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

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

The editors of the Virginia Journal of International Law invited me to contribute this Essay to mark the Journal's fiftieth year of publication. In view of the Journal's manifest contributions to scholarship during that time, it seemed fitting to reflect in this Essay on comparative constitutionalism's remarkable story during the past half century or so and why it matters.
In March 1848, the Lower House of the Hungarian Diet adopted its famous Address to the Crown. Petitioning the Hapsburg king, Ferdinand V, the delegates lamented that Hungarians had been “unable to render our constitution comfortable to the spirit of modern times . . . .”\(^1\) The delegates were convinced that, for the nation’s intellectual and material welfare, there must be a “national Government, totally independent and free from any foreign influence whatsoever.”\(^2\) They called for a government that, “in conformity with constitutional principles, must be a responsible Government, and the result of a majority of the people.”\(^3\)

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

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

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2. Id. at 67.
3. Id.
4. See Stroup supra note 1, at 100 (enumerating the “Twelve Points”).
5. Id. at 100, 102.
and, if so, where it was. When I put that question, one of the women sitting at the table turned to her friends. Indicating me, she said: “There, I told you he was Hungarian.” As I have, as far as I know, no Hungarian ancestry, I can only infer that she meant that anyone who had such a detailed interest in the events of 1848 must be of Hungarian descent.6

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

INTRODUCTION: COMPARATIVE CONSTITUTIONALISM’S MODERN RENAISSANCE

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

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


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

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

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

14. In a letter to James Madison, Jefferson wrote: "The Virginia act for religious freedom has been received with infinite approbation in Europe and propagated with enthusiasm. . . . It has been translated into French and Italian, has been sent to most of the courts of Europe, and has been the best evidence of the falshood [sic] of those reports which stated us to be in anarchy. It is inserted in the new Encyclopedie, and is appearing in most of the publications respecting America." Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON 602, 603–04 (Julian P. Boyd ed., 1950).
15. On the debates in the French National Assembly, including references to the American constitutional experience, see PALMER, supra note 13, at 489–502.
The ensuing years have seen a lively international traffic in constitutional ideas. When the revolutions of 1848 broke out in Europe, the delegates who gathered at the Paulskirche in Frankfurt showed their intimate knowledge of American federalism and judicial review as they shaped a constitution for Germany. Although their draft, opposed by Germany's conservative powers, was ultimately not adopted, it remained an important feature of German constitutional culture and ultimately influenced today's German Basic Law.16

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

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

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

19. WILLIAM W. CRANE & BERNARD MOSES, POLITICS: AN INTRODUCTION TO THE STUDY OF COMPARATIVE CONSTITUTIONAL LAW (1884).
These authors took an organic approach to their subject, seeing a constitution as the expression of national will. The nation, they argued, "is an organic social being, a growth, and not an artificial creation."\(^{20}\) Like Aristotle, Crane and Moses were concerned with determining the locus of sovereignty—"the person or persons competent to amend the constitution."\(^{21}\) When, in 1890, John W. Burgess published his *Political Science and Comparative Constitutional Law*, he took an avowedly comparative approach.\(^{22}\) "If . . . my book," Burgess writes, "has any peculiarity, it is in its method. It is a comparative study. It is an attempt to apply the method, which has been found so productive in the domain of Natural Science, to Political Science and Jurisprudence."\(^{23}\) For Burgess, the drafting of constitutions was inherently a political, rather than legal, process. Placing his treatise under the heading of political science rather than constitutional law, Burgess declared, "The formation of a constitution seldom proceeds according to the existing forms of law. Historical and revolutionary forces are the more prominent and important factors in the work."\(^{24}\) In the scholarship of the late nineteenth century, the emerging study of comparative constitutional law was simply an extension of comparative politics.

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

\(^{20}\) Id. at 6.
\(^{21}\) Id. at 144.
\(^{22}\) See generally John W. Burgess, *Political Science and Comparative Constitutional Law* (1890).
\(^{23}\) Id. at vi.
\(^{24}\) Id. at 90.
seminar in Comparative Constitutional Design, at Duke University’s law school, considers “political institutions in democratizing or redemocratizing countries, especially those divided by ethnic or religious affiliations.”

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

Respected scholars have given us important and useful textbooks and treatises. These books amplify the possibilities open to professors and students in the academy. Two recent publications invite particular attention. One is the second edition of Vicki Jackson and Mark Tushnet’s *Comparative Constitutional Law*. In this edition, as in its predecessor, the authors are wary of grand theories of constitutionalism. They ground their discussion in historical and cultural contingencies. Rather than focusing solely on issues of doctrine, they devote a fair amount of attention to examining the theory and purposes of comparative constitutionalism. The new edition discusses such developments as judicial interpretation under the United Kingdom’s Human Rights Act of 1998, federalism in the European Union and Canada, and positive rights in South Africa. The other recent treatise worthy of special note is *Comparative Constitutionalism*, edited by Norman Dorsen, Michel Rosen-
feld, Andras Sajo, and Susanne Baer, and published in 2003. This text takes a “neofunctionalist” approach, suggesting the use of comparative constitutionalism to solve contemporary problems through a general science of constitutions. The editors show a particular interest in convergence and the search for universal values. They also note the emergence of transnational constitutional regimes, such as the European Convention on Human Rights.

Overviews and general textbooks aside, the field of comparative constitutionalism has spawned enormous growth in its many subfields. Recent years have seen studies, among others, in: comparative human rights, comparative judicial review, comparative separation of powers, comparative federalism, comparative positive rights, and comparative studies of religion and society. Other studies examine constitutional developments in particular countries and regions. Moreover, scholars debate at length the writing about and teaching of comparative constitutionalism, an indication that the discipline’s role in the academy is far from settled.

Looking at periodicals, one finds not only articles...
in the traditional publications, but also the appearance of journals, such as the *International Journal of Constitutional Law*, especially suited to essays on comparative constitutionalism.\textsuperscript{44} One of the most exciting developments in comparative constitutionalism is to watch the emergence of some especially promising younger scholars, whose insights promise to enrich the field further.\textsuperscript{45}

No development in recent years has drawn more attention to comparative constitutionalism than citations to foreign law by Justices of the United States Supreme Court. For years, some scholars have argued that American constitutional law would be enriched by the use of comparative material.\textsuperscript{46} The issue burst into public view with three high-profile cases handed down between 2002 and 2005.\textsuperscript{47} Much of the current scholarship in comparative constitutional law delves into the legitimacy of comparative citations in the interpretation of the United States Constitution.\textsuperscript{48} Harold Koh has expressed the hope that “the American ostrich is finally starting to take its head out of the sand.”\textsuperscript{49} Interest in this issue is heightened by the flow of constitutional ideas among constitutional and

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

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

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


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

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

The global growth of democracy has unquestionably been a key factor in the modern era’s heightened interest in comparative constitutionalism. In a famous formulation, Samuel Huntington identified successive “waves” of democratization. The first was a long, slow wave, from 1828 to 1926. A second wave occurred from 1843 to 1964. Each of these two waves, Huntington observed, was followed by a “reverse wave” marked by the failure of some of the recently established

51. Id.
56. Id. at 16–17.
57. Id. at 18–19.
democracies.\textsuperscript{58} Then came an explosive "third wave," beginning with the overthrow of Portugal’s dictatorship in 1974.\textsuperscript{59} If the twentieth century was a century of totalitarianism, war, genocide, and brutality, it proved also to be a century of democracy.\textsuperscript{60} As of 1950, only twenty-two of the world’s eighty sovereign nations were democratic.\textsuperscript{61} By the end of the century, Freedom House counted 120 democracies, the highest number ever and the greatest percentage (63\%) of the world’s countries.\textsuperscript{62} In a 1999 report, the U.S. Department of State was so bold as to identify democracy and human rights as a third "universal language" (along with money and the Internet).\textsuperscript{63}

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

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

\textsuperscript{58} Id. at 17–21.
\textsuperscript{59} Id. at 21–26.
\textsuperscript{60} See Larry Diamond, A Report Card on Democracy, HOOVER DIGEST, NO. 3, 2000.
\textsuperscript{62} Id. at 189.
\textsuperscript{65} Id. at 114.
\textsuperscript{67} For the daunting challenges facing constitution makers after the collapse of communism, see A.E. Dick Howard, Constitutionalism and the Rule of Law in Central and Eastern Europe, in TRADITION UND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FUR HELMUT STEINBERGER 755, 758–66 (Hans-Joachim Cremer et al. eds., 2002).
in general, more authentic constitutions. Examples include post-Franco Spain's Constitution of 1978, the constitutions adopted in Central and Eastern Europe after the collapse of communism in 1989, and the charter drafted in South Africa after apartheid's demise. The advent of democracy in a country does not, however, necessarily advance liberalism or bring constitutionalism. When parties or politicians appeal to narrow, chauvinistic interests, elections can be a parochializing exercise, as commonly occurs in the former Yugoslavia.  

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

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

I. HUMAN RIGHTS: THE INTERNATIONAL QUEST FOR HUMAN DIGNITY

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

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

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

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

69. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ.
70. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 42 (Thomas Mahoney
71. Jeremy Bentham, Anarchical Fallacies, in NONSENSE UPON STILTS: BENTHAM, BURKE
AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987). David Hume shared in
Bentham’s skepticism, arguing that natural law and natural rights were simply imaginary meta-
72. For John Austin’s exposition of his theory of legal positivism, see JOHN AUSTIN, THE
PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid Rumble ed., Cambridge Univ. Press 1995)
(1832).
73. Weston, supra note 71, at 261.
lacked traction. It took another round of tragic lessons, those imparted by totalitarian regimes and the suffering of World War II, to bring human rights truly to the fore. The United Nations Charter, adopted in 1945, begins by affirming a "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The architects of the new universe of human rights soon took more concrete steps. In 1948, the Universal Declaration of Human Rights was adopted, with only the Soviet bloc, Saudi Arabia, and South Africa abstaining. Then, in 1966, came two important covenants: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. While the Declaration of 1948 and the later covenant on positive rights remained largely aspirational, the covenant on civil and political rights was augmented by an enforcement mechanism, the United Nations Human Rights Committee. Designed to win the allegiance of regimes in many parts of the world, these international documents avoid being grounded in arguably ethnocentric concepts such as natural law or the social compact. Instead they are seen as being derived from the "inherent dignity of the human person."

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

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

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


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

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

\textsuperscript{82} KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 30 (Pol.).


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

\textsuperscript{85} For insiders’ accounts of the Nuremberg trials, see DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT (1999); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992).
a part in heightening human rights consciousness. Non-western nations were often the most ardent advocates of articulating human rights standards. Third, the revolution in communications technology has made it possible for victims of human rights abuses to telegraph their situation to other countries and for activists to be quick to respond. Finally, globalization may be a factor, to the extent that intertwined economies provide opportunities for economic sanctions to be visited upon states that violate human rights.

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


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

88. Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT’L & COMP. L. 287, 313 (1995–96). In my own experiences consulting with constitution makers, I have found that one of the quickest ways to persuade drafters to include a rights provision is to point out that it is to be found in one of the leading international or regional documents such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights.
Copenhagen Document) and of the Council of Europe’s Venice Commission, and the jurisprudence of important constitutional and other high courts (Germany’s Constitutional Court is especially well regarded).

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

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

89. Ghai, supra note 83, at 1105–07.
90. Id. at 1123–24.
91. Influenced by Rousseau’s concept of the general will, the French constitutional tradition sees rights as achieved and guaranteed through law. Louis Henkin, Revolutions and Constitutions, 46 L.A. L. REV. 1023, 1044 (1989). As a result, the Napoleonic Code has historically been more central to French legal thought than have France’s constitutions (of which there have been sixteen). See Martin A. Rogoff, A Comparison of Constitutionalism in France and the United States, 49 Me. L. REV. 21, 22 (1997).
92. Professor Osiatynski’s remarks during a panel discussion held at the Miller Center in Charlottesville, VA on April 11–12, 1989 are published in A.E. Dick Howard et al., Roundtable Discussion, in CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND AND FRANCE 143, 156 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991).
93. See James Allan & Grant Huscroft, Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts, 43 SAN DIEGO L. REV. 1, 31–37 (2006); Thomas C. Grey, Judicial Review and Legal Pragmatism, 38 WAKE FOREST L. REV. 473, 479–80 (2003). This is not just the creation of foreign judiciaries. Constitutions around the globe often make these techniques explicit. For example, Section 36(1) of the South African Constitution permits the limitation of provisions of its Bill of Rights so long as the restraint is “reasonable and justifiable in an
Divergence may also be seen in how courts respond to claims of positive rights, such as economic entitlements. There is also significant difference as regards the recognition of collective rights. Classical liberal constitutions, such as that of the United States and its Bill of Rights, are framed in terms of traditional individual rights. Countries riven by differences of culture, religion, or nationality often have constitutions providing cultural autonomy or other collective recognition and protections for minority groups.

Discourse about human rights implicates a larger debate about universalism and relativism. Some countries in Asia and Africa complain that talk about human rights is a form of cultural imperialism, an effort by the West to force their values on other parts of the world. Such complaints may shift with time and experience. In the years after decolonization, many African leaders, especially those who found a one-party state congenial to their own political ambitions, were able to sell their people on the notion that individual rights were western inventions, not suited to African conditions. After experience with authoritarian governments created by African politicians like Hastings Banda or Robert Mugabe, many Africans are more willing to reconsider their assumptions about individual rights being an uncongenial idea.
er theory may say about human rights, their origin, their nature, and
their universality, comparative constitutionalism can be a handmaiden
to reform. Human rights activists, as much as constitutional draftsmen,
scholars, and jurists, have good reason to become practitioners of the
comparativist’s art.

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

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

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

99. Louis Favoreu, Constitutional Review in Europe, in CONSTITUTIONALISM AND RIGHTS,
supra note 78, at 38, 42–43 (1990); Alec Stone Sweet, Why Europe Rejected American Judicial

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

HANDBOOK OF LAW AND POLITICS 81 (Keith E. Whittington, R. Daniel Kelemen & Gregory A.
Caldeira eds., 2008).

102. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL
most influential high courts. Even France, despite its long tradition of Rousseau's general will and parliamentary supremacy, has created a Conseil Constitutionnel, which has edged toward judicial review. 103

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

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

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


A TRAVELER FROM AN ANTIQUE LAND

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

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

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

110. For studies of the Human Rights Act in operation, see HELEN FENWICK, CIVIL RIGHTS: NEW LABOUR, FREEDOM AND THE HUMAN RIGHTS ACT 17–19 (2000); HELEN FENWICK ET AL., JUDICIAL REASONING UNDER THE HUMAN RIGHTS ACT 174–81 (2007). The journal Legal Studies has devoted a special issue to the creation of the United Kingdom’s Supreme Court. 24 LEGAL STUD. 1, 1–293 (2004).
have added reason to embrace judicial review; India, Canada, and South Africa are cases in point. Finally, domestic pressures aside, the very spread of judicial review has spurred imitation or experimentation in other countries. Decisions like that of the Warren Court in Brown v. Board of Education carried moral instruction for many countries. There is also the influence of supranational tribunals. The leading example is the European Court of Human Rights, whose impact on the practices of member states—and, indeed, on countries beyond its jurisdiction—would be hard to overemphasize.111

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

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

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

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

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

115. See Favoreu, supra note 99; Sweet, supra note 99, at 2767; Tushnet, supra note 112, at 1244-45; Tushnet, Marbury, supra note 113, at 263-64.
117. I discuss the debate over the Supreme Court's use of comparative data, infra Part IV.
118. Madison, supra note 12; see also THE FEDERALIST NO. 18 (James Madison).
strongly influenced by American federalism, and Argentina also looked to its northern neighbor in 1853. With the passage of the British North America Act in 1867, Canada became a genuine federation, and in 1900, Australia shifted from its loose confederal structure of 1885 to an "indissoluble" federation. Yet, well into the twentieth century, there was widespread commitment to centralized government, exemplified by Rousseau's general will. Centralizing the power of government had an appeal both to rulers, who wanted authority and efficiency, and to democrats, who saw uniform laws as inherently egalitarian. As late as the eve of World War II, the European mind deemed federalism as an antiquated idea, unsuited to modern states, and doomed to extinction in an era requiring a centralized, activist government. In 1939, Harold Laski declared, "I infer in a word that the epoch of federalism is over."

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


123. Watts, supra note 122, at 111.


125. Nevil Johnson, Constitutionalism in Europe Since 1945: Reconstruction and Appraisal, in CONSTITUTIONALISM AND DEMOCRACY, supra note 17, at 26, 34.
unity, laid the way for broad grants of authority to the regions in an effort to defuse separatist forces in Catalonia and the Basque country.\textsuperscript{126} Even the United Kingdom, while maintaining its formal commitment to Parliament's supremacy, has undertaken devolution of degrees of authority to Assemblies in Northern Ireland and Wales and to a Scottish Parliament, something Edinburgh had not seen since the Act of Union in 1707.\textsuperscript{127} At the supranational level, the European Union has been described as a "nascent form of federal government."\textsuperscript{128} The European Union is based on treaties, but scholars have noted the constitutional nature of its formation and structure.\textsuperscript{129}

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

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


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

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

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

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

132. Watts, supra note 122, at 116.
134. See Daniel Halberstam, Comparative Federalism and the Role of the Judiciary, in The Oxford Handbook of Law and Politics, supra note 101, at 142, 142–43.
yet cannot be wholly understood without reference to its historical grounding. American federalism has, of course, evolved in manifest ways in the centuries since its inception. Disputes over the nature of the federal union (Webster versus Calhoun), the Civil War and Reconstruction, the rise of the modern administrative state, the decisions of the Warren Court—these and other forces have reshaped the face of federalism in America. Setting the American experience, both its origins and its evolution, alongside that of other federal systems offers useful lessons for deciding how power should be shared at different levels of government.

Comparativism is especially useful in an age of ethnic tensions and in a search for ways to protect minorities. At a meeting of the Organization on Security and Cooperation of Europe (OSCE), I recall how Americans at the table argued strongly for looking first and foremost to individual rights, the antidiscrimination principle, and judicial enforcement of rights as a road to protection of minorities. By contrast, Europeans were more inclined to look to structural devices such as the right of national minorities (Hungarians in Romania, Turks in Bulgaria) to have a measure of local autonomy regarding education, culture, and other subjects seen as important to their sense of being. Federalism, in some form, can be a useful tool for protecting minority rights and defusing ethnic conflict.

Arrangements for federalism or devolution need not require that each constituent unit have the same powers. Where a country faces distinctive problems in some but not all of its parts—Quebec in Canada, Catalonia and the Basque country in Spain—it is possible to make asymmetrical dispensations while maintaining a larger national identity.

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


138. *Id.* at 959–60.
solution. If the states had a problem with that, they could take their complaints to Congress. I remember telling students in my first-year constitutional law class that they would never live to see the day when the Court would declare that Congress had exceeded its powers under the commerce clause. I did not foresee the Rehnquist Court and United States v. Lopez. Whatever the ebbs and tides of litigation, federalism, including the Tenth and Eleventh Amendments, is back as a serious subject of constitutional debate and study. With that development has come the glimmering that comparative federalism may be thought relevant. One of the earliest skirmishes in the current controversy over the use of comparative data in interpreting the United States Constitution came in Printz v. United States (1997). In his dissent, Justice Breyer drew on the federalism experience in Germany, Switzerland, and the European Union to argue that "there is no need to interpret the Constitution as containing an absolute principle— forbidding the assignment of virtually any federal duty to a state official." Justice Scalia, writing for the majority, rebuffed that suggestion, observing tartly that "our federalism is not Europe's."

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

143. Id. at 977 (Breyer, J., dissenting).
144. Id. at 921 n.11 (majority opinion).
146. HUTSON, supra note 120, at 58-65. A leading reformer in Oregon, which adopted the initiative and referendum in 1902, declared, "I believe I do not overstate the fact when I say Oregon is wholly indebted to Switzerland for these tools of democracy." William E. Rappard, The Initiative, Referendum and Recall in Switzerland, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1912, at HeinOnline -- 50 Va. J. Int'l L. 30 2009-2010
made great sense a hundred years ago, when legislators were in the pockets of vested interests. But one only has to look at California’s fiscal morass—where voters mandate spending on the one hand and limit taxes on the other—to realize how the ideals of direct democracy collide with the realities of responsible government.147

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

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

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

148. 3 U.S. (3 Dall.) 386 (1798).
149. Id. at 388. The opinion of Justice Chase and concurrence of Justice Paterson also used the definitions of “ex post facto laws” in the history of state constitutions to define the term in the U.S. Constitution. Id. at 391–92 (Chase, J.); id. at 396–97 (Paterson, J., concurring). While some could view this as an example of comparative constitutional reasoning, the search for a commonly understood meaning of a textual provision among constituent parts of a nation is different from borrowing ideas from foreign constitutions.
150. Id. at 399 (Iredell, J., dissenting).
own, and the Justices looked to a wide variety of interpretive sources, including international or general norms.\textsuperscript{152} In the seminal case of \textit{Marbury v. Madison}, Chief Justice John Marshall discussed at length the theory of a written constitution before turning to the language of the Constitution itself toward the end of his opinion.\textsuperscript{153} As the nineteenth century wore on, however, comparative citations became increasingly rare as American constitutional jurisprudence matured into a separate body of law. With the rise of legal positivism, the appeal of natural law waned. Both in the academy and in the courts, Americans increasingly looked to their own laws and traditions rather than to external sources.\textsuperscript{154}

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

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

\begin{footnotesize}
\begin{enumerate}
\item[152.] Rahdert, \textit{supra} note 54, at 571.
\item[153.] “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the land . . . .” \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177 (1803). The Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” U.S. \textsc{const.} art. VI.
\item[154.] See Rahdert, \textit{supra} note 54, at 571–72, 597–99 (2007).
\item[155.] Lorraine E. Weinrib, \textit{The Postwar Paradigm and American Exceptionalism, in The Migration of Constitutional Ideas} 84, 89, 91 (Sujit Choudhry ed., 2006).
\item[156.] \textit{Id.} at 89.
\item[157.] Lüth, 7 BVerfGe 198 (1958) (F.R.G.).
\item[159.] See Grey, \textit{supra} note 93, at 483–84.
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concept of proportionality. This notion is hardly an invitation to the use of formalism, and it is not a concept usually associated with the way in which American courts go about interpreting and enforcing rights.\textsuperscript{160} Further, originalism, fervently advanced by some judges and commentators in the United States, is largely irrelevant to postwar constitutionalism abroad. The idea of a “living Constitution” may raise hackles in some quarters in America, but in countries like Canada and Israel “living constitutionalism” is widely accepted.\textsuperscript{161} Aharon Barak, President of Israel’s Supreme Court, has declared that the “life” of a constitution “is not expressed in imposing old constitutional principles on new circumstances.”\textsuperscript{162} Finally, the postwar paradigm embraces constitutional comparisons. It has little tolerance for claims of exceptionalism. In the early decades after World War II—the era when postwar constitutionalism emerged—there appears to have been a widespread academic view that American exceptionalism was a vice rather than a virtue.\textsuperscript{163}

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

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\item \textsuperscript{161} Allan & Huscroft, \textit{supra} note 93, 31–34 (2006).
\item \textsuperscript{162} AHARON BARAK, \textit{PURPOSIVE INTERPRETATION IN LAW} 390 (Sari Bashi trans., Princeton Univ. Press 2005).
\end{itemize}
nalism and invoked the feelings of inferiority engendered in colored children by segregation.164 Comparative constitutionalism surfaced explicitly in *Trop v. Dulles* (1958).165 Holding that revoking citizenship for wartime desertion was cruel and unusual punishment, Chief Justice Warren pointed to a United Nations survey demonstrating that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."166 In *Miranda v. Arizona* (1966), Warren looked to foreign law and experience to argue that "the danger to law enforcement in curbs on interrogation is overplayed."167 The practice of using comparative data was not confined to the Court's liberal ranks. In his famous dissent in *Poe v. Ullman* (1961), Justice Harlan observed that "no nation" sought to criminalize contraception in a manner similar to the statute being reviewed.168

The conservative counter-revolution expected of the Burger Court never happened.169 One only has to think of cases like *Roe v. Wade* (1973) to realize that the style of reasoning representative of postwar constitutionalism had not gone out of fashion on the Court, even after President Nixon had filled four vacancies.170 Ronald Reagan's election as President in 1980, however, signaled the burgeoning of a conservative legal movement for whom the Warren Court and its way of doing business were anathema. With Ed Meese as Attorney General and Antonin Scalia on the Supreme Court, originalism, textualism, and formalism were proclaimed as a more legitimate road to judicial review than the loose pragmatism of the Warren era.171 In 1988, Justice Scalia threw down the gauntlet. Dissenting in *Thompson v. Oklahoma*, Scalia argued that "the views of other nations... cannot be imposed upon Americans through the Constitution."172 A year later, in *Stanford v. Kentucky*, a case involving the death sentence for juveniles, Justice Scalia pre-
vailed. It was, he wrote for the majority, “American conceptions of decency” to which the Court must look in deciding the contours of cruel and unusual punishment. Justice Brennan, who dissented, argued that, in measuring contemporary standards of decency, the Court should look, not only to traditional legal sources, but also to enlightened opinion, both here and abroad—indicators of what is acceptable in a “civilized society.” Thus, for Brennan, it mattered that over fifty countries had banned capital punishment, and of the remainder a majority had abolished capital punishment for juveniles.

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

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

174. Id. at 369 n.1.
175. Id. at 383–90 (Brennan, J., dissenting).
177. Id. at 935 n.11.
179. Id. at 990.
182. Id. at 316 n.21.
Justice Scalia and Chief Justice Rehnquist objected. The next year, in *Lawrence v. Texas* (2003), Justice Kennedy cited a decision of the European Court of Human Rights in overruling *Bowers v. Hardwick* and recognizing constitutional protection for homosexual sodomy. Justice Scalia, dissenting, complained that constitutional entitlements "do not spring into existence... because foreign nations decriminalize conduct." Then, in *Roper v. Simmons* (2005), Justice Kennedy's majority opinion undertook a lengthy review of foreign practice in concluding that the United States stood almost alone in executing juveniles. In deciding *Roper*, the Court overruled Justice Scalia's decision in *Stanford*, so dismissive of comparative data and decided only sixteen years earlier. In *Roper*, Justice Scalia, of course, dissented. For him, the Court's use of comparative sources was nothing more than an opportunistic attempt to confirm "the Justices' own notion of how the world ought to be."

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

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

183. *Id.* at 322, 324–25 (Rehnquist, J., dissenting); *id.* at 347–48.
186. *Lawrence*, 539 U.S. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) ¶ 52 (1981)). Justice Kennedy went on to cite additional cases from the European Court of Human Rights to support the Court's holding in *Lawrence*. *Id.* at 576–77.
187. *Id.* at 598 (Scalia, J., dissenting).
188. 543 U.S. 551 (2005).
189. 543 U.S. at 574–75.
190. *Id.* at 628 (Scalia, J., dissenting). Justice O'Connor dissented separately on the grounds there was no national consensus on the issue. She did, however, take issue with Justice Scalia's statement "that foreign and international law have no place in our Eighth Amendment jurisprudence." *Id.* at 604 (O'Connor, J., dissenting).
world that increasingly cite each others' work. Those who criticize the Court for remaining outside this community charge it with being guilty of "emphatic provincialism." One scholar has compared the United States to France in the first half of the nineteenth century, which he described as having been narrow-minded and self-absorbed while the rest of the world was embracing its legal export. A second goal is to have the United States regain leadership in the arena of human rights. For such critics, the U. S. Supreme Court has drifted from being a model for other countries to, as Frank Michelman puts it, "mildly pariah status." American human rights jurisprudence has become less relevant to courts abroad, while courts in countries like Canada and South Africa have become more influential. Harold Koh argues that America's failure to participate in transnational jurisprudence "undermines U.S. influence over the global development of human rights."

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

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

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192. See Slaughter, supra note 52. See generally Frank I. Michelman, Integrity-Anxiety?, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, supra note 163, at 241.
193. Ackerman, supra note 129, at 773; see also Ignatieff, supra note 163, at 8.
tries today. Comparative sources may be used, not only as a means of reaching a desired outcome in a particular case, but more broadly as a way to shape the law itself. Roscoe Pound said as much many years ago: “In legal history, periods of growth and expansion call for and rely upon philosophy and comparative law. . . . [T]he revival of serious use of comparative law in our legal literature is a significant sign of the times.” Professor Pound was writing about Roman law, but today he might well make the same observation about comparative constitutional law.

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

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

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

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

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

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\bibitem{208} Weinrib, \textit{supra} note 200, at 14.
\bibitem{209} See \textit{supra} Introduction and note 54.
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Americans at every level—judges, scholars, politicians, commentators, and citizens—have a stake in constitutional interpretation. Arguments over using comparative data in deciding what the Constitution means are fundamental in a society that attempts to balance an accountable government, one based in popular sovereignty and a democratic process, against limits on government as manifested through judicial review. Indeed, at a basic level of argumentation about constitutional interpretation, it is not hard to see the debate over comparativism as another chapter in the saga that stretches back to the duel between Justices Chase and Iredell over two centuries ago.

EPILOGUE: BRATISLAVA

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

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

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

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

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