

AGAINST FOREIGN LAW

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In recent years, several Supreme Court Justices have looked to the decisions of foreign and international courts for guidance in interpreting the U.S. Constitution. This practice has occurred in several controversial, high-profile cases. *Roper v. Simmons*¹ outlawed application of the death penalty to offenders who were under eighteen when their crimes were committed. *Lawrence v. Texas*² struck down a state law that criminalized homosexual sodomy. *Atkins v. Virginia*³ held against the execution of mentally retarded capital defendants. All three cite foreign and international precedents.

In *Roper*, the Court, per Justice Kennedy, found it “proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁴ The Court relied on a provision of the United Nations Convention on the Rights of the Child—a treaty the United States has not ratified—and on amicus briefs by the European Union and interested foreign observers.⁵ In *Lawrence*, Justice Kennedy’s majority opinion cited decisions of the European Court of Human Rights to conclude that prohibiting homosexual sodomy is at odds with the current norms of

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1. 125 S. Ct. 1183 (2005) (plurality opinion).

2. 539 U.S. 558 (2003).

3. 536 U.S. 304 (2002).

4. *Roper*, 125 S. Ct. at 1200.

5. *Id.* at 1199 (citing United Nations Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–70).

western civilization.⁶ In *Atkins*, the majority opinion by Justice Stevens relied on an amicus brief filed by the European Union to assert that executing the mentally retarded is “overwhelmingly disapproved.”⁷ References to foreign decisions have appeared not just in cases expanding individual rights,⁸ but also in dissents from federalism opinions.⁹

It is difficult to know how seriously to take this development. One possibility is that Justices cite foreign decisions merely as ornaments.¹⁰ Under this theory, while providing aesthetic support, the practice of citing to international law may contribute little of analytical value and have no real effect on the actual course of judicial decisionmaking. In other words, even had the foreign decisions come out differently, the Supreme Court would have still reached its preferred result by the same primary mode of reasoning. In this situation, foreign precedents provide only tangential authority to bolster decisions reached on more traditional grounds.

There are, however, two main reasons to think that use of foreign or international decisions extends beyond mere ornamentation, one such reason grounded in the expressed views of several Justices and the other in academic opinion.

First, several Justices—most prominently Justice Breyer—have been explicit proponents of the use of foreign law. In a speech before the American Society of International Law, Justice Breyer enthusiastically claimed that a “global legal enter-

6. *Lawrence*, 539 U.S. at 572–73 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. ¶ 52 (1981)).

7. *Atkins*, 536 U.S. at 316 n.21.

8. Other Justices have also relied on international agreements for support. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 344 (Ginsburg, J., joined by Breyer, J., concurring) (“The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422–423 (June 1996), endorses ‘special and concrete measures to ensure the adequate development and protection of certain racial groups . . .’”).

9. See *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (“At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle of the majority derives from the silence of our Constitution.”).

10. Thus, Professor Alford suggests that the Court’s use of international and foreign materials in constitutional cases may be mere “bricolage.” See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 64–65 (2004).

prise . . . is now upon us.”¹¹ His remarks built upon arguments he had previously made in judicial opinions.¹² Justices Stevens,¹³ O’Connor,¹⁴ and Ginsburg¹⁵ have also advocated the use of foreign law in constitutional adjudication. In such cases, Justice Breyer argues that the “judgment of other nations” should help “guide this Court” in Eighth Amendment cases.¹⁶ Justice O’Connor has gone even further in claiming that “we should not be surprised to find congruence between domestic and international values” in the Eighth Amendment context.¹⁷

11. Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., *The Supreme Court and The New International Law*, remarks to the American Society of International Law (Apr. 4, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

12. *See, e.g.*, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (citing European and Canadian judicial decisions for their treatment of First Amendment issues); *Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from denial of cert.) (“[A]ttention to the judgment of other nations’ . . . can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment” (quoting THE FEDERALIST NO. 63 (James Madison))); *Knight v. Florida*, 528 U.S. 990, 995–97 (1999) (Breyer, J., dissenting from denial of cert.) (finding the opinions of former British Commonwealth nations “particularly instructive” in constitutional death penalty adjudication).

13. *See* *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion).

14. *See, e.g.*, *Roper v. Simmons*, 125 S. Ct. 1183, 1215–16 (2005) (O’Connor, J., dissenting) (“I disagree with Justice Scalia’s contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency . . . [T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values”); Sandra Day O’Connor, Keynote Address at the 96th Annual Meeting of the American Society of International Law (March 13–16, 2002), in 96 AM. SOC. INT’L L. PROC. 348, 350 (2002) (“Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.”); Sandra Day O’Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20.

15. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (relying on international treatment of affirmative action); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329 (2004); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999).

16. *Foster*, 537 U.S. at 993 (Breyer, J., dissenting from denial of cert.).

17. *Roper*, 125 S. Ct. at 1216 (O’Connor, J., dissenting).

Second, legal academics have urged the Supreme Court to engage in a "dialogue" with their foreign counterparts. Four academic projects are particularly noteworthy: Professor Bruce Ackerman has advocated "world constitutionalism";¹⁸ Professors Vicki Jackson and Mark Tushnet have become interested in the possibilities of comparative constitutional analysis;¹⁹ Professor Harold Koh has argued that the Court should look beyond American law when interpreting a constitutional term (like unreasonable search or due process) that "implicitly refers to a community standard";²⁰ and international law scholar Anne-Marie Slaughter has argued in favor of transnational communication between courts.²¹ These academics appear to be attempting to construct an intellectual framework that could justify more extensive use of foreign judicial decisions in the future. This may presage further federal judicial reliance on foreign decisions for support.

This trend has not utterly swept the field, however. Several Justices have expressed hostility to the use of foreign or international decisions in interpreting the U.S. Constitution. In *Atkins*, Chief Justice Rehnquist declared, "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."²² After noting that such an approach had been rejected in earlier Eighth Amendment cases,²³ the Chief Justice argued that "[f]or if it is evidence of a *national* consensus for

18. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); see also David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

19. See 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); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

20. Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 46 (2004).

21. See Anne-Marie Slaughter, *A Typology of Transnational Communication*, 29 U. RICH. L. REV. 99 (1994); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000). In addition to the scholars cited, other scholars, even while critical of aspects of the Court's use of foreign and international law sources, believe that those sources may be relevant to *some* questions of constitutional interpretation. See, e.g., Michael Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 71 (2004) ("International sources are obviously relevant to the scope of the Constitution's structural provisions defining the international powers of the U.S. government.").

22. *Atkins v. Virginia*, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting).

23. *Id.* at 325 (citing *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (plurality opinion)).

which we are looking, then the viewpoints of other countries simply are not relevant."²⁴ Justices Scalia and Thomas have also argued that foreign precedents are irrelevant for constitutional interpretation because those decisions interpret other documents.²⁵ Most recently, Justice Scalia's *Roper* dissent contended that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."²⁶ Arguing that the Court's use of foreign law was inconsistent and unprincipled, as shown by the deviation between American and foreign case law on the exclusionary rule, church-state relations, and abortion, Justice Scalia concluded that "[t]he Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."²⁷

It is essential to identify precisely what is and what is not in controversy here. Some Justices appear to believe that foreign and international legal practices and opinions can serve, at a minimum, to illuminate possible solutions to questions similar to those that U.S. courts must address, just as our federal courts may learn from our state courts, and vice versa. Foreign materials can provide relevant empirical information about the practical effects of particular social policies. Or, like law review articles, they can furnish original legal arguments. To the extent that foreign and international legal materials are used only for those purposes, such use is unobjectionable (assuming it is methodologically sound). However, some Justices may also think it desirable for U.S. constitutional law to converge with the constitutional law of European and other democratic legal systems. The desire to promote such convergence may lead

24. *Id.*

25. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 598 (Scalia, J., dissenting) ("The Court's discussion of these foreign views . . . is therefore meaningless dicta."); *Foster v. Florida*, 537 U.S. 990, 990 n.* (Thomas, J., concurring in denial of cert.).

26. *Roper v. Simmons*, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting).

27. *Id.* at 1228. Just two months before the *Roper* decision, Justices Breyer and Scalia debated the role of international law. The Relevance of Foreign Law for American Constitutional Adjudication, January 13, 2005, <http://domino.american.eduAU/media/mediarel.nsf> (follow "AU Media Press Releases" hyperlink, then locate the releases issued on January 14, 2005).

those Justices to give *decisional* effect to foreign materials, thereby allowing them to be outcome-determinative in constitutional cases. So used, foreign or international law would have legal force in deciding important questions, including the rights of criminal defendants, the constitutionality of parental notification requirements for abortions, the reasonableness of searches by law enforcement, the extent of governmental leeway in religion cases, and the validity of various forms of capital punishment under the Eighth Amendment. It is this type of use of foreign law with which this Article will take issue.²⁸

Foreign and international law cannot be legitimately used in an outcome-determinative way to decide questions of constitutional interpretation. A narrow exception embraces those cases where the text of the Constitution itself refers to international or foreign law, as it does, for example, when it vests in Congress the powers to “define and punish . . . Offences against the Law of Nations”²⁹ and to “declare War.”³⁰ Under those clauses, the Constitution gives Congress the authority to promulgate rules of international law. As discussed further below, the Supreme Court held in the early days of the Republic that public international law (or more precisely, the Law of Nations) could be used to interpret the scope of Congress’ power to “declare War.”³¹ That holding makes perfect sense, given that the power to “declare War” is correctly seen not as a matter of domestic separation-of-powers law enabling Congress to check the President’s authority to engage in armed conflict, but rather as an exceptional grant of authority to Congress to make legal rules in the *international* sphere.³² Likewise, the scope of Congress’s power to define and punish offenses against the “Law of Nations” can be legitimately established by reference to that Law.³³ Such unusual cases aside, foreign and international law

28. No reason exists to distinguish between terms that appear in the constitutional text (like the term “unreasonable” in the Fourth Amendment) and terms that are the common coin of the Court’s constitutional case law (like “undue burden” in the context of abortion). If foreign law is irrelevant to interpreting constitutional *text*, it should not be relevant to constitutional *doctrine*.

29. U.S. CONST. art. I, § 8, cl. 10.

30. U.S. CONST. art. I, § 8, cl. 11.

31. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125 (1814).

32. See 1 JAMES KENT, COMMENTARIES 56–58 (Da Capo Press 1971) (1826) (explaining the meaning of the Declare War Clause). See also John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2004).

33. The Constitution also refers to international law in certain grants of power to the federal courts: for example, when it authorizes those courts to try “all Cases of

should not be available as a basis for interpreting the Constitution.

This Article makes four observations regarding the Supreme Court's practice of relying upon foreign and international decisions to support of its constitutional rulings. Part I argues that non-ornamental use of foreign decisions undermines the separation of powers and violates the constitutional rules against delegation of federal authority to bodies outside the control of the national government. Part II argues that use of foreign decisions undermines the limited theory of judicial review, as set out in *Marbury v. Madison*.³⁴ Chief Justice Marshall justified the federal courts' power to ignore enacted laws that were inconsistent with the Constitution on the ground that such statutes fell outside the delegation of authority by the people to the government, as expressed in the Constitution.³⁵ Relying on decisions that interpret a wholly different document runs counter to the notion that judicial review derives from the Court's duty to enforce the Constitution. Part III considers the relevance of the Constitution's Supremacy Clause and Law of Nations Clause to the Court's emerging use of foreign law. Part IV questions the Court's use of precedents that derive almost exclusively from Europe. We will suggest that Europe does not present the ideal model of constitutionalism for the United States to follow and that in fact deviation between the United States and Europe may significantly enhance global welfare.

admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1. Maritime and admiralty law "has strong roots in international custom. In extending judicial power 'to all cases of admiralty and maritime jurisdiction,' the framers of the Constitution apparently had English admiralty practice in mind, itself based on the civil law of continental Europe." James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT'L L. J. 251, 266 (2003). See also WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND at *67 (stating that the Law of Nations is "universal law" that encompasses "mercantile questions, such as bills of exchange and the like," "all marine causes," "the law-merchant," and "disputes relating to prizes, to shipwrecks, to hostages, and ransom bills."); Edward Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38, 39 (1955) (quoting the statement of Lord Mansfield that "the maritime law is not the law of a particular country, but the general law of nations"). See *infra* text accompanying notes 120–22.

34. 5 U.S. (1 Cranch) 137 (1803).

35. *Id.* at 176 ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.").

I. FOREIGN LAW AND U.S. SEPARATION OF POWERS

As noted above, in *Roper*, *Atkins*, and *Lawrence*, the Court used foreign precedents to analyze the application of the Eighth Amendment and the Due Process Clause. All three cases involved measuring state action—execution of juveniles and the mentally retarded and the criminalization of homosexual sodomy—against social norms. To determine the content of such norms, the Court looked to European precedents as indicative of world opinion on the question.³⁶

The Court's use of foreign law has the potential to turn into a standard of deference. There is support for such a development within the legal academy. Scholars have argued in favor of allowing customary international law to enjoy the status of federal common law,³⁷ and certain lower court interpretations of the Alien Tort Statute³⁸ threaten to do just that.³⁹ Other scholars have argued that American courts should defer to the decisions of foreign courts in interpreting treaties.⁴⁰

36. *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005) (“The United Kingdom’s experience bears particular relevance here As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter.”); *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.”); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

37. See, e.g., Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

38. 1 Stat. 73 (1789) (codified at 28 U.S.C. § 1350 (2000)) (providing that federal district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

39. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). See also Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002) (arguing that the “law of nations” provision of the Alien Tort Statute was not originally understood as “creating a federal statutory cause of action for violations of the law of nations”); Julian Ku & John Yoo, *Foreign Competence: Formalism, Functionalism, and the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (arguing that courts lack functional competence to promote foreign policy goals absent direct guidance from the political branches).

40. See, e.g., Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1293 (2002) (responding to John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001)); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 787–91 (1998).

Though the arguments for deferring to foreign precedents are not precise, analogy is possible to the standards of deference that courts apply to administrative agencies. The strongest of these standards, *Chevron* deference, requires courts to defer to agency interpretations of an ambiguous statutory provision if Congress's intent does not clearly dictate otherwise and if the interpretation is a permissible or not unreasonable reading of the provision.⁴¹ "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."⁴² Under a weaker standard of deference, *Skidmore* deference, the weight given to an agency interpretation rests "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁴³ One of the authors has elsewhere criticized offering either form of deference to foreign law as a problematic delegation of authority from the federal government to foreign courts.⁴⁴

That sort of deference to foreign decisions runs counter to the constitutional structure. It would subject American citizens to the judgments of foreign and international courts, and the Constitution makes no provision for the transfer of federal power to entities outside of our system of government. To the contrary, the Appointments Clause directly limits the transfer of federal power.⁴⁵ Much writing on this clause has focused on

41. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). For a classic exposition of *Chevron*, see Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990). For a more recent exposition, see Jonathan Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002).

42. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). On this point, see John Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223.

43. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 227, 234 (2001) (distinguishing *Chevron* deference from *Skidmore* deference).

44. See John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002).

45. John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 96 (1998) ("[T]he Constitution erects limits on the ability of the federal government to

the balance of power between the President and Senate in the appointment of federal judges.⁴⁶ However, the Clause also functions as a mechanism to conserve federal power. In recent decisions, the Supreme Court has recognized that the Appointments Clause restricts the exercise of federal power to those officials appointed through the processes set out in the Clause.⁴⁷ This restriction ensures that federal power is limited to officials who are accountable solely to elected representatives, and thus ultimately to the American people. Plainly, international and foreign courts do not meet this standard.

The Court's discussions of the Appointments Clause in *Edmond v. United States*⁴⁸ and *Printz v. United States*⁴⁹ affirm the notion that Congress may not transfer responsibility for the execution of federal law to officers outside the control of the executive branch. In *Edmond*, the Court observed that the Appointments Clause "is among the significant structural safeguards of the constitutional scheme."⁵⁰ In *Printz*, the Court held that Congress could not delegate the power to enforce the Brady Act to state officials because such delegation would leave federal law enforcement free of "meaningful Presidential control" and would undermine the effectiveness of a unitary executive.⁵¹ "That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."⁵² *Printz* made clear that the Appointments Clause would be offended not only if Congress sought to transfer federal law enforcement to officers of its own selection, but also if it attempted to delegate that

transfer or delegate power to entities that are not directly responsible to the American people.").

46. See John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1437 n.4 (2000) (collecting sources).

47. See, e.g., *Edmond v. United States*, 520 U.S. 651, 663 (1997); *Ryder v. United States*, 515 U.S. 177, 180–84 (1995); *Weiss v. United States*, 510 U.S. 163, 169–76 (1994); *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991); *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (per curiam).

48. 520 U.S. at 659.

49. 521 U.S. 898, 922–23 (1997).

50. 520 U.S. at 659.

51. 521 U.S. at 922.

52. *Id.* at 923.

power to officials outside the executive branch of the federal government.⁵³

The Appointments Clause also concerns itself with the general scope and execution of national power. The Clause's requirement that all individuals who exercise significant federal authority become Officers of the United States, appointed pursuant to Article II, Section 2, ensures that the federal government cannot blur the lines of accountability between the people and their officials. As Chief Justice Rehnquist wrote for the Court in *Ryder v. United States*,⁵⁴ "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'"⁵⁵ *Buckley v. Valeo*⁵⁶ first made clear the link between the Appointments Clause and the exercise of federal power. The *Buckley* Court rejected the proposition that Congress could appoint individuals to exercise federal power who were not Officers of the United States, observing, "We think . . . [that the Appointments Clause's] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Clause]." ⁵⁷ Individuals appointed by Congress, therefore, did not qualify as Officers of the United States and could only perform duties not involving the enforcement of federal law.

Two other elements of the Constitution's text and structure confirm the Appointments Clause's careful husbanding of federal power. First, Article III vests the federal judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁵⁸ This provision suggests that the federal judicial power, which includes the authority to decide cases or controversies under federal law, cannot be exercised by any other branch of the federal government, with the narrow and debatable exception of the

53. *Id.*

54. 515 U.S. 177 (1995).

55. *Id.* at 182 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

56. 424 U.S. 1 (1996) (per curiam).

57. *Id.* at 126 (per curiam).

58. U.S. CONST. art. III, § 1.

Senate's role in trying cases of impeachment.⁵⁹ The logical implication is that no part of the Article III authority to decide federal cases and controversies, from which springs the judicial power to interpret the Constitution, can be delegated or transferred outside the United States government.⁶⁰

Of course, Congress could have declined to create any lower federal courts. Furthermore, restrictions on the subject matter jurisdiction of federal courts cause many federal constitutional issues to arise first in state courts, whose judges are not members of the federal government.⁶¹ Any resulting damage to the separation of powers is not, however, insurmountable. State judicial decisions can be reviewed by the Supreme Court, and state courts are still part of the American political system with judges who take an oath to uphold the Constitution. The Supremacy Clause specifically permits, even requires, the "commandeering" of state courts to enforce federal law. The potential violation of separation of powers is, therefore, greater when the courts defer to foreign laws or courts. This transfer of judicial power ignores the vesting of all judicial power in the Supreme Court and undermines the accountability of government. Members of the electorate cannot hold accountable officials who stand completely outside the structure of American government.

The second element of the Constitution's text and structure that confirms the Appointments Clause's conservation of power is the nondelegation doctrine, which prohibits Congress from delegating rulemaking authority to another branch unless

59. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). Legislative attempts at jurisdiction-stripping, however, may obscure this concept. Commentators who believe that Congress has the authority to strip the federal courts of jurisdiction include Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-32 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984); and Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-66 (1953).

60. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000).

61. The well pleaded complaint rule precludes almost all defendants in state courts from removing their cases to federal courts. Federal defenses to state law claims made by plaintiffs are therefore adjudicated almost exclusively by state judges. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); 28 U.S.C. § 1331 (2001).

it has stated intelligible standards to guide administrative discretion.⁶² This requirement ensures that the exercise of delegated power can be monitored and controlled, and even reversed when necessary. Although the Supreme Court has not invalidated a statute on nondelegation grounds since the New Deal period,⁶³ it remains an important structural principle that finds its expression in quasi-constitutional doctrines including canons of construction.⁶⁴ The delegation of lawmaking power outside the federal government would prevent lower courts, Congress, and the public from monitoring whether the delegated authority was being exercised consistent with legislative or constitutional standards.⁶⁵

Providing any type of deference to foreign judicial decisions would cause considerable tension with these constitutional structures. Under the Appointments Clause, anyone who possesses the power to interpret and execute federal law must be an Officer of the United States. When the Court applies *Chevron* deference, or even the lesser form of *Skidmore* deference, it is providing that deference to officials who are appointed by the President or those responsible to him consistent with the Appointments Clause. Thus, those who make and interpret federal law, whether they are federal judges or federal agency officials, are still ultimately responsible to the American electorate. Foreign judges, in contrast, have been neither nominated by the President nor approved by the Senate, and thus should not exercise significant federal power by influencing the interpretation of a federal law. To the extent a foreign decision is outcome-determinative or triggers some type of deference, it would raise serious problems with the constitutional requirement that federal authority be exercised solely by federal officers.

62. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); cf. *Clinton v. City of New York*, 524 U.S. 417 (1998).

63. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

64. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Manning, *supra* note 42.

65. For recent discussion of the nondelegation doctrine, compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003). See also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

Reliance on foreign decisions also violates the policies animating the Appointments Clause and the nondelegation doctrine, namely, accountability and control. Delegation to federal agency officials seems tolerable because those officials are part of an executive branch responsible to the President, Congress, the courts, and the public. Though the Supreme Court may give it deference, an agency that goes well beyond its statutory mandate in interpreting or enforcing federal law is subject to checks, including congressional oversight, budget cuts, amended statutory requirements, presidential removal, public criticism and, ultimately, elections.⁶⁶ The same mechanisms do not constrain foreign judges, who are neither responsible to the American political system nor required to adapt their exercises of interpretive authority to federal constitutional or statutory principles. Reliance on foreign decisions would evade the Constitution's conferral of the power to implement and interpret federal law on officers of the United States who are accountable to the electorate.

II. FOREIGN LAW AND JUDICIAL REVIEW

Issues of delegation or deference aside, judicial reliance upon sources exogenous to the American political system in interpreting the Constitution undermines the textual and structural basis for judicial review. This criticism does not extend to all uses of foreign decisions by the federal courts. Such sources might be relevant to judicial interpretation of other types of federal law, such as treaties, statutes, and perhaps even federal common law. This Part argues, however, that when it comes to the Constitution, federal courts are limited to materials that derive from the American legal system.

The touchstone of this argument is the nature of judicial review. Some have argued that judicial review promotes certain functional goals, whether they be efforts to interpret the Constitution in light of contemporary values,⁶⁷ to protect minori-

66. Congressional attempts to shield itself from popular accountability have been struck down. *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (striking down a law that allowed a nine-member board of review made up of members of Congress to review the decisions of the airport authority).

67. *See, e.g.,* RONALD DWORKIN, *FREEDOM'S LAW* 2, 37 (1996) (articulating the view that judges should base judgments in part on public morality); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 36

ties,⁶⁸ to reinforce democratic representation and preserve space for democratic decisionmaking,⁶⁹ to promote the rule of law by interpretation along “common law” lines,⁷⁰ or to adhere solely to the Constitution’s original understanding.⁷¹ This Article offers a far more modest explanation of the origins of judicial review. Rather than deriving from any grand role of the judiciary within the constitutional system, judicial review originates in the nature of the Constitution as a document that delegates power from the people to the government, in the supremacy of constitutional law to statutory law, and in the duty of every federal officer to obey that higher law when confronted with the inconsistent actions of other branches of government.⁷²

The structural foundation for judicial review lies in the nature of the Constitution and its relationship with the officers of the federal government. According to the theory of popular sovereignty prevalent at the time of ratification, the Constitution was a creation of the people of the several States.⁷³ Indeed,

(1995) (asserting that constitutional interpretation must be based on a common commitment to national values); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 8–13 (1991) (arguing that each generation has a role in interpreting the Constitution).

68. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–88 (1980) (articulating a representation-reinforcing theory of judicial review); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (arguing that judicial review should protect minorities).

69. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at xiv (1999) (arguing that minimalist judicial decisions promote democratic deliberation).

70. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 78, 81–82 (1990).

71. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999); ANTONIN SCALIA, A MATTER OF INTERPRETATION 38–41 (1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990).

72. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

73. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) (noting that the Constitution was ratified by the consent of the people of individual states and not by the consent of “the undifferentiated people of the Nation as a whole”). See also Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 792–94 (1999) (describing the development of the idea that “judges, though

"We the People of the United States" speak at the start of the Constitution in an authorial voice.⁷⁴ This understanding of government power indicates a rejection of the notion that sovereignty itself lodged in the government or monarch. Necessarily, the government exercises power only because it serves as the agent of the people's will. As James Madison wrote in *The Federalist No. 46*, "The federal and State Governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."⁷⁵ Madison reminded critics of the proposed Constitution that "the ultimate authority, wherever the derivative may be found, resides in the people alone . . ."⁷⁶

It follows from this logic that the government may exercise only the power that the people have delegated to it. A written constitution serves to specify and limit those powers. Any exercise of authority beyond the grant of power in the written constitution is therefore invalid because it goes beyond the delegation from the people and undermines popular sovereignty. As Alexander Hamilton explained in *The Federalist No. 78*, "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."⁷⁷ A written constitution would prove inconsequential if its agents could simply exercise the powers that they saw fit, regardless of the will of the people. As Chief Justice John Marshall declared in *Marbury v. Madison*, "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."⁷⁸ For the Constitution successfully to establish written limitations on the powers of the branches of government, it must establish a rule of decision that places itself above the organs it creates.

not elected, resembled the legislators and executives in being agents or servants of the people with a responsibility equal to that of the other two branches of government"); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1443 (1987) (describing the Federalists' identification of the executive and judiciary as "agents of the People" in curbing legislative power).

74. U.S. CONST. pmb1.

75. THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

76. *Id.*

77. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 75, at 467.

78. 5 U.S. (1 Cranch) 137, 176–77 (1803).

The task of policing the other federal and state governmental actors has largely fallen to the federal courts.⁷⁹ In *The Federalist No. 78*, Hamilton specifically emphasized the role of the federal courts as “an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.”⁸⁰ Following Hamilton, Chief Justice Marshall in *Marbury* spelled out, through a series of *reductio ad absurdum* arguments, the necessity of such a judicial role. The view, he argued, that the courts could not examine the constitutionality of a statute before them, or pronounce it void if they found it repugnant to the Constitution, “would subvert the very foundation of all written constitutions.”⁸¹ Marshall explained:

It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.”⁸²

Neither *The Federalist* nor *Marbury*, however, makes the claim that it is *solely* the function of the judiciary to decide whether the acts of the other branches of government are unconstitutional, and hence ought not be obeyed.⁸³ Rather, popular sovereignty theory suggests that each branch has an obligation to refuse to obey commands that violate the Constitution. Judicial

79. This is in part because of the phenomenon of “agency costs,” which can make it effectively impossible for a principal to monitor the performance of its agents and so ensure that they are not acting outside the scope of the authority delegated to them. In order to maintain control over its agents, a principal may therefore delegate to one of those agents a lead role in monitoring the actions of the others. To be sure, such a delegation may itself be abused, precisely because close monitoring of *that* agent may also be unduly costly for a principal.

80. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 75, at 467.

81. 5 U.S. (1 Cranch) at 178.

82. *Id.*

83. Indeed, Marshall later went to some length to specify a class of “political” cases in which the constitutionality of the actions of another branch is not open to judicial review. *See, e.g.*, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307–09 (1829) (international boundaries a political question); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818) (recognition of international status a political question); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272 (1808) (independence of French colony a political question).

review arises from the principle that each branch of government is coordinate, independent, and responsible for interpreting and enforcing the Constitution when fulfilling its particular constitutional role. While the federal judiciary enjoys no constitutional authority to force the other branches to adopt its interpretations of the Constitution in the performance of their unique functions, neither can the other branches dictate constitutional meaning to the judiciary when it decides cases or controversies.⁸⁴ The Constitution's separation of powers necessarily requires judicial review.

There has been much debate between those who interpret separation of powers formally and those who interpret it functionally.⁸⁵ Nevertheless, both sides should concede several points that follow. The Constitution makes clear that the three branches are coordinate, in the sense that they are equal to each other. As James Madison wrote in *The Federalist* No. 49, "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . ."⁸⁶ Each branch exercises authority granted directly by the people through the Constitution, and no branch is subordinate to the others. In addition to being coordinate, the branches are separate. While some powers are shared, such those regarding treaties and appointments, each branch executes certain core functions that belong to it alone. Only Congress can enact legislation within the field of authority vested in it by Article I, Section 8 and the Reconstruction Amendments; only the President may execute federal laws; and only the judiciary may decide Article III cases or controversies. This basic structure gives birth to judicial review. In the course of performing its constitutional responsibility to decide cases or controversies, the judiciary must give primacy to the Constitution over other actions of

84. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

85. See generally Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47 (2000).

86. THE FEDERALIST NO. 49 (James Madison), *supra* note 75, at 314.

the federal or state governments.⁸⁷ This requires federal judges to interpret the Constitution in the course of resolving conflicts that arise between federal or state law and the Constitution.

Judicial review's roots in the Constitution's text and structure explain why reliance on foreign decisions creates severe constitutional difficulties. Judicial review operates because the Court, in carrying out its Article III duties, must follow the higher law of the Constitution above any inconsistent federal or state statutes. The Constitution is higher law, as Chief Justice Marshall observed in *Marbury*, because it represents the delegation of power from the people to their government.⁸⁸ When interpreting the scope and meaning of that delegation of power to the federal government, the federal courts should have no recourse to foreign decisions. Those, after all, interpret documents entirely different from the United States Constitution. The European Court of Human Rights (ECHR), for example, interprets and applies the European Convention on Human Rights of 1950, which was created by the member states of the Council of Europe.⁸⁹ The beliefs of the member states of the Council of Europe about the scope of various individual rights circa 1950 have little to do with the extent of the powers the American people delegated to their government in 1788, 1791 or 1865–1870. The European Convention and the ECHR decisions interpreting it do not even purport to relate to our Constitution's delegation or power; rather, the European Convention is an international agreement in which the party states committed themselves to abide by certain requirements.⁹⁰ By relying

87. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

88. *Id.* at 176 ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.").

89. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

90. The agreement's preamble opens, "The Governments signatory hereto, *being Members of the Council of Europe . . .*" *Id.* at 221 (emphasis added).

on foreign sources of law to interpret the Constitution, the Court undermines the very delegation of authority that gives it the power of judicial review.

Moreover, “the People” are the originator of the Constitution and the delegator of all powers under it. The states that are parties to the European Convention, no matter how worthy or progressive in their approach to human rights, are not part of the American polity and were not in 1787 or 1791. At those times, many of the nations that constitute the state parties to the various European treaties on economic integration or human rights were not even democracies that protected individual liberties, but were monarchies without representative governments. If anything, we enjoy our current Constitution precisely because the Americans of the late Eighteenth Century rejected their relationship with Europe, against the efforts of the British Empire.⁹¹ The Union (embodied by the Constitution) was largely designed to serve as an “effective barrier against the Europeanization of American politics.”⁹² This is not to say that interpreters should not refer to eighteenth-century understandings of British constitutional terms that the Framers borrowed in writing the Constitution. But it cautions against relying on the decisions of postwar Europeans who were neither part of the American polity that drafted and ratified the U.S. Constitution and Bill of Rights, nor descended from ancestors who shared a common political system with the Framers.

Even before the Framing, the Declaration of Independence had denounced King George III for “subject[ing] us to a jurisdiction foreign to our constitution, and unacknowledged by our laws,” and for “taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government.”⁹³ If the Framers considered English law oppressive, it is unlikely that they would have wanted the Constitution’s interpreters to defer to the laws and practices of Bourbon France or Spain, Habsburg Austria, Hohenzollern

91. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 73–74 (2001) (“The colonial experience of resisting King and Parliament served as the model from which the Founders constructed their theories, and the Revolution itself, beginning with the Stamp Act protests, provided their blueprint for opposing a government that exceeded its constitutional authority.”).

92. PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 176 (1993).

93. THE DECLARATION OF INDEPENDENCE paras. 17, 25 (U.S. 1776).

Prussia, or the Papal States. Nor is there any indication that the American people, at any point in their history, have wanted their delegation of authority to the national government to be construed to match the constitutions of foreign nations. Certainly the framers of those documents would not have thought any European treaties in existence at that time should provide a model for constitutional rights; indeed, the framework of international human rights that we have today would have been foreign to them.⁹⁴

Furthermore, a “living constitution” approach to constitutional interpretation—the conviction that the Constitution should be interpreted in light of contemporary attitudes and values—does not justify reliance on foreign precedents. If a living Constitution approach counsels in favor of interpreting the Constitution according to the meaning that “we the People” today would give it, then at the very least, it should be determined how “we the People” think. But there is no indication that the American people today believe that their constitutional rights and distribution of powers should be interpreted in light of foreign judicial decisions. In fact, American attitudes toward international human rights indicate the opposite. The United States has entered into relatively few human rights treaties, and those agreements to which it has consented have been ratified only with significant reservations, understandings, and declarations (RUDs).⁹⁵ The RUDs usually contain provisions making clear that the United States considers its existing laws to meet the requirements of the treaty, and that the treaty is non-self-executing.⁹⁶ Such a practice undermines any argument that inter-

94. How attentive an ear the Court should give to the intent of the Constitution’s Framers is often disputed. There is little doubt, however, that the Court itself often claims to place at least some importance on the intended design of the Framers.

95. Many scholars who complain of the United States’s unwillingness to join fully the international community readily admit that the cause may be a reluctance to do so on the part of American elected officials. *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 *EMORY L.J.* 775 (2001).

96. At least three modern treaties to which the United States is a party have been qualified with RUDs: the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 *U.N.T.S.* 85; the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 *U.N.T.S.* 171 [hereinafter *Political Rights Covenant*]; and the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21,

national human rights agreements, even those to which the United States is a party, should be given domestic effect. Certainly, the argument for judicial deference to international agreements to which the United States is not a party is even weaker.

Nevertheless, the majority opinion in *Roper* discounted the reservation, proposed by the President and accepted by the Senate, to the International Covenant on Civil and Political Rights (ICCPR).⁹⁷ This reservation was addressed to article 6(5) of the ICCPR, which prohibits the juvenile death penalty, and was intended to enable the United States and its component States to retain that form of punishment if they saw fit. The reservation stated, "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."⁹⁸ Despite this recent agreement by the nation's treaty-making branches on the matter, the Court effectively stripped the RUD out of the treaty.⁹⁹ The Court cited article 6(5) of the ICCPR to support its conclusion that the juvenile death penalty is unconstitutional.¹⁰⁰ Moreover, the majority opinion gave considerable weight to the prohibition on the juvenile death penalty in article 37 of the Convention on the Rights of the Child, despite the United States's failure to ratify that treaty.¹⁰¹ An exasperated Justice Scalia was led to wonder whether "the Court ha[d] added to its arsenal the power to join and ratify treaties on behalf of the United States" ¹⁰²

1965, 660 U.N.T.S. 195. On RUDs, see John Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999).

97. Political Rights Covenant, *supra* note 96, 999 U.N.T.S. at 171.

98. *International Covenant on Civil and Political Rights: Hearing Before the Committee on Foreign Relations of the United States Senate*, 102d Cong. 109 (1991) (reservation proposed by the administration).

99. *Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005) ("This reservation at best provides only faint support for [the state] petitioner's argument.").

100. *Id.*

101. *Id.* at 1199.

102. *Id.* at 1226 (Scalia, J., dissenting).

III. FOREIGN LAW, THE SUPREMACY CLAUSE,
AND THE LAW OF NATIONS

The Supremacy Clause does not mention the law of nations as a form of supreme law. By implication, this omission seems to exclude international law, absent congressional implementation, as a form of law enforceable in federal courts. However, the law of nations has played a role in American jurisprudence from the earliest days of the Republic. This Article considers the two competing formulations of the law of nations—as a form of natural law and as a form of positive law—and concludes that in neither case does it generally provide a valid basis for using foreign materials in constitutional adjudication. Only in the few cases involving constitutional provisions that themselves refer to international law is reliance on foreign sources appropriate.

On its face, the Supremacy Clause¹⁰³ does not include foreign or international law as a legal basis for judicial decisions.

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.¹⁰⁴

The Clause identifies three, and only three, kinds of supreme law within the United States: (1) the Constitution itself; (2) acts of Congress enacted in accordance with the procedures prescribed in Article I, Section 7; and (3) treaties ratified in accordance with the procedures prescribed in Article II, Section 2, Clause 2, together with treaties pre-existing the Constitution that had been ratified “under the authority of the United States” during the period of the Articles of Confederation. Foreign and international laws, other than treaties ratified by the United States, are not enumerated among the three kinds of law that can be “the supreme Law of the Land.” Therefore, they should not be treated as outcome-determinative in constitutional adjudication.

103. U.S. CONST. art. VI, cl. 2.

104. *Id.*

The purposes of the Supremacy Clause confirm this textual analysis. The Clause helped to cement a federal union. The Framers were gravely concerned that claims of state sovereignty would undermine the nation's independence, threaten the survival of republican forms of government, and undo the achievements of the Revolution. In their view, the Articles of Confederation reinforced the unfortunate centrifugal tendencies of the post-revolutionary period. Article II of the Articles even enshrined the principle that "[e]ach state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."¹⁰⁵ Thus, to some of the Framers, the Articles amounted to little more than a treaty among sovereign states that could be abrogated by any one of them at will. Given the sharp conflicts of interest between states and regions, the eventual dissolution of the Union was a real possibility. And the Framers feared that the Union's dissolution would result in the emergence of an unstable, unrepugnant and war-prone international system in North America that would resemble the uneasy balance of power in Europe. They were convinced that a fragmented nation would inevitably be swept up in European power politics, just as statesmen on both sides of the Atlantic had, prior to the Revolution, predicted that it would.¹⁰⁶

James Madison recognized the danger:

The [con]federal system being devoid of both [sanction and coercion], wants the great vital principles of a Political Cons[ti]tution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and alliance, between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislatures would render superfluous any ap-

105. ARTICLES OF CONFEDERATION art. II.

106. "[W]ith the growing importance of commerce and naval strength as elements of national power and their recognition in the theories of mercantilism, public opinion and leading men in France, England, and America realized, in the words of Franklin's opponent in the Canada-Guadeloupe controversy, William Burke, that 'there is a Balance of Power in *America* as well as in *Europe*.'" GERALD STOURZH, BENJAMIN FRANKLIN AND AMERICAN FOREIGN POLICY 113 (1954). See generally FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973) (discussing the foreign affairs concerns of Framers).

peal to the ordinary motives by which the laws secure the obedience of individuals.¹⁰⁷

The Supremacy Clause addressed these deficiencies by clearly subordinating state sovereignty to the authority of the federal government where the federal government acts within its proper sphere. The Clause operates, in effect, as a sharp and definitive conflict-of-laws rule, determining which of various laws is to be enforced in the event that a conflict arises. This rule has two aspects: It establishes the priority of the Constitution itself over all other law, whether federal or state; and the priority of federal law, whether in the form of the Constitution, an act of Congress, or a treaty, over any form of state law, including state constitutions.

The Supremacy Clause does not explicitly address the question of conflicts between domestic law and foreign and international law. This omission likely reflects the Framers' understanding that such laws could not serve as the basis for decisions by American courts, absent the consent of the American sovereign. As Chief Justice Marshall later explained in *The Schooner Exchange v. McFaddon*:¹⁰⁸

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction on it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.¹⁰⁹

The second purpose of the Supremacy Clause is to link the forms of federal law to specific processes of enactment, which require majorities or even supermajorities. To stand as the "supreme Law of the Land," a measure must either be the Constitution itself, a federal law that represents the outcome of the constitutional processes prescribed in Article I, or a treaty rati-

107. JAMES MADISON, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON 348, 351 (Robert A. Rutland et al. eds., 1975).

108. 11 U.S. (7 Cranch) 116 (1812).

109. *Id.* at 133–34.

fied under Article II. By requiring that any supreme source of legal authority meets these standards, the Supremacy Clause guarantees that such laws will ultimately stem only from the preferences of political majorities or super-majorities. All forms of federal law under the Supremacy Clause must receive at least the approval of the Senate, if not also the House and the President.¹¹⁰ Moreover, by subordinating state law to federal law, the Clause ensures that local majorities will not prevail over national majorities when their preferences conflict. The Supremacy Clause makes clear that sources of law that are not enacted through the appropriate federal political process cannot be the Law of the Land.

The Supremacy Clause's fundamental purposes are undermined if foreign and international laws are treated on par with, or as one of, the explicit sources of authority under the Clause. The Framers sought to establish a federal union in large part to stave off "the imminent Europeanization of American politics" and used "modern Europe . . . as a conceptual antitype and foil for their energized, extended republic."¹¹¹ The Supremacy Clause furthered that purpose by guaranteeing "that the corporate interests of state governments would always be subordinate to the rights of the sovereign people . . . and that the states would not arbitrarily interfere with the free movement of trade and people across state boundaries."¹¹² The Clause was thus integral to the creation and maintenance of a viable American nationhood, distinct from, but as strong as, that of any other nation. At the same time, the specific type of union that the Framers envisaged by no means encompassed the consolidation and destruction of the States. They remained free to "flourish as republics, the primary locus of self-government."¹¹³ To invalidate state laws because they do not conform to the laws of foreign legal systems therefore contradicts the policies of the Supremacy Clause in two ways: It undermines the distinctiveness of American law, and it frustrates and discourages the exercise, by the citizens of the States, of the republican freedoms that constitutionally belong to them.

110. Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003)

111. ONUF & ONUF, *supra* note 92, at 131.

112. *Id.* at 132.

113. *Id.*

This interpretation of the Supremacy Clause is subject to challenge, however. This analysis assumes that the Clause's enumeration of the possible forms of "supreme Law" is exhaustive: that international and foreign law, as such, cannot be "supreme Law" because they are nowhere mentioned in the Clause. But longstanding historical practice, it might be said, contradicts that interpretation.¹¹⁴ Though neither the "Law of Nations" nor common law is explicitly mentioned in the Supremacy Clause, American courts have long recognized such law. Indeed, the Constitution itself, in Article I, Section 8, Clause 10, refers expressly to the "Law of Nations," thus suggesting that such law can provide a rule of decision for our courts. And if the Law of Nations can provide a rule of decision, then, it may be argued, foreign and international law may legitimately provide a source of law in constitutional cases, notwithstanding the absence of any explicit reference to such law in the Supremacy Clause.

An assessment of this critique requires a determination whether the early understanding of the "Law of Nations" provides any support for treating contemporary foreign and international law as a source of law in constitutional adjudication. Early understanding does not support such a notion.

Some of the earliest commentators on the Constitution appear to have believed that the United States, merely by constituting itself as a nation among other nations in 1776, had assumed an obligation to comply with and enforce the law of nations. In *Chisholm v. Georgia*,¹¹⁵ Chief Justice John Jay stated that the United States "had, by taking a place among the nations of the earth, become amenable to the law of nations."¹¹⁶ Likewise, in *Ware v. Hylton*,¹¹⁷ Justice James Wilson, an influential and prominent Founder from Pennsylvania, wrote that when "the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."¹¹⁸ And President George Washington's

114. See Stephen G. Calabresi & Stephanie 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. (forthcoming Dec. 2005) (extensive survey of Supreme Court constitutional caselaw relying on foreign law).

115. 2 U.S. (2 Dall.) 419 (1793).

116. *Id.* at 474.

117. 3 U.S. (3 Dall.) 199 (1796).

118. *Id.* at 281.

Attorney General Edmund Randolph, another Framers from Virginia, opined in 1792 that the “law of nations, although not specifically adopted by the constitution or any municipal act, is essentially a part of the law of the land.”¹¹⁹ On this view, the constitutive act of founding the nation in itself subjected the United States to the law of nations; and the change in the nation’s constitutional arrangements in 1787 did nothing to alter that subjection.

Furthermore, the Constitution elsewhere authorizes federal courts to apply, as rules of decision, laws that are not the law of the United States under the Supremacy Clause. Article III, Section 2 of the Constitution states that the judicial power shall extend to “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” That language corresponds closely to the categorization of laws found in the Supremacy Clause. In addition, however, Article III, Section 2 states that the federal judicial power shall extend to other matters, including, for example, “all Cases of admiralty and maritime Jurisdiction.” In *American Insurance Co. v. Cantor*,¹²⁰ Chief Justice Marshall ruled that although a territorial court of Florida had been vested by an act of Congress with such jurisdiction as arose under the Constitution and laws of the United States, it was not on that account also vested with the authority to decide cases in admiralty.¹²¹ “A case in admiralty does not, in fact, arise under the Constitution or the laws of the United States. These cases are as old as navigation itself; and the law of admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.”¹²² The Constitution itself, therefore, appears to license the federal courts, sitting in admiralty, to apply a species of federal common law that represents more than simply filling in gaps in a federal statute. If so, this Article’s argument that foreign law is not “law” as specified in the Supremacy Clause, and thus cannot be applied to constitutional interpretation in an outcome-determinative way, may seem to fail.

That line of attack, however, does not lead to the conclusion that contemporary foreign and international law can be applied

119. 1 Op. Att’y Gen. 26, 27 (1792).

120. 26 U.S. (1 Pet.) 511 (1828).

121. *Id.* at 545–46.

122. *Id.* at 545.

comprehensively to decide constitutional issues. Although the original meaning of the “Law of Nations” is uncertain and disputable, it does not appear to be equivalent to the later term “international law” (which was first introduced in 1780 by Jeremy Bentham).¹²³ Still less did the eighteenth-century law of nations embrace anything resembling contemporary international human-rights law.

There were at least two main points of view expressed by leading American statesmen and jurists during the founding period concerning the foundations or sources of the law of nations. One view held that the law of nations was, at least primarily, an instance of the law of nature as applied to nations. On this approach, the law of nations (or such elements of it as were directly founded on the law of nature) was binding on all nations and could not be varied by local law, including domestic constitutional law. On the alternative view, the law of nations was primarily a matter of convention and derived its force from the consent of each nation, either through treaty or by practice, to be governed by that law.

James Wilson, a proponent of the former view, explained: “The law of nature, when applied to states or political societies, receives a new name, that of the law of nations.”¹²⁴ Wilson argued that the binding force of the law of nations does not depend on the consent of the nations subject to it:

I freely admit that there are laws of nations, which are founded altogether upon consent. National treaties are laws of nations, obligatory solely by consent. The customs of nations become laws solely by consent. Both kinds are certainly voluntary. But the municipal laws of a state are not more different from the law of nature, than those voluntary laws of nations are, in their source and power, different from the law of nations, properly so called. Indeed, those voluntary laws of nations are as much under the control of the law of nations, properly so called, as municipal laws are under the control of the law of nature. The law of nations, properly so called, is the law of nature applied to states and sovereigns. *The law of nations, properly so called, is the law of states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals.*

123. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 46 (1986).

124. JAMES WILSON, *Of the Law of Nations*, in 1 *THE WORKS OF JAMES WILSON* 148 (Robert Green McCloskey ed., 1967).

*Universal, indispensable, and unchangeable is the obligation of both.*¹²⁵

This understanding of the law of nations as the application, in the sphere of nations, of a “[u]niversal, indispensable, and unchangeable” law of nature is of course the latent premise behind Wilson’s statement in *Ware v. Hylton* that the United States received the law of nations upon becoming independent. Views akin to Wilson’s persisted for decades afterwards in American law. For instance, Justice Story’s opinion (as a Circuit Justice) in *United States v. La Jeune Eugenie*,¹²⁶ held that the African slave trade was inconsistent with the law of nations because it was “founded in a violation of some of the first principles, which ought to govern nations,” that is, a violation of the law of nature.¹²⁷ Accordingly, he considered himself bound “in an American court of judicature” to hold that the slave trade was “an offence against the universal law of society” and to subject those who engaged in it to “the penalty of confiscation.”¹²⁸

An alternative, more positivistic view of the law of nations was articulated by Secretary of State James Madison in 1806.¹²⁹ Madison identified five sources of the law of nations, including the work of publicists and the evidence of treaties, but *not* including the law of nature.¹³⁰ For Madison, the law of nations was to be defined instead as consisting of “those rules of conduct which reason deduces, as consonant to justice and common good, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.”¹³¹ Madison gave particular weight to the general treaty practice of nations: “Treaties can be sufficiently general, sufficiently uniform, and of sufficient duration, to attest that general and settled concur-

125. *Id.* at 150 (emphasis added). Wilson added that there was also a “voluntary” part of the law of nations, “founded on the principle of consent,” which consisted mainly of the “public compact and customs received and observed by civilized states.” *Id.* at 165.

126. 26 F. Cas. 832 (D. Mass. 1822) (No. 15,551).

127. *Id.* at 846.

128. *Id.* at 847.

129. JAMES MADISON, *An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace*, in 7 THE WRITINGS OF JAMES MADISON, 204 (Gaillard Hunt ed., 1908). For a discussion of the circumstances of this writing, see ONUF & ONUF, *supra* note 92, at 201–11.

130. MADISON, *supra* note 129, at 208.

131. *Id.* at 238.

rence of nations in a principle or rule of conduct among themselves, which amounts to the establishment of a general law."¹³²

Under this approach, the law of nations does not depend on, and indeed may be inconsistent with, the law of nature. This was the view of Chief Justice Marshall, writing for the Court in *The Antelope*.¹³³ That the African slave trade was inconsistent with the law of nature, Marshall conceded, could "scarcely be denied" because it was "generally admitted" that "every man has a natural right to the fruits of his own labour."¹³⁴ But Marshall nonetheless also ruled that the slave trade could not be condemned as contrary to the law of nations, because it had been universally practiced by nations since antiquity: "This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all."¹³⁵ Although Madison and Marshall differ in their emphases—the former relying more heavily on treaty law, the latter on state practice—they appear to agree that the law of nations is ultimately founded on state consent, not on the law of nature.

Distinguishing between these two early understandings of the law of nations clarifies the question of the legitimacy of relying on international materials. As both Justice Wilson and Justice Story argued, insofar as the law of nations is a species of the law of nature, *all* positive domestic law, including the Constitution, must be subordinated to it. As Wilson wrote, the law of nations, considered as falling under the law of nature, is "of obligation indispensable" and "of origin divine."¹³⁶ If the law of nations has those characteristics, then plainly it may and must

132. *Id.*

133. 23 U.S. (10 Wheat.) 66 (1825).

134. *Id.* at 120.

135. *Id.* at 120–21.

136. WILSON, *supra* note 124, at 149. Likewise, Sir William Blackstone, in a passage quoted by Alexander Hamilton, affirmed that the law of nature, "being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: No human laws are of any validity, if contrary to this." 1 BLACKSTONE, *supra* note 33, at *41, quoted in ALEXANDER HAMILTON, *THE FARMER REFUTED* (1775), reprinted in 1 *THE WORKS OF ALEXANDER HAMILTON* 53, 62 (Henry Cabot Lodge ed., 1904). See generally GERALD STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 59–61 (1970) (exploring but not deciding the question of whether Hamilton regarded the Constitution as subordinate to natural law).

guide constitutional interpretation. However, from its decision nearly seventy years ago in *Erie Railroad Co. v. Tompkins*¹³⁷ through its decision last year in *Sosa v. Alvarez-Machain*,¹³⁸ the Supreme Court has rejected the idea of law “as a discoverable reflection of human reason,” regarding it instead “in a positivistic way, as a product of human choice.”¹³⁹ The law-of-nations-as-natural-law defense of the use of foreign and international law is thus preempted, at least within the Court’s current jurisprudential horizon.

Nor is the law of nations relevant to constitutional interpretation even as a type of positive law, based only on the consent of sovereigns. In eighteenth-century America as in eighteenth-century England, the law of nations was part of the “general common law,” and was not the law of any particular national or local jurisdiction.¹⁴⁰ Like other kinds of common law, however, it could be overruled by statute.¹⁴¹ The subordination of the law of nations to national statutory law cuts against its use to decide constitutional questions. It would be incongruous if a court could invoke the law of nations to strike down an act of Congress that sought to overrule a tenet of the law of nations if the act itself has preemptive force. Thus, Congress could undoubtedly have banned the importation of African slaves (after 1808),¹⁴² even if the African slave trade remained permissible under the law of nations at the time; and the legality of the slave traffic under international law could hardly have been cited to undermine the constitutionality of such a statute. To be

137. 304 U.S. 64 (1938).

138. 542 U.S. 692 (2004).

139. *Id.* at 729; *see also id.* at 744 (Scalia, J., concurring in part and concurring in the judgment) (“The Court recognizes that *Erie* was a ‘watershed’ decision heralding an avulsive change.”).

140. *Id.* at 739 (Scalia, J., concurring in part and concurring in the judgment) (“The law of nations . . . at the time [of the Framing] was] part of the so-called general common law” (citing Edward Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 374 (2002); Curtis Bradley & Jack Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 824 (1997))). For English law at the time, see 4 BLACKSTONE, *supra* note 33, at *67 (“[T]he law of nations (wherever any question arises which is properly the object of it’s [sic] jurisdiction) is here adopted in it’s [sic] full extent by the common law.”).

141. *See* 1 BLACKSTONE, *supra* note 33, at *42–55 (doctrine of parliamentary sovereignty); *see also* FORREST McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 58 (1980) (discussing Blackstone’s views on parliamentary sovereignty in relation to the law of nature).

142. *See* U.S. CONST. art. I, § 9, cl. 1.

sure, the Supreme Court held in *Murray v. The Schooner Charming Betsy*¹⁴³ that acts of Congress should be construed, if reasonably possible, to avoid conflicts with international law.¹⁴⁴ However, that international or foreign law is relevant when determining the intent of Congress does not mean that they are relevant to determining the constitutional validity of that statute.

Moreover, during John Marshall's lengthy tenure as Chief Justice, the Court appears to have relied on the law of nations only once to decide a question of constitutional interpretation.¹⁴⁵ That case, *Brown v. United States*,¹⁴⁶ addressed whether a congressional declaration of war in 1812 had authorized the President to seize enemy property, found on land at the commencement of hostilities, which U.S. citizens had purchased before the outbreak of the war.¹⁴⁷ The Court held the seizure invalid on the grounds that further legislative authorization was needed before the President could seize enemy property.¹⁴⁸ Relying on treatises by several noted European writers and publicists, the Court found,

[T]he modern rule [of the law of nations] would then seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated It may be considered

143. 6 U.S. (2 Cranch) 64 (1804).

144. *Id.* at 118. For different views of the *Charming Betsy* canon, compare Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479 (1998) (arguing that the canon is justified as a means to preserve the separation of powers, to shift certain decision making away from the courts to Congress and the President, and to prevent Congress from unintentionally interfering with the diplomatic prerogatives of the President), with Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005) (arguing that the canon not only shifts certain decisionmaking from the courts to Congress and the President but also prefers legislative over presidential decisionmaking).

145. See Calabresi & Zimdahl, *supra* note 114. This excludes the Marshall Court's decisions in admiralty or maritime law, which did indeed frequently cite foreign or international law, but which did not implicate any constitutional questions (other than the scope of the Court's jurisdiction) to which that foreign law was relevant. As noted above, Article III, Section 2 seems to make express provision for the Court to employ foreign and international law in particular categories of cases, including admiralty and maritime law.

146. 12 U.S. (8 Cranch) 110 (1814).

147. *Id.* at 121–22.

148. *Id.* at 127–29.

as the opinion of all who have written on *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy.¹⁴⁹

Further, the Court stated,

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. *In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.*¹⁵⁰

Brown falls into a narrow and unusual category of cases in which it can be conceded that the use of international law to construe the Constitution is valid: cases in which the constitutional text being construed itself refers to international law. The Declare War Clause is such a clause. It confers on Congress the authority to create and transform relationships existing in international law. Because a purported exercise of that power necessarily implicates international law, it is appropriate for a reviewing court to consult international law in reviewing the scope and effect of Congress's action. To that extent alone is the use of foreign and international law in deciding constitutional issues legitimated by early judicial practice. And even then, *Brown* should not be read to suggest that international law prevented the United States from seizing enemy property; rather, it found that Congress simply had to pass a statute after the declaration of war.

Apart from the Declare War Clause, a few constitutional provisions may arguably permit a court to weigh foreign or international law.¹⁵¹ A court might properly consult foreign law in determining whether a federal office holder had accepted a "title" of nobility from a foreign state within the meaning of Article I, Section 9, Clause 8. Or a court might examine the content of the "Law of Nations" in determining whether Congress had validly exercised its power under Article I, Sections 8 and 10 to "define and punish . . . Offences" against that law. But

149. *Id.* at 125.

150. *Id.* (emphasis added).

151. Again, this excludes Article III, Section 2.

these provisions are isolated, and are of at most marginal relevance to contemporary constitutional law.

To summarize: The Supremacy Clause makes no reference to foreign or international laws. This is persuasive evidence that such foreign or international laws do not form part of the "supreme Law" of the United States. Although the Constitution makes various references to foreign and international law, including the "Law of Nations," those references do not open the door to the general use of foreign law in interpreting the Constitution. International and foreign law had a constitutionally recognized place within early American jurisprudence, and even provided rules of decision in the non-constitutional areas of admiralty and maritime law. Foreign law might also be relevant to questions of statutory construction. It does not follow, however, that international or foreign law can be controlling in questions of constitutional interpretation. That consequence would be defensible if the law of nations was taken to be part of the law of nature; but such natural-law thinking has been eclipsed in American jurisprudence by *Erie*. The only place that remains for using foreign or international law to decide constitutional questions are those pockets of constitutional text that themselves refer to such law.

IV. EUROPEAN SOURCES OF LAW

The Court's recent turn toward foreign law in constitutional adjudication involves reliance primarily on European decisions. Perhaps it is too early to make this generalization; decisions from Asia, Africa, and Latin America may appear over the next few years. For now, however, the Court's use of foreign decisions appears to be a European phenomenon.¹⁵² This part argues that Europe may not be the appropriate model for American constitutional interpretation.

Europe and the United States share different political histories. While the United States continues to exist in a Lockean framework in which government derives from a social contract with the American people, at least according to some sociolo-

152. When Justices have indicated a desire to incorporate foreign law into American decisions, they have specifically mentioned European law. See Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 710-11 (1998) (describing interest by Justices O'Connor and Breyer in applying European Community law).

gists,¹⁵³ Europe has been given to fluctuations of ideological extremes. In the Nineteenth Century, many European nations still considered monarchy the best system of government. Indeed, the other European powers intervened after the French Revolution to restore the Bourbon dynasty to power. In the Twentieth Century, monarchy was followed by fascism, socialism, and communism.¹⁵⁴ As history has demonstrated, the performance of these regimes has been less than exemplary. In particular, fascism and communism, which were once viewed by some as advanced, modern ideologies, were adopted by regimes that murdered millions. Should the Supreme Courts of the 1930s or the 1950s have looked to the decisions of Nazi or Soviet courts for guidance?¹⁵⁵ While the relative stability or gradual change in American political philosophy may have prevented the United States from adopting programs or policies viewed by some as progressive or enlightened, it may also have kept the nation from pursuing ideological extremes that resulted in disaster for European nations. Some attribute moderation in American politics, in part, to our written Constitution.¹⁵⁶ Separation of powers and federalism make it difficult to enact any sweeping, ideologically inspired legislation, and the Bill of Rights curtails government action that infringes individual liberties. Appealing to European decisions evades these structural checks on federal lawmaking because Supreme Court decisions are not subject to strict restraints of bicameralism, presentment, and federalism that apply to Congress and the President.

It is therefore doubtful that current European attitudes are superior to those of Americans. While current European consti-

153. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

154. See PAUL JOHNSON, *MODERN TIMES: A HISTORY OF THE WORLD FROM THE 1920S TO THE YEAR 2000* (1999).

155. For a discussion of both jurisprudence and legal scholarship during the Nazi era, see H.W. KOCH, *IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY* (1989); MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (Thomas Dunlap trans., 1998). For analysis of the Soviet legal system, see GORDON B. SMITH, *REFORMING THE RUSSIAN LEGAL SYSTEM* 60–61 (1996) (noting that the social order under Bolshevism, as dictated by the Communist Party, was always the principal concern of Soviet courts).

156. Several authors have discussed the unique impact that the separation of powers doctrine has on constraining each actor and maintaining policy moderation. See, e.g., CRAIG BRADY & DAVID W. VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON* (1998); KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998).

tutional schemes may appear to protect individual liberties more effectively, or better balance the tension between government power and individual rights, it is difficult to predict whether history will vindicate the choices that Europe has made. Some Americans once thought that fascism and communism were progressive ideologies from which the United States could learn, but history has demonstrated otherwise. Those ideologies resulted in the oppression of domestic populations, inter-European warfare, and the deaths of millions.¹⁵⁷

Not only do their histories differ, but the United States and Europe face social and political circumstances so different as to counsel against any attempt to transplant constitutional values from one to the other. Europe has spent the last sixty years turning away from great power conflict and forging a cooperative enterprise that has solved the problem of German ambition and melded former enemies into a broad economic common market.¹⁵⁸ The tools for this amazing integration have not been military power and conquest, but rather supranational institutions, international law, and diplomacy. As Robert Kagan explains, "Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation."¹⁵⁹ The United States, on the other hand, relies on power rather than international law, employs military force as much as persuasion, and sees a world threatened by terrorist organizations, rogue nations, and the proliferation of weapons of mass destruction.¹⁶⁰

The difference between European and American attitudes has promoted the integration of Europe and permitted Europeans to attempt a new experiment in political organization.¹⁶¹

157. JOHNSON, *supra* note 154, at 261–308, 398–431.

158. ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003).

159. *Id.* at 3.

160. *See id.* ("[O]n major strategic and international questions today, Americans are from Mars and Europeans are from Venus." While Europe "is entering a post-historical paradise of peace and relative prosperity, the realization of Immanuel Kant's 'perpetual peace,'" the United States "remains mired in history, exercising power in an anarchic Hobbesian world where international laws and rules are unreliable, and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might.").

161. *Id.* at 59 ("The integration of Europe was not to be based on military deterrence or the balance of power [T]he end of the Cold War, by removing

The ability of European nations to put aside their historical animosities and engage in integration may be the result of an American security guarantee. The North Atlantic Treaty Organization and heavy American military presence in Western Europe deterred the Soviet Union and allowed European integration to proceed. As Lord Ismay, the first secretary general of NATO, famously quipped, the purpose of the Atlantic alliance was “to keep the Americans in, the Russians out, and the Germans down.”¹⁶² Existing disparities in defense spending have only grown since the end of the Cold War. In the 1990s, Europeans discussed increasing collective defense expenditures from \$150 billion to \$180 billion a year while the United States was spending \$280 billion a year.¹⁶³ Ultimately, the Europeans could not, and had no political desire to, emulate high U.S. defense spending. The United States has become the “indispensable nation,” without which Europe cannot handle even civil wars along its borders. Only the United States has the ability to project power globally.¹⁶⁴

Without the United States’s willingness to engage in power politics, Europe would not have had the luxury to integrate. If this is correct, then European constitutional values are inappropriate for the United States. These values were developed because European governments enjoyed a different tradeoff between national security and individual liberties and economic prosperity. The United States, which has greater responsibility for keeping international peace and for guaranteeing stability in Europe, faces a different balance between the demands of national security and constitutional liberties.

even the external danger of the Soviet Union, allowed Europe’s new order, and its new idealism, to blossom fully into a grand plan for world order.”).

162. W.R. SMYSER & PAUL H. NITZE, *FROM YALTA TO BERLIN: THE COLD WAR STRUGGLE OVER GERMANY* 135 (1999).

163. Post-Cold War developments may be largely responsible for European opposition to defense spending increases. See Office of Technology Assessment, *European Defense Industries: Politics, Structure, and Markets*, in *GLOBAL ARMS RACE: COMMERCE IN ADVANCED MILITARY TECHNOLOGY AND WEAPONS* 63–82 (1991), available at <http://www.wws.princeton.edu/ota/disk1/1991/9122/912206.pdf>; KAGAN, *supra* note 158, at 22–23 (“Under the best of circumstances, the European role was limited to filling out peacekeeping forces after the United States had, largely on its own, carried out the decisive phases of a military mission and stabilized the situation.”).

164. See KAGAN, *supra* note 158, at 25 (“Not only were [European voters] unwilling to pay to project force beyond Europe, but, after the Cold War, they would not pay for sufficient force to conduct even minor military actions on their own continent without American help.”).

V. CONCLUSIONS

This Article concludes by speculating on *why* the Supreme Court is so attracted to the use of foreign and international law in constitutional adjudication. Two explanations seem plausible.

First, the Court may be seeking to augment its own power. The use of foreign law in constitutional cases makes constitutional law more uncertain and unpredictable, and hence more malleable. The use of foreign law enables the Court to impose the results it wants in any given case, with fewer constraints from the written text of the Constitution, the Constitution's structure and purposes, or even the Court's own past precedents. The Court is also less fettered by specifically American traditions of law or social practice, and freer to adopt European models and customs, if it finds them compelling. This has the effect of expanding the Court's power to pursue different policies that would be foreclosed were it limited to relying on purely American practices or doctrines.

A second possible explanation hypothesizes that the Justices seek not power, but rather reputation and esteem, whether it be the esteem of their peers, or of particular foreign or domestic audiences. Globalization has abetted the emergence of a variety of "global networks," including networks of governmental power-holders who, over time, may form a common outlook based on personal ties, shared experiences, and the like. Such global networks seem to be resulting in the creation of a transnational class of judicial and regulatory elites who are increasingly freed from the constraints of territoriality, national sovereignty, and domestic political constituencies,¹⁶⁵ and whose judicial and administrative decisions reflect an increasingly harmonized outlook.¹⁶⁶ As Professor Jonathan Macey has observed, "[m]any people, particularly those active in the foreign policy community, view regulatory cooperation as an end in itself. Cooperation in the international sphere is a form of

165. See Wolfgang H. Reinecke, *Global Public Policy*, 56 FOREIGN AFF. 127, 137 n.6 (1997).

166. See Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1272, 1302 n.74 (2005) (reviewing ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004)).

global social norm.”¹⁶⁷ The phenomenon has deeper and broader implications than the mere engineering of channels for institutional cooperation across national boundaries. The phenomenon appears to be linked to the emergence of what can be called a deterritorialized, “cosmopolitan” moral sensibility, generally shared by governing elites of the advanced nations. The Justices, who stand at the very apex of these elites, seem particularly likely to share this sensibility and to express it in their constitutional decisions.

167. Jonathan A. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1373–74 (2003).