law in state constitutional adjudication.¹⁸ In contrast to the federal debate, these positions have provoked little to no controversy among state-level policymakers. Instead, state-level actors seem to accept that, as Chief Justice Marshall puts it, “[w]ise parents should learn from

¹⁵ The Opportunity Agenda, *Human Rights in State Courts: An Overview and Recommendations for Legal Advocacy* 4, 6, 11-16, available at http://opportunityagenda.org/report_state_courts_and_human_rights_2008_editi on (discussing California). Judge Frank Newman, who taught international human rights law at the University of California at Berkeley before his appointment to the California Supreme Court, was a leader in this movement. See, e.g., *Cramer v. Tyars*, 23 Cal. 3D 131, 151 n.1 (1979) (Newman, J., dissenting); *Am. Nat'l Ins. Co. v. Fair Employment & Housing Com.*, 32 Cal. 3D 603, 608 n. 4 (1982). Judge Newman served on the California Supreme Court from 1977 to 1982. See *Frank Newman*, 78, *A Justice on California's Supreme Court*, N.Y. TIMES, Feb. 23, 1996. Judge Newman's transnational perspective seemed to have an impact on California's lower court judges as well. See, e.g., *Boehm v. Merced Cty.*, 178 Cal.App. 3D 494, 502 (1986) (Hamlin, J., citing the Universal Declaration of Human Rights).

¹⁶ *Id.* (discussing Connecticut). See *Moore v. Ganim*, 223 Conn. 557, 637-38 (1994) (Peters, C.J., concurring). Chief Justice Peters was a long-time academic prior to her appointment to the Connecticut Supreme Court. Her scholarship focused on state constitutions, and she is a strong proponent of the independent construction of state constitutions. See, e.g., Ellen Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986)

¹⁷ Abrahamson, *supra* n. 12.

¹⁸ The Honorable Margaret Marshall, *Wise Parents Do Not Hesitate to Learn from their Children: Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004).

their children,” and as other countries develop more sophisticated jurisprudence, we can learn from them.¹⁹

Still, given the differences between the federal and state systems, one might expect to see more state court references to transnational law. Is something holding back state court judges?

To find out, I have asked some of them.²⁰

One factor contributing to state court judges' reluctance to cite to transnational law is the fear of stirring up controversy. State court judges are naturally influenced by federal debate, and are afraid of unnecessarily provoking controversy when an opinion can be fully supported without reference to transnational law.

The second factor is fear of making a mistake. Judges with little background in transnational law are concerned about misciting a principle of international law or publicly revealing a lack of understanding of transnational principles.

But for all of their trepidation, the state court judges with whom I've spoken also know that in the 21st century, they are not going to be able to avoid these issues. For example, they see their states' own involvement in transnational affairs increasing, and know that many of the issues that foreign tribunals are currently addressing will eventually come before U.S. courts. In the environmental area, for example, many states are involved in regional international pacts and commitments to curb greenhouse gases.²¹ On the municipal level, some communities are adopting international human rights standards; for instance, San Francisco adopted a municipal CEDAW in 1996 and earlier this year, Chicago pledged that its municipal policies would adhere to the Children's Rights Convention.²² At the same time, state court

¹⁹ *Id.*

²⁰ I have participated in a number of state court judicial trainings on human rights law. These observations are drawn from discussions at these events.

²¹ Judith Resnik, et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).

²² See S.F., CAL., ADMIN. CODE § 12K, 12K.1-6 (2001) (adopting the Convention on the Elimination of All Forms of Discrimination Against Women, United Nations Convention on the Elimination of All Forms of Discrimination against Women, art. 2, Dec. 18, 1979, 1249 U.N.T.S. 14 ; Press Release on Chicago's Resolution Supporting the Children's Rights Convention, available at

judges see that the legal field has become increasingly globalized, and they understand that state courts will increasingly be asked to resolve suits arising from private transactions involving a range of foreign laws.

Not surprisingly, then, there has been an increased interest in transnational legal education for state court judges. Some judges have invited litigants to brief these issues.²³ Others have utilized training materials developed by the American Society for International Law.²⁴ Some have partnered with local universities to develop educational programs for judges.²⁵ These programs will only expand over the next few years.

III. LOOKING FORWARD

Looking forward, over the next ten to twenty years, what can we expect in terms of economic and social rights development in the state courts, with reference to human rights principles? I predict that human rights norms will be part of the legal culture in many states. There are a number of developments that will contribute to this shift.

First, there are growing efforts to urge the creation of a new national human rights institution, with similar shifts toward human rights analyses in existing state and local human rights

http://www.njln.org/media/resources/public/resource_992.pdf (citing the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3).

²³ For example, a Connecticut state court judge considering the legality of a prisoner's force feeding recently sought briefing on the international law on the issue. With others, I appeared as an *amicus* before the court to address the issue. *See, e. g.*, http://www.northeastern.edu/law/news/announcements/davis_forcefeeding.html.

²⁴ For information on ASIL's judicial education activities, *see* <http://www.asil.org/judicial-education-training.cfm>,

²⁵ For example, in 2008, Brandeis University's International Center for Ethics, Justice and Public Life brought together judges from the United States, Canada and other jurisdictions to discuss domestic application of international law. *See* <http://www.brandeis.edu/ethics/news/2008/2008.Nov.12.html>. Similarly, in 2006, Northeastern School of Law and the Massachusetts Association of Black Judges co-sponsored a judicial education seminar on international human rights featuring Chief Justice Pius Lange of the South African Constitutional Court. *See* <http://www.slaw.neu.edu/general/quarterlyv3n1.pdf>, at p. 6.

institutions.²⁶ Once fully implemented, the national human rights institution would take a leadership role in implementing U.S. human rights obligations. This national work would encourage a reorientation by local and state agencies that have, in the past, focused more narrowly on civil rights implementation issues. Over time, these shifts could have a significant effect on the place of human rights in state-level legal cultures.

Second, human rights education targeting the legal establishment will begin to bear fruit. There have been a number of human rights-focused programs to train lawyers addressing economic and social rights in state courts.²⁷ Already, several domestic legal organizations, such as the Center for Reproductive Rights and the Maryland Legal Aid Bureau, have refocused their advocacy efforts around a human rights framework. Human rights education has also been made increasingly available to judges, who will begin to refer to these materials more often as litigators present them and as the state-level legal culture shifts.

Finally, with increased international and human rights law education in law schools, more and more new lawyers will become comfortable with transnational materials. The Law School Initiative of the Center for Reproductive Rights Law School Initiative is one project contributing to this effort, aiming to introduce human rights perspectives into the first-year law school curriculum.²⁸ Twenty years from now, these curricular changes alone will transform the U.S. legal culture, as these law students, for whom familiarity with transnational law is a given, reach positions of power as judges and policymakers.

²⁶ Catherine Powell, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (American Constitution Society, Oct. 2008), available at <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>; Leadership Conference for Civil Rights, *Restoring the Conscience of a Nation: A Report on the U.S. Commission on Civil Rights* (March 2009), available at http://www.civilrights.org/publications/reports/commission/lccref_commission_report_march2009.pdf.

²⁷ See, e.g., Columbia Law School Continuing Legal Education Program, *Human Rights and State Law: New Strategies for Economic Justice Advocacy*, April 2009, http://www.law.columbia.edu/center_program/human_rights/2009_CLE.

²⁸ For a description of CRR's Law School Initiative, see <http://reproductiverights.org/en/our-work/law-school-initiative>.

IV. CONCLUSION

Changing the prevailing legal culture in the United States is obviously a major challenge, with a lot of moving parts at all levels of society. But given that state constitutions already recognize a range of economic and social rights, and have fewer institutional impediments in considering transnational legal precedents than do federal courts, there is good reason to think that states will lead the way in this transformation.