

Peeking Abroad?:  
The Supreme Court's Use of Foreign Precedents in Constitutional Cases

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In the last few years, some Supreme Court Justices have been looking to the decisions of foreign courts for guidance in interpreting the American constitution. This phenomenon has occurred not only in minor instances, but in several controversial, high-profile cases. Lawrence v. Texas,<sup>1</sup> in which the Court struck down a state law that criminalized homosexual sodomy,<sup>2</sup> and Atkins v. Virginia,<sup>3</sup> which found unconstitutional the execution of mentally retarded capital defendants,<sup>4</sup> are two of the most prominent decisions discussing foreign precedents. In Lawrence, the majority opinion by Justice Kennedy referred to decisions by the European Court of Human Rights to support the conclusion that prohibiting homosexual sodomy was at odds with the current norms of western civilization.<sup>5</sup> In Atkins, the majority opinion by Justice Stevens relied on additional evidence from an amicus brief filed by the European Union for the idea that a ban on executing the mentally retarded reflected a broad social consensus.<sup>6</sup> References to foreign decisions have appeared not just in regard to individual rights,<sup>7</sup> but also to structural issues like the proper balance between the state and federal governments.<sup>8</sup>

It is difficult to know how seriously to take this development. One possibility is that Justices may be using foreign constitutional decisions simply as an ornament, merely to illuminate or decorate their opinions. While providing support, these precedents may contribute little analytical value. Under this model, the foreign decisions have no real effect on the actual course of judicial decisionmaking. Even if the foreign decisions had come out entirely differently, the Supreme Court would still have reached the same result by the same reasoning.

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<sup>1</sup> 539 U.S. 558, 123 S. Ct. 2472 (2003).

<sup>2</sup> Id. at \_\_\_, 123 S. Ct. at 2484.

<sup>3</sup> 536 U.S. 304 (2002).

<sup>4</sup> Id. at 321.

<sup>5</sup> Lawrence, 539 U.S. at \_\_\_, 123 S. Ct. at 2481 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) ¶ 52).

<sup>6</sup> Atkins, 536 U.S. at 316 n.21.

<sup>7</sup> Other Justices have also referred to international agreements for similar support. See, e.g., Grutter v. Bollinger, 539 U.S. 306, \_\_\_, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, 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 . . . .’”)

<sup>8</sup> Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

Foreign precedents provide perhaps only a reservoir of authorities to bolster otherwise sound decisions.

There are, however, two reasons to think that use of foreign decisions goes beyond mere ornamentation. First, several Justices have openly stated their hostility to the use of these decisions. In *Atkins*, for example, 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.”<sup>9</sup> After noting that such an approach had been rejected in earlier Eighth Amendment cases,<sup>10</sup> the Chief Justice argued that “[f]or if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”<sup>11</sup> Justices Scalia and Thomas have similarly argued that foreign precedents are irrelevant for constitutional interpretation because those decisions interpret other documents.<sup>12</sup>

Second, some academics have urged the U.S. Supreme Court to engage in “dialogue” with their foreign counterparts. Three academic projects are particularly noteworthy: Professor Bruce Ackerman has called for something called “world constitutionalism;”<sup>13</sup> Professors Vicki Jackson and Mark Tushnet have become interested in the possibilities of comparative constitutional analysis;<sup>14</sup> and international law scholar Anne-Marie Slaughter has argued in favor of transnational communication between courts.<sup>15</sup> Although one hopes that the Supreme Court is not excessively guided by the writings of law professors, it appears that academics are attempting to construct an intellectual framework that could justify more extensive use of foreign judicial decisions in the future. This may presage further judicial efforts in the Supreme Court and the lower federal courts to rely, at least in part, upon foreign decisions for support.

This Article makes three observations regarding the Supreme Court’s practice of relying upon foreign decisions for support. Part I outlines the separation of powers problems that arise if the use of foreign decisions is more than merely ornamental. If foreign decisions were to become, in close cases, outcome-determinative, or even triggered some type of deference, they would effectively transfer federal authority to bodies outside the control of the national government. Part II argues that use of foreign decisions undermines the limited theory of

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<sup>9</sup> *Atkins*, 536 U.S. at 324-25 (Rehnquist, C.J., dissenting).

<sup>10</sup> *Id.* at 325 (citing *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989)).

<sup>11</sup> *Atkins*, 536 U.S. at 325.

<sup>12</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, \_\_\_, 123 S. Ct. 2472, 2495 (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 certiorari).

<sup>13</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

<sup>14</sup> 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).

<sup>15</sup> Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

judicial review, as set out in Marbury v. Madison.<sup>16</sup> 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.<sup>17</sup> 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 questions the Court's use of precedents that derive almost exclusively from Europe. I 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.

## I.

Supreme Court use of foreign precedents could amount to nothing. Such precedents may amount to no more than mere ornaments; they simply make an opinion look better by adding support for the Court's conclusions, but make no real difference in the outcome. If that is the case, then there is little worth in discussing the practice. Citing foreign precedents would have the same importance as the choice of newspapers that the Court cites, or the specific law reviews that appear in the Court's opinions.

This part, however, assumes that foreign precedents have, or perhaps will have, more importance than mere ornaments. In the two most prominent cases, Atkins and Lawrence, the Court looked to foreign precedents as part of its analysis of the application of the Eighth Amendment and Due Process. In both situations, doctrine calls upon the Court to measure state action against social norms. In determining whether norms existed against the execution of the mentally retarded or against the criminalization of homosexual sodomy, the Court considered European precedents as indicative of world opinion on the question.<sup>18</sup> Conceivably, when the Court measures social norms in this manner, the amount of evidence makes some difference. It is possible that in close cases, perhaps, foreign precedents could make a difference in the outcome.

It is also possible that the current nod to foreign law could coalesce into some type of deference. Some scholars, for example, have argued in favor of allowing customary international law to enjoy the status of federal law, a result that some lower courts have approached through their interpretation of the Alien Tort Statute.<sup>19</sup> Other scholars have argued

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<sup>16</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup> 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.").

<sup>18</sup> Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); Lawrence v. Texas, 539 U.S. 558, at \_\_\_, 123 S. Ct. 2472, at 2481 (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.").

<sup>19</sup> Under the "law of nations" clause in the Alien Tort Statute (sometimes less accurately called the Alien Tort Claims Act), customary international law has been given the status of federal common law. See, Filartiga v.

that American courts should defer to the decisions of foreign courts in interpreting treaties.<sup>20</sup> While these arguments have not been terribly precise, one can analogize them to the standards of deference that courts apply to administrative agencies. The strongest form, termed “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.<sup>21</sup> As the Supreme Court has described Chevron, “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.”<sup>22</sup> Under a weaker form of deference, termed Skidmore deference, agency interpretations do not receive this presumption of reasonableness, but instead possess only the “power to persuade, if lacking power to control,”<sup>23</sup> based “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,”<sup>24</sup> and other factors. I have elsewhere criticized offering either type of deference to foreign law as a problematic delegation of authority outside the federal government to foreign courts.<sup>25</sup> The trend, however, may be in this direction. It is a small step from applying customary international law in federal court, and from deferring to foreign decisions in interpreting treaties, to a situation in which federal courts offer some type of deference to foreign courts in interpreting the scope of individual liberties or structural provisions.

A judicial role of this kind raises significant problems of constitutional text and structure. It would subject the private conduct of American citizens, in a relatively unfiltered form, to the regulatory decisions of foreign or international courts. The Constitution, however, makes no implicit or explicit provision for the transfer of federal power to entities outside of the American governmental system. As I have argued elsewhere, this principle of the conservation of federal power is embodied primarily in the Appointments Clause.<sup>26</sup> While much writing on this clause

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Pena–Irala, 630 F.2d 876 (2d. Cir. 1980). See also Curtis A. Bradley, The Alien Tort Statute and Article III, 42 VA. J. INTL L. 587 (2002).

<sup>20</sup> See, e.g., Michael P. Van Alstine, The Judicial Power and Treaty Delegation, 90 CAL. L. REV. 1263 (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 (1998).

<sup>21</sup> Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (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 modern exposition, see Jonathon T. 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).

<sup>22</sup> FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). On this point, see John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 SUP. CT. REV. 223.

<sup>23</sup> Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

<sup>24</sup> Id.

<sup>25</sup> John C. Yoo, Rejoinder: Treaty Interpretation and the False Sirens of Delegation, 90 CAL. L. REV. 1305 (2002).

has focused on the balance of power between the President and Senate in the appointment of federal judges,<sup>27</sup> the Clause also has importance as a mechanism to conserve federal power. In recent decisions, the Supreme Court has rediscovered the Appointments Clause's broader purpose in restricting the exercise of federal power only to those officials who undergo appointment through the processes set out in the Clause.<sup>28</sup> This restriction has the fundamental effect of rendering the use of federal power accountable solely to the people's elected representatives. Reserving the exercise of federal power only to federal appointees prevents the delegation of the authority to interpret U.S. law to international or foreign courts.

The Court's discussion of the Appointments Clause in Edmond v. United States<sup>29</sup> and Printz v. United States,<sup>30</sup> underscores the basic idea that the Appointments Clause serves the goal of preventing Congress from transferring control over 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."<sup>31</sup> 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 without "meaningful Presidential control"<sup>32</sup> and would undermine the effectiveness of a unitary executive.<sup>33</sup> "That unity would be shattered," according to the Court, "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."<sup>34</sup> 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 power to officials outside the executive branch and the federal government.<sup>35</sup>

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<sup>26</sup> 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 transfer or delegate power to entities that are not directly responsible to the American people.").

<sup>27</sup> See, e.g., John C. Yoo, Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy, 98 MICH. L. REV. 1436, 1437 n.4 (2000).

<sup>28</sup> 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 of Internal Revenue, 501 U.S. 868, 884 (1991); Buckley v. Valeo, 424 U.S. 1, 135 (1976) (per curiam).

<sup>29</sup> 520 U.S. at 659.

<sup>30</sup> 521 U.S. 898, 922-23 (1997).

<sup>31</sup> Edmond, 520 U.S. at 659.

<sup>32</sup> Printz, 521 U.S. at 922.

<sup>33</sup> Id.

<sup>34</sup> Id. at 923.

<sup>35</sup> Id.

Printz points to the second concern animating the Appointments Clause: the general scope and execution of national power. By requiring that all those who exercise federal authority become officers of the United States, appointed pursuant to Article II, Section 2, the Constitution 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: “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.’”<sup>36</sup> Ryder reinforces the link that Buckley v. Valeo first made clear between the Appointments Clause and the exercise of federal power. In rejecting the idea that Congress could appoint individuals who would not be officers of the United States but could still exercise federal power, the Buckley Court observed: “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.]”<sup>37</sup> Individuals appointed by Congress, therefore, did not qualify as officers of the United States and could only perform duties which do not involve enforcement of federal law.

In addition to providing the basis for a centralized appointments process, two other elements of the constitutional structure support 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.”<sup>38</sup> A textual reading of this provision suggests that the federal judicial power—which at its core includes the authority to decide cases or controversies under federal law—cannot be exercised by any other branch of the federal government.<sup>39</sup> This would logically also imply 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 as a whole. To be sure, under the Madisonian compromise, Congress could have declined to create any lower federal courts. Furthermore, subject matter jurisdiction restrictions on federal courts entail that a great many federal constitutional issues arise as a first instance by state judges, who are not members of the federal government.<sup>40</sup>

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<sup>36</sup> Ryder v. United States, 515 U.S. 177, 182 (1995) (quoting Freytag v. Comm’r of Internal Revenue, 501 U.S. 868, 878 (1991)).

<sup>37</sup> Buckley v. Valeo, 421 U.S. 1, 126 (1976) (per curiam).

<sup>38</sup> U.S. CONST. art. III, § 1.

<sup>39</sup> See, e.g., Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153 (1992); Akhil R. Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205 (1985). Jurisdiction stripping attempts by the legislature, however, may distort this concept. Those who support greater congressional 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); 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).

Distortions of the separation of powers doctrine in the domestic sphere are not, however, insurmountable. State judicial decisions can be reviewed on appeal by the Supreme Court. Moreover, even if the broadest theories of congressional jurisdiction-stripping came to life, state judges could still hear federal questions. State courts are still part of the American political system and take an oath to uphold the Constitution. No such distortions of the separation of powers may be remedied where courts offer deference to foreign law or courts. Regardless, therefore, of whether one follows a formalist or functionalist theory<sup>41</sup> of the separation of powers, transferring judicial power wholly outside the Article III courts and the federal government would violate the vesting of all judicial power in the Supreme Court and undermine accountability in government. Members of the electorate could not hold accountable officials who stand completely outside the structure of American government.

Second, the nondelegation doctrine places limits on the ability of the government to transfer power. As the Court has recently clarified, the nondelegation doctrine prohibits Congress from delegating rulemaking authority to another branch unless it has stated intelligible standards to guide administrative discretion.<sup>42</sup> The requirement of standards ensures that the exercise of delegated power can be monitored and controlled, and even reversed when necessary. While the Supreme Court has not invalidated a statute on nondelegation grounds since the New Deal period,<sup>43</sup> it remains an important structural principle that finds its expression in quasi- or sub-constitutional doctrines such as canons of construction and the like.<sup>44</sup> Delegating lawmaking power totally outside the federal government would prevent lower courts, Congress, and the public from monitoring whether the delegated authority was being exercised consistent with legislative standards.<sup>45</sup>

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<sup>40</sup> 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. Co. v. Mottley*, 211 U.S. 149 (1908); 28 U.S.C.A. § 1331 (West, WESTLAW through 2004 Pub. L. 108-217).

<sup>41</sup> Functionalism asserts that Congress enjoys substantial flexibility in arranging the order of government, so long as it does not prevent any branch from fulfilling its core constitutional duties. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding creation of U.S. Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988) (allowing independent counsel to be insulated by “good cause” removal requirement from direct presidential control); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (defending functionalism); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Formalists argue that each exercise of federal power can be categorized and allocated to one of the three branches of government, and that generally the President must have the unrestricted authority to control the execution of federal law. *See* *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating Comptroller General’s statutory role in administering budget reductions); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (defending formalism); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).

<sup>42</sup> *See, e.g.*, *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001); *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>43</sup> *See* *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>44</sup> *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Manning, *supra* note 22.

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 lower 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, however, do not undergo presidential nomination or senatorial consent, even as they exercise significant federal power by influencing the interpretation of a provision of federal law. To the extent a foreign decision was outcome-determinative or triggered some type of deference, it would raise serious problems with the Constitution’s conservation of federal authority in federal officers.

Reliance on foreign decisions also creates difficulties for the policies behind the Appointments Clause and the nondelegation doctrine. It seems clear that the concerns that motivate these constitutional structures are rooted in accountability and control. Delegation to federal agency officials seems tolerable, for example, because they are part of an executive branch which the President, Congress, the courts, and the public can monitor and correct if it goes astray. If, for example, an agency to which the Court defers has gone well beyond its statutory mandate in interpreting or enforcing federal law, a number of checks can come into play, including congressional oversight, budgetary cuts, statutory amendment, presidential removal, public criticism and ultimately elections.<sup>46</sup> These mechanisms, however, would not constrain foreign judges. Foreign judges are not responsible to the American political system, nor must they adapt their exercises of interpretive authority to federal constitutional or statutory principles. Indeed, the traditional methods that would come into play to correct an undesired interpretation of the law—appellate review or legislative overrule—would prove unavailable. Reliance on foreign decisions would evade the Constitution’s strict centralization of the implementation and interpretation of federal law in officers of the United States who are accountable to the electorate.

## II.

This Part raises a second concern with substantive, as opposed to ornamental, reliance upon foreign judicial decisions by the Supreme Court. Putting aside issues of delegation or deference, reliance upon sources exogenous to the American political system in interpreting the Constitution undermines the textual and structural basis for judicial review. It is important to emphasize here the limited nature of this argument. 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 may be limited to materials that derive from the American legal system.

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<sup>45</sup> For recent discussion concerning the nondelegation doctrine, compare Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. CHI. L. REV. 1721 (2002) with Gary Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327 (2002).

<sup>46</sup> Congressional attempts to shield itself from popular accountability have been struck down. See Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) (striking down law that allowed a nine-member Board of Congresspersons to review the decisions of the airport authority).



The touchstone of this argument is one regarding the nature of judicial review. Some have argued that judicial review promotes certain functional goals, such as the protection of individual rights or the moderating role of the Court as a check on the other branches.<sup>47</sup> I provide 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 finds its origins 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 the duty of every federal officer to obey that higher law over inconsistent actions by the other branches of government.<sup>48</sup>

We can see the structural foundation for judicial review 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 is a creation of the people of the several states.<sup>49</sup> This understanding of government power represented 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 Federalist 46, "[t]he Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes."<sup>50</sup> Madison reminded critics of the proposed constitution that "the ultimate authority, wherever the derivative may be found, resides in the people alone."<sup>51</sup> It follows from this that the government may exercise only that power which the people have delegated to it. A written constitution serves to codify these powers. Any exercise of authority beyond the grant of power in the written Constitution therefore is invalid, because it goes beyond the delegation from the people and undermines popular sovereignty. As Alexander Hamilton expressed it in Federalist 78, "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."<sup>52</sup> This understanding must hold sway, for 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 Marbury declared, "[t]he 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."<sup>53</sup> In order for the

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<sup>47</sup> See, e.g., Jesse H. Choper, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); Terri Jennings Peretti, *IN DEFENSE OF A POLITICAL COURT* (1999).

<sup>48</sup> See Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. CHI. L. REV. 887 (2003).

<sup>49</sup> 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 in individual states and not by the consent of "the people" as a whole).

<sup>50</sup> THE FEDERALIST NO. 46, at 343 (James Madison) (Jacob E. Cooke, ed., 1984).

<sup>51</sup> Id. at 343-44.

<sup>52</sup> THE FEDERALIST NO. 78, at 568 (Alexander Hamilton) (Jacob E. Cooke, ed., 1984).

<sup>53</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

Constitution to successfully establish written limitations on the powers of the branches of government, it must establish a rule of decision that places it above the actions of the organs it creates.

Neither *The Federalist* nor *Marbury* makes the claim, however, 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. Rather, popular sovereignty theory suggests that each branch has an obligation to refuse to obey government actions that go beyond the Constitution. Otherwise, these agents of the people's delegated power would be complicit in allowing "the deputy" to become "greater than his principal." Indeed, the Oaths Clause suggests as much. It declares that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution[.]"<sup>54</sup> The Oaths Clause makes clear that all officials of both the federal and state governments have a basic obligation not to violate the Constitution. *Marbury* suggested that the Clause might go further by requiring oath-takers to disregard governmental actions of other institutions that conflict with the Constitution.<sup>55</sup> Under this approach, judicial review is not uniquely special. It is merely the manner in which federal judges implement their obligation, while performing their unique function of deciding Article III cases or controversies, to obey the written limits on the delegation of power to the government by the people. Similarly, other branches of the government must obey the same obligation to enforce the Constitution while performing their unique responsibilities—whether it is a congressman who votes against legislation that he believes to be unconstitutional, or a president who vetoes unconstitutional legislation.<sup>56</sup>

It is in performing its unique constitutional function to decide Article III cases or controversies that these obligations to the Constitution as the higher law come into play. Judicial review arises from both the separation of powers and the principle that each branch of government is coordinate, independent, and responsible for interpreting and enforcing the Constitution while fulfilling its unique constitutional function. Federal judges must engage in judicial review because of their basic duty to obey the Constitution while performing their job, defined in Article III, to decide cases or controversies. 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

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<sup>54</sup> U.S. CONST. Art. VI, cl. 3.

<sup>55</sup> *Marbury*, 5 U.S. (1 Cranch) at 180.

<sup>56</sup> See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343 ("The President may exercise a power of legal review . . . over acts of Congress and refuse to give them effect insofar as his constitutional authority is concerned."); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 906–09 (1990) (discussing the presidential practice of vetoing legislation on constitutional grounds). See also, John O. McGinnis, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993) (addressing the relationship between the Supreme Court and the President).

meaning to the judiciary when it decides cases or controversies.<sup>57</sup> By its nature, the Constitution's separation of powers creates judicial review.

There has been a great deal of debate over whether the separation of powers should be understood formally or functionally.<sup>58</sup> Without entering this debate, a few general principles, it seems, can be agreed upon. 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 Federalist 49, "[t]he 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."<sup>59</sup> Each branch possesses constitutional equality because each exercises grants of authority received directly from the people through the Constitution, and none is subordinate to the others. In addition to being coordinate, the branches are in important respects separate. While there are some mixtures of powers, such as in treaties and appointments, each branch clearly executes certain core functions that belong to it alone. Only Congress can enact legislation within the sphere granted to the federal government 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 the federal or state governments.<sup>60</sup> This requires federal judges to interpret the Constitution in the course of resolving conflicts that arise between federal or state law and the Constitution. One important implication of this argument is that the judiciary's ability to interpret the Constitution may not be supreme or exclusive. Rather, the power to interpret the Constitution is common to all three branches, arising in different manners as they each perform their different functions.

Rooting the power of judicial review directly in the constitutional text and structure suggests why reliance on foreign decisions creates 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

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<sup>57</sup> See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

<sup>58</sup> See generally, Erwin Chemerinsky, Formalism and Functionalism in Federalism Analysis, 13 GA. ST. U. L. REV. 959 (1997); Laura E. Little, Articles, Envy and Jealousy: A Study of Separation of Powers and Judicial Review, 52 HASTINGS L.J. 47 (2000); William N. Eskridge, Jr., Symposium, Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 HARV. J.L. & PUB. POL'Y 21 (1998).

<sup>59</sup> THE FEDERALIST NO. 49, at 369 (James Madison) (Jacob E. Cooke, ed., 1984).

<sup>60</sup> See Marbury, 5 U.S. (1 Cranch) at 178.

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.

Id.

their government.<sup>61</sup> In interpreting the scope and meaning of that delegation of power to the federal government, the federal courts should have no recourse to foreign decisions. Foreign decisions, after all, interpret a wholly different document from the Constitution. The European Court of Human Rights (“ECHR”), for example, interprets and applies the European Convention of Human Rights of 1953 (“European Convention”), which was created by the member states of the Council of Europe.<sup>62</sup> It is difficult to see what the member states of the Council of Europe believed to be the scope of an individual right in 1953, no matter how enlightened or progressive, has to do with what the American people delegated to the government in 1788 (the original Constitution), 1791 (the Bill of Rights) or 1865-70 (the reconstruction amendments). The European Convention, and certainly ECHR decisions after 1953 interpreting it, simply do not rest within the four corners of the delegation of power that is the Constitution. They do not even purport to have any relation to the delegation from the American people to its government; rather, the European Convention is an international agreement by which the state parties to that agreement agreed to abide by certain standards of minimum treatment.<sup>63</sup> By relying on foreign sources of law to interpret the Constitution, the Court is undermining the very delegation of authority that gives it the power of judicial review.

More importantly, we should focus on the delegator of the power. The Constitution represents a delegation of power from the American people. 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. They certainly were not in 1787 or 1791. If anything, we enjoy our current Constitution precisely because the Americans of the late eighteenth century rejected their relationship with Europe, despite the violent efforts of the British Empire to keep them within its polity.<sup>64</sup> Nor is there any indication that the American people have wanted their delegation of authority to the national government to be construed consistently with the constitutions of foreign nations. I suspect that the notion would have proved laughable if the Framers of 1787, 1791, or 1865-1870 were asked whether ambiguities in their work should be interpreted in line with future European treaties. 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.<sup>65</sup>

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<sup>61</sup> *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.”).

<sup>62</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

<sup>63</sup> The agreement’s preamble opens, “The [g]overnments signatory hereto, being members of the Council of Europe.” *Id.* at 221.

<sup>64</sup> See Larry D. Kramer, *The Supreme Court 200 Term Forward: We The Court*, 115 HARV. L. REV 4, 73-74 (2001) (stating that “[t]he 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”).

Perhaps there is a more subtle argument available to those who would have the Court rely on foreign decisions. While admitting that the Constitution represents a delegation of authority from the people to their government, they might reject the idea that the terms of the delegation should be interpreted according to the original understanding of the drafters and ratifiers. Rather, they might argue that the constitutional text should be interpreted in light of what the American polity believes it should mean today—otherwise known as the living Constitution thesis. Even if this better describes the Court’s approach to interpreting the Constitution, it still encounters difficulties in reaching for foreign decisions. There is no indication that the American people today believe that their constitutional rights and delegation of powers should be interpreted in light of foreign judicial decisions. In fact, American attitudes toward international human rights seem to suggest the exact 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.<sup>66</sup> These “RUDs,” as they are known, usually contain provisions making clear that the United States considers its federal and state laws to already meet the requirements of a human rights treaty, and that the treaty in any event is non-self-executing.<sup>67</sup> Such a practice negates any idea that international human rights agreements, even those to which the United 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. It is difficult to understand why decisions interpreting agreements to which the United States is not even legally a party should have any effect in interpreting the Constitution, when the political branches have effectively made this impossible with regard to international human rights agreements.

### III.

One final concern with the use of foreign decisions involves their source. In general, it appears that the Court’s recent turn to foreign judicial decisions in constitutional adjudication involves decisions from only one place: Europe. Perhaps we are too early in the phenomenon and our sample size is too small to make any generalizations—it may be the case that decisions from Asia, Africa, and Latin America will appear over the next few years as well. For now,

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<sup>65</sup> 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 in the intended design of our framers. See generally, Jacobus Broek, Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction, 27 CAL. L. REV. 399, 399 (1939) (“[The Court] has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument”); Raoul Berger, ‘Original Intention’ in Historical Perspective, 54 GEO. WASH. L. REV. 296 (1986) (describing that even judges indisposed to subscribe to “intentionalism” as doing so more out of fear of inaccurate inferences, not the dislike of the notion itself).

<sup>66</sup> Many of the scholars who complain that the United States is loathe to fully enter the international community admit readily 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).

<sup>67</sup> 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, adopted Dec. 10, 1984, 1465 U.N.T.S. 85; the International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171; and the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195.

however, it seems that the Court's use of foreign decisions seems to be a European phenomenon.<sup>68</sup> Rather than asking why this is the case, this part will argue that Europe may not be the appropriate model for American constitutional interpretation.

Europe and the United States share very different political histories. While the United States continues to exist in a Lockean framework, in which government derives from the social contract between the American people, or so it has seemed to some sociologists, Europe has been given to fluctuations of ideological extremes. In the 19th Century, many European nations still supported monarchy as the best system of government—indeed, the great powers intervened after the French Revolution to restore the Bourbons to power. In the 20th Century, monarchy was followed by fascism, socialism, and communism.<sup>69</sup> As history has made clear, the performance of these regimes was not good, to say the least. In particular, fascism and communism, which were seen by some in their day as advanced, modern ideologies, were adopted by regimes that murdered millions of their citizens. One wonders if the Supreme Court of the 1930s or the 1950s should have looked to the decisions of Nazi or Soviet courts for guidance.<sup>70</sup> While the relative stability or gradual change in American political philosophy may have prevented the United States, in the view of some, from adopting progressive social programs or enlightened redistribution policies, it may also have kept the nation from pursuing ideological extremes that have produced disaster for European nations.

This leads to two objections to using European decisions. First, as just suggested, the American political system should remain several steps removed from European “innovations” because it keeps the nation from falling into extremes of policy. Some attribute this moderation in American politics, in part, to our written Constitution.<sup>71</sup> The separation of powers and federalism make it difficult to enact any sweeping, ideologically-inspired legislation, and the Bill of Rights places some obstacles before government action that might infringe on individual liberties. Appealing to European decisions would evade these structural checks on federal lawmaking, since the Supreme Court's decisions themselves are not subject to the strict restraints of bicameralism, presentment, and federalism that apply to Congress and the President. Second, the modern European experience should lead us to question whether its current phase of

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<sup>68</sup> In instances where Supreme Court Justices have indicated a penchant for incorporating foreign law into American courts, it has been European law which is mentioned specifically. *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).

<sup>69</sup> *See* PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES (2d. ed. 2001).

<sup>70</sup> For analysis discussing both jurisprudence and legal scholarly work 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 on 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 in Soviet courts).

<sup>71</sup> Several authors have discussed the unique impacts that the separation of powers doctrine has on constraining each actor and maintaining policy moderation. *See, e.g.*, DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON (1998); Keith Krehbiel, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998).

development is inevitably superior to the American. It may appear to some today that European constitutional schemes seem to protect individual liberties more effectively, or better balance the tension between government power and rights. It is difficult to determine now, however, whether history will vindicate the choices that Europe has made. It may have appeared to some American observers at the time that fascism and communism were modern, progressive ideologies from which the United States could learn, but history demonstrated their failure. Those ideologies produced tens of millions of deaths from inter-European warfare and from the oppression of domestic populations;<sup>72</sup> not exactly a sterling example to follow.

Not only are their histories different, but the United States and Europe face very different social and political circumstances. This should discourage any transplantation of constitutional values from the latter to the former. Europe has spent the last 60 years turning away from great power conflict and forming itself into a nation-state, one that has solved the problem of German ambition and melded former enemies into a broad economic common market.<sup>73</sup> Military power and conquest have not been the tools for this amazing integration, but supranational institutions, international law, and diplomacy. As Robert Kagan has put it, “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.”<sup>74</sup> The United States, on the other hand, has chosen to rely more on power than international law, on military force as much as on persuasion, and sees a world threatened by terrorist organizations, rogue nations, and the proliferation of weapons of mass destruction.<sup>75</sup> 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.”<sup>76</sup> Europeans, in other words, may be unusually reliant upon international law, legal instruments, and legal institutions because these tools have been one of the key mechanisms by which they have promoted integration. If this view of European-American relations is correct, then European judicial decisions may be particularly inappropriate for guidance for American constitutional interpretation, because they take place in an environment of reliance upon law and legal institutions that makes no sense in the American context.

In fact, it may well be the case that the difference between our political systems has both promoted the integration of Europe and permitted the Europeans to attempt a different experiment in political organization.<sup>77</sup> That European nations have been able to put aside their

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<sup>72</sup> JOHNSON, *supra* note 69, at 56-58, 95-97.

<sup>73</sup> ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 3 (2003).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (“[O]n major strategic and international questions today, Americans are from Mars and Europeans are from Venus . . .”).

<sup>76</sup> *Id.*

historical animosities and engage in integration may be thanks to an American security guarantee. The North Atlantic Treaty Organization allowed the integration of Europe to proceed without heavy demands for military spending, thanks to the stationing of United States forces to contain the Soviet Union. 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.”<sup>78</sup> That disparity in spending on defense is even starker 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.<sup>79</sup> Ultimately, the Europeans could not, and there was little political desire to come within shouting distance of the United States, which in the wake of September 11 and the wars in Afghanistan and Iraq plans to spend \$400 billion a year on defense.<sup>80</sup>

The large gap in power between the United States and Europe is perhaps even more apparent qualitatively; the United States has become the “indispensible nation” without which Europe could not even handle the internal civil war along its borders in Kosovo. Only the United States has the power to project power globally or to fight more than one large regional war at the same time.<sup>81</sup> Without the United States’ willingness to engage in power politics, Europe would not have had the luxury to integrate. If this is correct, then European constitutional values are particularly inappropriate for the United States. They have been developed and enjoyed because their governments enjoy a different tradeoff between national security on the one hand, and individual liberties and economic prosperity on the other. The United States, however, which has greater responsibilities for keeping international peace, and for guaranteeing stability in Europe, faces a different balance between national security demands and constitutional liberties.

One last reason why European precedents should not find an easy home in American constitutional law draws on the lessons of federalism. Federalism makes sense, in part, because it creates a decentralized system of government that allows jurisdictions to offer a diversity of social, economic, and political policies. Similarly, at the international level, states may compete for residents and businesses by offering different mixes of economic and social policies. As in a market, citizens can satisfy their preferences by deciding to live in states that provide the tax,

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<sup>77</sup> *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 danger of the Soviet Union, allowed Europe’s new order, and its new idealism, to blossom fully into a grand plan for world order.”).

<sup>78</sup> W.R. SMYSER, *FROM YALTA TO BERLIN: THE COLD WAR STRUGGLE OVER GERMANY* 135 (1st 1999).

<sup>79</sup> Post-Cold War developments may be largely responsible for European opposition to defense spending increases. See OFFICE OF TECHNOLOGY ASSESSMENT, *GLOBAL ARMS RACE: COMMERCE IN ADVANCED MILITARY TECHNOLOGY AND WEAPONS* 63-82 (June 1991), available at <http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1991/9122/912206.PDF>; KAGAN, *supra* note 71, 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.”).

<sup>80</sup> The Defense budget for FY 2005 will be \$401.7 Billion (U.S.). Figures available at <http://www.gpoaccess.gov/usbudget/fy05/browse.html> (last visited March 24, 2004).

<sup>81</sup> KAGAN, *supra* note 73, 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.”).



education, welfare or family policies that they agree with. Diversity of policies enhances social welfare by allowing individuals to increase their utility by living in jurisdictions that offer their desired policies. Certainly, there are certain minimum rights and structures that every jurisdiction should recognize, just as in a market certain basic rules must exist in order for a market to function. It is important, however, that before a universal right is recognized, that it really be one that we are sure must be universal, rather than one that is best handled through choice available from diverse jurisdictions. Indeed, diversity of policies will permit experimentation that will make apparent which policies may best work. Just as Justice Brandeis praised federalism because it permitted experimentation by the state laboratories of democracy,<sup>82</sup> so too international decentralization allows jurisdictions to experiment before committing to a single policy. A convergence of American and European constitutional systems, through the citation of precedents, could reduce the ability of jurisdictions to offer the packages of policies that will enhance global welfare.

#### IV. CONCLUSION

This essay has sought to identify several problems raised by the Supreme Court's recent use of foreign precedents in interpreting the Constitution. If these citations are no more than simply ornamental, or are no more than friendly suggestions from another jurisdiction, then there is little about which to be concerned. If reliance on foreign precedents represents a more significant trend, however, there are several difficulties that arise. First, if foreign courts are receiving some sort of deference, then they may well be exercising federal authority outside the bounds of our Constitution. Second, reliance on such decisions breaks the relationship between the people and their government as expressed in the Constitution, because foreign courts are interpreting a different document within a different constitutional and political context. Third, to the extent use of these precedents has focused on European decisions, it is unclear whether the United States should seek to coordinate its constitutional solutions to problems with those of Europe, which has suffered from serious political instability over the last two centuries brought about by sometimes extreme political ideologies.

Admittedly, it may well be the case that the Supreme Court's use of foreign precedents is not too be taken seriously, because they would never be outcome determinative. It is too early to tell whether that will be the case. If it is not, however, this Essay may serve as an early caution for those who would accelerate such practices by the federal courts.

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<sup>82</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").