

A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism

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Although I have borrowed the Essay’s title from the first line of Shelley’s *Ozymandias*, I do not recommend that the reader probe the text of that poem for clues to the meaning of this Essay. Certainly it would take a more bold or self-confident author than I to bid readers, as *Ozymandias* did, “Look on my works, ye Mighty, and despair.”

The editors of the *Virginia Journal of International Law* invited me to contribute this Essay to mark the *Journal*’s fiftieth year of publication. In view of the *Journal*’s manifest contributions to scholarship during that time, it seemed fitting to reflect in this Essay on comparative constitutionalism’s remarkable story during the past half century or so and why it matters.

PROLOGUE: BUDAPEST

In March 1848, the Lower House of the Hungarian Diet adopted its famous Address to the Crown. Petitioning the Hapsburg king, Ferdinand V, the delegates lamented that Hungarians had been “unable to render our constitution comfortable to the spirit of modern times”¹ The delegates were convinced that, for the nation’s intellectual and material welfare, there must be a “national Government, totally independent and free from any foreign influence whatsoever.”² They called for a government that, “in conformity with constitutional principles, must be a responsible Government, and the result of a majority of the people.”³

At the Café Pilvax, in Pest—a gathering place of law students, younger politicians, and literati—many saw the Address as just a beginning. Inspired by the great national poet Sandor Petofi and others, the café’s clientele collected signatures for a petition to be sent to the Diet. At a public meeting, Jozsef Irinyi read the “Twelve Points.” Under the title “What Does the Hungarian Nation Desire,” the petition included demands for freedom of the press, equal civil and religious rights for all, popular representation, trial by jury, and the taking of an oath to the Constitution by Hungarian soldiers.⁴ Two days later, at a second public meeting, public signing of the petition began. Unknown to those who assembled in Pest, that same day, both houses of the Diet had voted final approval of the Address to the Crown, its wording notably strengthened to include at least some of the demands of the Pest petition.⁵ The revolutions of 1848, in Hungary as elsewhere in Europe, failed. But the ideas memorialized in that year became a part of Europe’s collective consciousness.

A century and a half later, Hungary joined its neighbors in Central and Eastern Europe in emerging from the dark years of communist rule. I had the good fortune to be in Budapest and other capitals in the region as constitution makers went to work on new constitutions for the new age. I was at dinner one evening in Budapest, enjoying the company of Hungarian friends. The conversation turned to 1848 (that afternoon, a student had taken me to the spot on the steps of the National Museum where Petofi has declaimed his “National Hymn”). I asked my friends whether the Café Pilvax still existed, under that name or some other,

1. House of Commons, *Sessional Papers: Correspondence Relative to the Affairs of Hungary, 1847–1849 Presented to Both Houses of Parliament by Command of Her Majesty August 15, 1850*, vol. LVIII (1851), *quoted in* EDSSEL WALTER STROUP, *HUNGARY IN EARLY 1848: THE CONSTITUTIONAL STRUGGLE AGAINST ABSOLUTISM IN CONTEMPORARY EYES* 65–66 (1977).

2. *Id.* at 67.

3. *Id.*

4. *See* STROUP *supra* note 1, at 100 (enumerating the “Twelve Points”).

5. *Id.* at 100, 102.

and, if so, where it was. When I put that question, one of the women sitting at the table turned to her friends. Indicating me, she said: “There, I told you he was Hungarian.” As I have, as far as I know, no Hungarian ancestry, I can only infer that she meant that anyone who had such a detailed interest in the events of 1848 must be of Hungarian descent.⁶

I tell that story here because it is but one small incident in a much larger narrative. I did not begin my lifetime of teaching Constitutional Law with any thought that my interests would include comparative constitutionalism. My journey to comparativism has included directing the revision of Virginia’s state constitution.⁷ That experience had a distinctly comparative flavor, as I considered the drafting and interpretation of other state constitutions, the better to advise Virginia’s revisors.⁸ With the passage of time, I began to be asked to compare notes with drafters at work on new constitutions in other countries, especially in the post-communist countries of Central and Eastern Europe. It might be said that I drifted into comparative constitutionalism, rather in the manner of a lawyer who acquires areas of specialization because that is what his law firm or his clients ask him to do. No matter how I got there, it did not take me long to realize what profound pleasure I have derived from the study and practice of comparative constitutionalism. For me, immersion in the world of comparative constitutionalism has been one of the great intellectual adventures of a lifetime.

INTRODUCTION: COMPARATIVE CONSTITUTIONALISM’S MODERN RENAISSANCE

Comparative constitutionalism is as least as old as Aristotle. Eager to explore the best forms of government and the conditions of the good life, Aristotle studied the constitutions of 158 Greek cities and tribes, although only one fragment, his study of Athens’ Constitution, sur-

6. As to the eventual fate of the Café Pilvax, sources are not in agreement. Noel Riley Fitch and Andrew Midgley say that it was demolished in 1912. NOEL RILEY FITCH & ANDREW MIDGLEY, *THE GRAND LITERARY CAFÉS OF EUROPE* 77 (2006). Other sources say that it has been replaced by a restaurant. MICHAEL JACOBS, *BUDAPEST: A CULTURAL GUIDE* 155 (1998); Carl Honore, *Bohemian Coffee Houses in Hungary’s Capital*, *GLOBE & MAIL*, Nov. 2, 1996, at F2.

7. See A.E. Dick Howard, *Adopting a New Constitution: Lessons from Virginia*, in *THE POLITICS OF STATE CONSTITUTIONAL REFORM* 73 (G. Alan Tarr & Robert F. Williams eds., 2006).

8. How else would I know that Louisiana’s constitution declared that Huey P. Long’s birthday “shall be and forever remain a legal holiday” in that state, and that Oklahoma’s constitution specified the flash test for kerosene? See LA. CONST. of 1921, art. XIX, § 22 (1936); OKLA. CONST. art. XX, § 2. The Louisiana provision, approved in 1936, was omitted when the constitution was revised in 1974. The holiday remains on the statute books in Louisiana. LA. REV. STAT. ANN. § 1:55(A)(1) (1951 & Supp. 2009).

vives.⁹ Herodotus, wishing to assess Greek ethics and politics, traveled throughout the known world, recording the customs and values of Persia, Egypt, and elsewhere.¹⁰

Down through the centuries, comparisons have engaged many of the best minds, Montesquieu being one obvious example.¹¹ At the dawn of the age of modern constitutions, the American founders probed the lessons to be drawn from antiquity and from more recent practice. James Madison, tutored at Princeton by John Witherspoon, imbibed the teachings of the Scottish Enlightenment. On the eve of the Philadelphia Convention, Madison read deeply into the experience of ancient and modern confederacies, the better to underpin his Virginia Plan, which became the basis for the Convention's deliberations.¹²

Across the Atlantic, French intellectuals and reformers were fascinated by the unfolding American experience. George Mason's Declaration of Rights for Virginia (1776) directly influenced France's Declaration of Rights of Man and the Citizen.¹³ After the Virginia legislature enacted Thomas Jefferson's Bill for Religious Freedom into law, Jefferson, then in Paris, saw it included in Demeunier's Encyclopedia.¹⁴ When the National Assembly debated France's first Constitution, competing factions used American state constitutions as exemplars. The more moderate faction pointed to the Massachusetts Constitution of 1780, with its checks and balances, while the more radical faction invoked Pennsylvania's 1776 Constitution, more based in popular control of government (the radical faction carried the day, looking to the National Assembly to reflect a Rousseau-like general will).¹⁵

9. ARISTOTLE, *THE ATHENIAN CONSTITUTION* (P.J. Rhodes trans., Penguin Classics 1984).

10. See HERODOTUS, *THE HISTORIES* 3-168 (Robin Waterfield trans., Oxford Univ. Press 1998).

11. Montesquieu's most famous work is, of course, his *De l'Esprit des Loix* (1748). See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, 2 *OEUUVRES COMPLETES: DE L'ESPRIT DES LOIS* (Roger Caillois ed., Gallimard 1951) (1748). For an English translation, see CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds., Cambridge Univ. Press 1989) (1748).

12. James Madison, *Notes on Ancient and Modern Confederacies*, in 9 *THE PAPERS OF JAMES MADISON* 3-24 (Robert A. Rutland & William M.E. Rachal eds., 1975).

13. See R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800*, at 518-21 (1959).

14. In a letter to James Madison, Jefferson wrote: "The Virginia act for religious freedom has been received with infinite approbation in Europe and propagated with enthusiasm. . . . It has been translated into French and Italian, has been sent to most of the courts of Europe, and has been the best evidence of the falshood [sic] of those reports which stated us to be in anarchy. It is inserted in the new Encyclopedie, and is appearing in most of the publications respecting America." Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 10 *THE PAPERS OF THOMAS JEFFERSON* 602, 603-04 (Julian P. Boyd ed., 1950).

15. On the debates in the French National Assembly, including references to the American constitutional experience, see PALMER, *supra* note 13, at 489-502.

The ensuing years have seen a lively international traffic in constitutional ideas. When the revolutions of 1848 broke out in Europe, the delegates who gathered at the Paulskirche in Frankfurt showed their intimate knowledge of American federalism and judicial review as they shaped a constitution for Germany. Although their draft, opposed by Germany's conservative powers, was ultimately not adopted, it remained an important feature of German constitutional culture and ultimately influenced today's German Basic Law.¹⁶

This constitutional traffic has taken many forms. Sometimes revolutionaries look abroad for examples, as in the revolutions of 1848. Other times a departing colonial power leaves behind a legal and constitutional legacy, as when Great Britain bequeathed the common law and constitutions modeled after Westminster in its former colonies in Africa (these constitutions proved short-lived in those countries where one-party rule or autocrats took control).¹⁷ Other transfers of constitutional ideas have followed military defeat, as when MacArthur's military government largely wrote the constitution that remains in force in Japan today.¹⁸

In light of this transnational activity, one would expect academic interest to follow. One could imagine that comparative constitutionalism would flourish in the classrooms of American law schools and that American law professors would turn their pens to comparative constitutional law topics. Thinking back to my days as a law student, I cannot recall my constitutional law professor's having referred to another country's constitution (I hasten to add that his journey through American constitutionalism was rich and rewarding). International law was taught at the University of Virginia School of Law, of course, but I doubt that any member of the faculty entertained the notion of teaching comparative constitutional law.

In 1884, William W. Crane and Bernard Moses published *Politics: An Introduction to the Study of Comparative Constitutional Law*.¹⁹

16. See Bernd J. Hartmann, *How American Ideas Traveled: Comparative Constitutional Law at Germany's National Assembly in 1848–1849*, 17 TUL. EUR. & CIV. L.F. 23, 36, 64 (2002).

17. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 70–78 (Douglas Greenberg et al. eds., 1993). See generally J. C. McPetrie, *Survey of Constitutions Drafted at the Colonial Office Since 1944*, in CHANGING LAW IN DEVELOPING COUNTRIES 29 (J.N.D. Anderson ed., 1963).

18. See DALE M. HELLEGERS, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION 487–518 (2001); THEODOR MCNELLY, THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION 1–31 (2000); RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 81–93 (2002).

19. WILLIAM W. CRANE & BERNARD MOSES, POLITICS: AN INTRODUCTION TO THE STUDY OF COMPARATIVE CONSTITUTIONAL LAW (1884).

These authors took an organic approach to their subject, seeing a constitution as the expression of national will. The nation, they argued, “is an organic social being, a growth, and not an artificial creation.”²⁰ Like Aristotle, Crane and Moses were concerned with determining the locus of sovereignty—“the person or persons competent to amend the constitution.”²¹ When, in 1890, John W. Burgess published his *Political Science and Comparative Constitutional Law*, he took an avowedly comparative approach.²² “If . . . my book,” Burgess writes, “has any peculiarity, it is in its method. It is a comparative study. It is an attempt to apply the method, which has been found so productive in the domain of Natural Science, to Political Science and Jurisprudence.”²³ For Burgess, the drafting of constitutions was inherently a political, rather than legal, process. Placing his treatise under the heading of political science rather than constitutional law, Burgess declared, “The formation of a constitution seldom proceeds according to the existing forms of law. Historical and revolutionary forces are the more prominent and important factors in the work.”²⁴ In the scholarship of the late nineteenth century, the emerging study of comparative constitutional law was simply an extension of comparative politics.

In the years since World War II, comparative constitutional law has come into its own, both in the classroom and in the journals. In an informal survey of fifty of the top American law schools, I find at least forty to have a course in comparative constitutional law, comparative constitutionalism, or the like. These courses are taught by some of the country’s most distinguished scholars. At Yale Law School, for example, Bruce Ackerman teaches a seminar in “World Constitutionalism.” Noting the era of the American, French, and Latin American revolutions, Professor Ackerman’s syllabus encourages students to “use their understanding of one or another national history as [a] source for comparative insight.”²⁵ At Harvard Law School, Frank Michelman’s course in Comparative Constitutional Law examines “selected problems of both constitutional design and adjudication.”²⁶ Donald L. Horowitz’s

20. *Id.* at 6.

21. *Id.* at 144.

22. See generally JOHN W. BURGESS, 1 *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (1890).

23. *Id.* at vi.

24. *Id.* at 90.

25. Yale Law School Course Offerings, <http://www.law.yale.edu/academics/internationallawcourseofferings.asp#spring> (last visited Sept. 4, 2009) (listing spring term international law courses).

26. HLS: Courses, <http://www.law.harvard.edu/academics/courses/2009-10/?id=6798> (last visited Sept. 4, 2009) (listing comparative constitutional law courses for the 2009–10 academic year).

seminar in Comparative Constitutional Design, at Duke University's law school, considers "political institutions in democratizing or redemocratizing countries, especially those divided by ethnic or religious affiliations."²⁷ At Georgetown University, Vicki Jackson's Comparative Constitutional Law seminar looks at a number of specific topics, including abortion, minorities, federalism, and social welfare rights, and explores fundamental questions about the nature of a constitution and the process of constitution-making.²⁸ David Fontana, in his Comparative Constitutional Law course at George Washington University's law school, compares American and non-American legal systems and considers both structural issues, including federalism and separation of powers, and individual rights, including affirmative action and freedom of speech.²⁹ Aside from making the reader's mouth water—imagine sitting in those courses and seminars!—these descriptions convey a sense of both the depth and range of comparative constitutionalism as it is taught in American law schools.

Respected scholars have given us important and useful textbooks and treatises. These books amplify the possibilities open to professors and students in the academy. Two recent publications invite particular attention. One is the second edition of Vicki Jackson and Mark Tushnet's *Comparative Constitutional Law*.³⁰ In this edition, as in its predecessor, the authors are wary of grand theories of constitutionalism. They ground their discussion in historical and cultural contingencies.³¹ Rather than focusing solely on issues of doctrine, they devote a fair amount of attention to examining the theory and purposes of comparative constitutionalism.³² The new edition discusses such developments as judicial interpretation under the United Kingdom's Human Rights Act of 1998, federalism in the European Union and Canada, and positive rights in South Africa.³³ The other recent treatise worthy of special note is *Comparative Constitutionalism*, edited by Norman Dorsen, Michel Rosen-

27. Duke Law: Courses: Comparative Constitutional Design, <http://www.law.duke.edu/curriculum/courseinfo/course?id=170> (last visited Sept. 4, 2009).

28. Georgetown Law – Courses (Online Curriculum Guide), http://www.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=189 (last visited September 4, 2009) (giving description of Comparative Constitutional Law Seminar).

29. International & Comparative Law, <http://www.law.gwu.edu/Academics/curriculum/Pages/intl.aspx> (last visited Sept. 4, 2009) (listing comparative constitutional law courses at the George Washington University Law School).

30. See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006).

31. See Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2581 (2004) (book review).

32. See David Fontana, 25 YALE J. INT'L L. 233, 243 (2000) (reviewing VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1st ed. 1999)).

33. JACKSON & TUSHNET, *supra* note 30, at v–vi.

feld, Andras Sajó, and Susanne Baer, and published in 2003.³⁴ This text takes a “neofunctionalist” approach, suggesting the use of comparative constitutionalism to solve contemporary problems through a general science of constitutions. The editors show a particular interest in convergence and the search for universal values. They also note the emergence of transnational constitutional regimes, such as the European Convention on Human Rights.³⁵

Overviews and general textbooks aside, the field of comparative constitutionalism has spawned enormous growth in its many subfields. Recent years have seen studies, among others, in comparative human rights,³⁶ comparative judicial review,³⁷ comparative separation of powers,³⁸ comparative federalism,³⁹ comparative positive rights,⁴⁰ and comparative studies of religion and society.⁴¹ Other studies examine constitutional developments in particular countries and regions.⁴² Moreover, scholars debate at length the writing about and teaching of comparative constitutionalism, an indication that the discipline’s role in the academy is far from settled.⁴³ Looking at periodicals, one finds not only articles

34. MICHEL ROSENFELD, ANDRAS SAJO, SUSANNE BAER & NORMAN DORSEN, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003).

35. Teitel, *supra* note 31, at 2570–80. For another example of recent scholarship examining the phenomenon of transnational constitutional regimes, see Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 *IND. J. GLOBAL LEGAL STUD.* 621 (2009).

36. *See, e.g.*, PENELOPE E. ANDREWS & SUSAN BAZILLI, *LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE* (2008); RONALD E. LEENES, BERT-JAAP KOOPS & PAUL DE HERT, *CONSTITUTIONAL RIGHTS AND NEW TECHNOLOGIES: A COMPARATIVE STUDY* (2008).

37. *See, e.g.*, MICHAEL LOUIS CORRADO, *COMPARATIVE CONSTITUTIONAL REVIEW* (2005); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

38. *See, e.g.*, Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 *AM. J. COMP. L.* 531 (2009).

39. *See, e.g.*, JOHN KINCAID & G. ALAN TARR, *CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES* (2005); G. ALAN TARR, ROBERT F. WILLIAMS & JOSEF MARKO, *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* (2004).

40. *See, e.g.*, MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

41. *See, e.g.*, ROBERT FATTON, JR. & R.K. RAMAZANI, *RELIGION, STATE, AND SOCIETY: JEFFERSON’S WALL OF SEPARATION IN COMPARATIVE PERSPECTIVE* (2009).

42. *See, e.g.*, GIOVANNI BOGNETTI, *THE AMERICAN CONSTITUTION AND ITALIAN CONSTITUTIONALISM: AN ESSAY IN COMPARATIVE CONSTITUTIONAL HISTORY* (2008); FRANCIS MADING DENG, *IDENTITY, DIVERSITY, AND CONSTITUTIONALISM IN AFRICA* (2008); Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 *GA. J. INT’L & COMP. L.* 1 (2004).

43. *See, e.g.*, Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 *U. CHI. L. REV.* 265 (2003); Michel Rosenfeld, *The Role of Constitutional Scholarship in Comparative Perspective: An Exchange Among Armin von Bogdandy, Robert Post, Matthias Kumm, and Alexander Somek*, 9 *INT’L J. CONST. L.* 361 (2009); Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 *ST. LOUIS U. L.J.* 671 (2005); Catherine Valcke, *Global Law Teaching*, 54 *J. LEGAL EDUC.* 160 (2004).

in the traditional publications, but also the appearance of journals, such as the *International Journal of Constitutional Law*, especially suited to essays on comparative constitutionalism.⁴⁴ One of the most exciting developments in comparative constitutionalism is to watch the emergence of some especially promising younger scholars, whose insights promise to enrich the field further.⁴⁵

No development in recent years has drawn more attention to comparative constitutionalism than citations to foreign law by Justices of the United States Supreme Court. For years, some scholars have argued that American constitutional law would be enriched by the use of comparative material.⁴⁶ The issue burst into public view with three high-profile cases handed down between 2002 and 2005.⁴⁷ Much of the current scholarship in comparative constitutional law delves into the legitimacy of comparative citations in the interpretation of the United States Constitution.⁴⁸ Harold Koh has expressed the hope that “the American ostrich is finally starting to take its head out of the sand.”⁴⁹ Interest in this issue is heightened by the flow of constitutional ideas among constitutional and

44. See JACKSON & TUSHNET, *supra* note 30, at v. The *International Journal of Constitutional Law* was first published in 2003.

45. Among the younger scholars, one might note Sujit Choudhry (Toronto), Rosalind Dixon (Chicago), David Fontana (George Washington University), Tom Ginsburg (Chicago), Jamal Greene (Columbia), Ran Hirschl (Toronto), and David Law (Washington University). See CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? (Sujit Choudry ed., 2008); THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed., 2006); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (forthcoming Oct. 2009); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. (forthcoming 2009); HIRSCHL, *supra* note 37; RAN HIRSCHL, SACRED JUDGMENTS: THE RISE OF CONSTITUTIONAL THEOCRACY (forthcoming 2010); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008). I am sure there are other younger scholars worthy of similar note, and I apologize to any whom I should have included. I have simply given some examples here, to underscore how much important work is being done by rising figures in the field.

46. See, e.g., Donald P. Kommers, *Comparative Constitutional Law: Casebooks for a Developing Discipline*, 57 NOTRE DAME LAW. 642, 656–57 (1982).

47. The three cases are *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding the execution of mentally retarded criminals unconstitutional on Eighth Amendment grounds), *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating the criminalization of same-sex sodomy as a violation of the Due Process Clause), and *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the execution of juvenile offenders unconstitutional on the basis of the Eighth Amendment).

48. See, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 642 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005). Sujit Choudhry recently edited an entire book dedicated to the subject. THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 45.

49. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 48–51 (2004).

other courts around the world. Paul Kahn suggests that judges of those courts “write opinions as much for each other—drawing freely on their collective work—as they do for their own citizenry.”⁵⁰ Indeed, he continues, this traffic in ideas “is the dominant discourse of the contemporary practice of comparative constitutionalism and the main source of interest in the field.”⁵¹ Anne-Marie Slaughter has written of a “global community of courts.”⁵² Mark Tushnet argues that American jurisprudence cannot remain isolated and that resistance to comparative citation cannot last.⁵³ Whatever the prospects for more citation to comparative data by Supreme Court justices in the United States, the practice is the subject of widespread and spirited debate among commentators.⁵⁴

Looking back over the past half century, what factors can we identify as having spurred the growth of interest in comparative constitutionalism? A number of factors are in play. To begin with, since World War II, the sheer number of countries has vastly increased, especially with decolonization. Being a sovereign nation calls, almost reflexively, for a constitution, as much as it does for a flag and a national anthem. There are fewer than a half dozen countries that do not have written constitutions, the United Kingdom being the best known example.

The global growth of democracy has unquestionably been a key factor in the modern era’s heightened interest in comparative constitutionalism. In a famous formulation, Samuel Huntington identified successive “waves” of democratization.⁵⁵ The first was a long, slow wave, from 1828 to 1926.⁵⁶ A second wave occurred from 1843 to 1964.⁵⁷ Each of these two waves, Huntington observed, was followed by a “reverse wave” marked by the failure of some of the recently established

50. Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2679 (2003).

51. *Id.*

52. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003).

53. See Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985 (2009).

54. I develop this debate more fully, *infra* Part IV. For summaries of the debate among commentators, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 748–52 (2005); Sujit Choudhry, *Migration As a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 45, at 1–5; Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 554–60 (2007); Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 278–80 (2008); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653, 654 n.3 (2009).

55. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 15–26 (1991).

56. *Id.* at 16–17.

57. *Id.* at 18–19.

democracies.⁵⁸ Then came an explosive “third wave,” beginning with the overthrow of Portugal’s dictatorship in 1974.⁵⁹ If the twentieth century was a century of totalitarianism, world war, genocide, and brutality, it proved also to be a century of democracy.⁶⁰ As of 1950, only twenty-two of the world’s eighty sovereign nations were democratic.⁶¹ By the end of the century, Freedom House counted 120 democracies, the highest number ever and the greatest percentage (63%) of the world’s countries.⁶² In a 1999 report, the U.S. Department of State was so bold as to identify democracy and human rights as a third “universal language” (along with money and the Internet).⁶³

The momentum for global democratization has greatly slowed in recent years. Around the time of communism’s collapse in 1989, it was possible to see potential democracies in dichotomous terms—countries on the road to democracy, and those still under authoritarian or totalitarian rule.⁶⁴ Today, however, many of the countries seen as hopeful cases are now in what Thomas Carothers calls a “gray zone,” semiauthoritarian countries whose leaders resist efforts at democratic reform.⁶⁵ We are seeing the rise of new political models. Toward the close of the twentieth century, reformers could claim liberal democracy as the only surviving political model with global reach. Now it is not so easy to assume democracy’s preeminence, as major players like China and Russia take different, more authoritarian roads.⁶⁶

Having a constitution or practicing some form of “democracy” by no means assures that a country has constitutionalism in the sense of having a liberal constitutional democracy. The Soviet Union’s Constitution of 1936 glowed with promises to its people, but everyone knew that the document was a Potemkin Village, its provisions meaning whatever the Party chose for them to mean.⁶⁷ The spread of democracy has brought,

58. *Id.* at 17–21.

59. *Id.* at 21–26.

60. See Larry Diamond, *A Report Card on Democracy*, HOOVER DIGEST, NO. 3, 2000.

61. Adrian Karatnycky, *1999 Freedom House Survey: A Century of Progress*, J. DEMOCRACY, Jan. 2000, at 187, 187–88.

62. *Id.* at 189.

63. U.S. DEPT. OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2000), available at http://www.state.gov/www/global/human_rights/1999_hrp_report/99hrp_toc.html.

64. Thomas Carothers, *A Quarter-Century of Promoting Democracy*, J. DEMOCRACY, Oct. 2007, at 112, 113–14.

65. *Id.* at 114.

66. See Arch Puddington, *2008 Freedom House Survey: A Third Year of Decline*, J. DEMOCRACY, Apr. 2008, at 93, 93.

67. For the daunting challenges facing constitution makers after the collapse of communism, see A.E. Dick Howard, *Constitutionalism and the Rule of Law in Central and Eastern Europe*, in TRADITION UND WELTOFFENHEIT DES RECHTS: FESTCHRIFT FÜR HELMUT STEINBERGER 755, 758–66 (Hans-Joachim Cremer et al. eds., 2002).

in general, more authentic constitutions. Examples include post-Franco Spain's Constitution of 1978, the constitutions adopted in Central and Eastern Europe after the collapse of communism in 1989, and the charter drafted in South Africa after apartheid's demise. The advent of democracy in a country does not, however, necessarily advance liberalism or bring constitutionalism. When parties or politicians appeal to narrow, chauvinistic interests, elections can be a parochializing exercise, as commonly occurs in the former Yugoslavia.⁶⁸

The drafting of such constitutions has brought a greater diversity of constitutional arrangements. No longer does one study just the constitutions of the Anglo-American and Western European world. Countries like India and South Africa, while influenced by western ideas, also draw upon their own distinctive historical and cultural traditions. With so many constitutional arrangements to study, the opportunities for comparisons are many and rich. There are common law systems and civil law systems. Countries may choose between presidential and parliamentary government. Rights mean different things in different cultural settings. Judicial review may take varying forms, with America pointing one direction and Kelsenian constitutional courts in another. A country may have centralized government, or it may develop one or another of the diverse forms of federalism or devolution.

When one reflects on the factors that have helped drive modern interest in comparative constitutionalism, several stand out. In this Essay, I have chosen the following for special attention: (1) human rights, (2) judicial review, (3) federalism, and (4) debate over the Supreme Court's citation of comparative data. In each of these four sections, I begin with an overview, surveying the development of the particular topic up to World War II. Secondly, I sketch out important developments since World War II. Thirdly, I assess factors that strike me as helping to account for heightened interest in that topic in the post-war period. Finally, I consider the implications for the study and uses of comparative constitutionalism.

I. HUMAN RIGHTS: THE INTERNATIONAL QUEST FOR HUMAN DIGNITY

A concern with rights in one form or another traces back many centuries. In most traditions, notions of rights have been deeply intertwined with religion. One manifestation of rights inheres in western precepts of natural law. In the early modern era, with the rise of modern science and new notions of the human condition, natural law began to evolve into

68. Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.–Dec. 1997, at 22.

more atomistic conceptions of natural rights. Probably the most influential exponent of natural rights during this time was John Locke. He conceived natural and inalienable rights which, inhering in a state of nature, were not—indeed, could not be—given up when entering into a social compact.⁶⁹ Rights were at the heart of the rhetoric of the two great revolutions of the late eighteenth century. Thomas Jefferson turned Locke's prose into poetry in penning the Declaration of Independence, and George Mason gave us Virginia's Declaration of Rights, the model for other state bills of rights and eventually for the federal Bill of Rights. Across the Atlantic, French visionaries adopted the Declaration of Rights of Man and the Citizen, which continues to this day to be an organic part of France's Constitution.

The ideals of the French Revolution were overborne by the Reign of Terror, and the early republic gave way to Napoleon's Empire. In the minds of critics, conservative and otherwise, natural rights carried, for some, the taint of their association with the radicalism of the French Revolution and, for others, its being unscientific and without objective grounding. Edmund Burke, who preferred the teachings of history and tradition, condemned the French revolutionaries for their "metaphysical declarations" and their "monstrous fiction" of human equality for giving rise to "false ideas and vain expectations" in ordinary people.⁷⁰ Jeremy Bentham, the utilitarian reformer, was caustic: "Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts."⁷¹ The nineteenth century saw the rise of positivism as a way of thinking about law and rights.⁷² Moreover, with the sharpening of the struggle between labor and capital, political discourse became preoccupied with social and economic battles, with socialists eschewing the "rights of the individual" for the "welfare of the community."⁷³

The carnage of World War I spurred efforts to heighten protection for individual rights. Some European and American intellectuals urged the adoption of an international bill of rights, but this nascent movement

69. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

70. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 42 (Thomas Mahoney ed., Bobbs-Merrill 1955) (1790).

71. Jeremy Bentham, *Anarchical Fallacies*, in *NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN* 46, 53 (Jeremy Waldron ed., 1987). David Hume shared in Bentham's skepticism, arguing that natural law and natural rights were simply imaginary metaphysical phenomena. Burns H. Weston, *Human Rights*, 6 *HUM. RTS. Q.* 257, 261 (1984).

72. For John Austin's exposition of his theory of legal positivism, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid Rumble ed., Cambridge Univ. Press 1995) (1832).

73. Weston, *supra* note 71, at 261.

lacked traction.⁷⁴ It took another round of tragic lessons, those imparted by totalitarian regimes and the suffering of World War II, to bring human rights truly to the fore. The United Nations Charter, adopted in 1945, begins by affirming a “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”⁷⁵ The architects of the new universe of human rights soon took more concrete steps. In 1948, the Universal Declaration of Human Rights was adopted, with only the Soviet bloc, Saudi Arabia, and South Africa abstaining.⁷⁶ Then, in 1966, came two important covenants: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. While the Declaration of 1948 and the later covenant on positive rights remained largely aspirational, the covenant on civil and political rights was augmented by an enforcement mechanism, the United Nations Human Rights Committee.⁷⁷ Designed to win the allegiance of regimes in many parts of the world, these international documents avoid being grounded in arguably ethnocentric concepts such as natural law or the social compact. Instead they are seen as being derived from the “inherent dignity of the human person.”⁷⁸

The postwar surge in protection for human rights especially was manifested by the Council of Europe’s adoption in 1950 of the European Convention on Human Rights. Soon thereafter followed enforcement mechanisms—the European Commission of Human Rights and the European Court of Human Rights—allowing Europeans to appeal to a supranational body if their own respective nations infringed their rights under the Convention. In the half-century since their inception, these

74. For a lengthy history of this movement, see Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447 (1992). See also PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 4–12, 105–38 (1998).

75. U.N. Charter pmbl.

76. Douglass Cassel, *The Globalization of Human Rights: Consciousness, Law and Reality*, 2 NW. U. J. INT’L HUM. RTS. 6, ¶ 50 (2004); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 11 (1982).

77. On the two covenants and the work of the Human Rights Committee, see generally Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 473 (Philip Alston ed., 1992); PHILIP ALSTON, RYAN GOODMAN & HENRY STEINER, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 844–924 (3d ed. 2008); DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1991) (discussing the Human Rights Committee and the International Covenant on Civil and Political Rights); Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra*, at 369.

78. Louis Henkin, *Constitutionalism and Human Rights*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 383, 388 (Louis Henkin & Albert J. Rosenthal eds., 1990); Weston, *supra* note 71, at 257–58.

mechanisms have come to be widely and effectively employed.⁷⁹ Human rights have also played a more central role in the drafting of post-World War II constitutions. Germany's Basic Law puts rights at the beginning of the document and includes a provision making international law an integral part of German federal law.⁸⁰ The collapse of communism in 1989 brought constitutions whose drafters had personal experience with regimes for whom rights were whatever the ruling party thought they should be.⁸¹ Poland's 1997 Constitution proclaims: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."⁸² Nor was the constitutionalization of human rights limited to Europe. The drafters of India's Constitution, for example, were particularly concerned with the articulation of human rights.⁸³ South Africa's Constitution, drafted with burning recollection of the inhumanities of apartheid, commands judges who interpret rights provisions to "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom."⁸⁴

After so many centuries during which philosophers and constitution makers have mulled notions of rights, how does one account for the surge in interest in human rights during the half century or so since World War II? Several factors have surely been among the causes of this phenomenon. One is a revulsion at the evils of the twentieth century—the Nazi regime, fascism, genocide, ethnic cleansing, communist ideology, and other blights on the human consciousness. The Nuremberg Trials helped achieve a shift from a nineteenth-century notion of positivism to acceptance of self-evident norms of international behavior.⁸⁵ Second, decolonization and the emergence of new nations played

79. PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1–93 (4th ed. 2006).

80. GRUNDGESETZ [GG] [Constitution] arts. 1–19, 25 (F.R.G.).

81. On the drafting of constitutions in post-communist Central and Eastern Europe, see generally RETT R. LUDWIKOWSKI, *CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE* (1996).

82. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 30 (Pol.).

83. See Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 *CARDOZO L. REV.* 1095, 1104–07 (2000).

84. S. AFR. CONST. 1996 ch. 2, § 39(1). In its short lifespan, the South African Constitutional Court has quickly become one of the most important tribunals in the world. See Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *GOVERNANCE IN A GLOBALIZING WORLD* 258, 258–60 (Joseph S. Nye & John D. Donahue eds., 2000); Slaughter, *supra* note 52, at 198.

85. For insiders' accounts of the Nuremberg trials, see DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT* (1999); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992).

a part in heightening human rights consciousness. Non-western nations were often the most ardent advocates of articulating human rights standards. Third, the revolution in communications technology has made it possible for victims of human rights abuses to telegraph their situation to other countries and for activists to be quick to respond.⁸⁶ Finally, globalization may be a factor, to the extent that intertwined economies provide opportunities for economic sanctions to be visited upon states that violate human rights.⁸⁷

The international human rights revolution has had undeniable impact upon comparative constitutionalism. It is hard to imagine drafters of a new constitution going about their task unconcerned about human rights standards. Scholars who write about constitutional law in a given country do so in the shadow of comparative norms. And judges, wherever they come down on the uses of comparative data, cannot escape thinking about the question whether they should look only to domestic sources or also to those from other countries or those based in international law. Comparative constitutionalism has drawn from the human rights revolution in several ways. To begin with, the vast body of human rights norms, both in basic documents and in interpretations, offers a rich trove of material for the design of constitutions. For half a century, the Universal Declaration of Human Rights has served as a model for constitution makers. Countless constitutions written since 1948 contain guarantees that either mirror or draw upon the Declaration.⁸⁸ In the years since the Declaration's adoption, constitutional actors can look to a far greater range of sources for human rights than even those found in international documents. These include the bills of rights of other nations (South Africa and Canada seem especially influential), regional charters (none carry more caché than the European Convention on Human Rights), the experiences of countries with salutary human rights records, writings of eminent scholars, the norms of such bodies as the Organization for Security and Cooperation in Europe (an example is its

86. Consider how, despite the Iranian regime's efforts to ban journalists from covering post-election protests in Tehran, pictures taken by ordinary protesters were seen around the world. *See, e.g.,* Iran Views: Quiet but not Normal, http://news.bbc.co.uk/2/hi/middle_east/8131056.stm (last visited Sept. 4, 2009); Robert Mackey, Latest Iran Protests Reverberate Online, <http://thelede.blogs.nytimes.com/2009/07/31/latest-iran-protests-reverberate-online/> (July 31, 2009, 17:32 EST).

87. *See* Cassel, *supra* note 76, ¶ 127. The limits of such sanctions are suggested by such cases as the tenacity of the Mugabe regime in Zimbabwe.

88. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 313 (1995–96). In my own experiences consulting with constitution makers, I have found that one of the quickest ways to persuade drafters to include a rights provision is to point out that it is to be found in one of the leading international or regional documents such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights.

Copenhagen Document) and of the Council of Europe's Venice Commission, and the jurisprudence of important constitutional and other high courts (Germany's Constitutional Court is especially well regarded).

Not all norms converge. Thus, another way in which the world of human rights shapes comparative constitutionalism is recourse to the differing ways in which even seemingly standard norms play out in the setting of particular nations and cultures. Countries often have different reasons for adopting a given human rights norm. After experiencing British rule that divided India along cultural lines, the drafters of that country's constitution looked to human rights as a way of nurturing a national identity, achieving reforms, and preserving the peace.⁸⁹ In South Africa, constitution makers saw the declarations of rights as being a direct response to the abuses suffered under apartheid.⁹⁰

Nations differ as to how they understand the idea of rights. As reflected in the language of the Declaration of Independence, Americans have been accustomed to seeing rights as being natural and alienable, as having an origin before and beyond positive law. Europeans, by contrast, have long tended to see rights as flowing from law—one of the legacies of French legal thought and the civil code.⁹¹ Europe has been moving away from this model since 1945, but there is still force in Wiktor Osiatynski's observation that "the American order rests on the principle that power is a grant of freedom and the European order rests on the principle that freedom is a grant of power."⁹² Such cultural differences help explain how rights are limited. Most of the world's constitutional courts subscribe to a jurisprudence of pragmatism, in which rights can be shaped and limited in light of society's needs. The tradition is different in American courts, where text and history hold more sway.⁹³

89. Ghai, *supra* note 83, at 1105–07.

90. *Id.* at 1123–24.

91. Influenced by Rousseau's concept of the general will, the French constitutional tradition sees rights as achieved and guaranteed through law. Louis Henkin, *Revolutions and Constitutions*, 46 LA. L. REV. 1023, 1044 (1989). As a result, the Napoleonic Code has historically been more central to French legal thought than have France's constitutions (of which there have been sixteen). See Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 22 (1997).

92. Professor Osiatynski's remarks during a panel discussion held at the Miller Center in Charlottesville, VA on April 11–12, 1989 are published in A.E. Dick Howard et al., *Roundtable Discussion*, in CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND AND FRANCE 143, 156 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991).

93. See James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 31–37 (2006); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 479–80 (2003). This is not just the creation of foreign judiciaries. Constitutions around the globe often make these techniques explicit. For example, Section 36(1) of the South African Constitution permits the limitation of provisions of its Bill of Rights so long as the restraint is "reasonable and justifiable in an

Divergence may also be seen in how courts respond to claims of positive rights, such as economic entitlements.⁹⁴ There is also significant difference as regards the recognition of collective rights. Classical liberal constitutions, such as that of the United States and its Bill of Rights, are framed in terms of traditional individual rights.⁹⁵ Countries riven by differences of culture, religion, or nationality often have constitutions providing cultural autonomy or other collective recognition and protections for minority groups.⁹⁶

Discourse about human rights implicates a larger debate about universalism and relativism. Some countries in Asia and Africa complain that talk about human rights is a form of cultural imperialism, an effort by the West to force their values on other parts of the world.⁹⁷ Such complaints may shift with time and experience. In the years after decolonization, many African leaders, especially those who found a one-party state congenial to their own political ambitions, were able to sell their people on the notion that individual rights were western inventions, not suited to African conditions. After experience with authoritarian governments created by African politicians like Hastings Banda or Robert Mugabe, many Africans are more willing to reconsider their assumptions about individual rights being an uncongenial idea.⁹⁸ Whatever

open and democratic society based on human dignity, equality and freedom.” S. AFR. CONST. 1996 ch. 2, § 36(1).

94. See Ran Hirschl, “*Negative*” Rights vs. “*Positive*” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order, 22 HUM. RTS. Q. 1060, 1095–96 (2000) (discussing developments in Canada, New Zealand, and Israel). On social and economic rights, see generally Keith D. Ewing, *The Case for Social Rights*, in PROTECTING HUMAN RIGHTS 323 (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., 2003); ELLIE PALMER, JUDICIAL REVIEW, SOCIO-ECONOMIC RIGHTS AND THE HUMAN RIGHTS ACT (2007); TUSHNET, *supra* note 40; Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 INT’L J. CONST. L. 56 (2004).

95. Justice Hugo Black called such rights the Constitution’s “Thou shalt nots”: “We can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.” *Reid v. Covert*, 354 U.S. 1, 8–9 (1957) (Black, J., plurality opinion).

96. On collective rights, see generally CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?, *supra* note 45; Hercules Booyesen, *South Africa: In Need of a Federal Constitution for its Minority Peoples*, 19 LOY. L.A. INT’L & COMP. L.J. 789 (1997); Makau Mutua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927 (2006).

97. On cultural resistance to universal claims regarding human rights, see generally HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES (Michael C. Davis ed., 1995); Thomas Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT’L L. 593 (1997); Surya P. Subedi, *Are the Principles of Human Rights “Western” Ideas?: An Analysis of the Claim of the “Asian” Concept of Human Rights From the Perspective of Hinduism*, 30 CAL. W. INT’L L.J. 45 (1999); Symposium, *East Asian Approaches to Human Rights*, 2 BUFF. J. INT’L L. 193 (1996).

98. See H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Consti-*

er theory may say about human rights, their origin, their nature, and their universality, comparative constitutionalism can be a handmaiden to reform. Human rights activists, as much as constitutional draftsmen, scholars, and jurists, have good reason to become practitioners of the comparativist's art.

II. COURTS AND CONSTITUTIONS: THE GLOBAL GROWTH OF JUDICIAL POWER

Before World War II, judicial review was very much the exception among the nations of the world. Parliamentary supremacy was commonplace. The early twentieth century seemed fallow ground for judicial review. An effort by several French legal scholars to follow the American example foundered on the argument that courts would pose a reactionary obstacle to social progress (how do you say “Nine Old Men” in French?).⁹⁹ After World War I, both Czechoslovakia and Austria, the latter the home of Hans Kelsen, created the first constitutional courts in Europe, but these efforts to make the idea of the *grundnorm* a judicial reality accomplished little.¹⁰⁰

By the twenty-first century, however, judicial review has become, if not universal, certainly widespread. Indeed, a majority of today's constitutions contain explicit provisions for some form of judicial review.¹⁰¹ The aftermath of World War II proved to be a watershed in the rise of judicial review, coupled with a heightened sense of the importance of constitutional guarantees against the tragic events of the wartime era. The most important and influential move was Germany's adoption, in 1949, of its Basic Law and its creation, two years later, of its Constitutional Court.¹⁰² This tribunal was destined to become one of the world's

tionalism in Contemporary Africa, 80 TUL. L. REV. 1239, 1317–22 (2006).

99. Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 78, at 38, 42–43 (1990); Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2746–60 (2003).

100. See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 104–05 (2000); Bojan Bugarcic, *Courts As Policy-Makers: Lessons from Transition*, 42 HARV. INT'L. L.J. 247, 250–60 (2001) (discussing the influence of Hans Kelsen on the political nature of modern European judicial review); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 714 (2001); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942) (describing the workings of the Austrian Constitutional Court under the Austrian Constitution of 1920); Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 RATIO JURIS 223, 232–37 (2003) (discussing Kelsen's role in establishing the foundations of the Austrian Constitutional Court).

101. See Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 81 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

102. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL*

most influential high courts. Even France, despite its long tradition of Rousseau's general will and parliamentary supremacy, has created a Conseil Constitutionnel, which has edged toward judicial review.¹⁰³

Independence brought judicial review to post-colonial countries, notably India.¹⁰⁴ The fall of dictatorships saw constitutional courts appear in countries like Spain and Portugal.¹⁰⁵ Judicial review even spread to the sphere of former Soviet dominance with communism's collapse in 1989. Post-Soviet countries created constitutional courts modeled closely on Germany's tribunal.¹⁰⁶ Latin America, Asia, Africa—all have seen the creation of courts with the power of judicial review.¹⁰⁷ Especially prominent is South Africa's Constitutional Court.¹⁰⁸

Not all versions of judicial review are equally robust. In the United Kingdom, the Human Rights Act of 1998 allows judges to find statutes to be incompatible with the European Convention on Human Rights.¹⁰⁹ Such a finding does not invalidate the statute; rather it imposes a politi-

REPUBLIC OF GERMANY 3–17 (1989); DONALD KOMMERS, *THE FEDERAL CONSTITUTIONAL COURT* 2–6 (1994); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 61–62 (2005).

103. On the jurisprudence of the Conseil Constitutionnel, see ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); Raphael Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006*, 25 J.L. ECON. & ORG. 262, 265 (2008); Susan Wright, *The French Conseil Constitutionnel Since the Beginning of 2005: Activity on All Fronts*, 14 EUR. PUB. L. 143, 143–49 (2008).

104. See Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 485–95 (2003); Venkat Iyer, *The Supreme Court of India*, in *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS* 121, 121–22 (Brice Dickson ed., 2007).

105. Spain's Constitutional Court has been of particular interest. See generally James Casey, *The Spanish Constitutional Court*, 25–27 IR. JUR. 26 (1990); Enrique Guillén López, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L.A. L. REV. 529, 530–31 (2008).

106. See RADOSLAV PROCHÁZKA, *MISSION ACCOMPLISHED: ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE* 1–33 (2002); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 1–4 (2005); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 1–3 (2000).

107. For a brief discussion of judicial review in Latin America, see HIRSCHL, *supra* note 37, at 7–8. For a treatment of recent developments in African constitutionalism, see Gardbaum, *supra* note 100, at 716; Prempeh, *supra* note 98. For discussions of the adoption of judicial review in East Asia as well as the Middle East, see Said Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 DRAKE L. REV. 943, 955–60 (2005); Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 916–18 (2006); Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763, 764–66 (2002).

108. See generally Ginsburg, *supra* note 101, at 87; HIRSCHL, *supra* note 37, at 8; MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (2009); NELSON, *supra* note 100, at 110 (2000); Hugh Corder, *Judicial Authority in a Changing South Africa*, 24 LEGAL STUD. 253, 253–54 (2004).

109. Human Rights Act, 1998, c. 42, § 4 (U.K.).

cal obligation on the government to introduce legislation to bring UK law into line with the European Convention. This is not yet full-blown judicial review, but it sets in motion momentum which the creation of a Supreme Court in 2009 may heighten.¹¹⁰ That the land which, for many, embodies the very essence of parliament as the shaper of rights and privileges should take these steps says something about the vitality of judicial review.

After so many years of judicial review being confined to a few countries, how does one account for its global spread, especially in such a relatively short period of time? Several forces have been at play. First, there is the worldwide movement toward democracy and constitutionalism. Government based on popular will and limits placed on popular measures by judges may, of course, at times be in tension. Even so, democracy is a precondition to authentic judicial review. It is hard to imagine an authoritarian government tolerating a genuinely independent judiciary (one has only to recall “telephone justice” in the days of communism). Further, judicial review is a natural corollary of constitutionalism. A country that establishes such features of constitutionalism as human rights, separation of powers, federalism, and the rule of law is not obliged to choose judicial enforcement of the constitution, but experience has shown judicial review to be both the most effective and the most prevalent way to make reality of constitutional guarantees. The human rights discourse that flowered after World War II subtly but forcefully redefined notions of democracy to mean a commitment to constitutional rather than legislative supremacy. Likewise, the creation of structural guarantees, such as separation of powers and federalism, calls for an independent arbiter. Disputes between political branches or between central government and constituent units are often seen as political questions, but history and practice teach that an independent judiciary has an important role to play in assuring the political actors of their constitutional authority.

The spread of constitutionalism tells only part of the story. The rise of the modern administrative state heightens the need for judicial involvement. This could, of course, take the form of judges whose role, as in post-revolutionary France, was seen to be to enforce the legislature’s will. But unease with majoritarian institutions and the abuse of government power, both legislative and administrative, turns attention to the courts. Diverse societies, beset by religious, ethnic, or cultural divisions,

110. For studies of the Human Rights Act in operation, see HELEN FENWICK, CIVIL RIGHTS: NEW LABOUR, FREEDOM AND THE HUMAN RIGHTS ACT 17–19 (2000); HELEN FENWICK ET AL., JUDICIAL REASONING UNDER THE HUMAN RIGHTS ACT 174–81 (2007). The journal *Legal Studies* has devoted a special issue to the creation of the United Kingdom’s Supreme Court. 24 LEGAL STUD. 1, 1–293 (2004).

have added reason to embrace judicial review; India, Canada, and South Africa are cases in point. Finally, domestic pressures aside, the very spread of judicial review has spurred imitation or experimentation in other countries. Decisions like that of the Warren Court in *Brown v. Board of Education* carried moral instruction for many countries. There is also the influence of supranational tribunals. The leading example is the European Court of Human Rights, whose impact on the practices of member states—and, indeed, on countries beyond its jurisdiction—would be hard to overemphasize.¹¹¹

The decisions of constitutional and other high courts offer ample fodder for the comparative constitutionalist. Some of the leading courts, such as those in Germany, Italy, and India, have been at work for over a half century, creating important bodies of case law in important areas (expression, abortion, etc.) on which the comparativist may draw. Moreover, we now have divergent models to form the basis for the study of comparative judicial review. The American model has at least two major competitors—the Kelsenian system of constitutional review dominant in Europe, and the more recent model of “weak-form” review now found in Commonwealth countries such as Canada and New Zealand.¹¹² By contrasting the Kelsenian model with that in the United States, scholars may analyze basic choices in constitutional design. These questions include: Should judicial review be lodged in a generalist or specialized court? Should it be concentrated or dispersed? Should it be concrete or abstract? Is judicial independence better secured by appointment for life or good behavior, or by a long tenure without reappointment? As to the newer form of weak-form review, one taken to allow for a greater legislative role, this can be studied as an alternative model put forth as promoting constitutional dialogue between the branches.¹¹³

In some respects, comparisons between American and other forms of judicial review reflect questions about the idea of a higher law. Spurred

111. For the work of the European Court on Human Rights, see DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 811–69 (2d ed. 2009); MARK JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 65–118 (1995).

112. For brief discussions of the importance of the Kelsenian model abroad, see John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 51–52 (2002); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1672–74 (2004). For thoughts on the appearance of “weak-form” judicial review, see Mark Tushnet, *Comparative Constitutional Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1225, 1242 (Mathias Reimann & Reinhard Zimmerman, eds., 2006); Gardbaum, *supra* note 100, at 707–09.

113. See Gardbaum, *supra* note 100, at 707–09 (2001); Tushnet, *supra* note 112, at 1246–48; Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 263 (2004) [hereinafter Tushnet, *Marbury*].

by a post-World War II belief in the inherently unjust nature of racial, religious, and comparable forms of discrimination, judicial review in many countries became the practical embodiment of a new search for natural law. Judicial review in the United States was in part the natural extension of important precepts of the English legal tradition, stretching back to Magna Carta (even though judicial review did not take hold in the mother country). Its organic quality invites judges to look at text and history. By contrast, the judicial review that enjoys international acceptance today was, in many countries, nurtured by a sharp reaction to the failures of parliamentary supremacy and is inextricably linked to the protection of human rights. American constitutional texts are not devoid of lofty language (due process and equal protection come to mind). But constitutional discourse abroad often takes place on a more abstract plane (an example being the German Basic Law's commitment to human dignity).¹¹⁴ Kelsen designed constitutional courts on the assumption that constitutional law is in fact political and that those courts' judges are "negative legislators."¹¹⁵ This merger of law and politics helps explain why such judges are comfortable relying on abstract theories of justice, universal norms, and comparative sources.¹¹⁶ As we know, hints that an American judge might undertake such a course provokes sharp protests, both on and off the bench.¹¹⁷

III. FEDERALISM AND DEVOLUTION: APPLYING FAMILIAR SOLUTIONS TO NEW PROBLEMS

It is easy to suppose, especially if one is an American, that the idea of federalism was born at the Philadelphia convention in 1787. In fact, the concept has its roots in antiquity.¹¹⁸ As one scholar has commented, to regard federalism as dating from 1787 could only be the result of drinking "deeply of Lethe's waters of forgetfulness."¹¹⁹ Even so, in an era when European rulers were drawn to Jean Bodin's notions of centralized sovereignty, the American federal structure that emerged from the Constitutional Convention was a bold experiment in dividing power and authority between a central government and its constituent units. America's example spread to several other countries in the course of the next century. Switzerland's 1848 Constitution created a federal system

114. GRUNDGESETZ [GG] [Constitution] art. 1(1) (F.R.G.).

115. See Favoreu, *supra* note 99; Sweet, *supra* note 99, at 2767; Tushnet, *supra* note 112, at 1244–45; Tushnet, *Marbury*, *supra* note 113, at 263–64.

116. Kahn, *supra* note 50, at 2701–02.

117. I discuss the debate over the Supreme Court's use of comparative data, *infra* Part IV.

118. Madison, *supra* note 12; see also THE FEDERALIST NO. 18 (James Madison).

119. Charles S. McCoy, *Federalism: The Lost Tradition?*, 31 PUBLIUS 1, 2 (2001).

strongly influenced by American federalism, and Argentina also looked to its northern neighbor in 1853.¹²⁰ With the passage of the British North America Act in 1867, Canada became a genuine federation, and in 1900, Australia shifted from its loose confederal structure of 1885 to an “indissoluble” federation.¹²¹ Yet, well into the twentieth century, there was widespread commitment to centralized government, exemplified by Rousseau’s general will.¹²² Centralizing the power of government had an appeal both to rulers, who wanted authority and efficiency, and to democrats, who saw uniform laws as inherently egalitarian. As late as the eve of World War II, the European mind deemed federalism as an antiquated idea, unsuited to modern states, and doomed to extinction in an era requiring a centralized, activist government.¹²³ In 1939, Harold Laski declared, “I infer in a word that the epoch of federalism is over.”¹²⁴

Laski inferred incorrectly. In the years since World War II, federalism has taken on new appeal. The forms and circumstances have been various, ranging from structural federalism to degrees of devolution or subsidiarity. Germany’s Basic Law of 1949 built on long-standing German traditions of federalism, but the federal structure created by that document also helped assuage the Allied powers’ concerns lest a highly centralized Germany be once again a threat to peace and security.¹²⁵ In 1978, Spain produced a constitution which, while reaffirming Spain’s

120. On Switzerland’s 1848 Constitution, see GEORGE A. CODDING, *THE FEDERAL GOVERNMENT OF SWITZERLAND* 32–54 (1961); JAMES H. HUTSON, *THE SISTER REPUBLICS: SWITZERLAND AND THE UNITED STATES FROM 1776 TO THE PRESENT* 32–41 (1991). On Argentina, see Mitchell Gordon, *Don’t Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type*, 8 WASH. U. GLOBAL STUD. L. REV. 487 (2009); Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483 (1997).

121. On Canadian federalism, see DONALD V. SMILEY & RONALD L. WATTS, *INTRASTATE FEDERALISM IN CANADA* (1985); Michael Burgess, *Federal Societies and the Founding of Federal States: An Examination of the Origins of Canadian Confederation*, in *CANADIAN FEDERALISM: PAST, PRESENT, AND FUTURE* (Michael Burgess ed., 1990); Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111 (1984). On federalism in Australia, see MICHAEL COPER, *ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION* ch. 2 (1987). Australian constitutionalism continues to evolve, for example, in its relationship with the Crown. See D.J. Markwell, *The Crown and Australia* (Jan. 20, 1987), available at <http://www.kcl.ac.uk/content/1/c6/01/65/70/DMarkwell.pdf>.

122. See JACKSON & TUSHNET, *supra* note 30, at 926–27 (discussing the two rival forms of government); Thomas Fleiner-Gerster, *Federalism, Decentralization, and Rights*, in *CONSTITUTIONALISM AND RIGHTS*, *supra* note 78, at 19, 20 (1990); Ronald L. Watts, *Federalism in the Post-Cold War Era: The Contemporary Relevance of the Federal Idea*, 1995 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 109, 111 (1995).

123. Watts, *supra* note 122, at 111.

124. Harold J. Laski, *The Obsolescence of Federalism*, 48 NEW REPUBLIC 367 (1939).

125. Nevil Johnson, *Constitutionalism in Europe Since 1945: Reconstruction and Appraisal*, in *CONSTITUTIONALISM AND DEMOCRACY*, *supra* note 17, at 26, 34.

unity, laid the way for broad grants of authority to the regions in an effort to defuse separatist forces in Catalonia and the Basque country.¹²⁶ Even the United Kingdom, while maintaining its formal commitment to Parliament's supremacy, has undertaken devolution of degrees of authority to Assemblies in Northern Ireland and Wales and to a Scottish Parliament, something Edinburgh had not seen since the Act of Union in 1707.¹²⁷ At the supranational level, the European Union has been described as a "nascent form of federal government."¹²⁸ The European Union is based on treaties, but scholars have noted the constitutional nature of its formation and structure.¹²⁹

What factors account for the spread of federalism? The need to deal with widespread economic dislocation after World War I and during the Great Depression fueled the growth of the administrative state and a concomitant growth in the authority of centralized government. But the dark side of concentrated power was seen in the faces of Nazism, fascism, and communism. The lessons learned during World War II brought a search for ways to respect human rights and the worth of the individual. Along with articulation of rights and the creation of judicial remedies came a heightened interest in devolving authority as yet another way of guarding against the excesses of government power.¹³⁰ In this respect,

126. See ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY* (1987); Francisco Rubio Lorente, *The Writing of the Constitution of Spain*, in *CONSTITUTION MAKERS ON CONSTITUTION MAKING: THE EXPERIENCE OF EIGHT NATIONS* 239 (Robert Goldwin & Art Kaufman eds., 1988).

127. See VERNON BOGDANOR, *DEVOLUTION IN THE UNITED KINGDOM* (1999). *Publius: The Journal of Federalism* devoted its Winter 2006 issue entirely to this topic. See 36 *PUBLIUS* 1–211 (2006). The Constitution Unit at the University College London Department of Political Science closely monitors devolution policy in the United Kingdom through frequent reports, conferences, and seminars. UCL Department of Political Science: The Constitution Unit, *Devolution & Territorial Politics*, <http://www.ucl.ac.uk/constitution-unit/research/devolution/index.htm> (last visited Sept. 4, 2009). Lest it be thought that devolution is purely cosmetic, consider the outrage directed at the Scottish government after the release of Abdel Basset Ali al-Megrahi, who had been convicted in the bombing of Pan Am Flight 103 over Lockerbie in 1988. News reports referred to actions by "Scotland" and by the "Scottish government," not to the "United Kingdom" or the "British government." *The New York Times* described how the "British government and the Scottish government, which made the formal decision to free the bomber, each appeared to be trying to shunt responsibility to the other." John F. Burns, *New Questions in Lockerbie Bomber's Release*, *N.Y. TIMES*, Aug. 22, 2009, at A5. A casual reader, uninformed about the constitutional bounds of devolution, would be forgiven for thinking that two sovereign states were doing the finger-pointing.

128. Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 *AM. J. COMP. L.* 537, 537–38 (1996).

129. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771, 792–94 (1997); Thomas O. Hueglin, *From Constitutional to Treaty Federalism: A Comparative Perspective*, 30 *PUBLIUS* 137, 139–140 (2000).

130. See Daniel J. Elazar, *FROM STATISM TO FEDERALISM: A PARADIGM SHIFT*, 25 *PUBLIUS* 5, 5 (1995); Daniel J. Elazar, *The Federal Idea. Volume 1: The History of Federalism from the Enlightenment to 1945*; Daniel J. Elazar, *The Federal Idea. Volume 2: The History of Federalism*

federalism can be seen as a structural response to an unending search for ways to limit power and protect rights.

Majoritarian democracy has its obvious appeal. But elections, however free and fair, can leave ethnic and other minorities isolated and exposed. Ancient hatreds can fuel ethnic quarrels that require structural protections for those who may be seen as “outsiders” by the group in power. We are reminded daily, as we read news accounts from the Balkans, Central Asia, and other parts of the world, of how ethnic conflict threatens to pull states apart at the seams. Boundaries drawn by great-power conferences (such as at Versailles) or by colonial powers (as in nineteenth-century Africa) often cut across ethnic, religious, and cultural groupings. Such divisions often create powerful centrifugal forces. One way to defuse separatist tendencies is, through formal federalism or otherwise, to devolve a measure of authority to a country’s regions.¹³¹

Comparative constitutionalism finds federalism and its many variations a rich field of study. Federal systems vary in the number and size of constituent units, the division of authority between the central government and the other units, mechanisms for resolving disputes over who exercises what powers, and the place of individual and collective rights in the overall scheme.¹³² A federal system may result from individual states agreeing to form a central authority (the United States in 1787) or a decision to decentralize what had been a unitary state (Belgium in 1993).¹³³ The arrangement may be set out in a constitution, a treaty, or in ordinary legislation.¹³⁴ Such variations serve to remind us that the great compromise reached in Philadelphia in 1787 is hardly the only model of how a federal system can or should be arranged. Politics—large and small states, mercantile and agricultural interests, slaveholding and nonslaveholding forces—drove the bargain in 1787. For all his skills, even James Madison had to give ground, lest the convention result in failure. The result was a federal system that is to be admired,

Since 1945, 67 J. MOD. HIST. 381, 382 (1995) (book review); Watts, *supra* note 122, at 115.

131. See, e.g., Charles E. Ehrlich, *Democratic Alternatives to Ethnic Conflict: Consociationalism and Neoseparatism*, 26 BROOK. J. INT’L L. 447, 469–72 (2000) (discussing the Spanish Constitution of 1978).

132. Watts, *supra* note 122, at 116.

133. For discussions of Belgium’s 1993 revision, see ANDRE ALEN & RUSEN ERGEC, *FEDERAL BELGIUM AFTER THE FOURTH STATE REFORM OF 1993* (1994); JOHN HOPKINS, *DEVOLUTION IN CONTEXT: REGIONAL, FEDERAL AND DEVOLVED GOVERNMENT IN THE EUROPEAN UNION* 57–77 (2002); Neal Alan Carter, *Complexity as a Shock Absorber: The Belgian Social Cube*, 8 ILSA J. INT’L & COMP. L. 963 (2002); Michael O’Neill, *Re-imagining Belgium: New Federalism and the Political Management of Cultural Diversity*, 51 PARLIAMENTARY AFF. 241 (1998).

134. See Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 101, at 142, 142–43.

yet cannot be wholly understood without reference to its historical grounding.¹³⁵ American federalism has, of course, evolved in manifest ways in the centuries since its inception. Disputes over the nature of the federal union (Webster versus Calhoun), the Civil War and Reconstruction, the rise of the modern administrative state, the decisions of the Warren Court—these and other forces have reshaped the face of federalism in America. Setting the American experience, both its origins and its evolution, alongside that of other federal systems offers useful lessons for deciding how power should be shared at different levels of government.

Comparativism is especially useful in an age of ethnic tensions and in a search for ways to protect minorities. At a meeting of the Organization on Security and Cooperation of Europe (OSCE), I recall how Americans at the table argued strongly for looking first and foremost to individual rights, the antidiscrimination principle, and judicial enforcement of rights as a road to protection of minorities. By contrast, Europeans were more inclined to look to structural devices such as the right of national minorities (Hungarians in Romania, Turks in Bulgaria) to have a measure of local autonomy regarding education, culture, and other subjects seen as important to their sense of being.¹³⁶ Federalism, in some form, can be a useful tool for protecting minority rights and defusing ethnic conflict.¹³⁷ Arrangements for federalism or devolution need not require that each constituent unit have the same powers. Where a country faces distinctive problems in some but not all of its parts—Quebec in Canada, Catalonia and the Basque country in Spain—it is possible to make asymmetrical dispensations while maintaining a larger national identity.¹³⁸

Can comparative federalism add context to a study of American constitutional law? Those who remember the days of the Warren Court will recall how, at least in Supreme Court cases, federalism seemed to have been consigned to the dustbin of history. If there were a national problem, the majority seemed to say, then Congress could provide a national

135. There are many accounts of the framing of the Federal Constitution. An especially admired treatment is Jack Rakove's Pulitzer Prize-winning *Original Meanings: Politics and Ideas in the Making of the Constitution*. Gordon Wood takes the story from the Revolution through the Philadelphia Convention in his highly respected book, *The Creation of the American Republic, 1776–1787*, which won the Bancroft Prize. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 469–564 (1969).

136. See generally CONFERENCE ON SEC. & COOPERATION IN EUR., REPORT OF THE CSCE MEETING OF EXPERTS ON NATIONAL MINORITIES (1991).

137. See Donald L. Horowitz, *The Many Uses of Federalism*, 55 DRAKE L. REV. 953, 958–59 (2007).

138. *Id.* at 959–60.

solution.¹³⁹ If the states had a problem with that, they could take their complaints to Congress.¹⁴⁰ I remember telling students in my first-year constitutional law class that they would never live to see the day when the Court would declare that Congress had exceeded its powers under the commerce clause. I did not foresee the Rehnquist Court and *United States v. Lopez*.¹⁴¹ Whatever the ebbs and tides of litigation, federalism, including the Tenth and Eleventh Amendments, is back as a serious subject of constitutional debate and study. With that development has come the glimmering that comparative federalism may be thought relevant. One of the earliest skirmishes in the current controversy over the use of comparative data in interpreting the United States Constitution came in *Printz v. United States* (1997).¹⁴² In his dissent, Justice Breyer drew on the federalism experience in Germany, Switzerland, and the European Union to argue that “there is no need to interpret the Constitution as containing an absolute principle—prohibiting the assignment of virtually any federal duty to a state official.”¹⁴³ Justice Scalia, writing for the majority, rebuffed that suggestion, observing tartly that “our federalism is not Europe’s.”¹⁴⁴

Whatever the place of comparative federalism in the Supreme Court, American federalism can surely profit from thinking about how well federal governments around the world handle social and economic problems which know no national boundary.¹⁴⁵ It is instructive to recall that allowing state constitutions to be amended by way of the initiative and referendum, first adopted in this country in South Dakota in 1898, was borrowed from Switzerland.¹⁴⁶ Bypassing state legislatures may have

139. See the Court’s essentially abdicationist opinions in *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

140. See Justice Blackmun’s majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). For scholarly arguments that protecting the states against federal power should be seen as a “political question,” see JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 171–259 (1980); Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For an opposing perspective, see A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985).

141. 514 U.S. 549 (1995).

142. 521 U.S. 898 (1997).

143. *Id.* at 977 (Breyer, J., dissenting).

144. *Id.* at 921 n.11 (majority opinion).

145. See generally Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999).

146. HUTSON, *supra* note 120, at 58–65. A leading reformer in Oregon, which adopted the initiative and referendum in 1902, declared, “I believe I do not overstate the fact when I say Oregon is wholly indebted to Switzerland for these tools of democracy.” William E. Rappard, *The Initiative, Referendum and Recall in Switzerland*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1912, at

made great sense a hundred years ago, when legislators were in the pockets of vested interests. But one only has to look at California's fiscal morass—where voters mandate spending on the one hand and limit taxes on the other—to realize how the ideals of direct democracy collide with the realities of responsible government.¹⁴⁷

IV. THE SUPREME COURT AND COMPARATIVE DATA: SOVEREIGNTY AND THE POSTWAR PARADIGM

Debate over whether the United States Supreme Court should look beyond the Constitution's text and history in deciding constitutional cases reaches back to the Court's early years. In *Calder v. Bull*, the Court had before it the question whether a Connecticut law violated the Constitution's ex post facto clause.¹⁴⁸ Justice Chase declared, "An ACT of the Legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority."¹⁴⁹ Justice Iredell, dissenting, wrote that, if a legislature acted within the bounds of the Constitution in enacting a law, "the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard . . ."¹⁵⁰ This was the opening salvo in a debate that, over two centuries later, would come to include comparative constitutionalism.

In its early years, the Supreme Court did not hesitate to cite to foreign law.¹⁵¹ The Court was new, it did not yet have a vast jurisprudence of its

125–26. On the modern use of the initiative and referendum, see Shaun Bowler & Todd Donovan, *The Initiative Process*, in *POLITICS IN THE AMERICAN STATES* 129 (Virginia Gray & Russell Hansen eds., 8th ed. 2004); Stanley H. Friedelbaum, *Initiative and Referendum: The Trials of Direct Democracy*, 70 ALB. L. REV. 1003 (2007); G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in *DEMOCRACY: HOW DIRECT?* 87 (Elliott Abrams, ed., 2002).

147. On California's problems, see Daniel J.B. Mitchell, *When Luck Runs Out: Leadership—Present and Past—and the California State Budget*, in *CALIFORNIA POLICY OPTIONS* 2009, at 29 (Daniel J.B. Mitchell ed., 2009); PETER SCHRAG, *CALIFORNIA: AMERICA'S HIGH-STAKES EXPERIMENT* 194–230 (2006); John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 STATE POL. & POL'Y Q. 248 (2005); John G. Matsusaka, *Initiatives: Slouching Toward Respectability?*, 8 ELECTION L.J. 55 (2009) (book review).

148. 3 U.S. (3 Dall.) 386 (1798).

149. *Id.* at 388. The opinion of Justice Chase and concurrence of Justice Paterson also used the definitions of "ex post facto laws" in the history of state constitutions to define the term in the U.S. Constitution. *Id.* at 391–92 (Chase, J.); *id.* at 396–97 (Paterson, J., concurring). While some could view this as an example of comparative constitutional reasoning, the search for a commonly understood meaning of a textual provision among constituent parts of a nation is different from borrowing ideas from foreign constitutions.

150. *Id.* at 399 (Iredell, J., dissenting).

151. Calabresi & Zimdahl, *supra* note 54, at 791–92.

own, and the Justices looked to a wide variety of interpretive sources, including international or general norms.¹⁵² In the seminal case of *Marbury v. Madison*, Chief Justice John Marshall discussed at length the theory of a written constitution before turning to the language of the Constitution itself toward the end of his opinion.¹⁵³ As the nineteenth century wore on, however, comparative citations became increasingly rare as American constitutional jurisprudence matured into a separate body of law. With the rise of legal positivism, the appeal of natural law waned. Both in the academy and in the courts, Americans increasingly looked to their own laws and traditions rather than to external sources.¹⁵⁴

The years after World War II saw the rise of a more global vision of constitutionalism. This vision—one scholar calls it the “postwar constitutional paradigm”—found an early and vigorous practitioner in the German Constitutional Court.¹⁵⁵ The new paradigm differs in manifest respects from traditional American constitutional interpretation. To begin with, rooted in the experience of the wartime period, the new vision pays special attention to the protection of human dignity.¹⁵⁶ Constitutional provisions are interpreted in light of this ideal. For example, in upholding legislation punishing Holocaust denials as consistent with the right to free expression, the German Constitutional Court interpreted the Basic Law’s guarantee in light of the “personal worth” of the Jewish people.¹⁵⁷ Justice Brennan invoked human dignity in his opinions, especially those where he attacked the death penalty, but this value is, by and large, not a hallmark of U. S. Supreme Court jurisprudence.¹⁵⁸

The new vision of constitutional interpretation also differs from traditional American jurisprudence in that rights are seen to be shaped and balanced by policy judgments. By nature broad and abstract, a dignity clause creates greater indeterminacy than that associated with American constitutional provisions.¹⁵⁹ A hallmark of the new jurisprudence is the

152. Rahdert, *supra* note 54, at 571.

153. “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the land” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” U.S. CONST. art. VI.

154. See Rahdert, *supra* note 54, at 571–72, 597–99 (2007).

155. Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 89, 91 (Sujit Choudhry ed., 2006).

156. *Id.* at 89.

157. Lüth, 7 BVerfGE 198 (1958) (F.R.G.).

158. In his concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan invokes the concept of human dignity and discusses it at length. 408 U.S. at 270–74, 277, 279, 281–82, 285–86, 291, 297, 305 (Brennan, J., concurring).

159. See Grey, *supra* note 93, at 483–84.

concept of proportionality. This notion is hardly an invitation to the use of formalism, and it is not a concept usually associated with the way in which American courts go about interpreting and enforcing rights.¹⁶⁰ Further, originalism, fervently advanced by some judges and commentators in the United States, is largely irrelevant to postwar constitutionalism abroad. The idea of a “living Constitution” may raise hackles in some quarters in America, but in countries like Canada and Israel “living constitutionalism” is widely accepted.¹⁶¹ Aharon Barak, President of Israel’s Supreme Court, has declared that the “life” of a constitution “is not expressed in imposing old constitutional principles on new circumstances.”¹⁶² Finally, the postwar paradigm embraces constitutional comparisons. It has little tolerance for claims of exceptionalism. In the early decades after World War II—the era when postwar constitutionalism emerged—there appears to have been a widespread academic view that American exceptionalism was a vice rather than a virtue.¹⁶³

With the end of World War II, the United States emerged as the dominant player on the international stage. At home, Americans might have wanted to return to their everyday lives, but the nation was drawn ineluctably into international politics with the advent of the Cold War. Isolationism was no longer a serious option. During that same era, ideas associated with postwar constitutionalism found their way into the jurisprudence of the United States Supreme Court. It was the era of the Warren Court, a tribunal more inclined to do the right thing and leave worrying about tight legal analysis to others. Parallels to the new international paradigm can be found in the Court’s decision in *Brown v. Board of Education*, in which Chief Justice Warren brushed aside origi-

160. See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 532–33 (1992). But see Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 419–31 (2008) (arguing that proportionality analysis is now a well-settled part of U.S. constitutional law).

161. Allan & Huscroft, *supra* note 93, 31–34 (2006).

162. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 390 (Sari Bashi trans., Princeton Univ. Press 2005).

163. See Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 1, 21–22 (Michael Ignatieff ed., 2005) (noting the dismay of Thomas Franck and Louis Henkin over the refusal of the United States to take the lead in international human rights development). Thomas Franck published an early comparative constitutional law casebook in 1968. THOMAS M. FRANCK, *COMPARATIVE CONSTITUTIONAL PROCESS: CASES AND MATERIALS* (1968). Moreover, these decades also saw the rise of functionalism in comparative constitutionalism, an approach which shared a similar commitment to universalism. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 588–90 (1997). For casebooks reflecting a functionalist approach, see HARRY E. GROVES, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1963); W.J. WAGNER, *THE FEDERAL STATES AND THEIR JUDICIARY: A COMPARATIVE STUDY IN CONSTITUTIONAL LAW AND ORGANIZATION OF COURTS IN FEDERAL STATES* (1959).

nalism and invoked the feelings of inferiority engendered in colored children by segregation.¹⁶⁴ Comparative constitutionalism surfaced explicitly in *Trop v. Dulles* (1958).¹⁶⁵ Holding that revoking citizenship for wartime desertion was cruel and unusual punishment, Chief Justice Warren pointed to a United Nations survey demonstrating that the “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”¹⁶⁶ In *Miranda v. Arizona* (1966), Warren looked to foreign law and experience to argue that “the danger to law enforcement in curbs on interrogation is overplayed.”¹⁶⁷ The practice of using comparative data was not confined to the Court’s liberal ranks. In his famous dissent in *Poe v. Ullman* (1961), Justice Harlan observed that “no nation” sought to criminalize contraception in a manner similar to the statute being reviewed.¹⁶⁸

The conservative counter-revolution expected of the Burger Court never happened.¹⁶⁹ One only has to think of cases like *Roe v. Wade* (1973) to realize that the style of reasoning representative of postwar constitutionalism had not gone out of fashion on the Court, even after President Nixon had filled four vacancies.¹⁷⁰ Ronald Reagan’s election as President in 1980, however, signaled the burgeoning of a conservative legal movement for whom the Warren Court and its way of doing business were anathema. With Ed Meese as Attorney General and Antonin Scalia on the Supreme Court, originalism, textualism, and formalism were proclaimed as a more legitimate road to judicial review than the loose pragmatism of the Warren era.¹⁷¹ In 1988, Justice Scalia threw down the gauntlet. Dissenting in *Thompson v. Oklahoma*, Scalia argued that “the views of other nations . . . cannot be imposed upon Americans through the Constitution.”¹⁷² A year later, in *Stanford v. Kentucky*, a case involving the death sentence for juveniles, Justice Scalia pre-

164. “In approaching this problem, we cannot turn the clock back to 1868, when the [Fourteenth] Amendment was adopted We must consider public education in the light of its full development and its present place in American life throughout the Nation.” *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

165. 356 U.S. 86 (1958).

166. *Id.* at 102. Justice Frankfurter dissented, but, rather than objecting to his colleagues’ use of comparative data, he used his own data about countries that revoked citizenship because of desertion. *Id.* at 126 (Frankfurter, J., dissenting).

167. 384 U.S. 436, 486 (1966).

168. 367 U.S. 497, 554–55 (1961) (Harlan, J., dissenting); *see also* Fontana, *supra* note 45, at 589–90 (2001).

169. *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T (Vincent Blasi ed., 1983).

170. 410 U.S. 113 (1973).

171. *See* Grey, *supra* note 93, at 478–79.

172. 487 U.S. 815, 869–70 n.4 (1988) (Scalia, J., dissenting).

vailed.¹⁷³ It was, he wrote for the majority, “American conceptions of decency” to which the Court must look in deciding the contours of cruel and unusual punishment.¹⁷⁴ Justice Brennan, who dissented, argued that, in measuring contemporary standards of decency, the Court should look, not only to traditional legal sources, but also to enlightened opinion, both here and abroad—indicators of what is acceptable in a “civilized society.” Thus, for Brennan, it mattered that over fifty countries had banned capital punishment, and of the remainder a majority had abolished capital punishment for juveniles.¹⁷⁵

The skirmishing continued in 1997, when Justices Scalia and Breyer locked horns over the relevance of comparative federalism in *Printz v. United States*.¹⁷⁶ Again, Justice Scalia carried the day. For him, comparative analysis could be “quite relevant to the task of writing” a constitution, but it was wholly inappropriate to the job of interpreting one.¹⁷⁷ Justice Breyer kept up his effort, citing foreign sources in a dissent from a denial of certiorari.¹⁷⁸ This time, it was Justice Thomas who picked up Justice Scalia’s refrain. Thomas tartly observed that petitioners would not have to seek evidence from “the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council” had they found any support in “the American constitutional tradition” or in “this Court’s precedent.”¹⁷⁹ In another case, Thomas was even more acerbic. The Court, he said, “should not impose foreign moods, fads, or fashions on Americans” when deciding the meaning of the Eighth Amendment.¹⁸⁰

Three cases, decided between 2002 and 2005, have kindled even more intense debate, both on and off the bench. In all three cases, comparative data surfaced in majority opinions—a surprising coda to the concluding years of the Rehnquist Court. In *Atkins v. Virginia* (2002), Justice Stevens wrote an opinion striking down the death penalty for mentally retarded offenders.¹⁸¹ Stevens noted that, “within the world community,” the practice was “overwhelmingly disapproved.”¹⁸² Both

173. 492 U.S. 361 (1989). Justice Scalia’s approach also prevailed in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (involving the death penalty for the mentally retarded).

174. *Id.* at 369 n.1.

175. *Id.* at 383–90 (Brennan, J., dissenting).

176. 521 U.S. 898 (1997).

177. *Id.* at 935 n.11.

178. *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari).

179. *Id.* at 990.

180. *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari).

181. 536 U.S. 304 (2002).

182. *Id.* at 316 n.21.

Justice Scalia and Chief Justice Rehnquist objected.¹⁸³ The next year, in *Lawrence v. Texas* (2003),¹⁸⁴ Justice Kennedy cited a decision of the European Court of Human Rights in overruling *Bowers v. Hardwick*¹⁸⁵ and recognizing constitutional protection for homosexual sodomy.¹⁸⁶ Justice Scalia, dissenting, complained that constitutional entitlements “do not spring into existence . . . because *foreign nations* decriminalize conduct.”¹⁸⁷ Then, in *Roper v. Simmons* (2005), Justice Kennedy’s majority opinion undertook a lengthy review of foreign practice in concluding that the United States stood almost alone in executing juveniles.¹⁸⁸ In deciding *Roper*, the Court overruled Justice Scalia’s decision in *Stanford*, so dismissive of comparative data and decided only sixteen years earlier.¹⁸⁹ In *Roper*, Justice Scalia, of course, dissented. For him, the Court’s use of comparative sources was nothing more than an opportunistic attempt to confirm “the Justices’ own notion of how the world ought to be.”¹⁹⁰

The battle over the Supreme Court’s use of comparative data is more than a mere academic matter. This is not the kind of debate that engages a handful of scholars jousting in the pages of the Times Literary Supplement over whether Arthur Evans got it right at Knossos.¹⁹¹ It is hard to suppose that, in any of the controversial trio of cases, the Court’s majority was in fact moved to decide as they did simply because of comparative data. It is more likely that comparative data played the role that non-traditional sources have played in so many cases in past years—as a means of adding persuasive weight to the Court’s argument. Even so, one cannot deny the intensity of debate over the issue, debate that is perhaps more intense off the Court than on. What, then, is at stake?

Several goals seem to animate those who would move the Court toward comparativism. One is to have the Court join what Anne-Marie Slaughter calls a “global community of courts”—tribunals around the

183. *Id.* at 322, 324–25 (Rehnquist, J., dissenting); *id.* at 347–48.

184. 539 U.S. 558 (2003).

185. 478 U.S. 186 (1986).

186. *Lawrence*, 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) ¶ 52 (1981)). Justice Kennedy went on to cite additional cases from the European Court of Human Rights to support the Court’s holding in *Lawrence*. *Id.* at 576–77.

187. *Id.* at 598 (Scalia, J., dissenting).

188. 543 U.S. 551 (2005).

189. 543 U.S. at 574–75.

190. *Id.* at 628 (Scalia, J., dissenting). Justice O’Connor dissented separately on the grounds there was no national consensus on the issue. She did, however, take issue with Justice Scalia’s statement “that foreign and international law have no place in our Eighth Amendment jurisprudence.” *Id.* at 604 (O’Connor, J., dissenting).

191. See Tom Holland, *Modern Minotaurs*, TIMES LITERARY SUPPLEMENT, June 3, 2009 (reviewing THEODORE ZIOLKOWSKI, *MINOS AND THE MODERNS* (2008), and CATHY GERE, *KNOSSOS AND THE PROPHETS OF MODERNISM* (2009)).

world that increasingly cite each others' work.¹⁹² Those who criticize the Court for remaining outside this community charge it with being guilty of "emphatic provincialism."¹⁹³ One scholar has compared the United States to France in the first half of the nineteenth century, which he described as having been narrow-minded and self-absorbed while the rest of the world was embracing its legal export.¹⁹⁴ A second goal is to have the United States regain leadership in the arena of human rights. For such critics, the U. S. Supreme Court has drifted from being a model for other countries to, as Frank Michelman puts it, "mildly pariah status."¹⁹⁵ American human rights jurisprudence has become less relevant to courts abroad, while courts in countries like Canada and South Africa have become more influential.¹⁹⁶ Harold Koh argues that America's failure to participate in transnational jurisprudence "undermines U.S. influence over the global development of human rights."¹⁹⁷

Some observers who urge more comparativism in the Supreme Court have an activist agenda for American constitutional law. The American Civil Liberties Union's Nadine Strossen is quite candid: "[T]o the extent that increased protection for individual rights is offered by other binding legal authorities, domestic or international, they should prevail over US constitutional law. In contrast, though, whenever those other authorities purport to undermine rights protected by the US Constitution, the Constitution trumps them."¹⁹⁸ One might call this a "ratchet" or "best practices" approach. For Koh, comparative interpretation should look only to "mature democracies" and not construe the Constitution "in light of the world's worst practices."¹⁹⁹

In fact, the fight over citing to foreign sources is about more than human rights. It is part of a larger battle, a contest of how to read and interpret the Constitution. On one side are those who look to traditional sources, especially history and tradition. On the other side is postwar constitutionalism, practiced in the United States by the Warren Court and embraced by constitutional and supreme courts in an array of coun-

192. See Slaughter, *supra* note 52. See generally Frank I. Michelman, *Integrity-Anxiety?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 163, at 241.

193. Ackerman, *supra* note 129, at 773; see also Ignatieff, *supra* note 163, at 8.

194. Vernon Valentine Palmer, *Insularity and Leadership in American Comparative Law: The Past One Hundred Years*, 75 TUL. L. REV. 1093, 1093-94 (2001).

195. Michelman, *supra* note 192, at 242.

196. Schauer, *supra* note 84, at 258-60 (Joseph S. Nye & John D. Donahue eds., 2000).

197. Koh, *supra* note 49, at 56.

198. Nadine Strossen, *Liberty and Equality: Complementary, Not Competing, Constitutional Commitments*, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 149, 153 (Grant Huscroft & Paul Rishworth eds., 2002).

199. Koh, *supra* note 49, at 56.

tries today.²⁰⁰ Comparative sources may be used, not only as a means of reaching a desired outcome in a particular case, but more broadly as a way to shape the law itself. Roscoe Pound said as much many years ago: “In legal history, periods of growth and expansion call for and rely upon philosophy and comparative law. . . . [T]he revival of serious use of comparative law in our legal literature is a significant sign of the times.”²⁰¹ Professor Pound was writing about Roman law, but today he might well make the same observation about comparative constitutional law.

If these are fair assessments of the goals of the proponents of comparativism in the Supreme Court, it is no surprise that conservatives have reacted so strongly. As Frank Michelman concedes, it is not beyond imagining that both conservative and liberal Justices engaged in the comparative debate believe international engagement will pull the Court in a more liberal direction.²⁰² Justice Scalia has sought to impugn the legitimacy of comparative citations: “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”²⁰³ American political and constitutional culture also ensures a popular basis for objections to comparativism. From the social compact theory embodied in the early state constitutions, to the federal Constitution’s “We the People,” and beyond, a belief in popular sovereignty permeates how Americans think about their constitutional system. Add to this commitment ideas of American exceptionalism and the unique place of the Constitution in the American mind, and it is hardly surprising that internationalism in constitutional interpretation will encounter stiff headwinds.²⁰⁴

To the extent that the debate over comparative citations is about constitutional interpretation and judicial power, conservatives dig in their heels. Charles Fried wants us to remember the difference between the role of the scholar and that of the judge. Fried says that, while Justice Breyer’s use of comparative federalism in *Printz* would have been “quite unremarkable” if he had been writing a law review article, using such data in a Supreme Court opinion signifies an effort to expand the

200. See Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 3, 4–5, 28 (Vicki C. Jackson & Mark Tushnet eds., 2002).

201. Roscoe Pound, *Forward to “The Valuation of Property in the Roman Law,”* 34 *HARV. L. REV.* 227, 227–28 (1921).

202. Michelman, *supra* note 192, at 264; see also Allan & Huscroft, *supra* note 93, at 10–12, 54–55 (2006).

203. *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting). Justice Scalia’s use of the adjective “alien” is revealing of the depth of his antagonism to comparative citations.

204. See Steven G. Calabresi, “*A Shining City on a Hill:*” *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 *B.U. L. REV.* 1335, 1410–11 (2006).

canon of interpretative sources, a far more controversial enterprise.²⁰⁵ Similarly, Judge Frank Easterbrook sees comparative citations as a symptom of a larger disease—the use of nontraditional sources to strike down democratic enactments.²⁰⁶

In the minds of conservatives, comparativism is at war with originalism. An originalist is willing to use comparative sources, such as the English Bill of Rights of 1689, if they throw light on the historical meaning of a constitutional provision.²⁰⁷ Otherwise, opening up American constitutional interpretation to the latitudinarianism of foreign jurisprudence is a threat to originalism. Originalism affirms the Constitution as a document safeguarded against the vicissitudes of time and manners. The style of jurisprudence practiced abroad since 1945 smacks of modernity.²⁰⁸ Those who complain of “judicial activism” and fear a return to Warren Court-style jurisprudence may see comparative citations as one instrument of that return.

There is no doubt that the debate will continue. There is already extensive academic commentary.²⁰⁹ The justices are quick to spar, as they have done in cases like *Atkins*, *Lawrence*, and *Roper*. But the contest extends well beyond academic journals and Supreme Court opinions. Politicians and pundits have entered the fray. Robert Bork complains that judges tend to align themselves with elites and that the result of their internationalism is the “steady decline of self-government and sovereignty”²¹⁰ Lodging a similar objection, Senator Jeff Sessions, Republican of Alabama, asks, “Simply put: Do judges serve American citizens or the citizens of the world?”²¹¹ At the confirmation hearings of John Roberts, Samuel Alito, and Sonia Sotomayor, members of the Senate Judiciary Committee challenged the nominees on whether they would employ foreign law.²¹²

205. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 815–19 (2000); see also Michelman, *supra* note 192, at 262–64 (evaluating Fried’s concerns).

206. Frank Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL’Y 223, 226–30 (2006).

207. See, e.g., Justice Scalia’s opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) (drawing on the English Bill of Rights of 1689 in interpreting the Second Amendment).

208. Weinrib, *supra* note 200, at 14.

209. See *supra* Introduction and note 54.

210. Robert H. Bork, *American Conservatism: The Soul of the Law*, WALL ST. J., Jan. 20, 2003, at A14.

211. Jeff Sessions, *Our Laws, Not Foreign Laws*, WASH. TIMES, June 30, 2009, at A21.

212. See, e.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370–71, 410, 470–71, 604 (2006); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 30, 42, 200–01, 292–93 (2005). Sonia Sotomayor was pressed on

Americans at every level—judges, scholars, politicians, commentators, and citizens—have a stake in constitutional interpretation. Arguments over using comparative data in deciding what the Constitution means are fundamental in a society that attempts to balance an accountable government, one based in popular sovereignty and a democratic process, against limits on government as manifested through judicial review. Indeed, at a basic level of argumentation about constitutional interpretation, it is not hard to see the debate over comparativism as another chapter in the saga that stretches back to the duel between Justices Chase and Iredell over two centuries ago.

EPILOGUE: BRATISLAVA

I was talking with some Czech and Slovak judges in Bratislava. The time was after the Velvet Revolution but before the divorce that saw Czechoslovakia split into two countries, the Czech Republic and Slovakia. Our conversation turned to judicial review. The local judges were curious about American practices—such things as the selection of judges, jurisdiction, certiorari review, political questions, and enforcement of a court's mandate. I commented that I assumed that a constitutional court for Czechoslovakia would have jurisdiction to review and overturn decisions of the high courts of the two constituent regions—the Czech and Slovak lands. A Slovak judge, rather large and formidable, banged his fist on the table and said, “That would never do! That would violate our sovereignty!” I was startled for a moment. But reflection brought to mind the U.S. Supreme Court's decision in *Martin v. Hunter's Lessee*.²¹³ Judges of Virginia's Supreme Court of Appeals had declared that “the appellate power of the Supreme Court of the United States, does not extend to this court . . .” and that therefore the provision of the Judiciary Act of 1789 purporting to grant such jurisdiction was unconstitutional.²¹⁴ In the Supreme Court's opinion, Justice Story rejected Virginia's argument and affirmed the Court's authority to review the state court's judgment.²¹⁵ Having been born and raised in Richmond, the home town of Spencer Roane, the most prominent of the Virginia judges in the *Martin* case, I had reason to understand (even if not to

judicial use of comparative citations on two days of her confirmation hearing. *Senate Committee on the Judiciary Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, CQ Transcriptions Verbatim Transcript (July 15–16, 2009), available at 2009 WL 2039064 and 2009 WL 2055124.

213. 14 U.S. (1 Wheat.) 304 (1816).

214. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 33 (1815).

215. *Martin*, 14 U.S. (1 Wheat.) 304.

agree with) the Slovak judge's reasoning. I can imagine the conversation he and Roane might have had.²¹⁶

Johann Wolfgang von Goethe is quoted as having said, "A man who has no acquaintance with foreign languages knows nothing of his own."²¹⁷ I would make the same argument about constitutional law. A person who would suppose that, by knowing something about the American Constitution, he or she knows all one needs to know, misses the treasure trove that comparisons offer. One who cares nothing for the experience of other constitutional systems rejects the insights available to James Madison and James Wilson at Philadelphia, to Benjamin Franklin and Thomas Jefferson in Paris, to Woodrow Wilson at Princeton and in Washington.

Given the developments in the postwar world sketched in this Essay, it is small wonder that comparative constitutional law has been a growth industry in American law schools. Comparativism in constitutional law serves many purposes. It enriches one's study of American constitutional law by adding another dimension to our critique of what the Supreme Court does. It heightens our sense of the world beyond our national boundaries, useful to lawyers whose firms and clients operate on the international scene, but also to lawyers as world citizens. Ultimately, comparative studies can also nourish our search for principles of ordered liberty and for theories of a just society.

216. It is ironic, and perhaps instructive, that John Marshall's house in Richmond survives and is maintained as a shrine, while the house of Spencer Roane, Marshall's archenemy, was torn down years ago.

217. JOHANN WOLFGANG VON GOETHE, *THE MAXIMS AND REFLECTIONS* 154 (T. Bailey Saunders trans., McMillan 2d ed. 1906) (1893).