

## STRUCTURAL EXCEPTIONALISM AND COMPARATIVE CONSTITUTIONAL LAW

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### INTRODUCTION

IN the last decade, the controversy over whether the Supreme Court should rely on foreign law in its interpretation of the U.S. Constitution has reached an unprecedented level of intensity. Debate over the wisdom and propriety of relying on comparative material is hardly a new phenomenon; arguments among the Justices over such citations go back to the ill-fated case of *Chisholm v. Georgia* in 1793.<sup>1</sup> But beginning with *Thompson v. Oklahoma* in 1988,<sup>2</sup> concern over the practice took on a renewed urgency, as Justice Scalia insisted in dissent that “the views of other nations . . . cannot be imposed upon Americans through the Constitution.”<sup>3</sup> Salvos between the Justices continued through the dawn of the twenty-first century, with foreign references confined to the dissents, particularly those of Justice Breyer.<sup>4</sup>

Between 2002 and 2005, however, the use of comparative law in the majority opinions of several high-profile cases brought the controversy directly to the American public. In the 2002 case of *Atkins v. Virginia*, the Court invalidated the execution of mentally handicapped criminals on Eighth Amendment grounds, noting that

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<sup>1</sup> 2 U.S. (2 Dall.) 419 (1793). Justice Wilson looked to “the laws and practice of different States and Kingdoms” in deciding whether a state possessed sovereign immunity from suit, surveying the traditions from ancient Greece up to the present day. *Id.* at 459–61 (Wilson, J.). Justice Iredell responded that if authority for suits against a state did not exist under the Constitution of the United States, then “ten thousand examples of similar powers would not warrant its assumption.” *Id.* at 449 (Iredell, J.).

<sup>2</sup> 487 U.S. 815 (1988).

<sup>3</sup> *Id.* at 868 n.4 (Scalia, J., dissenting).

<sup>4</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

“within the world community” the practice was “overwhelmingly disapproved.”<sup>5</sup> One year later, in *Lawrence v. Texas*, the Court cited a string of cases from the European Court of Human Rights in striking down a Texas law criminalizing same-sex sodomy under the Due Process Clause.<sup>6</sup> And in 2005, the Court in *Roper v. Simmons* devoted an entire section of its opinion to a discussion of foreign human rights law to support its invalidation of the juvenile death penalty.<sup>7</sup> This crescendo of citations sparked a heated response, including proposed congressional resolutions condemning the practice<sup>8</sup> and an array of arguments from commentators across the ideological spectrum.<sup>9</sup>

Concern over the practice has only grown since these opinions were issued. Beginning with the elevation of Chief Justice Roberts, senators have made questioning a nominee’s thoughts on the issue a staple of the confirmation process.<sup>10</sup> The Court’s recent Second Amendment cases have also touched on the debate, as dissents in both *District of Columbia v. Heller*<sup>11</sup> and *McDonald v. City of Chicago*<sup>12</sup> attempted to use comparative material in vain.<sup>13</sup> Most re-

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<sup>5</sup> 536 U.S. 304, 316–17 n.21 (2002).

<sup>6</sup> 539 U.S. 558, 573, 576–77 (2003).

<sup>7</sup> 543 U.S. 551, 575–78 (2005).

<sup>8</sup> See, e.g., S. Res. 92, 109th Cong. (2005) (“Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”).

<sup>9</sup> For a summary of some of the vast academic literature on the subject, see Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 Am. U. L. Rev. 553, 576–83, 586–88 (2007).

<sup>10</sup> Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2010) (statement of Sen. Chuck Grassley), available at 2010 WLNR 13085164; Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 633–34, 645, 647–54, 661, 673 (2010); Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 370–71, 410, 470–72, 604 (2006); Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 30, 42, 200–01, 292–93 (2005).

<sup>11</sup> 128 S. Ct. 2783 (2008).

<sup>12</sup> 130 S. Ct. 3020 (2010).

<sup>13</sup> In *Heller*, Justice Breyer employed the concept of “proportionality”—an important feature of many other nations’ constitutional law—to no avail. See 128 S. Ct. at

cently, in the 2010 case of *Graham v. Florida*, the Court once again drew on foreign law to hold that sentencing juvenile offenders to life in prison without parole for crimes other than homicide violated the Eighth Amendment.<sup>14</sup> Controversy over the Court's use of comparative materials is unlikely to vanish any time soon.

Before entering the debate, it is important to clarify what is at stake. While debate over the Supreme Court's use of foreign law is not a new phenomenon, the intense criticism sparked by recent citations has surprised some proponents of comparative sources.<sup>15</sup> But to dismiss this opposition as inexplicable hostility to a long-standing practice ignores two important aspects of the current debate. First, whereas the prior use of foreign law had limited implications, the practice has now taken on a countermajoritarian cast. While the Supreme Court has cited foreign law since its early existence,<sup>16</sup> the first time it directly employed such material to strike

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2852 (Breyer, J., dissenting). Two scholars have argued that this represents an effort to employ comparative constitutional law without direct citation. See Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 *San Diego L. Rev.* 367, 378–84 (2009). Justice Breyer's recent reference to the use of proportionality analysis in foreign courts bolsters these claims. See *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part) (citing cases employing proportionality analysis from Canada, Israel, South Africa, and the United Kingdom). In *McDonald*, Justice Stevens marshaled the laws of other nations to protest the incorporation of the Second Amendment, calling it "silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders." 130 S. Ct. at 3110–11 (Stevens, J., dissenting).

<sup>14</sup> 130 S. Ct. 2011, 2033–34 (2010) (recognizing that while the "judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment," they are "not irrelevant" (quoting *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982))).

<sup>15</sup> For example, in a public debate with Justice Scalia over the use of foreign law, Justice Breyer remarked that he "was taken rather by surprise, frankly, at the controversy that this matter has generated." Stephen Breyer & Antonin Scalia, *Assoc. Justices, Supreme Court of the United States, Debate at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005), *quoted in* Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 *Alb. L. Rev.* 771, 795 (2006).

<sup>16</sup> For a helpful discussion of foreign law references through the Marshall Court, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 *Wm. & Mary L. Rev.* 743, 756–80 (2005).

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down a domestic practice was not until after World War II.<sup>17</sup> The Court's reliance on foreign authorities to invalidate American laws has significantly raised the stakes of the theoretical debate.

Second, the debate now occurs in the shadow of a global constitutional community. Since the end of World War II, judicial review has gone from being a constitutional rarity to a nearly universal practice,<sup>18</sup> and the proliferation of new courts engaging in judicial review marks a new chapter in the history of constitutional adjudication.<sup>19</sup> According to Professor Slaughter, many of these relatively recent tribunals have come to form a "global community of courts" filled with judges who view one another as "participants in a common judicial enterprise."<sup>20</sup> While comparative scholars have been calling for the U.S. Supreme Court to join this community since the 1970s,<sup>21</sup> the American high court has largely remained an outsider. Both sides of the controversy agree that the Court's recent use of comparative constitutional law may signify the dawn of a new era in American constitutional interpretation, where U.S. courts more frequently engage with foreign concepts and precedents.<sup>22</sup>

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<sup>17</sup> See *Trop v. Dulles*, 356 U.S. 86, 102–04 (1958). In holding that the loss of citizenship for wartime desertion was a cruel and unusual punishment, Chief Justice Warren's plurality opinion relied on a United Nations survey demonstrating that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.* at 102; see also Calabresi & Zimdahl, *supra* note 16, at 846–47 (discussing the *Trop* plurality opinion).

<sup>18</sup> See Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 *Wake Forest L. Rev.* 473, 474 (2003). According to one calculation, out of the 191 constitutional nations in the world, 158 have explicit constitutional provisions for some form of judicial review. Tom Ginsburg, *The Global Spread of Constitutional Review*, in *The Oxford Handbook of Law and Politics* 81, 81 (Keith E. Whittington et al. eds., 2008). This tally, however, includes a small number of countries that allow for a legislative form of review. *Id.* at 81 n.1.

<sup>19</sup> Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 *Alb. L. Rev.* 653, 667–68 (2006).

<sup>20</sup> Anne-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191, 192–94 (2003).

<sup>21</sup> See, e.g., Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 *J. Marshall J. Prac. & Proc.* 685, 693–95 (1976).

<sup>22</sup> See Alford, *supra* note 19, at 667–68; Justice Stephen Breyer, *Keynote Address*, 97 *Am. Soc'y Int'l L. Proc.* 265, 266, 268 (2003); see also A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 *Va. J. Int'l L.* 3, 36–40 (2009) (arguing that the debate over foreign law citations implicates a larger struggle between originalism and postwar constitutionalism).

Still, proponents of comparative citation offer several reasons why the Court's recent reliance on foreign law is not as significant as critics of the practice suggest. First, they point out that the Court has treated foreign material merely as additional support for controversial conclusions, rather than as a source of guidance in discerning universal human rights.<sup>23</sup> In a relative sense, this assertion is correct. Viewed alongside the practice of foreign citation in other constitutional courts, the Supreme Court's use of comparative data is indeed comparatively modest.<sup>24</sup> Second, they are eager to clarify that the Supreme Court should treat comparative constitutional law as "persuasive" rather than "controlling" authority.<sup>25</sup>

Despite these arguments, there are at least two reasons why the Court's recent comparative turn is a more significant shift than its supporters suggest. First, even the modest use of comparative constitutional law may expand the accepted canon of interpretive sources.<sup>26</sup> If the pages of U.S. Reports become peppered with comparative law, advocates may use the constitutional law of foreign nations in their arguments more frequently, which, in turn, will increase the Court's reliance on these authorities.<sup>27</sup> Some candid

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<sup>23</sup> See Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 *Minn. L. Rev.* 1275, 1301 (2006).

<sup>24</sup> See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *Harv. L. Rev.* 109, 112–13 (2005) (describing other constitutions that encourage the use of foreign law to ensure compliance with international norms).

<sup>25</sup> See, e.g., *id.* at 111–15. Unfortunately, this response ignores the actual debate. Even Supreme Court precedent is not "controlling," given the Court's ability to overrule its earlier decision, and American Justices are unlikely to treat a foreign tribunal as a court of superior jurisdiction. Moreover, the definition of what is "persuasive" authority is somewhat unclear, even to supporters of the practice. John O. McGinnis, *Foreign to Our Constitution*, 100 *Nw. U. L. Rev.* 303, 309–11 (2006); see also Frederick Schauer, *Authority and Authorities*, 94 *Va. L. Rev.* 1931, 1943–46, 1952 (2008) (noting that the Court's recent references to foreign law use "the language of authority" and describing the distinction in terms of "optional" and "binding" authority).

<sup>26</sup> Charles Fried, *Scholars and Judges: Reason and Power*, 23 *Harv. J.L. & Pub. Pol'y* 807, 818–19 (2000); see also Schauer, *supra* note 25, at 1954–60 (acknowledging genuine concern over the phenomenon of a source becoming progressively more authoritative).

<sup>27</sup> Frank I. Michelman, *Integrity-Anxiety?*, in *American Exceptionalism and Human Rights* 241, 263 (Michael Ignatieff ed., 2005).

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comparativists encourage the use of milder citations to foreign law precisely for this purpose.<sup>28</sup>

Second, even if Justices do not directly cite comparative material, their engagement with comparative legal concepts may open the door for foreign authority to enter American constitutional law in the future. Given the eagerness of several Justices to look abroad, it is likely that they will employ foreign methodologies covertly if they cannot do so directly.<sup>29</sup> And if a foreign constitutional doctrine such as proportionality analysis becomes an accepted part of American law, it will make comparative sources look far less alien in the future. This in turn will likely ease the transition into the global constitutional community.<sup>30</sup>

This Note contributes to the debate by offering a pragmatic critique of the Supreme Court's reliance on comparative constitutional law. While this Note often relies on history, it does so in the service of highlighting practical consequences, rather than offering an originalist argument.<sup>31</sup> Given that those who promote the use of comparative constitutional law are inherently nonoriginalists,

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<sup>28</sup> See, e.g., Slaughter, *supra* note 20, at 203–04 (“[I]f [the Justices] do succeed in making citation of foreign and international decisions accepted or even common practice in U.S. case law, they will indeed introduce a whole new range of materials to the texts, precedents, and doctrines to the advocates and deliberators who must present and decide disputes in American courts under American law. . . . [T]hey will have broadened their own constitutional vision, thereby fully joining the global community of courts.”) (internal quotation marks omitted).

<sup>29</sup> See David S. Law, *Generic Constitutional Law*, 89 *Minn. L. Rev.* 652, 738 (2005) (“Any victory won by opponents of comparative constitutional argument may, however, be Pyrrhic. Insofar as their goal is simply to prevent judges from cloaking arguments in the prestige and authority of other courts or jurisdictions, anti-comparativists may well succeed. . . . But no amount of criticism is likely to prevent judges from plagiarizing covertly.”). Justice Breyer’s use of proportionality analysis in his *Heller* dissent may be one example of this phenomenon. See *supra* notes 11, 13 and accompanying text.

<sup>30</sup> See Cohen-Eliya & Porat, *supra* note 13, at 382–83. These tactics have been employed in foreign courts before. For example, the Supreme Court of Canada introduced proportionality analysis into Canadian constitutional law without an explicit citation to foreign precedent. See *id.* at 383 (citing *R. v. Oakes*, [1986] 1 S.C.R. 103, 136–37 (Can.)).

<sup>31</sup> While there is some overlap between this debate over comparative constitutionalism and arguments over originalism, not all critics of comparative citation are originalists. See Alford, *supra* note 19, at 656–57. For instance, Judge Posner, who is hardly a champion of originalism, is an outspoken opponent of the citation of foreign constitutional law. See Richard A. Posner, *Foreword: A Political Court*, 119 *Harv. L. Rev.* 32, 84–90 (2005).

originalist critiques—although raising important questions of legitimacy—tend not to be persuasive to the other side.<sup>32</sup> And if critics of the Court's comparative turn hope to persuade Justices to abstain from both direct citations to foreign sources as well as the hidden use of foreign constitutional doctrines, they may have to articulate reasons questioning the wisdom, rather than the legitimacy, of the practice.

This Note's argument against the Supreme Court's use of comparative constitutional law is an exceptionalist one.<sup>33</sup> Exceptionalist critiques argue that foreign law cannot be imported because American constitutional law is the unique product of a particular history and culture.<sup>34</sup> The comparativist response to these arguments has been either to downplay the differences between American legal traditions and those of other countries<sup>35</sup> or to promise that the use of foreign law will only occur in certain areas of commonality.<sup>36</sup> This Note avoids each of these responses by advancing the exceptionalist argument on a more fundamental level. It argues that the structures of the U.S. Constitution are ill-equipped to handle the constitutional law of foreign nations with sharply different conceptions of the judicial role.

The U.S. Constitution is rare among contemporary documents in its reflection of the belief that the judicial branch should be con-

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<sup>32</sup> See Tushnet, *supra* note 23, at 1278–79.

<sup>33</sup> The scholarship on American exceptionalism intersects in multiple ways with the debate over the Supreme Court's use of foreign law. For a starting point that connects these two areas of inquiry, see Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335 (2006).

<sup>34</sup> See Rahdert, *supra* note 9, at 647.

<sup>35</sup> See, e.g., Stephen Gardbaum, The Myth and the Reality of American Constitutional Exceptionalism, 107 Mich. L. Rev. 391, 397–98, 411–31, 461–66 (2008).

<sup>36</sup> See, e.g., David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539, 617 (2001) ("A refined comparativist judge only uses comparative constitutional law after deciding that contextual factors and cultural differences will not impinge on the transferability of the constitutional principle or fact, assisted very often by a comparative law expert."). Other commentators suggest that the practice is more appropriate with respect to some constitutional provisions than others because of their relatively indeterminate nature. See, e.g., Steven G. Calabresi, *Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal, 65 Ohio St. L.J. 1097, 1104–05 (2004) (contending comparative constitutional law is more permissible in the interpretation of constitutional provisions that involve open-ended inquiries into "reasonableness," such as the Fourth and Eighth Amendments).

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financed to law rather than politics, an assumption manifested in the relative absence of institutional safeguards to control the federal judiciary. Architects of foreign constitutions, by contrast, expected some judicial policymaking and consequently built democratic controls into their systems. When the Supreme Court draws on the constitutional law of these countries, however, it does so without the accompanying institutional safeguards these foreign courts took for granted. The Supreme Court's importation of comparative constitutional law without these democratic checks will likely lead to unintended costs for American society.

In the interest of a manageable study, this Note focuses on three constitutional traditions. It first considers the U.S. Constitution, specifically in the early years of its existence, as the document's lack of institutional safeguards reflects the beliefs of its eighteenth-century Framers. As the American version of judicial review is currently a unique model on the world stage, this Note contrasts it with its two major alternatives: Commonwealth constitutionalism, represented by the Supreme Court of Canada, and Kelsenian constitutional review, represented by the Federal Constitutional Court of Germany.<sup>37</sup>

This Note's argument is also a limited one in several respects. First, it is concerned with the U.S. Supreme Court's use of comparative *constitutional* law—that is, the precedents from foreign constitutional courts—rather than foreign law generally. This Note's arguments will be less relevant for the debate over relying on foreign law in general, such as considering other nations' democratically enacted penal codes when interpreting the Eighth Amendment. Second, this Note addresses the use of comparative constitutional law in *federal* courts only, and the U.S. Supreme Court in particular. It has little to say about foreign citations by American state courts, which are often the products of different structural arrangements. Finally, this Note proceeds from the assumption that a policy-oriented judiciary that exacerbates deep divisions in American society is not a desirable institution for pragmatic reasons. While this premise is shared to some extent by thinkers from across the ideological spectrum, it is still a controversial one. Many theorists are likely to find the consequences of in-

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<sup>37</sup> See Howard, *supra* note 22, at 24.



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creased reliance on foreign sources—such as the further expansion of constitutional rights or the greater empowerment of the judiciary—to be welcome developments.<sup>38</sup> Rather than rehash previous arguments over these larger issues, this Note will focus on the institutional consequences of comparative citation. At the very least, it seeks to demonstrate that the practice cannot be characterized as a modest or neutral tool of interpretation.

The Note will proceed as follows. Part I introduces the two alternative traditions to American judicial review and their representative courts. Part II analyzes the differing views of the judiciary in each tradition by examining each system's view of the relationship between law and politics and the expected role of interpreters in resolving constitutional indeterminacy. Part III investigates the institutional safeguards in each constitution that reflect differing conceptions of the judicial role. Part IV then points out several problems with the U.S. Supreme Court's reliance on comparative constitutional law and addresses some potential objections. While not an exhaustive treatment of global constitutionalism, this Note demonstrates that combining American structural exceptionalism with comparative constitutional law is neither a prudent nor desirable course of action.

#### I. ALTERNATIVES TO AMERICAN JUDICIAL REVIEW

As the debate over the use of comparative constitutional law has largely occurred in the abstract, few commentators have examined the actual courts the U.S. Supreme Court would likely consider. In an effort to make the debate more concrete, this Part introduces two major competitors to the American constitutional tradition. Aside from representing two widespread alternatives to American judicial review, the Supreme Court of Canada and the Federal Constitutional Court of Germany are prominent tribunals from which U.S. Supreme Court Justices have drawn or are likely to draw. While this examination is not exhaustive, it should provide a representative picture of the global constitutional community that comparativists hope American courts will join.

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<sup>38</sup> See *id.* at 36–38.

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*A. Commonwealth Constitutionalism*

In the area of parliamentary supremacy, the United States broke early on from the remainder of the British Commonwealth. While the concept of judicial review of legislation grew out of long-standing English traditions, the entrenchment of parliamentary sovereignty following the Glorious Revolution precluded its development in the mother country.<sup>39</sup> For much of the United States' existence, Britain and her other colonies instead cleaved to a robust tradition of parliamentary supremacy. Beginning with Canada in 1982, however, several commonwealth nations departed from this trend and empowered their judiciaries to guard against violations of newly constitutionalized rights. These countries did not, however, adopt the American practice of granting the judiciary the last word. Instead, this new "Commonwealth model of constitutionalism" sought to preserve institutional protection of certain liberties without granting judicial supremacy by allowing for a legislative role in the construction of rights.<sup>40</sup>

Canada has been the clear vanguard in the attempt to reconcile judicial review and legislative supremacy. Despite a longer constitutional history, the critical year for Canadian constitutionalism was 1982, which witnessed the birth of the Canadian Charter of Rights and Freedoms. To build a consensus around this reform, the drafters of the Charter offered a safeguard against judicial activism in Section 33, commonly known as the "notwithstanding clause."<sup>41</sup> This provision gives both the Canadian Federal Parliament and provincial governments the option to legislatively override certain instances of judicial review.<sup>42</sup> Many saw the notwithstanding clause as a way to protect rights without succumbing to judicial supremacy.<sup>43</sup> The Charter and its subsequent interpretation under the Ca-

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<sup>39</sup> See Philip Hamburger, Foreword, *Law and Judicial Duty*, 72 *Geo. Wash. L. Rev.* 1, 20 (2003).

<sup>40</sup> See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *Am. J. Comp. L.* 707, 708–09 (2001).

<sup>41</sup> Kent Roach, *Judicial Activism in the Supreme Court of Canada*, in *Judicial Activism in Common Law Supreme Courts* 69, 72–73 (Brice Dickson ed., 2007).

<sup>42</sup> Under the provision, Parliament or a provincial legislature can uphold statutes that conflict with judicial interpretations of certain Charter rights for renewable five-year terms. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) § 33 [hereinafter *Constitution Act*].

<sup>43</sup> See Gardbaum, *supra* note 40, at 724.

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nadian Supreme Court soon became a model for many nations within the common law tradition, with provisions similar to the notwithstanding clause appearing in recent bills of rights in New Zealand, South Africa, and the United Kingdom.<sup>44</sup> Canadian constitutionalism has been “disproportionately influential” in Anglophone nations with a common law tradition, arguably even eclipsing the United States.<sup>45</sup>

When employing foreign law, the U.S. Supreme Court has paid considerable respect to the views of former members of the British Commonwealth.<sup>46</sup> Justice Breyer has sought guidance from the decisions of the Supreme Court of Canada in cases involving the death penalty and political speech.<sup>47</sup> Given its role in the development of this new Commonwealth constitutionalism, its prominence as an international tribunal, and its likelihood of citation by American Justices, the Supreme Court of Canada is a good starting point for evaluating the potential of comparative constitutional law.

*B. Kelsenian Constitutional Review*

While Commonwealth nations have been a prominent source of comparative material, judicial review is no longer confined to nations that were once part of the British Empire. Since the end of World War II, a competing model—termed “Kelsenian” constitu-

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<sup>44</sup> Roach, *supra* note 41, at 69–70. Israel also has similar provision in its guarantee of freedom of occupation. Basic Law: Freedom of Occupation, 1994, S.H. 90 § 8.

<sup>45</sup> Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *Governance in a Globalizing World* 253, 258 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

<sup>46</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (Stevens, J., plurality opinion) (citing legal and cultural norms from “nations that share our Anglo-American heritage”).

<sup>47</sup> See, e.g., *Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part) (citing *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 (Can.)) (advocating for the use of proportionality review when evaluating burdens on speech); *Knight v. Florida*, 528 U.S. 990, 996–97 (1999) (Breyer, J., dissenting) (citing *Kindler v. Minister of Justice*, [1991] 2 S.C.R. 779, 838 (joint opinion) (Can.) and noting that “the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment”).

tional review—has swept through civil law countries.<sup>48</sup> The constitutional courts that cover Europe today owe their existence to the Austrian jurist Hans Kelsen, whose legal theories shaped contemporary European constitutionalism.<sup>49</sup> Unlike the U.S. Supreme Court, Kelsenian courts have exclusive jurisdiction over constitutional questions, cannot decide ordinary cases, and remain separate from the legislative and judicial branches. Some Kelsenian courts can even engage in the abstract review of legislation before it is enacted.<sup>50</sup>

Chief among these tribunals stands the Federal Constitutional Court of Germany. In the wake of World War II, German statesmen looked to a new constitution as a way to redefine Germany's national identity.<sup>51</sup> To help achieve this vision, the Basic Law—Germany's Constitution since 1949—created a Federal Constitutional Court endowed with expansive powers that has since become one of the most influential tribunals in the world.<sup>52</sup> The German Court's proportionality analysis has also become a mainstay of global constitutionalism. Under this method of adjudication, when a court finds that a law based on a legitimate governmental interest violates a constitutional right, it will weigh the value of the right against the state interest. Despite incompatibility with the constitution, the legislation will be upheld if (1) it furthers a legitimate purpose, (2) it is the least restrictive way of achieving that purpose, and (3) the benefits of that purpose are strictly "proportionate" to the extent of the constitutional violation.<sup>53</sup> This pragmatic method

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<sup>48</sup> John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 *Tex. L. Rev.* 1671, 1671–72 (2004).

<sup>49</sup> See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* 34 (2000).

<sup>50</sup> *Id.* at 33–34.

<sup>51</sup> See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *Va. L. Rev.* 771, 779–80 (1997).

<sup>52</sup> For descriptions of the German Court's expansive powers, see *Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949*, *Bundesgesetzblatt, Teil I [BGBl. I]* arts. 18, 21(2), 41(2), 61, 84(4), 93, 98(2), 99, 100, 126 (F.R.G.); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 *Emory L.J.* 837, 840–42 (1991). The Federal Constitutional Court continues to be particularly well-regarded on the world stage. Following the fall of the Berlin Wall, most post-Soviet nations created a constitutional court based on the German tribunal. Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 *Theoretical Inquiries L.* 49, 75 (2002).

<sup>53</sup> Cohen-Eliya & Porat, *supra* note 13, at 380.

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of evaluating infringements of constitutional rights has become “one of the clearest features of global constitutionalism” and is used by most Western courts outside of the United States.<sup>54</sup> While some advocates of comparative citation have argued that this form of analysis is indistinguishable from similar doctrines in American constitutional law,<sup>55</sup> there are significant differences between the two methods in practice.<sup>56</sup>

While the Federal Constitutional Court does not fall into the common law tradition, there is good reason to suspect that comparativist members of the U.S. Supreme Court will draw upon its case law. *Thompson v. Oklahoma* paid respect to the views of “the leading members of the Western European community,”<sup>57</sup> and the Supreme Court has maintained that commitment in cases such as *Atkins v. Virginia* and *Lawrence v. Texas*.<sup>58</sup> Moreover, Justice Breyer has looked to German principles of federalism when addressing similar questions in American constitutional law<sup>59</sup> and has sought to introduce proportionality analysis into American jurisprudence.<sup>60</sup> Whether German constitutional law is employed in American cases directly or indirectly, it would be a striking omission to neglect the role of this court.

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<sup>54</sup> Id. at 380–81. A diverse set of tribunals has embraced proportionality analysis, including the European Court of Human Rights, the Supreme Court of Canada, and the South African Constitutional Court. Id.

<sup>55</sup> See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting); Law, *supra* note 29, at 693–96.

<sup>56</sup> For example, proportionality analysis operates on a more flexible spectrum than the three-tiered scrutiny scheme of American constitutional law, allowing judges more discretion to balance competing interests. See Donald P. Kommers, Germany: Balancing Rights and Duties, *in* *Interpreting Constitutions: A Comparative Study* 161, 202 (Jeffrey Goldsworthy ed., 2006). See generally Cohen-Eliya & Porat, *supra* note 13, at 384–403 (examining the differences between American balancing tests and German proportionality analysis).

<sup>57</sup> 487 U.S. 815, 830–31 (1988).

<sup>58</sup> *Lawrence v. Texas*, 539 U.S. 558, 572–73, 576–77 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

<sup>59</sup> See *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

<sup>60</sup> See *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting).

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## II. THE JUDICIAL ROLE IN COMPARATIVE PERSPECTIVE

With the United States no longer having a monopoly on constitutional adjudication, many theorists have promised that precedents from other courts will enrich the American practice. Unfortunately, these comparativists seldom have considered the expected role of the judiciary under different constitutions. In particular, they have failed to appreciate that the American tradition diverges from those of other nations over the proper relationship between law and politics, as well as how to interpret indeterminate constitutional provisions. This Part seeks to correct that mistake.

*A. The Line Between Law and Politics**1. The U.S. Constitution*

Article III of the U.S. Constitution is striking in its brevity. Less than five hundred words long, the Constitution's treatment of the federal judiciary pales in comparison to its detailed discussions of the legislative and executive branches. While there are a number of reasons for this disparity, a critical one is the Founding generation's view on the proper relationship between law and politics. To understand American judicial review in light of its alternatives, one must grasp the importance of the distinction between the two realms in eighteenth-century America and its impact on the formation of exceptional constitutional structures.

The idea that a judge could be a political actor instead of a neutral interpreter was not a foreign concept to the early American mind. The effects of the Protestant Reformation—with its commitment to *Sola Scriptura* and attacks on papal claims of interpretive authority—were not confined to the theological realm. For Protestants in England and the colonies, the political analogue to the charges of the Reformation was not lost: judicial interpretation of laws—like papal interpretation of scripture—posed the risk that judges would manipulate their authority for their own ends. Puritans on both sides of the Atlantic attempted to simplify the legal system to prevent judicial exploitation of the law, and their commitment to legal clarity became a staple for later American revolu-

tionaries.<sup>61</sup> Enlightenment scholars such as Beccaria echoed such attacks.<sup>62</sup> As a practical matter, the fact that colonial judges were Crown appointees with often little expertise in the law further undermined the colonists' faith in the judiciary.<sup>63</sup> By the time of independence, fear of interpretive abuse was a recurrent theme in American political discourse.<sup>64</sup>

To remedy this ill, many newly independent Americans proposed a strict separation of powers between the legislature and the judiciary.<sup>65</sup> While this solution existed more in theory than in practice due to the trend toward legislative supremacy under early state constitutions, even the aspiration was unusual for the time. Given their long history of overlap between judicial and legislative roles, the English had proved far less receptive to Puritan interpretive concerns than their colonial cousins.<sup>66</sup> Consequently, the need for a more rigid separation of powers seemed less pressing. William Blackstone would describe the three branches of the English government as formally independent but in reality "thoroughly interwoven."<sup>67</sup> In contrast, many—though by no means all—Americans were attached to a reading of Montesquieu that emphasized the

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<sup>61</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 891–93 (1985).

<sup>62</sup> See Cesare Beccaria, *On Crimes and Punishments* 14–18 (Henry Paolucci trans., 1963) (1764) (contrasting "the constant fixed voice of the law" with "the erring instability of interpretation").

<sup>63</sup> See Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 Geo. Wash. L. Rev. 51, 63 (2003); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 Wash. & Lee L. Rev. 787, 789–90 (1999) ("Colonial America considered judges dangerous because they regarded judges essentially as appendages or extensions of royal authority embodied in the governors, or chief magistrates.").

<sup>64</sup> The rejection of the Massachusetts Constitution of 1778 by the Essex County Convention is one instructive example. The Essex Convention dismissed the document in part for its lack of proper safeguards against "artful constructions" of the law. See *From the Essex Result, 1778, reprinted in Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775–1780*, at 74, 79–80 (Robert J. Taylor ed., 1961) (1778).

<sup>65</sup> This was the proposed solution of the Essex County Convention, for instance. See *id.* at 80–89.

<sup>66</sup> See Powell, *supra* note 61, at 891–92; see also James T. Barry III, *Comment, The Council of Revision and the Limits of Judicial Power*, 56 U. Chi. L. Rev. 235, 237–39 (1989) (discussing England's history of intermingling judicial and legislative functions).

<sup>67</sup> See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 210 (1985).

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strict separation between the three branches of government and the need for judicial independence.<sup>68</sup> But few American thinkers considered judicial forays into the realm of policy to be an acceptable practice.<sup>69</sup>

Debates over the proper separation of powers came to a head at the Philadelphia Convention. The delegates were well aware that a judiciary could be involved in the practice of lawmaking. The British Privy Council had served as the court of last resort for the colonists in addition to reviewing colonial statutes in the abstract.<sup>70</sup> The New York Constitution of 1777 itself had established a Council of Revision, a body composed of the state governor, chancellor, and supreme court judges that revised prospective statutes and returned them to the legislature for modification.<sup>71</sup> Madison was drawn to this institution and advocated establishing a similar body under the Federal Constitution to keep the legislature in check.<sup>72</sup>

During the debates, supporters of a federal Council of Revision, including George Mason and James Wilson, argued that the body would give the judiciary the opportunity to evaluate the wisdom—rather than the constitutionality—of legislation.<sup>73</sup> Their opponents objected out of a commitment to a strict separation of powers and

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<sup>68</sup> The American reading of Montesquieu's work was likely more extreme than the French philosopher's actual position. Barry, *supra* note 66, at 241–42. Followers of Blackstone could count James Madison and James Wilson among their ranks, whereas those who hewed to this interpretation of Montesquieu included John Dickinson and Elbridge Gerry. *Id.* at 242, 250, 253–54.

<sup>69</sup> See William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* 14 (2000) (discussing quotations from the Founding Era that warned of the perils of willful judges).

<sup>70</sup> Julius Goebel, Jr., 1 *History of the Supreme Court of the United States* 65–69 (1971). The role of the English House of Lords as both a judicial and legislative body was another familiar example. Barry, *supra* note 66, at 239. During the Constitutional Convention, both James Madison and Gouverneur Morris would reference these practices. 2 *The Records of the Federal Convention 1787*, at 75 (Max Farrand ed., 1911) [hereinafter 2 *Records of the Federal Convention*]; 1 *The Records of the Federal Convention 1787*, at 139 (Max Farrand ed., 1911) [hereinafter 1 *Records of the Federal Convention*].

<sup>71</sup> N.Y. Const. of 1777, art. III. For a brief history of the body's existence, see Barry, *supra* note 66, at 243–48.

<sup>72</sup> See Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 *The Papers of James Madison* 350, 351 (Robert A. Rutland et al. eds., 1973).

<sup>73</sup> 2 *Records of the Federal Convention*, *supra* note 70, at 73, 78.



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out of fear of granting judges control over policy.<sup>74</sup> In the end, the proposed Council of Revision was rejected by a vote of eight to three.<sup>75</sup> The history of this ill-fated proposal is particularly instructive. In the face of long-established British traditions as well as New York's decade-old Council, the Philadelphia Convention chose to remove the judiciary from the realm of legislative policy as a matter of constitutional structure. That choice was just one example of a structural commitment to a strict division between law and politics.

For its part, the nascent Supreme Court sought to reassure the public that it would remain an apolitical body. While *Marbury v. Madison*<sup>76</sup> has often been characterized as an instance of judicial statecraft, several scholars recently have challenged that assumption by placing the decision in its historical context.<sup>77</sup> More accurately, *Marbury* is a decision that only can be understood "against a background assumption that the duty of judges, especially in constitutional cases, is to decide questions of law and abstain from politics."<sup>78</sup> Chief Justice Marshall's statements about the judicial role in *Marbury* help explain why the American public in 1803 did not treat the decision as a particularly controversial one.<sup>79</sup> Marshall would reiterate his commitment to the distinction in *Osborn v. Bank of the United States*, declaring that "[j]udicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."<sup>80</sup>

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<sup>74</sup> 1 Records of the Federal Convention, supra note 70, at 97–98; 2 Records of the Federal Convention, supra note 70, at 75. Representative of their arguments was Elbridge Gerry's assertion that the Council of Revision would "mak[e] the Expositors of the Laws . . . the Legislators[,] which ought never to be done." 2 Records of the Federal Convention, supra note 70, at 75.

<sup>75</sup> 1 Records of the Federal Convention, supra note 70, at 140. Repeated attempts to resurrect the provision were similarly denied. See 2 Records of the Federal Convention, supra note 70, at 80, 298. For a longer account of the proposed Council of Revision, see Philip Hamburger, *Law and Judicial Duty* 507–12 (2008).

<sup>76</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>77</sup> See, e.g., Hamburger, supra note 75, at 8–9; Nelson, supra note 69, at 2–5; Stephen A. Siegel, *Lochner* Era Jurisprudence and the American Constitutional Tradition, 70 N.C. L. Rev. 1, 42–43 (1991).

<sup>78</sup> Nelson, supra note 69, at 117.

<sup>79</sup> See id. at 8, 59, 72.

<sup>80</sup> 22 U.S. (9 Wheat.) 738, 866 (1824).

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The refrain of a strict separation between law and politics was not confined to *Marbury*. Federal and state court decisions of the time affirmed the distinction in unmistakable terms.<sup>81</sup> These repeated affirmations were not formalistic cant designed to obscure political motives but reflections of the intellectual world of the early American republic. This commitment to a firm line between law and politics has grown only more exceptional with the rise of new constitutional systems skeptical of the distinction.

## 2. *The Canadian Charter of Rights and Freedoms*

Nearly two centuries after the Philadelphia Convention, Canada engaged in a constitutional revolution grounded in a decidedly different view of the line between law and politics. There were at least three causes of this divergence. First, throughout its history, Canada hewed much closer to the British model of a looser separation of powers than did the American Framers.<sup>82</sup> The nation had spent much of its existence under the control of the Privy Council, and its constitutional independence from Britain was not the product of a violent revolution that demanded an opposing model to the English Constitution. Moreover, the intellectual climate of eighteenth-century America offered several traditions that were absent from late twentieth-century Canada. The influences of the Reformation and the Enlightenment had waned, replaced with ideas drawn from legal realism and the human rights revolution.<sup>83</sup> In contrast to the American Founding, there was little impetus for Canadians to reject the more fluid concept of separation of powers that had remained a mainstay in English constitutionalism for centuries.

Second, the Charter's drafters had nearly two centuries of American experience with judicial review upon which to draw.

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<sup>81</sup> See, e.g., *United States v. The William*, 28 F. Cas. 614, 620 (D. Mass. 1808) (No. 16,700) ("Legal discretion has not the means of ascertaining the grounds, on which political discretion may have proceeded."); *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 47 (1793) ("The judiciary, from the nature of the office, and the mode of their appointment, could never be designed to determine upon the equity, necessity, or usefulness of a law; that would amount to an express interfering with the legislative branch . . .").

<sup>82</sup> See Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in *Interpreting Constitutions: A Comparative Study*, supra note 56, at 55, 60.

<sup>83</sup> For an account of the effects of the human rights revolution on global constitutionalism, see Howard, supra note 22, at 15–21.

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Much of that history cast doubt on the possibility of neutral adjudication. By 1982, Canadian drafters could draw numerous lessons from the American judiciary's repeated forays into the policy realm: *Dred Scott*, the *Lochner* era, and the Warren Court proved to be remarkable teachers.<sup>84</sup> At the very least, the lessons of American history had made the Charter drafters less sanguine about the prospect of judicial restraint.

Third, many Canadian theorists believed that judicial policymaking could often be a useful practice. For postwar constitutionalists around the world—Canadians included—the attraction of judicial review was not found in the legal reasoning of *Marbury*. Instead, it was located in the promise of a policy mechanism to protect minorities and promote social justice.<sup>85</sup> For Canadian jurists, the defining era for judicial review was not the age of *Marbury* but rather that of the Warren Court.<sup>86</sup> The fact that Canada treated a particularly policy-oriented period in American constitutional history as the model for judicial review says much about its conception of the practice.

These influences have shaped Canadian judicial review to be a more political enterprise in a number of ways. To begin, assumptions that the judiciary will be a political actor are built into the Charter itself. Section 1 of the document, which requires that Charter rights be subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” permits legislation to burden rights so long as it is for a “reasonable” purpose.<sup>87</sup> This “reasonable purpose” requirement amounts

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<sup>84</sup> *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny were particularly instructive. See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 Int'l J. Const. L. 1, 15–16 (2004) (noting that *Lochner's* treatment of substantive due process was influential in the drafting of the Canadian analogue to the Due Process Clause).

<sup>85</sup> See Nelson, *supra* note 69, at 109, 118–20.

<sup>86</sup> James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 San Diego L. Rev. 1, 28 (2006). For example, Justice L'Heureux-Dubé of the Supreme Court of Canada has argued that cases from the Warren and Burger Courts were the most important instances of American judicial review because these Courts “attempted to make the principles of their constitution relevant for modern times.” Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 20 (1998).

<sup>87</sup> Constitution Act, *supra* note 42, § 1.

to an explicit transfer of the legislative function of weighing social policies to the Canadian judiciary, a responsibility it has taken up with remarkable zeal.<sup>88</sup> In contrast, while the U.S. Supreme Court occasionally engages in the explicit weighing of competing values, such a practice is often regarded with suspicion as inappropriate political activity.<sup>89</sup>

Additionally, many of the American doctrines confining the scope of adjudication to legal questions are absent from Canadian jurisprudence. In contrast to the longstanding American refusal to issue advisory opinions,<sup>90</sup> the Supreme Court of Canada has a “reference jurisdiction” that allows it to answer abstract questions submitted by the federal government.<sup>91</sup> Oftentimes, these are the most important cases that the Canadian Court hears, giving it the opportunity to discuss sweeping constitutional principles, rather than being confined to a specific controversy.<sup>92</sup> Unlike concrete cases that often can be decided on narrower grounds, abstract questions provide little room for familiar methods of judicial restraint. Furthermore, since the appearance of the Charter, the Supreme Court of Canada has significantly relaxed its standing requirements.<sup>93</sup> This shift provides increased opportunities for questions of policy to be brought to the Court’s attention.

Finally, the Supreme Court of Canada had grown accustomed to policymaking even before the Charter’s appearance. In 1973, Prime Minister Trudeau appointed Bora Laskin as Chief Justice in part because of his well-known reputation as an advocate for judi-

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<sup>88</sup> Hogg, *supra* note 82, at 70, 103.

<sup>89</sup> See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943, 984–86 (1987) (discussing objections to the “judiciary’s performance of the legislative task”).

<sup>90</sup> See, e.g., Letter from the Supreme Court Justices to President George Washington (Aug. 8, 1793), *reprinted in* Richard H. Fallon et al., *Hart & Weschler’s The Federal Courts and the Federal System* 78–79 (5th ed. 2003).

<sup>91</sup> Hogg, *supra* note 82, at 60–61.

<sup>92</sup> See Allan & Huscroft, *supra* note 86, at 30–31. For example, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ¶¶ 83–87 (Can.), the Canadian Court held that Quebec could not secede unless there was sufficient evidence that the majority of Quebecois desired separation. Such a showing would then create an obligation on the Canadian central government to bargain in good faith over the possibility and terms of secession. *Id.* ¶¶ 88–105.

<sup>93</sup> See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 21 (2004).

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cial creativity.<sup>94</sup> Chief Justice Laskin's term lasted until 1984, which was long enough to cement the tribunal's orientation as a policy-making institution.<sup>95</sup> This trend greatly accelerated after 1982, as the Court struck down sixty-six statutes—forty-three of them federal—on Charter grounds in the first fourteen years of the document's existence.<sup>96</sup> For its part, the Court “frankly acknowledges a law-making role in all of its work, certainly including constitutional law.”<sup>97</sup> Given the assumption of the Charter's framers that the Canadian Court would not draw a firm line between the judicial and political, such developments are not surprising.

### 3. *The German Basic Law*

Like the Supreme Court of Canada, Germany's high court is assumed to be a political body. This blending of the judicial and political was not always the case; for most of its history, Germany, like other European powers, drew a sharp line between legislators, who spoke for the people, and judges, who interpreted the civil code.<sup>98</sup> The key change occurred with the appearance of a sophisticated theory that regarded constitutional jurisprudence as a unique type of political law.

In 1928, Hans Kelsen—the Austrian theorist whose ideas underlie German constitutionalism—penned an influential defense of Austrian judicial review.<sup>99</sup> Seeking to convince a continent steeped in civil law, Kelsen argued that constitutional judges were “negative legislators” endowed with political authority.<sup>100</sup> Kelsen viewed constitutional law as inherently political and therefore different from ordinary law such as the civil code.<sup>101</sup> Drawing on this belief,

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<sup>94</sup> Id. at 80.

<sup>95</sup> Id.

<sup>96</sup> Hogg, supra note 82, at 72. By contrast, it took the U.S. Supreme Court over fifteen years to strike down a federal statute under the Constitution, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), and it would not do so again for over half a century, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 452 (1857).

<sup>97</sup> Hogg, supra note 82, at 105.

<sup>98</sup> Kommers, supra note 56, at 206.

<sup>99</sup> Hans Kelsen, *La garantie juridictionnelle de la Constitution* [The Jurisdictional Protection of the Constitution], 45 *Revue du Droit Public* 197 (1928) (Fr.); see also Sweet, supra note 49, at 34.

<sup>100</sup> Sweet, supra note 49, at 35.

<sup>101</sup> Mark Tushnet, *Marbury v. Madison* Around the World, 71 *Tenn. L. Rev.* 251, 258 (2004).

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Kelsen argued that a constitutional court should handle only constitutional law and primarily engage in the abstract review of proposed legislation.<sup>102</sup> Finally, Kelsen was adamant that constitutional law should not be concerned with a bill of rights, fearing that its indeterminate nature would lead to judges becoming positive legislators.<sup>103</sup> Kelsen's ideas were not received favorably. Some Europeans viewed a constitutional court merely as a superlegislature, while those favoring American-style judicial review dismissed his proposal as "political rather than judicial review."<sup>104</sup>

But after World War II, many Europeans became more amenable to a powerful judiciary. Germany fused Kelsenian structure with a rights-based constitution, creating a hybrid in tension with Kelsen's original theory.<sup>105</sup> Moreover, German theorists largely rejected the American view of a constitution as a charter protecting individual liberties from government encroachment. Instead, relying on Germany's tradition of a communitarian state, they hoped their new constitutional court would use the Basic Law to help shape societal values.<sup>106</sup>

These two strands of thought combined to produce a court that is oriented to engage in policymaking. While Kelsen's proposal was intended to constrain the judiciary, it instead resulted in its empowerment. One of the main causes of the blurring between law and politics is the abstract review inherent in the Kelsenian model. Under the Basic Law, a parliamentary minority can seek review of proposed legislation's constitutionality. Moreover, this review is mandatory—the Court has no safety hatch through a political question doctrine.<sup>107</sup> The Basic Law's framers realized this abstract review would necessarily involve the Court in matters of policy and acknowledged that the tribunal would act "as a kind of higher third legislative chamber, whose decisions have the same effects as legis-

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<sup>102</sup> *Id.* Kelsen also argued that normal courts should not engage in constitutional questions. *Id.*

<sup>103</sup> Sweet, *supra* note 49, at 35–36.

<sup>104</sup> Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 *Mich. L. Rev.* 2744, 2768 (2003) (internal quotation marks omitted).

<sup>105</sup> *Id.* at 2769.

<sup>106</sup> See Cohen-Eliya & Porat, *supra* note 13, at 388–91.

<sup>107</sup> Kommers, *supra* note 52, at 842 (internal quotation marks omitted).

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lation.”<sup>108</sup> Whereas the drafters of the U.S. Constitution had rejected a Council of Revision with the power to review proposed legislation,<sup>109</sup> German constitution-makers embraced an analogous arrangement without hesitation.<sup>110</sup>

While all legislatures face incentives to pass along thorny issues to the judiciary,<sup>111</sup> the German arrangement makes it even easier to shift difficult policy questions to a high court in order to escape political consequences. The opportunity to directly transfer such questions has led to some of the Federal Constitutional Court’s most controversial decisions.<sup>112</sup> Coupled with the tribunal’s ability to issue advisory opinions, this practice ensures that the Federal Constitutional Court will maintain a substantial policymaking role.<sup>113</sup>

Additionally, the Federal Constitutional Court’s particular jurisdiction increases the likelihood that it will engage in policy choices. Because its sole duty is to decide constitutional issues, the Federal

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<sup>108</sup> John Ford Golay, *The Founding of the Federal Republic of Germany 183* (1958). Consider the fact that any time the Federal Constitutional Court declares a law unconstitutional, the decision must be published in the reporter of German federal statutes. Kommers, *supra* note 56, at 192.

<sup>109</sup> See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 941 (2003) (discussing the Constitutional Convention’s rejection of the Council of Revision in favor of an executive veto).

<sup>110</sup> Justice Powell noted this divergence in 1974, insisting that the American constitutional system had rejected abstract review “for good reasons.” *United States v. Richardson*, 418 U.S. 166, 191 n.10 (1974) (Powell, J., concurring).

<sup>111</sup> American history contains several instances of legislators hoping to indirectly transfer controversial issues to the judiciary in order to escape political consequences, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), being one of the most notorious. Mark A. Graber, *The Non-majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35, 36, 46–49 (1993). In more recent times, American legislatures have passed constitutionally questionable laws with the expectation that the judiciary will resolve any potential problems. For example, Congress was aware that portions of the Bipartisan Campaign Reform Act of 2002 might not survive scrutiny under the First Amendment but nevertheless enacted the legislation. See *Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 5 (2001) (statement of Rep. Steve Chabot, Chairman, Subcomm. on the Constitution) (“The tension between certain campaign finance proposals and the First Amendment is clear even to those supporting such regulations.”).

<sup>112</sup> See Kommers, *supra* note 56, at 176. While they are few in number, these decisions have included polarizing issues such as abortion, campaign finance, and immigration. *Id.* at 176 n.54.

<sup>113</sup> Sweet, *supra* note 49, at 58.

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Constitutional Court cannot avoid these questions through nonjusticiability doctrines or discretionary review.<sup>114</sup> And given the German Court's attachment to proportionality review as a way of harmonizing competing values, many of these cases will have policy-oriented resolutions. Indeed, many German justices freely admit that they cross the line between law and politics.<sup>115</sup>

*B. Dealing with Constitutional Indeterminacy: The Purpose of Interpretation*

*1. The U.S. Constitution*

As with the American Framers' beliefs regarding the line between law and politics, their views on the role of the judge in constitutional interpretation have become exceptional in today's world. As already noted, they did not want the judiciary to decide questions of policy. But this does not describe how the Framers expected judges would deal with the ambiguities in constitutional text. The competing constitutional ideas of the eighteenth century illustrate that, from the earliest days of the republic, Americans engaged in an unusual effort to establish the permanent meaning of their constitution.

While the contemporary usage of "constitution" connotes a written document, such a connection was a foreign one for most of the world's history. Before the American Revolution, the word "constitution" often referred to the way in which a state structured its government and society.<sup>116</sup> The unwritten constitution with which American colonists were most familiar was the English Constitution, a combination of ancient custom, revered documents, and

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<sup>114</sup> Kommers, *supra* note 52, at 848–49.

<sup>115</sup> See Kommers, *supra* note 56, at 179, 212–13. For example, Jutta Limbach, a former president of the Federal Constitutional Court, has stated that "there is no usable catalogue of criteria that could serve as a signpost in the ridge-walking between law and politics. The two fields of action partly overlap, and cannot unambiguously be separated from each other." Jutta Limbach, *The Law-Making Power of the Legislature and the Judicial Review*, in *2 Law Making, Law Finding and Law Shaping: The Diverse Influences* 174 (Basil S. Markesinis ed., Iain L. Fraser trans., 1997).

<sup>116</sup> For example, Aristotle's study of the "Athenian Constitution" is an examination of the political organization of Athens, not of a written document. See Aristotle, *The Athenian Constitution* 9–13 (Penguin Books ed., P.J. Rhodes trans., 1984).



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common law.<sup>117</sup> The fact that the American Founders chose instead to make their constitution a single written document has significant interpretive implications.<sup>118</sup> The U.S Constitution must be understood in light of why the American revolutionaries rejected the English Constitution in the first place.

Like the common law, the English Constitution purportedly consisted of enduring principles, yet changed gradually over time.<sup>119</sup> This inherent tension came under increased strain in the years leading up to the American Revolution, as the ambiguity of the English Constitution permitted both the British government and the aggrieved colonists to appeal to the same set of traditions.<sup>120</sup> Frustrated by the English Constitution's fluid nature, many colonists invoked the guarantees of their written charters, only to see

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<sup>117</sup> As described by one eighteenth-century commentator, the English Constitution consisted of "that Assemblage of Laws, Institutions and Customs, derived from certain fix'd Principles of Reason, directed to certain fix'd Objects of publick Good, that compose the general System, according to which the Community hath agreed to be govern'd." Henry St. John Viscount Bolingbroke, *A Dissertation Upon Parties* (3d ed. 1735), *quoted in* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1130 (1987).

<sup>118</sup> See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 48 (1999); Powell, *supra* note 61, at 902. The importance of a written constitution in the American tradition preceded 1787, as colonial charters and state constitutions provided citizens with clear expectations of the limits on their governments. See Whittington, *supra*, at 52; see also Bernard Bailyn, *The Ideological Origins of the American Revolution 190-94* (Harvard University Press enlarged ed. 1992) (1967) (discussing early American efforts at codifying limitations on government and enumerating individual rights, including the Pilgrim code of law and the Fundamental Orders of Connecticut of 1639). Nevertheless, Professor Coan has argued that the Framers' choice of a written constitution and their reasons for doing so are irrelevant for contemporary disputes over the proper method of interpretation. See Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Pa. L. Rev. 1025, 1037-39 (2010) ("In short, the perceived connection of writtenness to originalism in the Founding Era offers no compelling reason for believing that writtenness entails originalism today."). But even if one does not accept the Founding generation's interpretive expectations as authoritative, there may nonetheless be practical reasons for following them today. For a further discussion of this point, see *infra* Subsection IV.B.3.

<sup>119</sup> Whittington, *supra* note 118, at 51; Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 247-49 (1989).

<sup>120</sup> Whittington, *supra* note 118, at 51; see also Bailyn, *supra* note 118, at 181-84 (providing specific examples of the colonial desire for a fixed and permanent constitution in the years leading up to the Revolution).

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these rights disregarded by Parliament or “subject to a perpetual mutability.”<sup>121</sup>

By 1776, the abuses suffered under the English Constitution led Americans to reject its instability. Their solution was to delineate the powers of government in a single, written document.<sup>122</sup> The newly independent Americans believed that a written constitution would shield its permanent meaning from the views of particular governments or times. As Justice Story noted,

[T]he policy of one age may ill suit the wishes, or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever [sic].<sup>123</sup>

Many Americans also celebrated the fact that a written document would be relatively determinate. As Justice Patterson remarked, “[i]t is difficult to say what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament . . . [whereas] [e]very State in the Union has its constitution reduced to written exactitude and precision.”<sup>124</sup>

The Framers were nevertheless aware of the need to accommodate change, as the rigidity of the Articles of Confederation proved to be a source of their undoing during the tumultuous years following independence.<sup>125</sup> But their solution to this problem was to include only essential, immutable principles in the Constitution, leaving temporary policy questions to later governments.<sup>126</sup> This

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<sup>121</sup> Whittington, *supra* note 118, at 52, 237 n.20 (internal quotation marks omitted).

<sup>122</sup> See Hamburger, *supra* note 119, at 262–64; see also Thomas B. McAfee, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding* 16 (2000) (“[T]houghtful Americans saw the British constitution’s flexibility and mutability . . . as embodying the very antithesis of a true constitution—one that fixes basically immutable limitations on government power.”).

<sup>123</sup> Joseph Story, *Commentaries on the Constitution of the United States* § 193 (Carolina Academic Press 1987) (1833).

<sup>124</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795) (Patterson, J.) (emphasis omitted).

<sup>125</sup> See Hamburger, *supra* note 119, at 276.

<sup>126</sup> *Id.* at 276–78. One example was the compromise over the existence and jurisdiction of lower federal courts in Article III. Recognizing that the law might have to

distinction between enduring principles and open questions helps explain why the U.S. Constitution remains a skeletal document compared to most foreign constitutions.<sup>127</sup> The Framers recognized the possibility of a “dead-hand problem, but they seem to have thought of it as a *drafting* issue rather than an *interpretive* issue.”<sup>128</sup>

Despite the Framers’ best efforts, the Constitution was not a perfectly determinate document.<sup>129</sup> This problem was not a new one for the Founding generation, which was heir to centuries of disputes over the correct interpretation of Scripture and arguments over the meaning of colonial charters.<sup>130</sup> Additionally, a well-established Lockean philosophy of language had already sought to address the issue. John Locke—although acknowledging that some imprecision in language was unavoidable—nevertheless sought to increase its clarity to the greatest extent possible.<sup>131</sup> Madison himself employed Locke’s arguments in the *Federalist* papers, arguing that no constitution could be completely determinate, as “no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.”<sup>132</sup>

But Madison, following Locke, did not abandon the constitutional project to an indeterminacy that would render it forever

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adapt over time in this area, several Framers found it prudent to leave this question to the judgment of Congress. Id. at 294–95.

<sup>127</sup> Consider, for example, the constitutions of Brazil and India, containing 250 and 395 articles, respectively. Constituição Federal [C.F.] [Constitution] (Braz.); India Const.

<sup>128</sup> Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 543 (2003).

<sup>129</sup> The records of the convention furnish multiple instances of the Framers attempting to refine the Constitution’s language to the greatest degree possible in an effort to eliminate any indeterminacy. See Powell, *supra* note 61, at 903 nn.88–90 (discussing a number of examples).

<sup>130</sup> See Hamburger, *supra* note 119, at 303.

<sup>131</sup> See John Locke, *An Essay Concerning Human Understanding* bk. III, ch. ix (Kenneth P. Winkler ed., Hackett Pub. Co. 1996) (1690) (exploring the sources of linguistic imprecision). Locke nevertheless believed that language could convey an objectively true meaning. See Letter from John Locke to William Molyneux (Jan. 1698), *quoted in* James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. Am. Hist. 9, 16 n.9 (1987); see also Hamburger, *supra* note 119, at 305 (noting that Madison “shared with Locke a belief that language could be somewhat precise and that precision was desirable”).

<sup>132</sup> The *Federalist* No. 37, at 172 (James Madison) (Terence Ball ed., 2003); see also Hamburger, *supra* note 119, at 303–05 (linking Madison’s and Locke’s arguments).

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malleable. Like many other leading members of his generation, Madison assumed that the meaning of particular constitutional provisions would soon be “ascertained,” “liquidated,” “settled,” or “fixed.”<sup>133</sup> As Professor Nelson has shown, this language was associated with the goal of establishing a permanent meaning.<sup>134</sup> Indeed, Madison hoped for the time when the Constitution’s “meaning on all great points” would be “settled by precedents.”<sup>135</sup> These expectations fit well with the American practice of constitutional interpretation on a case-by-case basis. Individual cases do not require a judge to decide between all possible meanings of a particular text, but instead settle its meaning only to the extent necessary to resolve the issue at hand.<sup>136</sup> In any event, the American Framers did not expect constitutional indeterminacy to be employed by the judiciary to change the document’s meaning over time. After all, the written Constitution was intended to provide permanency and determinacy for a generation of Americans distrustful of a mutable and organic constitution.

## 2. *The Canadian Charter of Rights and Freedoms*

Like the United States, Canada’s approach to constitutional interpretation must be understood in light of its relationship to Britain. For over sixty years, the Privy Council in London treated Canada’s foundational charter, the British North America Act, 1867 (now known as the Constitution Act, 1867), as an ordinary statute and interpreted it according to principles of strict textualism, refusing to follow the Supreme Court of Canada’s pleas to consider the document’s legislative history.<sup>137</sup> In 1930, however, the Privy Council adopted a new approach that treated the Constitution as an organic document, with Lord Sankey declaring that “[t]he British North America Act planted in Canada a living tree capable of

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<sup>133</sup> For scholarship discussing these interpretive expectations, see Hamburger, *supra* note 119, at 309; Nelson, *supra* note 128, at 527–29; Powell, *supra* note 61, at 910.

<sup>134</sup> Nelson, *supra* note 128, at 530–35.

<sup>135</sup> Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 *The Papers of James Madison* 249, 250 (Charles F. Hobson & Robert A. Rutland eds., 1979).

<sup>136</sup> See Whittington, *supra* note 118, at 60–61.

<sup>137</sup> Hogg, *supra* note 82, at 74–76.

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growth and expansion within its natural limits.”<sup>138</sup> When the Supreme Court of Canada became the country’s final court of appeal in 1949, it eagerly embraced this approach as an alternative to the Privy Council’s earlier textualism.<sup>139</sup>

Canada’s history therefore never fostered a national attachment to textualist or originalist methods of constitutional interpretation. By the time Canada achieved constitutional independence, reading the constitution as a statute was largely a relic from the days of the Privy Council. And given the absence of a strong tradition of the constitution as the embodiment of popular sovereignty, Canadians never had a great desire to turn to the original understanding of their foundational document.<sup>140</sup> Contemporary Canadians have unsurprisingly treated originalist arguments with indifference or hostility.<sup>141</sup> As for the Charter, there is little evidence that its drafters and adopters expected judges to fix any uncertainty in the constitutional language. If anything, the historical record indicates that the Charter’s creators assumed that the Supreme Court of Canada would not search out the original meaning and would instead engage in expansive interpretation.<sup>142</sup>

The Canadian Supreme Court has made full use of the indeterminacy of the Charter’s text. Rather than attempting to settle the scope of the written language, it has left the Charter open to respond quickly to changed circumstances.<sup>143</sup> The Canadian Court has

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<sup>138</sup> *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, 136 (P.C.) (appeal taken from Can.), *quoted in* Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 23 (2009).

<sup>139</sup> Greene, *supra* note 138, at 27–37.

<sup>140</sup> Luc B. Tremblay, *Marbury v. Madison* and Canadian Constitutionalism: Rhetoric and Practice, 36 *Geo. Wash. Int’l L. Rev.* 515, 523 (2004).

<sup>141</sup> Greene, *supra* note 138, at 33 (“Among jurists, legal scholars, and (by all indications) the Canadian public, the notion that a court’s conclusions as to the expectations of the ratifying generation should be sufficient to dispose of a present individual-rights case is nearly risible.”).

<sup>142</sup> Patrick Monahan, *Politics and the Constitution* 78–82 (1987).

<sup>143</sup> For example, the Canadian Court reversed itself within a decade on the question of whether extradition to face the death penalty violated the Charter’s ban on deprivations of liberty inconsistent with fundamental principles of justice. See *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.) (overturning *Kindler v. Canada*, [1991] 2 S.C.R. 779 (Can.)). The Canadian Court stated that although “the basic tenets of [Canada’s] legal system . . . have not changed since 1991 . . . their application in particular cases . . . must take note of factual developments in Canada and in relevant foreign jurisdictions.” *Id.* ¶ 144.

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argued the Charter should not be “frozen in time . . . with little or no possibility of growth, development and adjustment to changing societal needs.”<sup>144</sup> The “living tree” metaphor from 1930 has become a well-established trope in Canadian jurisprudence.<sup>145</sup>

Furthermore, the Supreme Court of Canada has incorporated unwritten principles into the Canadian Constitution. In addition to relying on the preamble to find an “unwritten norm,”<sup>146</sup> it has also looked to ancient, unstated principles that are part of the document: “Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles . . . . [I]t would be impossible to conceive of our constitutional structure without them.”<sup>147</sup> This statement precisely captures the idea of the customary English Constitution that the American Framers were attempting to avoid.

### 3. *The German Basic Law*

In the wake of World War II, a concern for human rights superseded a desire for permanency for the drafters of the German Basic Law. As they expected the judiciary to take an active role in protecting human rights, their primary concern was not to limit interpretive possibilities through carefully drafted language. If anything, the text of the Basic Law seems designed to maximize judicial discretion. While the U.S. Constitution contains less determinate provisions such as “due process,” it is dwarfed in this respect by the Basic Law’s guarantees of “human dignity” and the “free development of [one’s] personality.”<sup>148</sup>

Given the Basic Law’s language, it is unsurprising that the Federal Constitutional Court has engaged in an expansive interpretation of Germany’s constitution. While the Court often focuses on the text in its decisions, it tends to construe provisions in light of

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<sup>144</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ¶ 53 (Can.).

<sup>145</sup> For discussions of how this metaphor has shaped Canadian jurisprudence, see Greene, *supra* note 138, at 23–37; Vicki C. Jackson, *Constitutions as “Living Trees”?* *Comparative Constitutional Law and Interpretive Metaphors*, 75 *Fordham L. Rev.* 921, 943–53 (2006).

<sup>146</sup> *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, ¶ 109 (Can.).

<sup>147</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶¶ 49, 51 (Can.).

<sup>148</sup> See *Grundgesetz für die Bundesrepublik Deutschland* [GG] [Basic Law] arts. 1(1), 2; Howard, *supra* note 22, at 25.

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their abstract purposes.<sup>149</sup> And in accordance with its role as a shaper of German norms, the Federal Constitutional Court seeks to interpret the document in light of current German values and harmonize the inconsistent traditions underlying the Basic Law.<sup>150</sup>

The Federal Constitutional Court's regime of pragmatism and proportionality also leaves no room for textual certainty and absolute rights. Given the open-ended language in many rights provisions, their expansive interpretation, and the competing intellectual strands inherent in the Basic Law, rights and values in German constitutionalism predictably come into direct tension. Instead of establishing a right's meaning and then shielding it from infringement, the German Court employs uncertain language in multiple provisions to reach a mutually acceptable solution.<sup>151</sup> For example, in a case involving the display of crucifixes in public school classrooms, the German Court held that schools must remove the icons from classes in which students objected but permit their display in rooms where there were no complaints.<sup>152</sup> In this way, the German Court was able to reconcile the right to have religious instruction in public schools with the right to be free from religious indoctrination.<sup>153</sup>

Proportionality analysis, which balances constitutional rights with reasonable legislative limitations, similarly avoids a firm textual approach.<sup>154</sup> In contrast to the American remedy of "fixing" the Constitution, the German solution to indeterminacy is constitutional balancing. Like the Supreme Court of Canada, the German Constitutional Court appears to regard constitutional indeterminacy as a tool to order society rather than a problem to be rectified.

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<sup>149</sup> See Kommers, *supra* note 56, at 200. While originalist arguments occasionally appear in the Court's opinions, they are treated as supplementary evidence, much like the way the U.S. Supreme Court generally employs comparative law. *Id.* at 197.

<sup>150</sup> See Kommers, *supra* note 52, at 861. As the Basic's Law existence was contingent on the approval of the dominant parties, its rights provisions drew upon a mixture of Germany's Christian, liberal, and socialist traditions. Kommers, *supra* note 56, at 171.

<sup>151</sup> See Kommers, *supra* note 56, at 203.

<sup>152</sup> *Id.* (discussing Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.)).

<sup>153</sup> *Id.*

<sup>154</sup> See *id.* at 201–02; Cohen-Eliya & Porat, *supra* note 13, at 392–95.

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## III. COMPARATIVE CONSTITUTIONAL CONSTRAINTS

Given their sharply different assumptions about the role of the judiciary, the creators of each constitution provided institutional safeguards to control their respective courts. This Part illustrates how these three different constitutional theories were expressed in structural realities, thereby helping to explain why the debate over using comparative constitutional law cannot be divorced from history.

*A. The U.S. Constitution*

The U.S. Constitution offers few democratic checks on the federal judiciary. While the American Framers were well aware of the threat of judges abusing their interpretive office, they thought it an unlikely possibility given the widespread commitment to the distinction between law and politics. Far more pressing was the fear of Congress claiming sole interpretive authority over the Constitution in a manner akin to the British Parliament.<sup>155</sup> These concerns were reflected on an institutional level, with a lengthy Article I spelling out numerous qualifications for the legislative branch while the rest of the Constitution remained silent on the qualifications for members of the judiciary, save for Article II's "advice and consent" manner of appointment.<sup>156</sup> Similarly, Article III is relatively sparse, offering little detail about the role of the federal judiciary or the existence of judicial review.<sup>157</sup> The Constitution's design reflects the Framers' assumption that the threat of an unrestrained judiciary was a remote possibility.

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<sup>155</sup> See Keith E. Whittington, *Judicial Review and Interpretation: Have the Courts Become Sovereign When Interpreting the Constitution?*, in *The Judicial Branch* 116, 118 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

<sup>156</sup> This lack of judicial qualifications is largely an anomaly among the constitutional nations of the world today. See Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 *Wm. & Mary Bill Rts. J.* 7, 17 (2001).

<sup>157</sup> See William E. Nelson, *The Historical Foundations of the American Judiciary*, in *The Judicial Branch*, supra note 155, at 3–5. Of course, there are a number of explanations for the omission of judicial review in the Constitution. See, e.g., Hamburger, supra note 39, at 38–40 (arguing judicial review needed no express authorization because it was the natural corollary to the idea of a constitution as a superior document). At any rate, the Founding generation never developed a sophisticated system of democratic checks on the federal judiciary.



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The U.S. Constitution nevertheless provides three institutional mechanisms of keeping the federal judiciary in check. None, however, is a robust defense against judicial policymaking. The first is the Appointments Clause,<sup>158</sup> but the Senate's power of "advice and consent" was not conceived of as a democratic mechanism to control judicial policymaking.<sup>159</sup> At the dawn of the Constitution, the offices responsible for selecting the judiciary—the President and the Senate—were not popularly elected. Additionally, Article III guaranteed that judges were appointed for life so long as they held their offices in good behavior.<sup>160</sup> These mechanisms make sense in a system that rests on the assumption that the judiciary should remain above the democratic fray. The appointments process is therefore ill-designed to function as a control on judicial policymaking, even though it is increasingly employed toward that end today.

The second potential safeguard against judicial overreaching is Article V's amendment process. Of course, the constitutional requirements for amendment are currently difficult to meet. But in light of the assumptions of the Founding, the amendment process was not intended to be a democratic check on judicial activity.<sup>161</sup> The judiciary and the people were not supposed to engage in a dialogue over the Constitution's meaning. Rather, the former was to preserve the latter's will over the potential abuses of the legislature.<sup>162</sup>

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<sup>158</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>159</sup> Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 *Minn. J. Int'l L.* 61, 77–78 (2007).

<sup>160</sup> U.S. Const. art. III, § 1.

<sup>161</sup> It was, however, used for that very purpose shortly after ratification. The Eleventh Amendment—the first constitutional revision after the Bill of Rights—was a swift response to the Supreme Court's infamous decision of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See generally Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 *Geo. Wash. L. Rev.* 113, 183 (2003) (describing the public response to *Chisholm*).

<sup>162</sup> See, e.g., *The Federalist No. 78* (Alexander Hamilton), *supra* note 132, at 380 (arguing that the power of judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . .").

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The final and most extreme check is removal of a judge through the Impeachment Clause.<sup>163</sup> There is little evidence, however, that the Framers intended the remedy of impeachment as a way of policing the judiciary.<sup>164</sup> As a practical matter, it is not a plausible democratic control over judicial policymaking today.

The U.S. Constitution is exceptional among the world's constitutions in its lack of safeguards against judicial overreaching. It offers life tenure to its judges, an anomaly when compared to most European constitutions that offer limited, nonrenewable terms.<sup>165</sup> Instead, the U.S. Constitution reflects a deep concern with judicial independence and treats the judiciary as a relatively harmless institution. Whether this is a desirable arrangement is beyond the scope of this Note, but within the global constitutional community, it is certainly an unusual one.

### *B. The Canadian Charter of Rights and Freedoms*

At first glance, the United States and Canada appear similar with respect to weak controls over the judiciary. The appointments process is ill-suited to serve as a democratic safeguard. The Canadian custom is to grant the Prime Minister full control over appointing justices to Supreme Court,<sup>166</sup> whose terms are limited only by a mandatory retirement age of seventy-five.<sup>167</sup> As for opportunities to revise problematic interpretations, the amendment procedure since 1982 has proven to be a difficult threshold to meet.<sup>168</sup>

Nevertheless, Canadian politics have been relatively free from struggles over judicial appointments since the Charter's inception.<sup>169</sup> One reason for this is that the Charter includes two mecha-

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<sup>163</sup> U.S. Const. art. II, § 4; see also U.S. Const. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.").

<sup>164</sup> Raoul Berger, *Impeachment: The Constitutional Problems* 153–54 (1973).

<sup>165</sup> Tushnet, *supra* note 101, at 255.

<sup>166</sup> F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* 56, 56–57 (Kate Malleson & Peter H. Russell eds., 2006).

<sup>167</sup> Supreme Court Act, R.S.C., ch. S-26 § 9 (1985).

<sup>168</sup> Hogg, *supra* note 82, at 57. Most amendments require the agreement of both houses of Parliament as well as seven of the ten provincial assemblies that represent half of Canada's population. *Id.* Since 1982, there have only been eight amendments, with their effect often confined to a particular province. *Id.* at 57 n.9.

<sup>169</sup> See *id.* at 59.

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nisms that ostensibly allow for a greater legislative role in its interpretation. First, Section 1 permits legislatures to impose reasonable restrictions on Charter rights, giving the legislative branch some control over their contours. In the majority of cases where a law is struck down, the legislature has reenacted a more carefully drafted version of the law, attempting to provide a more reasonable limitation on the right at issue.<sup>170</sup> In this respect, a dialogue between the legislature and judiciary helps temper the Supreme Court of Canada's more aggressive interpretations.

Second, Section 33—also known as “the notwithstanding clause”—theoretically provides for a legislative override of Charter interpretations.<sup>171</sup> While the notwithstanding clause has proven to be a rather ineffective check on the Canadian judiciary due to a lack of political will,<sup>172</sup> its perception as an available option has had remarkable effects. For the Supreme Court of Canada, the possibility of an override has been employed as a rhetorical tool to quell charges of activism.<sup>173</sup> Whether the Canadian Court believes that the override is still a realistic option or sees it as a justification for venturesome decisions, the existence of the notwithstanding clause has removed another rationale for judicial restraint. The provision has also diverted political energies away from the appointments process. While American citizens unhappy with particular decisions have turned to appointment skirmishes as their only remaining control over the judiciary, Canadian discontents have a more direct hope in the possibility of an override. Even if the use of the override remains a rarity, its existence serves as a safety valve for countermajoritarian angst.<sup>174</sup>

As with the U.S. Constitution, the Charter's safeguards largely mirror the assumptions of its drafters about the role of the judiciary. Because the architects of the Charter anticipated a policy-oriented Court, they built in several democratic checks to appease those who rightly expected an aggressive judiciary. Whether those

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<sup>170</sup> See Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 *Osgoode Hall L.J.* 75, 96–104 (1997).

<sup>171</sup> See *supra* notes 41–43 and accompanying text.

<sup>172</sup> See Tushnet, *supra* note 101, at 267–69.

<sup>173</sup> See, e.g., *Vriend v. Alberta*, [1998] 1 S.C.R. 493 ¶¶ 137–39 (Can.); see also Roach, *supra* note 41, at 70.

<sup>174</sup> Schor, *supra* note 159, at 107.

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protections are illusory does not change the fact that the Supreme Court of Canada claims that it does not have the last word and is therefore more comfortable in its policymaking role. If anything, the democratic safeguards have made Canadian judicial review an even more expansive practice.

### *C. The German Basic Law*

Unlike the United States and Canada, Germany's judicial selection process offers a real possibility of democratic control. Drawing on Kelsen's belief that constitutional law is political and that the composition of a constitutional court should be chosen by politicians, the Basic Law provides for the election of judges by both houses of the German legislature, and legislation requires nominees to be approved by two-thirds of each body.<sup>175</sup> Given that a determined minority can stymie a nomination under this supermajority requirement, a great deal of political wrangling occurs which tends to produce a moderate court.<sup>176</sup> These explicit political considerations in the judicial selection process demonstrate a greater acceptance of constitutional judges as political actors.<sup>177</sup> The Kelsenian belief in the connection between law and politics also plays out in term limits. Each justice is chosen for a single nonrenewable term of twelve years, ensuring that the nominee of a temporary coalition does not shape the Court for decades.<sup>178</sup>

Furthermore, the German Basic Law has proven relatively easy to amend. While the Basic Law requires a two-thirds majority of both legislative bodies for an amendment, this threshold has repeatedly been met throughout the constitution's history.<sup>179</sup> While the Basic Law's "eternity clause" makes certain basic provisions of the document unalterable—namely guarantees of federalism, de-

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<sup>175</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] art. 94(1) (F.R.G.); Kommers, *supra* note 56, at 173.

<sup>176</sup> See Kommers, *supra* note 56, at 173–74. The sixteen seats on the German Court have consistently been distributed equally between the two major parties, with a minor party occasionally getting a seat as a reward for joining a coalition. *Id.*

<sup>177</sup> See Tushnet, *supra* note 101, at 259–60.

<sup>178</sup> Kommers, *supra* note 52, at 844.

<sup>179</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] art. 79(2) (F.R.G.). Since 1949, thirty-nine new articles have been added to the Basic Law. Kommers, *supra* note 56, at 165. In the past sixteen years alone, amendments have impacted twenty-five articles and forty-four clauses. *Id.* at 171.

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mocracy, and human dignity—most of the Basic Law and its judicial glosses are open to democratic revision.<sup>180</sup> Consequently, justices on the Federal Constitutional Court recognize that their interpretations of the Basic Law may face a popular response. Once again, the institutional safeguards in the Basic Law are corollaries to the beliefs of the document's drafters. While they may have spurned Kelsen's advice regarding constitutional rights, the Basic Law's multiple safeguards indicate that its drafters took his views on the political nature of a constitutional court seriously.

## IV. THE CHALLENGE OF STRUCTURAL EXCEPTIONALISM

This study of the assumptions and safeguards of various constitutional traditions offers several lessons for the debate over the U.S. Supreme Court's use of comparative law. Perhaps most obvious is the fact that not all constitutional courts were designed to engage in a common project. Canada and Germany are hardly unique among the constitutional countries of the world in their acceptance of judicial policymaking.<sup>181</sup> Prominent transnational tribunals such as the European Court of Human Rights only reinforce this

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<sup>180</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] art. 79(3) (F.R.G.). For example, the constitutional guarantee of a right to privacy in mail and telecommunications was altered by amendment to allow for reasonable legislative restrictions. The Federal Constitutional Court upheld the validity of the change, while noting that it still possessed the ability to strike down amendments that would conflict with the "eternity clause." Kommers, *supra* note 56, at 172 n.37.

<sup>181</sup> In common law nations such as India and Israel, many jurists treat judicial review as a policy-oriented practice. See, e.g., Aharon Barak, *Purposive Interpretation in Law* 370 (Sari Bashi trans., 2005) (arguing that a constitution "shapes the character of society and its aspirations . . . . It is at once philosophy, politics, society, and law."); Venkat Iyer, *The Supreme Court of India*, in *Judicial Activism in Common Law Supreme Courts* 121, 163–68 (Brice Dickson ed., 2007) (discussing the Supreme Court of India's lengthy history of using the judiciary to achieve social reform). As for civil law countries, the post-war constitutionalism begun in Germany spread across Western Europe, creating broadly defined rights that have opened the door for judicial creativity. See Sweet, *supra* note 49, at 31–37. Australia, however, may be another outlier that shares to some extent the American attraction to originalist and textualist methods of interpretation. See Fiona Wheeler & John Williams, 'Restrained Activism' in the High Court of Australia, in *Judicial Activism in Common Law Supreme Courts* 19, 20 (Brice Dickson ed., 2007); Greene, *supra* note 138, at 40–61. But as a practical matter, these similarities may not matter much. The U.S. Supreme Court has generally limited its use of comparative constitutional law to interpreting rights provisions. Given that the Australian Constitution lacks a bill of rights, it is unlikely the Supreme Court will consider Australian constitutional law in the near future.

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method of adjudication.<sup>182</sup> With judges around the world acting as if they are engaged in a similar enterprise, it is tempting for American scholars and Justices to aspire to join this community.<sup>183</sup> But these comparativists must be reminded that America's constitutional architecture does not rest on the same intellectual foundations as the rest of the constitutionalized world. Focusing on the common office of constitutional interpreter can obscure critical differences that may have unintended consequences. This Part will discuss three potential pitfalls the U.S. Supreme Court may encounter in its incremental move toward global constitutionalism and respond to three possible objections.

*A. The Risks of Comparative Constitutional Law*

*1. The Unintended Expansion of Constitutional Rights*

To begin, coupling comparative constitutional law with America's rights culture may cause the unintended expansion of constitutional rights. Given the emphasis on pragmatism, proportionality, and policy in other courts, rights are often first defined at a high level before being limited in accordance with reasonable social needs. For example, the Supreme Court of Canada often gives much broader interpretations to rights provisions than its American counterpart because it knows that the legislature can constrain the broadly defined right under the limitation clause.<sup>184</sup> When the U.S. Supreme Court searches for persuasive authority to support a new interpretation, however, it may cite to this first stage of the analysis without going on to consider the second.<sup>185</sup> And once a particular right enters the United States, most Americans will regard claims that it can be limited for the good of society with skepticism. Separated from its context, the foreign interpretation will likely be

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<sup>182</sup> Grey, *supra* note 18, at 484–85.

<sup>183</sup> See, e.g., Breyer, *supra* note 22, at 266; Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 *Yale L. & Pol'y Rev.* 329, 329 (2004); Slaughter, *supra* note 20, at 203–04.

<sup>184</sup> See Hogg, *supra* note 82, at 88.

<sup>185</sup> See Allan & Huscroft, *supra* note 86, at 27.

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given greater effect in the United States, resulting in consequences the original tribunal would never have foreseen.<sup>186</sup>

Proponents of foreign citation may respond that intelligent American Justices are unlikely to consider comparative constitutional law outside of its context. But preliminary evidence such as the Court's use of *Dudgeon v. United Kingdom*, a decision from the European Court of Human Rights, in *Lawrence v. Texas* suggests otherwise.<sup>187</sup> The central issue in *Dudgeon* was whether an Irish law criminalizing all homosexual sodomy that admittedly violated the petitioner's right to privacy was "necessary in a democratic society."<sup>188</sup> While the European tribunal struck down the legislation for its breadth, it went on to hold "there can be no denial that some degree of regulation of male homosexual conduct . . . can be justified as 'necessary in a democratic society.'"<sup>189</sup> By contrast, the *Lawrence* Court concluded that consensual adult sodomy fell within "a realm of personal liberty which the government may not enter," thereby insulating it from any regulation.<sup>190</sup>

The larger problem is not that Justices will invariably take interpretations out of context, but that rights themselves possess greater cache within the American constitutional system. This makes sense in a system where the expected role of the judiciary is to guard the will of the people from legislative encroachments, not balance the competing values of society. If the Court proceeds without hesitation into the realm of comparative constitutional law, it may come to adopt more unyielding rights interpretations than the rest of the world. Granted, there are theorists who would welcome this development.<sup>191</sup> But as a practical matter, such a trend would only exacerbate deep rifts in American society.

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<sup>186</sup> Professor Glendon has offered a similar argument with regard to borrowing positive rights from foreign constitutions. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. Chi. L. Rev. 519, 532–33 (1992).

<sup>187</sup> *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

<sup>188</sup> *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) ¶¶ 38–39, 48 (1981).

<sup>189</sup> *Id.* ¶¶ 49, 61.

<sup>190</sup> *Lawrence*, 539 U.S. at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 923 (1992)).

<sup>191</sup> See, e.g., Nadine Strossen, *Liberty and Equality: Complementary, Not Competing, Constitutional Commitments*, in *Litigating Rights: Perspectives from Domestic and International Law* 149, 153 (Grant Huscroft & Paul Rishworth eds., 2002) ("[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

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*2. The Entrenchment of Foreign Judicial Policymaking*

Second, drawing on the constitutional law of foreign nations without incorporating their accompanying safeguards may lead to the entrenchment of judicial policymaking within the United States. Given the lack of structural safeguards in the U.S. Constitution, American Justices are aware that their constitutional interpretations can be overridden only through future decisions or the rare process of constitutional amendment. This is one of the reasons why opinions of the majority tend to be much more restrained in both substance and tone than the colorful challenges of their dissenting colleagues.<sup>192</sup> The American Justice is invested with exceptional authority and expected to use it carefully.

In constitutional tribunals around the world, however, jurists are free to be less deferential. Canadian jurists can and have announced sweeping rights with the full knowledge that there is at least some possibility of a legislative limitation or override.<sup>193</sup> German justices can utter majestic pronouncements without hesitation because any problematic decision they render can be corrected after their twelve-year term or amended with relative ease. And the citizens under both regimes worry less about judicial discretion. Arguably one of the reasons why philosophies of originalism, judicial restraint, or fixing an indeterminate text carry little weight in these countries is because their citizens have more direct remedial mechanisms at their disposal. Even if they did not, the constitutional systems they belong to expect some measure of judicial policymaking, thus rendering their courts' venturesome interpretations less controversial on the whole.

Therefore, when American Justices look abroad and become emboldened by their foreign counterparts, they do so largely unaware of the safeguards under which those judges operate.<sup>194</sup> When

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law. In contrast, though, whenever those other authorities purport to undermine rights protected by the US Constitution, the Constitution trumps them.”).

<sup>192</sup> See Posner, *supra* note 31, at 89 (“Think of the uncomfortable position in which Justices Black and Douglas would have found themselves had their dissenting position that obscenity is fully protected by the First Amendment commanded the assent of a majority of the Justices. They would have been flirting with impeachment.”).

<sup>193</sup> See *id.*; Allan & Huscroft, *supra* note 86, at 21–22.

<sup>194</sup> See Posner, *supra* note 31, at 89–90 (“Our Justices are fooled if they think that the audaciously progressive opinions expressed by foreign constitutional judges would be the same if those judges had the power of our Justices.”).



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the Supreme Court draws upon comparative case law in its decisions, it is incorporating the policy decisions of contemporary constitutional courts into eighteenth-century structures. The trouble is that American citizens—unlike their foreign counterparts—have little recourse. Consequently, the fusion of American constitutional structure with comparative constitutional law risks creating a hybrid form of judicial review where Justices can employ aggressive interpretations with little possibility of correction.

*3. The Transformation into a Political Court*

Finally, drawing on the constitutional reasoning of foreign tribunals is likely to create a judiciary that increasingly behaves like a legislature, or, in Judge Posner's terms, "a political court."<sup>195</sup> It is unsurprising that the interpretive philosophies of pragmatism and comparativism tend to complement each other. This link is underscored by the fact that the current Court's leading pragmatist, Justice Breyer, is also its leading advocate of comparative engagement.<sup>196</sup> As shown earlier, foreign constitutional courts are often assumed to act as political bodies with a quasi-legislative role, and their interpretive methodologies meet that expectation. Adopting foreign methodologies such as proportionality analysis into American jurisprudence will inevitably increase the policymaking discretion of the U.S. Supreme Court.

But once again, when foreign jurists take on a legislative role of weighing the costs and benefits of rights and legislation, they are also treated as political actors that must be kept in check. If they err in their balancing, there are democratic remedies to rectify incorrect decisions. And regardless of the available solutions, the architects of foreign constitutions often expected their judges to engage in this role. For this reason, Professor Jackson, a strong advocate of the Supreme Court's engagement with comparative constitutional law,<sup>197</sup> has urged caution in adopting proportionality

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<sup>195</sup> See *id.* at 39–40.

<sup>196</sup> See Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 *UCLA L. Rev.* 639, 695–99 (2005).

<sup>197</sup> See, e.g., Jackson, *supra* note 24, at 112.

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tests.<sup>198</sup> It is sound advice. Drawing on political law in a system based on a strict division between law and politics hardly seems to be a prudent course of action.

*B. Three Objections to an Exceptionalist Critique*

*1. The Past American Practice of Foreign Citation*

Given the intensity of the debate over the use of comparative constitutional law, the arguments in this Note are likely to face several objections. First, advocates of comparative citation have not hesitated to point out that the Supreme Court has used foreign law from its early existence.<sup>199</sup> Given that the Court relied on foreign law during a period when it was acutely aware of the judiciary's intended role, one might wonder why the contemporary practice should warrant any concern. There are at least two answers to this challenge.

To begin, in the interest of a fair debate, many early uses of foreign law occurred in less controversial settings such as admiralty law, the law of nations, or statutory interpretation.<sup>200</sup> Given that admiralty law inherently has transnational characteristics, critics of the U.S. Supreme Court's comparative turn would consider the Court's consultation of international admiralty sources relatively unproblematic. Their primary frustration is over the use of foreign law in the interpretation of constitutional provisions that have little to do with international affairs. To actually engage their opponents, comparativists must point to the historical use of foreign law in interpreting a portion of the Constitution with a domestic cast, such as provision dealing with federalism or a particular right.<sup>201</sup>

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<sup>198</sup> See Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. Pa. J. Const. L. 583, 618 (1999).

<sup>199</sup> See, e.g., Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43, 44–45 (2004) (describing early Supreme Court references to foreign legal precedent and arguing that "the early Supreme Court saw the judicial branch as a central channel for making international law part of U.S. law").

<sup>200</sup> See Alford, *supra* note 19, at 666–67, 670–74; Calabresi & Zimdhal, *supra* note 16, at 755–69.

<sup>201</sup> One possible example from the post-Civil War era is *Wilkinson v. Utah*, 99 U.S. 130, 134 (1878), where the Court drew on foreign law to uphold an execution by firing squad under the Eighth Amendment.

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But even if a number of compelling historical examples were offered, matters have changed with the rise of constitutional courts around the world since World War II. This Note is concerned with problems of using comparative *constitutional* law in adjudication, not comparative law generally. As contemporary constitutional courts have very different views on the relationship between law and politics and their role in interpreting indeterminate provisions, citations to their jurisprudence are notably different than references to foreign legal theorists from the Marshall Court.<sup>202</sup> To historically attack an argument from structural exceptionalism, one would have to find early uses of the output of other constitutional courts that did not subscribe to a separation of law and politics. But given that judicial review was a rarity on the world stage until after 1945,<sup>203</sup> the prospects are not promising.

*2. The Current Global Use of Comparative Constitutional Law*

Second, comparativists could argue that the use of comparative constitutional law in foreign courts undermines any exceptionalist critiques. If nations with diverse histories such as Canada and Germany regularly draw upon the work of other constitutional courts,<sup>204</sup> some may regard claims that the United States cannot do so as well with skepticism.<sup>205</sup> Advocates of comparative engagement might be tempted to dismiss this Note as another incarnation of Montesquieu's argument that "the political and civil laws of each nation . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another."<sup>206</sup> For those cognizant of the growing global constitu-

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<sup>202</sup> Comparative scholars will occasionally use such citations to make a historical argument. See, e.g., Fontana, *supra* note 36, at 582–83.

<sup>203</sup> For a general discussion of developments in global constitutionalism since World War II, see Howard, *supra* note 22.

<sup>204</sup> Hogg, *supra* note 82, at 80–82; Kommers, *supra* note 21, at 694.

<sup>205</sup> See, e.g., Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *Defining the Field of Comparative Constitutional Law* 3, 23 (Vicki C. Jackson & Mark Tushnet eds., 2002) (arguing that the "transplantation of legal systems in the twentieth century" undermines the view that comparative constitutionalism is inappropriate in the interpretation of the U.S. Constitution).

<sup>206</sup> Montesquieu, *The Spirit of the Laws* 8 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

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tional community, simple claims of exceptionalism may be difficult to fathom.

This Note's critique, however, rests on a less ambitious claim. Its main point is that the structures of the U.S. Constitution reflect relevant assumptions about the role of the judiciary that the rest of the constitutionalized world does not share. When participants in this new global constitutionalism borrow from one another, they do so within a community of common assumptions.<sup>207</sup> It may be perfectly permissible for one constitutional system that treats its judiciary as a policymaking body to embrace the law of another system with similar beliefs. All this Note claims is that American participation would be unwise.

### 3. *The Irrelevance of History*

Finally, this Note must confront the fact that alternative conceptions of American judicial review have appeared since the days of Chief Justice Marshall. After all, the Warren Court itself was to some extent part of twentieth-century global constitutionalism.<sup>208</sup> For some scholars, any historical distinction between law and politics is at best an anachronistic myth.<sup>209</sup> Instead of fearing the practice, they see comparative engagement as a way to finally rid American jurisprudence of its formalist vestiges.<sup>210</sup> Many comparativists may consequently be tempted to dismiss the historical evidence in this Note as irrelevant.

There are at least two responses to this fundamental objection. The first is that the objection itself creates a legitimacy problem for proponents of comparative engagement. A recurrent theme in the recent comparativist enterprise—and a significant reason for its

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<sup>207</sup> It is illustrative that some of the most globalized courts are turning to American rights jurisprudence less frequently. Allan & Huscroft, *supra* note 86, at 5–6. In this regard, the Supreme Court of Canada has remarked that it is “wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances.” *R. v. Keegstra*, [1990] 3 S.C.R. 697, 740 (Can.).

<sup>208</sup> Howard, *supra* note 22, at 32–34.

<sup>209</sup> See, e.g., Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 *Tex. L. Rev.* 1463, 1496 (2009) (“When the framers designed the U.S. Supreme Court, they obviously had no idea how powerful it would become. They believed naively, moreover, that courts did not engage in policy making.”).

<sup>210</sup> See, e.g., Weinrib, *supra* note 205, at 28–29.

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success—is the promise that engagement with foreign constitutional law is a modest practice that meshes well with American traditions.<sup>211</sup> The sharp divergences between the United States and other nations over the role of judiciary, however, cast this claim into doubt. But to respond by suggesting that the Founding generation's views on the judiciary are irrelevant is to admit that comparative engagement cannot be entirely reconciled with the American tradition. Of course, one can make an honest and coherent argument for comparative citation on the grounds that it will fundamentally transform American constitutional law.<sup>212</sup> But such a defense is likely to cost the comparativist enterprise its current legitimacy.

Second, even if one considers the Founding generation's beliefs to be false, there are good pragmatic reasons not to ignore them. Given that the U.S. Constitution has proven difficult to amend, the assumptions of the past control the safeguards of the present. Regardless of whether these beliefs are true, they continue to have a profound effect on the functioning of American government and society. Given that there are few countermajoritarian safety valves in the United States, frustration over an increasingly policy-oriented judiciary will be fully directed toward the Court. Appointments battles will become fiercer and the Court's institutional capital may be greatly weakened. All of this should at the very least caution hesitation. Supporters of comparative engagement may have far less to be optimistic about than they once thought.

For even if American institutions have withstood willful judges in the past, the Court's current comparative venture could lead to an unprecedented level of judicial policymaking. This is because persuasive authority can mean far more on a practical level than is commonly thought. Considering comparative constitutional law may lead to less restraint on the part of American judges already inclined to expansive interpretations. For a Justice uncertain about advancing a controversial interpretation at a particular time, con-

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<sup>211</sup> See, e.g., Jackson, *supra* note 24, at 123–24. As Professor Jackson notes in this regard, “[t]o retain legitimacy, judicial decisions interpreting the Constitution must be, and be seen to be, grounded in U.S. interpretive traditions.” *Id.* at 123.

<sup>212</sup> See, e.g., Weinrib, *supra* note 205, at 28–29; see also Howard, *supra* note 22, at 37–38 (noting that the debate over comparative citation is struggle over the shape of American law).

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firmation that foreign courts have already reached this decision can prove emboldening. Following the climate of world opinion rather than being on the vanguard of reform can be a remarkable source of comfort.

#### CONCLUSION

Despite repeated criticisms, the Supreme Court's use of comparative constitutional law is likely to continue in the future. For those who remain concerned about the Court becoming an increasingly policy-oriented institution, this trend is not a positive one. As the practice of American judicial review is rooted in a strict division between law and politics and a view that constitutional indeterminacy is a problem to be solved rather than a mechanism for judicial amendment, it is ill-equipped to participate in the current global community of courts. Lacking the institutional safeguards of its foreign analogues, the U.S. Constitution furnishes little remedy for the policymaking of the world's other constitutional courts. The global constitutional landscape is an inhospitable environment to some of the key assumptions upon which American judicial review was built.

All of this is not to say that the study of comparative constitutional law should be avoided. Indeed, as this Note has endeavored to show, it can result in a more sophisticated understanding of the American constitutional tradition, as well as those of other nations. But by seeking to use the discipline as a handmaiden for domestic reform, comparative scholars can be tempted to ignore critical differences and assume that all constitutional courts are engaged in a common project. At the very least, America's structural exceptionalism compels the opposite conclusion.