Pragmatist Constitutionalism in Comparative Perspective

Author : Mark Kende

Date : April 19, 2018

David Landau, *Legal Pragmatism and Comparative Constitutional Law*, in Elgar Handbook on Comparative Constitutional Theory (forthcoming 2018), available at SSRN.

Law is a practical field. It resolves concrete disputes. Constitutional law, however, is often thought of as more theoretical than practical. For example, a common current debate in constitutional interpretation is between originalism and living constitutionalism. Both have been advocated and criticized to death. Thus, Thomas Colby and Peter Smith have argued that originalism does not consist of one overarching theory, and that it leaves many questions unanswered. Self-proclaimed originalists disagree on some major issues and acknowledge that courts must often "construct" the right answers. But William van Alstyne has emphasized that living constitutionalists also have "clashing visions."

It is therefore a breath of fresh air to read David Landau's forthcoming book chapter, "Legal Pragmatism and Comparative Constitutional Law." Eschewing these sorts of rehearsed debates between theories that each contain their own brand of formalism, Landau argues that legal pragmatism is an especially useful approach to interpreting the United States Constitution. It requires judges to acknowledge the indeterminacy of constitutional interpretation, to appreciate the importance of focusing on the detailed factual, empirical, and other contextual elements of the constitutional issues presented, and to achieve the best result possible using the toolkit provided by the law, and other "eclectic" criteria. Landau also shows that pragmatism is useful in comparative constitutional law, rather than seeing it as a uniquely American approach.

Landau takes on the unenviable task of defining legal pragmatism. He acknowledges that no formalistic legal theories can provide a single right answer to constitutional questions. Originalism simply leaves open too many questions. It is also arguably wrong in many cases. For example, and despite arguments to the contrary, backwards-looking originalism cannot really support the result in *Brown v. Board of Legal Education*, 347 U.S. 483 (1954), or the idea that the Equal Protection Clause provides special legal protection to women. But Landau also says that the liberal legal philosopher Ronald Dworkin's judge, Hercules, has an impossible task. He could have added that Dworkin's solution is inevitably and conveniently politically liberal. And with entrants to the field like Jack Balkin and his living originalism, we now have even more varied results to contend with under the general umbrella of "originalism."

Landau asserts that both originalists and Dworkinian believers in liberal reasoning to "right answers" pretend to be value-neutral when they are not. Moreover, a Justice's perspective inevitably influences his or her rulings. Instead of abstract neutrality, Landau contends that constitutional interpretation is about the narrower task of "problem solving," which is why the specific facts and context of cases, including empirical data and "other forms of knowledge," are so important.

Landau admits that "formalist consistency" is useful but argues that the law has other ends. Legal pragmatism employs a "more inductive" analysis than the deductive syllogisms of formalism. Thus, pragmatism often involves "balancing" the competing interests at stake, such as liberty and security, which also means fully acknowledging and weighing their relative importance. Relying on the pragmatic analysis of Daniel Farber and Suzanna Sherry, Landau shows how they praise Justice O'Connor's opinion in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), as drawing this balance by noting the individual's rights as

well as competing national security interests. This pragmatic approach, Landau contends, helps us see the instrumental value of law to the present, rather than honoring “the dead hand” of the past as a goal in itself.

Perhaps the most impressive part of Landau’s short chapter is its brief yet sophisticated response to likely criticisms. Critics of Judge Richard Posner’s pragmatism, with its emphasis on “common sense,” compare it to a Rorschach test. Landau retorts that judicial subjectivity is present in any application of an overarching theory as well, given the inevitable biases of those applying such a theory. At least pragmatism addresses all of the possible facts and arguments from both sides, and pragmatist judges explain why they have chosen one side over the other. It’s a choice, not a foregone conclusion. Similarly, he addresses the concern that judges are not trained to use empirical data or other non-formalist legal criteria, and so are ill-suited to be skillful pragmatists. Landau admits that judges are imperfect, but contends that they must consider all of the factors relevant to the best result. And perhaps judges—and the lawyers who argue their cases before the courts—can be trained in the supposedly eclectic fields of knowledge and analysis that are most common and relevant in resolving legal disputes.

It has been argued that pragmatism is inevitably conservative, since it would balance individual rights against state interests rather than enshrine them or treat them as trumps. Landau responds that this is not at all inevitable, as shown by liberal pragmatists like Farber and Sherry (or, for that matter, the later decisions of Judge Posner himself). Nor is it sufficient to contend that pragmatism is an “unmoored” approach that fails to provide certainty; as Landau argues, that hardly distinguishes it from formalistic approaches, with their false certainty in the abstract and messy results in reality. Law, he writes, “can be highly open-textured and eclectic without abandoning constitutional principle, even in paradigm shifting cases.”

Finally and intriguingly, Landau argues that pragmatism should be—and is—used abroad, not just in the United States. He questions Judge Posner’s suggestion that there is a uniquely American essence to pragmatism. The old and vague language of the United States Constitution, after all, may make it more reasonable to turn to formalism to bring some greater degree of certainty to its meaning and application. By contrast, many nations, including a number in the global South, have “transformative” constitutions that with thicker and more detailed content than that of the United States Constitution. This thick, transformative quality makes a flexible and pragmatic approach to interpreting such constitutions even more necessary, given both the numerous competing values found in such documents and the political vulnerabilities of the judicial branch in those countries.

A common method of constitutional analysis in many countries other than the United States is that of “proportionality,” a specific form of constitutional balancing. Landau argues that the proportionality approach has a pragmatic quality that is not radically different from the balancing tests that the United States Supreme Court used to apply quite frequently and still employs from time to time. Proportionality requires that judges be transparent in identifying and weighing the legal and factual issues at the heart of their decisions. The tradeoffs at stake in such cases must be confronted. He discusses several different theories of proportionality that courts abroad have advocated, especially those of Robert Alexy. He suggests out that even Alexy could benefit from looking at more data in his analysis of certain problems.

From Landau’s useful perspective, proportionality has a pragmatic core that “forces judges to think through the systematic consequences of judicial decision making” and thus avoid “blind spots.” A court, for instance, that is tasked by its country’s constitution with the implementation of socio-economic rights must necessarily acknowledge and address the tradeoffs that are inevitably involved in doing so. In the end, he correctly points out that “pragmatic arguments have tended to become significant in

different constitutional cultures." Far from being an example of American exceptionalism, constitutional pragmatism is not only *suitable* for foreign export, but may be a constitutional method that has achieved greater success beyond our shores.

Cite as: Mark Kende, *Pragmatist Constitutionalism in Comparative Perspective*, JOTWELL (April 19, 2018) (reviewing David Landau, *Legal Pragmatism and Comparative Constitutional Law*, in Elgar Handbook on Comparative Constitutional Theory (forthcoming 2018), available at SSRN), https://conlaw.jotwell.com/pragmatist-constitutionalism-in-comparative-perspective/.