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The Imperialism of American Constitutional Law

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which does not undermine what may be its greatest virtue, the variety of approaches offered and of opinions presented. Undoubtedly, it is a good illustration of the pluralism that is required in contemporary comparative law.

Still, this pluralism has its limits, and I cannot help expressing here something of a regret. I think we can all agree on the necessity to have today a genuinely *international* approach to comparative law. Such an aim may be, of course, difficult to achieve as long as we must resort to different languages, but, after all, no more difficult than trying to unify the law in the same conditions. In any case, we should at least join our efforts to make progress in this direction. I perfectly understand that not all comparatists can be real polyglots and that not all languages can enjoy the same standing. It is, however, essential to avoid any sort of hegemony. There is no reason why, in a work of this quality, some legal developments, judicial decisions or pieces of scholarly writing should remain practically ignored only because they have not been expressed in English. It is sometimes a bit frustrating to see that important materials written in languages that can hardly be seen as mere local dialects are not even deemed worthy of mention (except, occasionally, in their translated version or through the quotation of another author). It seems that a more eclectic approach could have better fulfilled the expectations of a wide range of readers around the world. Why is it that we are left here with a slight feeling that comparative law ultimately remains a bit parochial and that some systems are given preferential treatment over others? It is imperative for comparatists to rid themselves of any sort of national bias or prejudice.

Needless to say, such a feature is not peculiar to this volume and a similar remark could be made about many other books published in English or in any other language. But the observation is warranted here because the *Handbook*, owing to its broad coverage and the richness of its contents, has taken upon itself a truly international vocation. It reminds us that what we need today is not only a globalization of the law, or a globalization of legal science, but also, and more importantly, in Harry Arthurs's words, "a globalization of the mind."[6]

6. Harry W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J. L. & SOC. 219 (1998).

RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (New York University Press, 2006)

*Reviewed by David Fontana**

THE IMPERIALISM OF AMERICAN CONSTITUTIONAL LAW

Some areas of scholarship keep to themselves. They produce their own debates, their own controversies, and their own methodologies, but only in very minor ways do they affect other areas of scholarship. By contrast, some areas of scholarship are more imperialistic (which can be good and bad, of course);[1] the questions that they ask, the way that they answer these questions, and the debates that they engender do not just affect their own area of scholarship, but affect other areas of scholarship also. Their intellectual imprints extend beyond just their own four corners. There are many examples of imperialistic fields of scholarship, but there is perhaps no better example in the past generation than economics. At first, economic analysis was limited mostly to explicit market transactions. Today, there are economic approaches to politics, to education, to family relations, to history, to discrimination, and to just about every other conceivable area of academic inquiry.[2]

The same is true of fields of legal scholarship. Some fields have kept to themselves, and some have expanded to affect many others. Law and economics is a good example of an imperialistic area of legal scholarship, since its footprint can now be felt in many areas of legal scholarship.[3] There is perhaps no better example, though, of an area of imperialistic legal scholarship than constitutional law, or more specifically *American* constitutional law. The leading scholars of American constitutional law are the most cited legal scholars,[4] and their articles and books are the most cited pieces of scholarship that

* Associate Professor, George Washington University Law School. This book review borrows some of the themes of a larger project regarding the current state of the field of comparative constitutional law. As part of that larger project, the author is working on a few article-length projects on the extent to which "comparative constitutional law" is really just a subfield of constitutional law (or a subfield of comparative law, for that matter).

1. By using this term "imperialistic," I do not mean necessarily to be overly negative. Sometimes the insights of one field can quite helpfully affect the approaches of another field, but it is just as possible that the pathologies or undue obsessions of one field can distort the approaches of another field.

2. A great discussion of the reasons for the expansion of the field of economics can be found in Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53 (1985).

3. *See, e.g.*, Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1 (1987) (summarizing the field and its analysis of a range of issues).

4. Indeed, according to Brian Leiter's list of most-cited faculty from several years ago, all of the ten most-cited scholars spend some—if not most—of their time writing about American constitutional law. *See* http://www.leiterrankings.com/faculty/2000faculty_impact_cites.shtml (last visited May 1, 2008); *see also* Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409 (2000).

the legal academy produces.[5] American constitutional scholarship, for instance, has significantly affected administrative law scholarship, with its obsession with *Chevron v. Natural Resources Defense Council*[6] and the role of courts in reviewing administrative actions, a topic that has caused a similar obsession in American constitutional scholarship.[7] Indeed, many of the main debates within administrative law scholarship and in administrative law casebooks are focused directly on constitutional issues like the non-delegation doctrine.[8]

More recently, the debates within American constitutional scholarship have strongly affected the emerging field of comparative constitutional law,[9] as Ronald Krotoszynski's interesting new book on comparative freedom of speech demonstrates.[10] Krotoszynski, already an accomplished scholar of American constitutional law, has recently started writing on the constitutional law of other countries, including an important first discussion of the comparative constitutional law of freedom of speech.[11] His new book continues this recent trend by focusing on the constitutional law of free speech in the United States, Canada, Germany, Japan and the United Kingdom. For each country, Krotoszynski provides a helpful summary of some of the main constitutional provisions regulating freedom of speech, some of the main doctrinal issues related to those textual provisions, and some of the main cases. A book of this scope is quite an accomplishment because substantial treatments of the comparative law of free speech of this depth are difficult to find.

Just as with the rest of the emerging field of comparative constitutional scholarship, though, Krotoszynski's book and its discussion of comparative constitutional law are dominated by the subjects discussed in *American* constitutional scholarship. For the purposes of

5. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751 (1996) (including list of most-cited articles demonstrating that a majority of the ten most-cited legal articles of all time discuss constitutional law in substantial part); Fred R. Shapiro, *The Most-Cited Legal Books*, 29 J. LEGAL STUD. 397 (2000) (including list of most-cited books, demonstrating that a majority of the ten most-cited legal books of all time discuss constitutional law in substantial part).

6. 467 U.S. 837 (1984).

7. *See infra* notes 23-28 and accompanying text.

8. It would be hard to teach administrative law in an American law school these days without teaching many constitutional law subjects, such as the non-delegation doctrine, so it is not surprising that administrative law casebooks feature constitutional law subjects prominently. *See, e.g.*, JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 59-94 (2003) (discussing the non-delegation doctrine and the constitutional debates surrounding the legislative veto). Just as importantly, it should also be said that much of administrative law scholarship is in fact dominated by scholars whose substantial focus is on constitutional law, another reason for the overlap between the two areas of scholarship.

9. By "comparative constitutional law," I am referencing the domestic constitutional law of other countries.

10. RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (2006).

11. *See, e.g.*, Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004).

this short review, I will focus on two themes that Krotoszynski seems to overemphasize. The first is his focus on judicial review (and a narrower version of judicial review) as the primary locus of activity for constitutional law. The second is the centrality of the state as the primary source of concern of constitutional law.

I. THE COMPARATIVE CONSTITUTIONAL LAW OF FREEDOM OF SPEECH

Krotoszynski's discussion of freedom of speech in five different countries shares a common approach: He uses what he regards as the two main justifications for freedom of speech—the marketplace of ideas justification and the Meiklejonian justification—and examines the role of those justifications in the constitutional law of the highest courts in the countries that are the focus of his study, and also whether the main cases establishing the doctrinal framework for freedom of speech in these other countries are desirable.[12] Because this is the main focus of Krotoszynski's book, he does not focus on two other threads of comparative constitutional scholarship: whether one country might borrow from the approaches of another country,[13] and the manner in which one or more countries have come to adopt the doctrinal approaches that they ultimately have adopted.[14]

First, Krotoszynski turns his attention to the United States and introduces the lens through which he then discusses freedom of speech in other countries. He first discusses the marketplace of ideas justification for the freedom of speech, which he states is derived substantially from Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*:[15]

> Men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[16]

As Krotoszynski defines it then, "[t]he marketplace of ideas metaphor generally requires government to avoid making subjective value judgments about either the specific content of speech or the means of communication" (p. 15).

12. The book's clear structure makes it an asset to those teaching comparative constitutional law or free speech law in an American class. The book sets out the reasons for protecting freedom of speech and returns to those reasons with such ease and frequency as to make it enormously valuable pedagogically.

13. For the most prominent example of this approach to comparative scholarship, see, for instance, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993).

14. For a prominent recent example of this approach to comparative scholarship, see, for instance, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN EUROPE AND AMERICA (2005).

15. 250 U.S. 616, 625-31 (1919) (Holmes, J., dissenting).

16. *Id.* at 630.

By contrast, the Meiklejohnian justification for freedom of speech holds that "the free speech guarantee of the First Amendment exists principally to facilitate democratic self-government" (p. 15). This latter justification for freedom of speech often results in less protection than does the Holmesian justification, at least for "speech unrelated to politics or self-governance" (p. 15), such as expression that is primarily artistic or commercial. After laying out these two justifications for freedom of speech, Krotoszynski then discusses them briefly in the context of the United States.[17]

Krotoszynski then turns his attention to freedom of speech in Canada, where section 2(b) of the Canadian Charter of Rights and Freedoms protects "freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication."[18] As Krotoszynski discusses (pp. 29-38) the Canadian Supreme Court has broadly defined the kinds of speech protected by section 2(b), for two reasons. First, because section 1 of the Canadian Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In other words, even if one's free speech rights are violated in Canada, it is constitutionally acceptable for these rights to be violated if there is a good justification for doing so—and Krotoszynski spends much time discussing how the Canadian Supreme Court has permitted too many weak justifications to overcome potential violations of the freedom of speech (pp. 38-89). In particular, Krotoszynski believes that restrictions on speech in the name of equality and diversity, in the long run, do not actually benefit equality and diversity (pp. 48-89). Second, Krotoszynski argues that the Canadian Supreme Court has found that many instances of expression are protected by section 2(b) because legislatures can override decisions of the Canadian Supreme Court pursuant to section 33 of the Charter, thereby providing a sort of safety valve in case the Canadian Supreme Court has defined Section 2(b) too broadly.[19]

Krotoszynski next turns to Germany. As with his discussion of Canada, Krotoszynski discusses how speech in Germany is, based on the text of its foundational human rights document (the German Basic Law), balanced against other considerations rather than given the

17. The fact that the book relies on the two primary threads of free speech scholarship in the United States proves the point I make in Part II about the American focus of the book; indeed, if one were to examine the rationales for free speech in Spain or Germany or Latin America, there would be other substantial justifications put forward. However, the fact that Krotoszynski focuses on the two primary threads to come *from the United States* is part of the reason why the book remains so clearly based on the American experience. *But see* KROTOSZYNSKI, *supra* note 10, at 18-21 (briefly discussing other potential approaches to freedom of speech).

18. Canadian Charter of Rights and Freedoms, section 2(b).

19. Note, though, that section 33 of the Canadian Charter only permits overrides of certain rights in the Charter. Canadian Charter of Rights and Freedoms, section 33(1) ("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.").

predominant status that the First Amendment enjoys in the United States.[20] Krotoszynski again reiterates his concern that balancing speech against other considerations does more harm than good, and he illustrates this by discussing some of the cases decided by the Federal Constitutional Court of Germany addressing freedom of speech issues. He then focuses on the idea of Germany as a "militant democracy," or a constitutional democracy that does *not* protect speech that threatens the "free and democratic basic order."[21] As with his discussion of balancing free speech against other considerations, he is critical of "militant democracy" as permitting the government to censor speakers based on the substance of what they are saying.

Krotoszynski's final two chapters more briefly discuss the situation in Japan and the United Kingdom. In his discussion of the former, he is most interested in how Japan has seemingly adopted the Meiklejohnian approach, protecting political speech but not protecting other forms of speech as much.[22] Krotoszynski also argues that the constitutional law of freedom of speech has not featured as prominently in Japan as in the United States, because the Japanese Supreme Court is in a weaker institutional position. Krotoszynski then turns his attention to the United Kingdom, which he discusses only briefly, because he believes that "British law is not materially different from Canadian or German law on these matters" (p. 187) and because Britain "lacks any judicially enforceable limits on the scope of Parliament's legislative powers" (p. 187).

20. Several parts of the Basic Law indicate that other values can be just as important as the freedom of speech. Article 5(1) protects freedom of speech by stating that "every person has the right to freely express and disseminate his opinion in speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and film are guaranteed. There shall be no censorship." However, Article 5 also states that "[t]hese rights find their limits in the provisions of the general statutes, in statutory provisions for the protection of youth, and in the right to personal honor," and further indicates that "[f]reedom of teaching shall not release any person from his allegiance to the Constitution." Even beyond Article 5, there are limitations on the freedom of speech in the Basic Law. Article 9 states that "[a]ssociations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited." Likewise, Article 18 provides that rights can be lost if a citizen attempts to use these rights to defeat "the free democratic basic order." Article 21 then declares that political "[p]arties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional."

21. *See* article 18 of the German Basic Law.

22. For instance, in the *Tokyo Ordinance Decision* the Japanese Supreme Court gave a restrictive interpretation to an ordinance that would have required that protest organizers take various preparatory steps before proceeding with a demonstration. Applying this interpretation, the court upheld the constitutionality of the ordinance. KROTOSZYNSKI, *supra* note 10, at 146-64. By contrast, the Japanese Supreme Court has provided very little constitutional protection to non-political speech. *Id.* at 164-82.

II. American Themes

Krotoszynski is to be credited for undertaking a comparative analysis that stretches across five different countries and for grappling with such a broad range of materials related to freedom of speech in those countries. Because of space limitations, I will briefly focus on two ways in which his analysis is perhaps unduly affected by a baseline of American constitutional law and American constitutional scholarship.

A. *The Narrow View of Courts*

First, Krotoszynski's discussion of freedom of speech concentrates on the role of courts and how courts act in an undemocratic fashion in overturning the wishes of a democratically elected branch of government (and also on how courts are relevant to the extent that they invalidate the laws of other branches of government). Of course, the "countermajoritarian difficulty"[23] goes back at least as far as Alexander Bickel and, as Barry Friedman has put it, this topic has become the "central obsession of modern constitutional scholarship."[24] The recent interest in comparative constitutional law among U.S. scholars has also been dominated by this attention to courts invalidating the actions of democratic branches of government; this has been behind much of what Mark Tushnet has been writing,[25] and explaining how courts come to assert this power in the first place has been at the center of Ran Hirschl's work as well.[26]

As an initial matter, it is not clear that in order to understand foundational legal protections for the freedom of speech, we need to focus on judicial decisions, and only those by the highest constitutional courts, in the way that Krotoszynski does. In the United Kingdom, freedom of speech is discussed in British casebooks and treatises mostly as a statutory subject, debated and defined in Parliament.[27] Similarly, in Japan many of the rules regarding freedom of speech are to be found in the actions of the Japanese Diet. Even beyond legislatures and executives, there are important other branches of government affecting how free speech rights will be defined. For

23. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-17 (Yale Univ. Press 2d ed. 1986) (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

24. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 334 (1998).

25. *See, e.g.*, Mark Tushnet, Weak Courts, Strong Rights (2007); Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 Harv. C.R.-C.L. L. Rev. 1 (2006); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781 (2003); Mark Tushnet, *Non-Judicial Review*, 40 Harv. J. On Legis. 453 (2003); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 Wake Forest L. Rev. 813 (2003); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 Mich. L. Rev. 245 (1995).

26. *See, e.g.*, Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

27. *See* Ian Loveland, Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction (2006).

instance, in the context of hate speech laws in Canada and Germany, it is important to analyze prosecutorial decisions. What do prosecutors do? How are they appointed? How are their decisions to prosecute constrained by systems other than courts?[28]

Another concern about permitting American approaches to the countermajoritarian difficulty to carry over into discussions of comparative constitutional law is that the American style of thinking about judicial-legislative interactions can be something of a caricature, often presented as follows: The legislature passes a law, and a court invalidates it, or a court affirms it. In other words, the interaction between courts and legislatures is separate, independent, and finite. The focus is on the power of the "judicial negative,"[29] the power of a court to invalidate a law, as the core part of judicial review and judicial constraints on other branches of government. But, of course, judicial-legislative interactions are more complicated than the simple model suggests, and the failure to recognize this complication, which has long plagued American constitutional scholarship, also plagues much of Krotoszynski's comparative discussion of the behavior of constitutional courts as well. Because Krotoszynski directs so much of his discussion toward how free speech rights are limited and constrained and operationalized, a complete understanding of what courts actually do is necessary in order to understand how free speech rights are defined by courts.

For instance, Krotoszynski does not consider the United Kingdom to be a subject worthy of much discussion because "the British judiciary (unlike the judiciaries in the United States, Canada, Germany, and Japan) lacks the power of judicial review" (p. 187). Indeed, it is true that there is no written British constitution with a higher status than regular statutes—one that would allow British courts to invalidate the laws of Parliament. Instead, there is a regular statute protecting human rights, called the Human Rights Act of 1998 (HRA), which makes the European Convention of Human Rights (ECHR) part of British law—and according to Krotoszynski, "[t]he HRA does not in any way bind a contemporary majority of the House of Commons" (p. 187). So then, according to Krotoszynski, "the most interesting aspect of British free speech law—its most salient characteristic—is the near-total reliance on cultural norms to check the abuse of government power to restrict or ban expression" in part because of "[t]he United Kingdom's extraordinarily weak courts" (p. 187).

28. *See* Mark Tushnet, *When is Knowing Less Better than Knowing More: Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 Minn. L. Rev. 1275, 1295-96 (2006) (noting the importance of prosecutorial decisions in understanding how hate speech laws work because there are "important institutional differences between the United States and [other] nations. Far more prosecutors would be authorized to institute hate-speech prosecutions in the United States than in Canada and Great Britain, which means that the risks to free expression would be greater in the United States than has been the case in those nations").

29. *See* Neal Katyal, *Judges as Advicegivers*, 50 Stan. L. Rev. 1709, 1709 (1998).

In fact, however, the relationship between courts and Parliament in the United Kingdom is much more complicated than Krotoszynski suggests, in substantial part thanks to the enactment of the HRA, which creates a regime in which courts are relevant even though they do not have the power of the judicial negative. Krotoszynski is right to note that section 3 of the HRA—which permits courts to interpret statutes to be compatible with the ECHR if at all possible[30]—was already essentially being used by British courts prior to enactment of the HRA (p. 185). Section 4 of the HRA, however, now permits British courts, when unable to interpret a statute to be consistent with the HRA, to issue a "declaration of incompatibility."[31] The declaration of incompatibility does not formally invalidate the statute,[32] but it does stigmatize the statute, so much so that every time a British court issues a declaration, the ruling pressures Parliament to act. So far, Parliament has acted to remove the incompatibility in virtually every instance in which the highest British court has issued such a declaration.[33] So the fact that British courts do not have the formal power to strike down legislation as unconstitutional does not actually matter that much. If we want to understand how rights are protected in the United Kingdom, then, we need to focus on a wider range of actions that courts take, not just on mechanisms with a direct counterpart in U.S. practice, because British courts have recognized that certain British statutes might have a "constitutional" status, and therefore that British courts might essentially exercise powers of constitutional review even through Britain does not have a formal written constitution.[34]

Likewise, in his discussion of Canada, Krotoszynski does not pay sufficient attention to the full extent of judicial-legislative interaction on rights issues. He argues that section 33 of the Charter and the legislative override have become something of a dead letter.[35] However, as Tsvi Kahana's research has demonstrated, Canadian legislatures have actually overturned Canadian courts far more often than is commonly realized.[36] Even when Canadian legislatures decide not

30. Human Rights Act, section 3(1) ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.").

31. Human Rights Act, section 4(2) ("If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.").

32. *Id.* at section 4(6) ("A . . . declaration of incompatibility . . . . (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.").

33. *See* Francesca Klug, *A Bill of Rights: Do We Need One or Do We Already Have One? available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999952.

34. *See Thoburn v. Sunderland City Council*, [2003] QB 151 (Div. Ct.).

35. KROTOSZYNSKI, *supra* note 10, at 28 ("[T]he effect of Section 33 on constitutional rights may be more apparent than real—the federal Parliament has never invoked this power, and the provincial legislatures, with but two exceptions, have been equally reluctant legislatively to override Charter rights.").

36. *See* Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. J. 255 (2001) (discussing the multitude of uses of section 33); Tsvi Kahana, *Legalism, Anxiety and Legislative Constitutionalism*, 31 QUEEN'S L.J. 536, 555 n.51 (2006) (updating his previous work).

to overturn a judicial decision, they often reference section 33 as a reason for taking a more active role in scrutinizing legislation with respect to constitutional issues.[37] Thus, if we want to understand how rights are protected in Canada, we cannot simply rely on the idea that Canadian courts issue decisions to settle constitutional matters like freedom of speech, and legislatures obediently comply; legislatures sometimes themselves consider whether to settle with finality what the Charter means.

B. The Obsession with the State

The second way in which Krotoszynski's book seems to be dominated by American constitutional concerns is his focus on the state as the real enemy of freedom of speech. When Krotoszynski discusses Canada, for instance, his primary concern is that creating hate speech laws permits *the government* to discriminate based on the substance of the speech, or the identity of the speaker.[38] Likewise, when Krotoszynski discusses Germany, he disapproves of hate speech laws (and the idea of a "militant democracy"), again because he believes that "as a practical matter [these laws] do[ ] not seem to be very effective" (p. 130.) But, in fact, the state is not always the sole or even the most important enemy of freedom of speech.

Of course, though, this focus on the flaws of a regime where the government has the power to block out culturally damaging speech ultimately rests on the idea "that no matter how dangerous the speech—and seen in an objective light speech rarely poses great danger—the nature of state power means that any regulation is inevitably the more hazardous option."[39] The focus of the book is on the dangers posed by the state; on how regulating speech based on its dangerous content almost always poses a greater danger than not regulating such speech, and indeed may be counterproductive. But Krotoszynski only briefly addresses the harms that would continue to exist if hateful private speech continued unregulated, such as "feelings of alienation from the community, low self-worth, voluntary withdrawal from public life, general anxiety over personal safety and security" (p. 57). All that he says about these harms is that they "all fall far short of the mark Holmes identified as the predicate for proscribing speech" (p. 57).

37. *See, e.g.*, JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? (2002).

38. KROTOSZYNSKI, *supra* note 10, at 68 ("At the end of the day, I do not find myself in agreement with the balance that the Supreme Court of Canada has struck; the risk of a censorial government acting to advance its own interests strikes me as a greater threat to democratic self-government than racist, sexist, or homophobic diatribes.").

39. Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WISC. L. REV. 1425, 1446 (1994).

This argument fails to consider harm to speech interests emanating from beyond the state. First, it is not as easy to measure harms caused by private parties to speech as it is to measure harms caused by the state. While the harm caused by hate speech laws is easy to observe and immediate in effect—the state prevents someone from speaking—the harms from private interests may be harder to detect because they may degrade individuals in more subtle ways that take time to materialize. Therefore, Krotoszynski's facially valid concern that the Canadian Supreme Court, for instance, has allowed weak empirical evidence of the effectiveness of hate speech to outweigh free speech interests[40] is less valid upon further consideration. It is harder to prove that hate speech laws are effective, just as a methodological matter.

In addition, even if the harms posed by the state and by private parties are equally able to be measured, Krotoszynski seems to dislike any restrictions on private speech because ultimately he does not seem to recognize that private harms can ever be as significant as state-caused harms. If the goal of protecting freedom of speech is to encourage people to speak, either only on political matters or on all matters, then private censors can be just as problematic as public censors. If the state can reinforce prevailing political majorities by censoring speech if it is given the power to constrain speech, the same is true of a world where there are no speech laws—private parties can prevent people from speaking and being heard in order to reinforce prevailing majorities. The same harms that Krotoszynski rightly fears that the state might aggravate can also be aggravated by non-state actors.

Conclusion

At a time when constitutional litigation has spread across the globe, it is imperative that we have an understanding of how constitutional rights are protected in different countries. Krotoszynski's book provides that and much more, by supplying comparative analytical content to go along with a summary of doctrinal issues in different countries. The main drawback to his contribution, though, is that his analysis is firmly anchored in American waters. By proceeding in this way, he misses some elements essential to a true understanding of freedom of speech in the others countries he is discussing.

40. Krotoszynski, *supra* note 10, at 43 (stating that the Canadian Supreme Court has permitted only "generalized" reasons for restricting freedom of speech to counterbalance speech rights).

THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW, EDITED BY MICHAEL GAGARIN & DAVID COHEN (Cambridge University Press, 2005)

*Reviewed by John A. Rothchild**

Ancient Greek law is a hard sell for comparativists. Unlike the law of ancient Rome, which enjoyed a "second life" beginning with its rediscovery at Pisa and Bologna in the tenth century CE and continuing through its reincarnation in the 1804 Code Napoleon and later European codifications, the impact of the law of ancient Greece on modern law cannot be traced in anything like a straight line. Even the ancient Athenian democratic constitution, which has served as an inspiration for modern democracies, has been described as an "evolutionary dead end."[1] Then too, ancient Greek law is relatively underdeveloped in comparison with Roman law, having flourished over a period of fewer than 150 years[2] as against the thousand-year reign of Roman law.[3] Furthermore, the historical sources of Greek law are relatively meager; indeed, with the exception of the law of Athens, and of the Cretan city of Gortyn, evidence of ancient Greek law is practically nonexistent. Any comparativist with a practical bent, whose interest lies in examining how a given legal issue is handled by peer legal systems, will find ancient Greek law unappealing due to the enormous material, technological, and cultural differences between that ancient society and our own.

The classicist, of course, does not need to be persuaded of the value of studying ancient Greek law. Law is one of the most revealing illuminants of society, and one can hardly hope truly to comprehend a society, ancient or modern, without an understanding of the system by which the society regulates the conduct of its members. The comparativist who lacks an inclination towards the classical may, however, need an extra push before he will willingly delve into ancient Greek law. For some, the requisite push exists in the form of the very strangeness of the ancient Greek legal system to modern eyes. That strangeness is apparent in terms of both its procedure and its substance. Consider a few features:

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1. Kurt A. Raaflaub, Josiah Ober, & Robert Wallace, Origins of Democracy in Ancient Greece 12 (2007).

2. The classical period of Athenian law dates from around 490 to 322 BCE—from the first Persian War to conquest by the Macedonians. The bulk of extant historical evidence begins around 450 BCE, when epigraphic evidence becomes relatively plentiful. The Laws of Solon are traditionally dated to ca. 594 BCE, but there is very little historical evidence for law of that vintage.

3. The period during which Roman law developed may be dated from the writing of the Twelve Tables in 451-50 BCE through the codifications of Justinian in the 530s CE.