

Chapter 1

WHAT IS A CONSTITUTION?

This chapter tackles some major and rather general subjects central to the issues and concerns surrounding comparative constitutional law. Section A, titled *Why Comparative Constitutional Law?*, explores the uses, benefits, rewards, drawbacks, and pitfalls of comparative analysis in constitutional law and focuses on the controversy over reliance on foreign constitutional materials in domestic constitutional adjudication. Section B analyzes the concept of “constitutionalism,” which remains elusive and contested, and is distinguished from the concept of the “constitution.” Section C focuses on the relation among “constitutionalism,” “justice,” and “the rule of law.” Section D discusses typologies of constitutional models throughout the world, including the contrast between written and unwritten constitutions; different contemporary constitutional systems; and multilevel constitutionalism such as in the European Union, and in transnational human rights regimes. Finally, section E examines the issues surrounding the making and altering or revising of constitutions and focuses in particular on the relationship between constitution making and constitutional amendment.

A. WHY COMPARATIVE CONSTITUTIONAL LAW?

Comparison is at the center of all serious inquiry and learning. Moreover, our curiosity prompts us to compare our experiences, beliefs, customs, traditions, and natural and institutional settings with those of others. Consistent with this, the study of law should be drawn to—and benefit from—comparative analysis in general and comparative constitutional analysis in particular. This has grown more common, as the world becomes increasingly interdependent, constitutional law expands beyond national boundaries and scholarship as well as politics become increasingly prominent in global dialogues, and national courts responsible for constitutional adjudication look more frequently to their counterparts in other countries for ideas and guidance.

Interest in comparative constitutional law has palpably increased in recent decades, due to, among other developments, (1) the proliferation of new constitutions and transitions to constitutional democracy in various parts of

the world, such as Eastern Europe, subSaharan Africa, and Latin America, and (2) the internationalization of fundamental rights, begun after World War Two. Even earlier, by the end of World War One, a large number of national constitutions already gave clear recognition to the fundamental rights of the individual. In the aftermath of World War Two, upon the creation of the United Nations in 1945, and its proclamation of the Universal Declaration of Human Rights in 1948, the trend toward the internationalization of fundamental rights was decidedly on its way. Although the 1948 Declaration wielded no legally binding force, clearly it thrust the kinds of rights promoted by the French Declaration of the Rights of Man and of the Citizen of 1789 and the American Bill of Rights of 1791 to the forefront of the international arena. The 1948 Declaration was followed by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which became binding, after ratification by a sufficient number of states, in 1976, ten years after initial adoption by the UN; and several more specific human rights instruments followed. Concurrent with this, several regional charters for the protection of human rights emerged, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its African, American and Asian counterparts. Although both international and regional schemes for the protection of human rights emanate from international treaties rather than constitutions and often differ significantly in application and implementation from rights enshrined in domestic constitutions, transnational rights share much in terms of content and scope with many of their domestic counterparts. Moreover, in some cases, such as the rights protected by the ECHR, judicial enforcement is akin to what is generally available under many domestic constitutions. For instance, an aggrieved individual in a country party to the ECHR may pursue claims arising under the Convention before the European Court of Human Rights (ECtHR), seated in Strasbourg, France. *See, generally*, Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008).

In more recent times, contacts among judges from different countries have increased sharply, and foreign judicial decisions have become more readily available through the Internet.^a Moreover, interest in, and opportunities for, exchanges among constitutional scholars from different parts of the world have risen in the past couple decades.^b Notwithstanding these evolving trends, comparative legal studies in general and comparative constitutional law in particular are subject to special challenges and objections. Possible objections, concerning the feasibility, desirability, and utility of meaningful comparative analysis, concentrate around the danger of misinterpreting foreign legal and constitutional materials by taking them out of context, or imposing one's own standards, often implicitly, on "the other." Legal norms and institutions are embedded in particular sociopolitical and cultural developments, and their

a. *See, e.g.*, Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998 (Justices O'Connor and Breyer commenting on a meeting between four U.S. Supreme Court justices and the judges of the European Court of Justice (ECJ), and indicating that they might use, and refer to, European Union court decisions).

b. For example, the International Association of Constitutional Law regularly organizes meetings, bringing together constitutionalists from all parts of the world. At its 2007 World Congress, in Athens, Greece, more than 600 scholars from 62 countries gathered to discuss various comparative constitutional law issues.

meaning and import are linked to these. Accordingly, to the extent that the comparativist is unfamiliar with the context of foreign materials examined for purposes of comparison, he or she may misinterpret apparent similarities or misunderstand the import of apparent differences, or may impose a specific bias on the subject.

These difficulties often seem more daunting in constitutional law than in private law. For example, to the extent that contract law is predominantly concerned with facilitating economic exchange and maximizing efficiency, political and cultural differences are seen to play a rather minor role in meaningful comparison of various national contract law regimes. Since they imply politics much more directly, constitutional frameworks and objectives are found to differ so markedly from one country to the next as to raise serious questions about the worth of comparative analysis. How can separation-of-powers problems or solutions in a presidential democracy, such as the U.S., be relevant for a parliamentary democracy, such as Germany or India? Or, how does the teaching of religion in public schools in a country where it is clearly constitutionally permissible, such as Germany, bear any useful relation to the same issue in countries with constitutions committed to the separation between religion and the state, such as France or the U.S.? Cf. Otto Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 6, 7 (1974) (arguing that private law is much more amenable to transplant from one country to another than constitutional law). However, it is also worth asking whether the very concept of a legal subject, such as property rights, is culturally specific, rather than universal, and whether concepts of corporations, obligations or compensation differ less obviously, but in similarly complex ways than constitutional questions.

The widespread skepticism towards comparative constitutionalism may be tied to different sources. First, proper consideration of significant contextual differences is difficult, and often limited. Second, the concept of a constitution, as well as derived versions of constitutionalism, is often attached to specific understandings of the nation-state, or of a particular form of governance, or democracy. The more exclusive the definition of the concept, the less inclination there is to challenge it from comparative perspectives.

On the other hand, there are strong reasons to engage in comparative studies of constitutionalism. In the case of basic human rights, which are widely incorporated in national constitutions as well as in international and regional conventions, there are strong indications of widespread overlap—if not underlying universalism—at the core, yet quick assumptions may overshadow important divergences underneath, and many universal claims are under severe threat from particularistic relativist perspectives. For a discussion of the controversy over “universalism” or “relativism” of human rights, see Yash Ghai, *Universalism and Relativism: Human Rights as Framework for Negotiating Interethnic Claims*, 21 Cardozo L. Rev. 1095 (2000); for a suggestion on how to contend with such a dilemma, see Brenda Cossman, *Migrating Marriages and Comparative Constitutionalism*, in *The Migration of Constitutional Law* 209 (Sujit Choudhry ed., 2006). For a defense of a workable overlap in the context of cultural diversity, see: Charles Taylor, *Conditions of an Unenforced Consensus on Human Rights*, in *The East Asian Challenge for Rights* 124–46 (Joanne R. Bauer and Daniel Bell eds., 1999); Abdullahi Ahmed An-Naim, *Islam and the Secular State Negotiating the Future of Shari’a* (2008); and

Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Pluralism? A Pluralist Critique Based on the Rights of Minorities*, 30 Colum. Hum. Rts. L. Rev. 249 (1999) (rejecting both universalism and relativism and, instead, arguing for a pluralistic approach resulting in widespread convergence amid certain inevitable divergences).

Another compelling reason for the pursuit of comparative constitutional analysis stems from the fact that constitutional norms elaborated in one country have often been adopted in others. Various constitutions, including the Canadian Charter of Rights and Freedoms (Constitution Act of 1982, pt. I), have influenced constitution making in South Africa, New Zealand, and Hong Kong and the Basic Law in Israel. See Sujit Choudhry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 821–22 (1999). Such borrowings have also occurred in constitutional interpretation, and are sometimes explicitly endorsed by constitutions themselves, as in the South African Constitution, which specifically empowers courts to consider foreign law when interpreting the Bill of Rights.⁶ See, e.g., Gary Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (1993), ch VI (discussing the Israeli Supreme Court's adoption of U.S. First Amendment free speech doctrine in the elaboration of its own free speech jurisprudence). See also: the *Ahmadi* cases (in Chapter 8); Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows its Constitution*, 3 Mich. J. Race and L. 29, 44 (1997) (concerning the use by the South African Constitutional Court (SACC) of comparative jurisprudence as a means for South Africa to claim "its place among the world's constitutional democracies"); and *State v. Mhlugu*, 1995 (3) SALR 867, 917 (CC) (according to Justice Sachs, South Africa's constitutional jurisprudence must take its place "as part of a global development of constitutionalism and human rights").

However, while some borrow, others reject constitutional materials from other countries, in moments of constitution making as well as in case law. Among the reasons for such rejections are conclusions that the norms originating abroad are either inefficient or contrary to the basic values, ideology, or constitutional objectives of the potentially borrowing country, are products of hegemonic or neocolonial politics or otherwise biased. Examples include cases from the Canadian Supreme Court that rejected U.S. American doctrine, such as: *Regina v. Keegstra et al.*, [1990] 3 S.C.R. 697, excerpted in Chapter 7; and *Andrews v. Law Society of British Columbia*, excerpted in Chapter 6. As Jon Elster notes in examining constitutional elaboration in the course of transition to democracy in Eastern Europe, upon the collapse of the Soviet empire, "in constitutional debates, one invariably finds a large number of references to other constitutions," in some cases "as models to be imitated" but in others "as disasters to be avoided, or simply as evidence for certain views about human nature." (Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. Chi. L. Rev. 447, 476 (1991).) For developments in Africa, see H. Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New Dawn?*, 5 Int'l J. Con. L. (I·CON) 469 (2007).

References to constitutions other than one's own are thus important not only in terms of searching for similarities but also in terms of looking for

c. CONST. S. AFR. §39(1) (c).

relevant or useful differences. This is true from the standpoint of constitution makers or interpreters and from those engaged in comparative analysis. Moreover, both users and analysts of foreign constitutional materials confront the need to deal successfully with relevant context-dependent variables. Accordingly, the tasks performed by comparativists bear strong similarity to those confronting all legal practitioners and scholars. In both cases analogical reasoning—that is, drawing analogies and ferreting out disanalogies—is crucial. Cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741 (1998) (stressing the prominence and superiority of analogical reasoning in law).

Because of the multiplicity and complexity of contextual variables, apparent similarities or differences stemming from diverse national constitutions may sometimes prove misleading. For example, a cursory review of various freedom of speech provisions drawn from numerous constitutions throughout the world, reveals a striking similarity in the formulation of that right. Examination of how freedom of speech is construed in various countries, however, reveals vast discrepancies, ranging from virtually unconstrained liberty to extensive speech regulation. See Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 353 (Michel Rosenfeld ed., 1994). What consequences should be drawn from Schauer's conclusions? That the constitutional text matters little? That not all cultural traditions share the same respect for fundamental constitutional rights? Or that different cultures genuinely disagree on the proper scope of freedom of expression? Or else, that they may not so much disagree as they confront, respectively, varying degrees of threats to political stability?

Conversely, what appears to be clearly different may turn out in the end to be quite similar. Compare, for example, the nearly contemporaneous abortion decisions issued by the U.S. Supreme Court (USSC) and the German Federal Constitutional Court (GCC). In *Roe v. Wade*, 410 U.S. 113 (1973) (see Chapter 5), the USSC recognized a constitutional right to abortion predicated on a woman's privacy and liberty rights. In contrast, the GCC, in the *Abortion I* Case, 39 BVerfGE 1 (1975) (see Chapter 5), stressed above all the paramountcy of the right to life, noting the German Constitution's great commitment to reversing the Nazi regime's wanton disregard for life evinced by its implementation of the extermination plan embodied in its "final solution" policy. In spite of their markedly different approaches, however, both courts carved out abortion rights that seem nearly equivalent in many respects. Are the differences between the two abortion jurisprudences or the similarities worthy of greater emphasis? Are the differences merely a matter of rationalization in the context of different political cultures? Or do they carry important legal or constitutional implications? Noteworthy in this connection is that both Germany and the U.S. later restricted the constitutionally permissible scope of abortions. See Chapter 5.

Although one might expect that older, more-developed constitutional systems might be less prone than younger ones to drawing materials from other constitutions, the gap between the two has recently narrowed. There are several reasons for this shift, including the trend toward internationalization of constitutional norms and the increased availability of foreign materials for comparison, both mentioned above. Additionally, scientific advances and

changing material conditions give rise to new constitutional issues that the older systems have not yet encountered and that on occasion may be adjudicated first within more recently established constitutional democracies. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (in ruling on constitutionality of assisted suicide the USSC referred to earlier decisions on the subject by courts in Australia and Colombia).

Traditionally, the U.S., which boasts the world's oldest living constitution, has been resistant to comparative approaches to constitutional law. Nevertheless, the U.S. has hardly been immune to influence by constitutional concepts from abroad. For example, early American equality jurisprudence borrowed French concepts, to be incorporated in the famous dissent by Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537 (1896), see Rebecca Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 Mich. L. Rev. 777 (2008). Also, the views of noted constitutional theorist Bruce Ackerman on the uses of comparative law changed within less than a decade. In 1991, he wrote that "to discover the [American] Constitution we must approach it without the assistance of guides imported from another time and place. Americans * * * have * * * built a genuinely distinctive pattern of constitutional thought and practice." Bruce A. Ackerman, *We the People*, Vol. 1: *Foundations*, 3 (1991). By 1997, however, he was focusing on the rise of "world constitutionalism." See Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771, 774-75 (1997):

First and foremost, we must learn to think about the American experience in a different way. Until very recently, it was appropriate to give it a privileged position in comparative study. Other experiments with written constitutions and judicial review were simply too short to warrant confident predictions about which if any, would successfully shape long-run political evolution. But as we move to the next century, such skepticism is no longer justified. Places like Germany or Italy or the European Union or India will be passing the fifty-year mark in their experiments with written texts and constitutional courts; France and Spain will soon be experiencing the distinctive challenges of a second full generation of judicial review * * *. [A]ll these initiatives * * * add up to a formidable fund of experience for comparative investigation. Against this emerging background, we must learn to look upon the American experience as a special case, not as the paradigmatic case.

A.1. THE CONTROVERSY OVER CITATION TO FOREIGN CONSTITUTIONAL MATERIAL IN DOMESTIC CONSTITUTIONAL ADJUDICATION

Reference to foreign constitutional materials, including judicial opinions, in domestic constitutional adjudication has become widespread. In some cases, such as that of South Africa noted above, the practice is sanctioned by the constitution itself and is thus uncontroversial. In other cases, such as that of the United States, the practice has taken hold, but remains highly controversial. Thus, USSC Justice Kennedy's citations to decisions by the ECtHR in U.S. constitutional cases led to calls for his impeachment from the Bench. See Dana Milbank, *And the Verdict on Justice Kennedy is: Guilty*, Wash. Post,

Apr. 9, 2005, at A03. In the following cases on the death penalty, an issue we discuss in relation to fundamental rights in Chapter 5, courts display rather different ways of dealing with this globalization of law.

S. v. MAKWANYANE AND ANOTHER

[SOUTH AFRICA DEATH PENALTY CASE]

Constitutional Court (South Africa)
1995 (3) SALR 391 (CC)

[Two men sentenced to death were awaiting execution on death row. No executions had occurred in South Africa since 1989. The new South African government, after the end of the apartheid regime, saw the death penalty as a cruel, inhuman, and degrading punishment, and asked the Court to declare it unconstitutional.]

CHASKALSON P.

*** Capital punishment was the subject of debate before and during the constitution-making process, and it is clear that the failure to deal specifically in the Constitution with this issue was not accidental. ***

[5] It would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution. That is the extent and limit of the Court's power in this case. ***

[7] *** It is a transitional constitution but one which itself establishes a new order in South Africa; an order in which human rights and democracy are entrenched ***

[9] [This Court] gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution. ***

[33] The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy. As societies became more enlightened, they restricted the offences for which this penalty could be imposed. The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances, in some it is prohibited save in times of war, and in most countries that have retained it as a penalty for crime, its use has been restricted to extreme cases. According to Amnesty International, 1,831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1,419 were in China, which means that only 412 executions were carried out in the rest of the world in that year. Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half of the countries of the world including the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola.

In most of those countries where it is retained, as the Amnesty International statistics show, it is seldom used.

[34] In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to *section 35(1)* of the Constitution, which states:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the right entrenched in this Chapter, and may have regard to comparable foreign case law.

[35] Customary international law and the ratification and accession to international agreements is dealt with in *section 231* of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of *section 35(1)*, public international law would include non-binding as well as binding law. They may both be used under the *section* as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission of Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.

[36] Capital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of *section 11(2)*. International human rights agreements differ, however, from our Constitution in that where the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorise exceptions to be made to the right to life by law. This has influenced the way international tribunals have dealt with issues relating to capital punishment, and is relevant to a proper understanding of such decisions.

[37] Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by *section 35(1)* that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution. This * * * is implicit in the injunction given to the Courts in *section 35(1)*, which in permissible terms allows the Courts to "have regard to" such law. There is no injunction to do more than this.

[38] When challenges to the death sentence in international or foreign courts and tribunals have failed, the constitution or the international instrument concerned has either directly sanctioned capital punishment or has specifically provided that the right to life is subject to exceptions sanctioned by law. The only case to which we were referred in which there were not such express provisions in the Constitution, was the decision of the Hungarian Constitutional Court. There the challenge succeeded and the death penalty was declared to be unconstitutional.

[39] Our Constitution expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right. In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it. * * *

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The Right to Dignity

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[58] Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being "necessary". The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries.

[59] In Germany, the Federal Constitutional Court has stressed this aspect of punishment. * * *

[60] That capital punishment constitutes a serious impairment of human dignity has also been recognised by judgments of the Canadian Supreme Court. * * *

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The International Covenant on Civil and Political Rights

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[67] * * * [W]hat is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning.

The European Convention on Human Rights

[68] Similar issues were debated by the European Court of Human Rights in *Soering v. United Kingdom* [11 EHRR 439 (1989) excerpted in Chapter 5]. * * *

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Capital Punishment in India

[71] *Section 302* of the Indian Penal Code authorises the imposition of the death sentence as a penalty for murder. * * *

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[75] The Supreme Court had recognised in a number of cases that the death sentence served as a deterrent, and the Law Commission of India, which had conducted an investigation into capital punishment in 1967, had recommended that capital punishment be retained. * * *

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[77] The Court [argued that] * * * it was clear that the State could deprive a person of his or her life, by "fair, just and reasonable procedure." In the circumstances, and taking into account the indications that capital punishment was considered by the framers of the constitution in 1949 to be a valid penalty, it was asserted that "by no stretch of the imagination can it be said that death penalty * * * either per se or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment" prohibited by the Constitution.

[78] The wording of the relevant provisions of our Constitution are different. The question we have to consider is not whether the imposition of the death sentence for murder is "totally devoid of reason and purpose", or whether the death sentence for murder "is devoid of any rational nexus" with the purpose and object of *section 277(1)(a)* of the Criminal Procedure Act. It is whether in the context of our Constitution, the death penalty is cruel, inhuman or degrading, and if it is, whether it can be justified in terms of *section 33*. * * *

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[80] The unqualified right to life vested in every person by *section 9* of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of *section 11(2)* of our Constitution. * * *

* * *

[83] An individual's right to life has been described as "[t]he most fundamental of all human rights", [Per Lord Bridge in *R. v. Home Secretary*] and was dealt with in that way in the judgments of the Hungarian Constitutional Court declaring capital punishment to be unconstitutional. * * *

[The Attorney General then argues that the public endorses the view that the death penalty is justified. But, referring to U.S. jurisprudence, the Court says:]

[89] This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public. * * *

* * *

[95] The carrying out of the death sentence destroys life, which is protected without reservation under *section 9* of our Constitution, it annihilates human dignity which is protected under *section 10*, elements of arbitrariness

are present in its enforcement and it is irremediable. Taking these factors into account, * * * I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.

Is capital punishment for murder justifiable?

[96] The question that now has to be considered is whether the imposition of such punishment is nonetheless justifiable as a penalty for murder * * *

The Two Stage Approach

[100] Our Constitution deals with the limitation of rights through a general limitations clause. As was pointed out by Kentridge AJ in *Zuma's* case, this calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of *section 33*. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the "two-stage" approach may often produce the same result as the "one-stage" approach, this will not always be the case.

[101] The practical consequences of this difference in approach are evident in the present case. In *Gregg v. Georgia* [excerpted in chapter 4], the conclusion reached in the judgment of the plurality was summed up as follows:

In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification, and is thus not unconstitutionally severe.

[102] Under our Constitution, the position is different. It is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by *section 33*. It is not whether the infliction of death as a punishment for murder "is not without justification", it is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of *section 33*. It is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified. * * *

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[104] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. * * *

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The Essential Content of the Right

[132] *Section 33(1)(b)* provides that a limitation shall not negate the es-

sential content of the right. There is uncertainty in the literature concerning the meaning of this provision. It seems to have entered constitutional law through the provisions of the German Constitution, and in addition to the South African constitution, appears, though not precisely in the same form, in the constitutions of Namibia, Hungary, and possibly other countries as well. The difficulty of interpretation arises from the uncertainty as to what the "essential content" of a right is, and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way? Currie [David P. Currie, *The Constitution of the Federal Republic of Germany* (1994)] draws attention to the large number of theories which have been propounded by German scholars as to the how the "essence" of a right should be discerned and how the constitutional provision should be applied. The German Federal Constitutional Court has apparently avoided to a large extent having to deal with this issue by subsuming the enquiry into the proportionality test that it applies and the precise scope and meaning of the provision is controversial. [See Dieter Grimm, *Human Rights and Judicial Review in Germany*, in *Human Rights and Judicial Review: A Comparative Perspective* 267, 275 (David H. Beatty ed., 1994).]

[133] If the essential content of the right not to be subjected to cruel, inhuman or degrading punishment is to be found in respect for life and dignity, the death sentence for murder, if viewed subjectively from the point of view of the convicted prisoner, clearly negates the essential content of the right. But if it is viewed objectively from the point of view of a constitutional norm that requires life and dignity to be protected, the punishment does not necessarily negate the essential content of the right. It has been argued before this Court that one of the purposes of such punishment is to protect the life and hence the dignity of innocent members of the public, and if it in fact does so, the punishment will not negate the constitutional norm. On this analysis it would, however, have to be shown that the punishment serves its intended purpose. This would involve a consideration of the deterrent and preventative effects of the punishment and whether they add anything to the alternative of life imprisonment. If they do not, they cannot be said to serve a life protecting purpose. If the negation is viewed both objectively and subjectively, the ostensible purpose of the punishment would have to be weighed against the destruction of the individual's life. For the purpose of that analysis the element of retribution would have to be excluded and the "life saving" quality of the punishment would have to be established.

[134] It is, however, not necessary to solve this problem in the present case. At the very least the provision evinces concern that, under the guise of limitation, rights should not be taken away altogether. It was presumably the same concern that influenced Dickson CJC to say in *R. v. Oakes* that rights should be limited "as little as possible", [1986] 1 S.C.R. 103, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295] and the German Constitutional Court to hold in the *Life Imprisonment* case that all possibility of parole ought not to be excluded.

[The court discusses the balancing process by which deterrence, prevention, and retribution are weighed against the alternative punishments available to the state.]

Conclusion

[144] The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

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ROPER V. SIMMONS

Supreme Court (United States)
543 U.S. 551 (2005)

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. In *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question. * * *

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." * * * The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense . . . By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. * * *

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop* [1958], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S. at 102-103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime") * * *

Thompson v. Oklahoma, 487 U.S. 815, 830–831, and n. 31, 108 S.Ct. 2687 (plurality opinion) (noting the abolition of the juvenile death penalty “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,” and observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual” * * *

Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–1470 (entered into force Sept. 2, 1990) * * * No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5)), * * * American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

* * *[O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

* * *[T]he United Kingdom abolished the juvenile death penalty before these covenants came into being * * * [and that] experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: “[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” 1 W. & M., ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1770) * * *. As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person’s Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the

understanding that the instability and emotional imbalance of young people may often be a factor in the crime. * * * The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See *The Federalist* No. 49, p. 314 (C. Rossiter ed.1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

* * * [T]he Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. See, e.g., R. Simon & D. Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over* 25, 26, 29 (2002). To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.* * *

[L]et us not forget the Court's abortion jurisprudence, which makes us

one of only six countries that allow abortion on demand until the point of viability.* * * Though the Government * * * in cases following *Roe v. Wade* [infra] urged the court to follow the international community's lead, these arguments fell on deaf ears.* * *

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. As we explained in *Harmelin v. Michigan*, 501 U.S. 957, 973–974, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the “Cruell and Unusuall Punishments” provision of the English Declaration of Rights was originally meant to describe those punishments “‘out of [the Judges’] Power’ ” that is, those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown's judges. Under that reasoning, the death penalty for under-18 offenders would easily survive this challenge. The Court has, however—I think wrongly—long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. See Law Commission, *Double Jeopardy and Prosecution Appeals*, LAW COM No. 267, Cm 5048, p. 6, ¶ 1.19 (Mar.2001); J. Spencer, *The English System in European Criminal Procedures* 142, 204, and n. 239 (M. Delmas-Marty & J. Spencer eds.2002). We would also curtail our right to jury trial in criminal cases since, despite the jury system's deep roots in our shared common law, England now permits all but the most serious offenders to be tried by magistrates without a jury. See D. Feldman, *England and Wales, in Criminal Procedure: A World-wide Study* 91, 114–115 (C. Bradley ed. 1999).

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.

LAWRENCE V. TEXAS

Supreme Court (United States)
539 U.S. 558 (2003)

JUSTICE KENNEDY delivered the opinion of the Court.

The question before the Court is the validity of a Texas statute mak-

ing it a crime for two persons of the same sex to engage in certain intimate sexual conduct. * * *

[The Court had held in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) that a state law criminalizing sexual acts between persons of the same sex was constitutional]. The facts in *Bowers* had some similarities to the instant case. * * * One difference between the two cases is that the Georgia statute [at stake in *Bowers*] prohibited the conduct whether or not the participants were of the same sex, while the Texas statute [involved here] applies only to participants of the same sex. * * * The Court [in *Bowers*], in an opinion by Justice White, sustained the Georgia law.

Chief Justice Burger joined the opinion for the Court in *Bowers* and * * * explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." 478 U.S., at 196, 106 S.Ct. 2841. * * * [S]cholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, e.g., Eskridge, *Hardwick and Historiography*, 1999 U. Ill. L.Rev. 631, 656. * * *

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales*, 869 S.W.2d 941, 943. * * *

Bowers was not correct when it was decided, and it is not correct today.

It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled. * * *

* * *

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

* * * Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion never relied on “values we share with a wider civilization,” *ante*, at 2483, but rather rejected the claimed right to sodomy on the ground that such a right was not “‘deeply rooted in *this Nation’s* history and tradition,’” 478 U.S., at 193–194, 106 S.Ct. 2841 (emphasis added). *Bowers’* rational-basis holding is at 196, 106 S.Ct. 2841. The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.” *Foster v. Florida* * * * 123 S.Ct. 470 * * * 359 (2002) (Thomas, J., concurring in denial of certiorari).

***The Relevance of Foreign Legal Materials in
U.S. Constitutional Cases: A Conversation between
Justice Antonin Scalia and Justice Stephen Breyer***

3 Int’l J. Const. L. (1• CON) 519, 521–531 (2005)

* * *

[Justice] SCALIA: * * * I do not use foreign law in the interpretation of the United States Constitution. I will use it in the interpretation of a treaty. * * * [T]he object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies—that is to say defer if it’s within the ballpark, if it’s a reasonable interpretation, though not necessarily the very best.

But you are talking about using foreign law to determine the content of American constitutional law—to be sure that we’re on the right track, that we have the same moral and legal framework as the rest of the world. But we *don’t* have the same moral and legal framework as the rest of the world, and like Europe, they would have been appalled. If you read the Federalist Papers, they are full of statements that make very clear the framers didn’t have a whole lot of respect for many of the rules in European countries. Madison, for example, speaks contemptuously of the countries of continental Europe, “who are afraid to let their people bear arms.” * * *

Should we say, “Oh my, we’re out of step”? Or, take our abortion jurisprudence: we are one of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently? Or, maybe a more pertinent question: Why *haven’t* we changed that, if indeed the Court thinks we should be persuaded by for-

eign law? Or do we just use foreign law selectively? When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it. Thus, we cited foreign law in *Lawrence*, the case on homosexual sodomy (though not all foreign law, just the foreign law of countries that agreed with the disposition of the case). But we said not a whisper about foreign law in the series of abortion cases.

What's going on here? Do you want it to be authoritative? I doubt whether anybody would say, "Yes, we want to be governed by the views of foreigners." Well if you don't want it to be authoritative, then what is the criterion for citing it? That it agrees with you? I don't know any other criterion to bring forward.

* * *

[Justice] BREYER: * * * I believe, and I suspect Justice Scalia also believes, that the United States differs from some other nations in that law here is not handed down from on high, not even from the Supreme Court. Rather, law emerges from a complex interactive democratic process. We justices play a limited role in that process. But we are part of it. So are lawyers, law professors, students and ordinary citizens. The process amounts to a kind of conversation. * * *

* * *

In many respects Justice Scalia and I will agree about how foreign law can and should influence judicial holdings in the United States Supreme Court and in the other courts as well. * * * But let me * * * describe the more controversial instances, where we likely do not agree. * * *

* * * [W]hen I refer to foreign law in cases involving a constitutional issue. I realize full well that the decisions of foreign courts do not bind American courts. Of course they do not. But those cases sometimes involve a human being working as a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect. To an ever greater extent, foreign nations have become democratic; to an ever greater extent, they have sought to protect basic human rights; to an ever greater extent they have embodied that protection in legal documents enforced through judicial decision making. Judges abroad thus face not only legal questions with obvious answers, e.g., is torture an affront to human dignity, but also difficult questions without obvious answers, where much is to be said on both sides of the issue.

* * * If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something. * * *

* * * In some foreign countries, people are struggling to establish institutions that will help them protect democracy and human rights despite earlier undemocratic or oppressive governmental traditions. They want to demonstrate the importance of having independent judges enforce constitutionally protected human rights. The United States Supreme Court has prestige in this area. Foreign courts refer to our decisions. And if we sometimes refer

to their decisions, the references may help those struggling institutions. The references show that we read, and are interested in, their reactions to similar legal problems. * * *

* * * Justice Scalia [does have a point]. Once we start to refer to foreign opinions, how do we know we can keep matters under control? How do we know we have referred to opinions on both sides of the issue? How do we know we have found all that might be relevant? The answers to these questions lie in the nature of the judicial process. We must rely upon counsel to find relevant citations. We must rely upon judicial integrity to assure a fair and comprehensive reading of any relevant foreign materials. Lack of either, of course, would mean faulty references, not just to foreign decisions, but to far more relevant domestic legal materials as well.

Of course. I hope that I, or any other judge, would refer to materials that support positions that the judge disfavors as well as those that he favors. For example, in a case where I took the position that the Establishment Clause prohibited extensive use of school vouchers,³ I had to face the fact that in countries with somewhat similar traditions of church/state separation, governments subsidized religious school education. And most citizens of those countries, for example Britain and France, believed that doing so caused no relevant harm. Referring to such cases, practices, and views means extra work, even though a majority of our Court does so only occasionally. We understand that we are not experts in such matters. But we believe it is worth while, for doing so sometimes opens our eyes. And that is what I would say to those who wonder about the validity of the practice. The practice involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful.

The European Human Rights Court, for example, decided a case called *Bowman*,⁴ which involved a law limiting campaign contributions and a charter provision protecting freedom of expression. Both sides referred to this opinion (in amicus briefs) filed in a campaign finance case in the Supreme Court. I read the case. I am not certain which side it helped. But I am pleased the lawyers referred to it because I learned something from reading it. Could I read many foreign cases in my work? Not too many, for doing so is time consuming. Should I be aware of the existence of foreign cases involving issues very similar to the issue at hand? I believe so. Do I believe concern about the use of my time is driving the opposition to the use of such materials? No. I do not. Some cases in which members of our Court have referred to foreign law have involved the death penalty; others have involved the constitutional rights of homosexuals. These subject matters, I believe, have fed the foreign law controversy. But they raise other issues as well. Reference to foreign law does not lie at the heart of those issues.

* * *

3. The Establishment Clause, which is in Amendment I to the US Constitution, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Supreme Court ruled in 2002 that it was constitutional for state governments to institute voucher systems that would use taxpayer money to help fund private or parochial schools. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

4. *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. Rep. 1 (1998).

SCALIA: I don't know what it means to express confidence that judges will do what they ought to do after having read the foreign law. My problem is I don't know what they ought to do. What is it that they ought to do? Why is it that foreign law would be relevant to what an American judge does when he interprets—interprets, not writes—the Constitution? Of course the founders used a lot of foreign law. If you read the Federalist Papers, it's full of discussions of the Swiss system, the German system, etc. It's full of that because comparison with the practices of other countries is very useful in devising a constitution. But why is it useful in interpreting one?

Now, my theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don't think it has changed since then. That approach used to be orthodoxy until about sixty years ago. Every judge would have told you that's what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: old English law—because phrases like “due process,” and the “right of confrontation” were taken from English law, and were understood to mean what they meant there. So the reality is I use foreign law more than anybody on the Court. But it's all old English law.

It should be easy to understand why, for someone who has my theory of interpretation, why foreign law is irrelevant. So Justice Breyer will never convert me. * * *

* * *

But let me continue. That's my approach to interpreting the Constitution. Justice Breyer doesn't have my approach. He applies the principle that the Court adopted about sixty years or so ago—first in the Eighth Amendment area (cruel and unusual punishments) and then elsewhere—the notion that the Constitution is not static. It doesn't mean what the people voted for when it was ratified. Rather, it changes from era to era to comport with—and this is a quote from our cases, “the evolving standards of decency that mark the progress of a maturing society.” I detest that phrase, because I'm afraid that societies don't always mature. Sometimes they rot. What makes you think that human history is one upwardly inclined plane: every day, in every way, we get better and better? It seems to me that the purpose of the Bill of Rights was to prevent change, not to foster change and have it written into a Constitution.

Anyway, let's assume you buy into the evolving Constitution. Still and all, what you're looking for as a judge using that theory is what? The standards of decency of *American* society—not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views. * * *

* * * [I]t is quite impossible for French practice to be useful in determining the evolving standards of decency of American society. The only way in which it makes sense to use foreign law is if you have a third approach to the interpretation of the Constitution, to wit: “I as a judge am not looking for the original meaning of the Constitution, nor for the current standards of decency of American society; I'm looking for what is the best answer to this social question in my judgment as an intelligent person. And for that purpose I take into account the views of other judges, throughout the world.”

Let me ask the law students here [the conversation between the justices

excerpted here took place at a law school and the vast majority of the audience were law students]: Do you think you're representative of American society? Do you not realize you are a small layer of cream at the top of the educational system, and that your views on innumerable things are not the views of America at large? And doesn't it seem somewhat arrogant for you to say, when you later become judges, I can make up what the moral values of America should be on all sorts of issues, such as penology, the death penalty, abortion, whatever? Yet that's the only context in which the use of foreign law makes sense—when what we're doing is not looking to history, as I do, and not looking to the mores of contemporary American society, which we did for a while. * * *

BREYER: That is a good answer. Indeed, I think you have identified something that understandably worries many people. Still, judges are trying not to decide cases subjectively. And they understand the temptation, in difficult cases with open questions of constitutional law, to identify a general public view, or even a founder's view, with their own. Robert Braucher, one of my law professors and later a Massachusetts Supreme Judicial Court justice, used to say "When I want to know what the common man thinks, I ask myself what I think, and I'm right every time." The judge in such cases looks, not to impose his own moral views, but for a more objective standard. * * *

I wrote a dissent from a denial of a petition for certiorari in a case raising the question: Is it a "cruel and unusual punishment," hence a violation of the Eighth Amendment, for the government to force a person convicted of murder to remain on death row for more than twenty years before his eventual execution? I believed we should hear the case; and my dissent implied that the answer to the question could well be "yes." In referring to relevant cases, I included a decision by the Privy Council in England (overturning a Jamaica case) * * *

* * *

I referred to a decision by the Supreme Court of India and one by the Supreme Court of Canada. I referred to certain United Nations determinations—those that I thought useful. But I did not limit myself to decisions supporting my own position. I referred to decisions that went the other way as well. I may have made what one might call a tactical error in referring to a case from Zimbabwe—not the human rights capital of the world. But that case, written by a good judge, Judge Gubbay, was interesting and from an earlier time. I did not believe any of these foreign decisions were controlling. But I did think that the issue is not technically legal, but rather a law-related human question, and all concerned, American and foreign judges alike are human beings using similar legal texts, dealing with a somewhat similar human problem. Reaching out to those other nations, reading their decisions, seems useful, even though they cannot determine the outcome of a question that arises under the American Constitution.

Justice Thomas—disagreeing with me—wrote his own brief opinion arguing that I could not find American precedent supporting my view, so I must have looked to Zimbabwe out of desperation. He had a certain point. But still, with all the uncertainties involved, I would rather have the judge read pertinent foreign cases while understanding that the foreign cases are not controlling. I would rather have the judge treat those cases cautiously, using them with care, than simply to ignore them. I would rather hope that judges will

exercise proper control, taking the cases for what they are worth, than have an absolute rule that says judges may never look at foreign decisions. The fact that I cannot find any absolute legal prohibition—not even in the laws of King Arthur—gives me cause for hope.

SCALIA: But let's talk about the precise case you brought up—

BREYER: I brought up a case that illustrated the difficulties of my own approach.

SCALIA: That case presented the claim that it was cruel and unusual punishment to wait too long between pronouncing the death penalty and execution. We haven't decided that question yet; we have just denied cert.

BREYER: Right.

SCALIA: One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is. * * *

And you can say every other country of the world thinks that holding somebody for twelve years under sentence of death is cruel and unusual, but you don't know that these other countries don't have habeas corpus systems which allow repeated applications to state and federal court, so that the reason it takes twelve years here is because the convicted murderer himself continues to file appeals that are continuously rejected.

In England, before they abolished the death penalty—and by the way, every public opinion poll in England suggests that the people would like to retain it, but maybe the judges and lawyers and law students feel differently about it—before they abolished the death penalty, whenever it was pronounced the judge pronouncing it would don a little skullcap. When you saw him reach for the skullcap you knew he was about to pronounce a sentence of death. And that sentence would be carried out within two weeks. So that's the reason twelve years seems extraordinary to them. It's extraordinary because we've been so sensitive to the problem of an erroneous execution that we allow repeated habeas corpus applications. I just don't think it's comparable. It's just not fair to compare the two.

But most of all, what does the opinion of a wise Zimbabwe judge or a wise member of a House of Lords law committee—what does that have to do with what Americans believe? It is irrelevant unless you really think it's been given to *you* to make this moral judgment, a very difficult moral judgment. And so in making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how it's relevant at all.

BREYER: Well, it's relevant in the sense I described. A similar kind of person, a judge, with similar training, tries to apply a similar document with similar language ("cruel and unusual punishment" or the like), in a society that is somewhat similarly democratic and protective of basic human rights. England is not the moon, nor is India. Neither is a question of "cruel and unusual punishment" an arcane matter of contract law where differences in legal systems are more likely to make a major difference. In fact, ironically in those more specifically legal areas—areas where results are more likely tied to the details of a different legal environment—references to foreign decisions are likely to prove less controversial. Indeed, we frequently look at foreign law

in such cases, i.e., technical cases. If in a "cruel and unusual punishment" case the fact that everyone in the world thinks one thing is at least worth finding out, for I doubt that Americans are so very different from people elsewhere in the world in respect to such matters. And, if my having the legal power to do so adds some uncertainty to the law, I believe the legal system can adjust. That is because the law is filled with uncertainty. Its answers in difficult cases can rarely be deduced only by means of legal logic from clear legal rules and a history book. Were the latter possible, I would be more tempted to agree with your view that a system without reference to foreign law would better control subjective judicial tendencies. But it is not. * * *

* * *

SCALIA: * * * In my dissent in *Lawrence*, the homosexual sodomy case, I observed that the court cited only European law; it pointed out that every European country has said you cannot prohibit homosexual sodomy.

Of course, they said it not as a consequence of some democratic ballot but by decree of the European Court of Human Rights, which was using the same theory that we lawyers and judges and law students know what's moral and what isn't. It had not been done democratically. Nonetheless, it was true that throughout Europe, it was unlawful to prohibit homosexual sodomy. The court did not cite the rest of the world. It was easy to find out what the rest of the world thought about it. I cited it in my dissent. The rest of the world was equally divided.

BREYER: But the reason that the majority referred to foreign cases in *Lawrence* is that the Court, in its earlier decision of *Bowers v. Hardwick*,⁸ had said that homosexual sodomy is almost universally forbidden. And I think that *Lawrence*, through its references, simply wanted to show that this was wrong.

SCALIA: Well, I understand. For whatever reason, we said universally, yes, it's not universally. But don't just talk about Europe; let's look at the rest of the world. * * *

* * *

I mean, it lends itself to manipulation. It invites manipulation. You know, I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite *something*. I can't cite a prior American opinion because I'm overruling two centuries of practice. * * * So my goodness, what am I going to use?

* * *

I have a decision by an intelligent man in Zimbabwe or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly! And it lends itself to manipulation. It just does.

Richard A. Posner, *Foreword: A Political Court*
119 HARV. L. REV. 31, 84–89 (2005)

* * *

* * * I do not think the citation of * * * foreign decisions is an accident,

8. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

viewed them, or could have viewed them, as relevant. Does not Justice Scalia's position then have only a purely contingent relationship to foreign citations? As an originalist, should he not be inherently for or against them?

5. In addition to being mindful of the possibility of selective reliance on particular foreign sources, one must also consider instances in which domestic courts place an implausible interpretative gloss on foreign authorities, apparently for strategic purposes. This may occur in the course of constitutional adjudication in relatively new constitutional democracies, when courts seek to shield controversial and contestable decisions through reference to the constitutional jurisprudence of an established and respected constitutional democracy. See Michel Rosenfeld and András Sajó, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies*, in *The Migration of Constitutional Ideas* 142 (Sujit Choudhry ed., 2006) (discussing Hungarian courts' use of German and U.S. liberal constitutional doctrine to justify their illiberal decisions). See also Jacobsohn, *Apple of Gold*, ch. 6 (discussing Israeli Supreme Court's use of American free speech doctrine to justify decisions inconsistent with those of American courts in similar cases). Is there any way to prevent or to minimize such uses or abuses of foreign sources? Is the practice involved in such cases worse than that regarding selective citation to foreign authorities albeit well within the bounds of accepted interpretive standards? One remedy for selective citations to foreign authorities is to draw attention, as Justice Scalia does in *Lawrence*, to foreign authorities that reach the opposite result of those cited in the first place.

A.2. CONSTITUTIONAL BORROWING IN THE MAKING AND DESIGN OF CONSTITUTIONS

Consideration of foreign materials can be useful for purposes other than constitutional adjudication, such as making or amending a constitution. Thus in rejecting the relevance of foreign constitutional experience in the context of adjudicating a dispute concerning the limits of the national government's powers under American federalism, in *Printz v. United States*, 521 U.S. 898 (1997) (see Chapter 4). Justice Scalia emphasized that "comparative analysis [is] inappropriate to the task of interpreting a constitution though it [is,] of course, quite relevant to the task of writing one." *Id.* at 921 n.11. But see Justice Breyer's dissenting opinion in *Printz*. Thus Justice Breyer argued for consideration of foreign experiences with federalism in *Printz* for the limited purposes of dealing with open questions and for these to be resolved pursuant to empirical evaluation. In contrast, in determining what kind of federalism to embrace in the making of a new constitution, a much broader use of foreign materials may be warranted.

The lack of consensus concerning the proper role of comparative analysis is also due to broader ideological disagreements about the nature and function of law. At one end of the spectrum are those who believe that the legal problems that confront all societies are essentially similar and that their solutions are fundamentally universal. See, e.g., Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* 36 (Tony Weir trans., 2d ed. 1987); and David M. Beatty, *Constitutional Law in Theory and Practice* (1995) (arguing that basic principles of constitutional law are essentially the same throughout

the world). At the other pole are those who maintain that all legal problems are so tied to a society's particular history and culture that what is relevant in one constitutional context cannot be relevant, or at least similarly relevant, in another. Compare Montesquieu's observation 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." Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* 8 (Ann M. Cohler et al. eds. and trans., 1989). Between the two extremes are various other positions. Some believe that the problems confronted by different societies are essentially the same (see, e.g., Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. Chi. L. Rev. 519, 535 (1992)), but that the solutions are likely to be different, owing to varying circumstances that distinguish one society from the next. See Mary Ann Glendon, *Comparative Legal Traditions* 10 (2d ed., 1994). Hence, the principal benefit of comparative work stems from its ability to highlight specificities that tend to be taken for granted, to enhance the knowledge and understanding of one's own system. For others, the function of comparative analysis is the development of an even more critical, reflexive analytical capacity. See Günther Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harv. Int'l L J (1985), 4311-455; and Peer Zumbansen, *Comparative Law's Coming of Age? Twenty Years after Critical Comparisons*, Germ. L. J. 6 (7/2005).

Constitutional "transplants" and influences are proper subjects of comparative analysis. However, their evaluation is bound to depend on the particular take one has on the dynamic between similarities and differences across separate constitutional orders. One important variable is how one construes the nexus between constitutional norms and national identity. If the nexus is weak, then transplants may be relatively unproblematic. Cf. Cass R. Sunstein, *On Property and Constitutionalism*, in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 383 (Michel Rosenfeld ed., 1994) (arguing for implantation of Western-type private property rights and against constitutionalization of social rights in new constitutions for formerly socialist Eastern European polities in transition to market economies). Sunstein states:

It is often said that constitutions, as a form of higher law, must be compatible with the culture and mores of those whom they regulate. In one sense, however, the opposite is true. Constitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce harm through that country's ordinary political processes. There is a large difference between the risks of harm faced by a nation committed by culture and history to free markets, and the corresponding risks in a nation committed by culture and history to social security and general state protection.

—*Id.* at 398.

Some have argued that the link between a country's constitution and its national identity may vary greatly. For example, Tushnet has contrasted the Indian Constitution, which he characterizes as quite removed from the country's identity, to the American Constitution, which he claims expresses the national character. Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1270-71 (1999). Does this mean that a country like the U.S. should be less susceptible to constitutional transplants

than one like India? Or does it simply mean that countries are open to different kinds of transplants, depending on how closely their constitution is linked to their national character?

Constitutional influence or transplants can be either positive or negative. As Andrzej Rapaczynski says:

By "positive influence" I mean the adoption or transformation of a legal concept, doctrine, or institution modeled in whole or in part on an American original, where those responsible are aware of the American precedent and this awareness plays some part in their decision. An example is the adoption of the American type of federalism in Australia, or the influence of American First Amendment doctrines on the free speech jurisprudence of Israel. * * * By "negative influence," I mean a process in which an American model is known, considered, and rejected, or in which an American experience perceived as undesirable is used as an argument for not following the American example. Examples of this kind of influence are provided by the Indian decision not to include a due process clause in the Indian constitution, or the portrayal of judicial review as a reactionary American institution in preventing its establishment in France in the first half of the twentieth century * * *.

—Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in *Constitutionalism and Rights: The Influence of the U.S. Constitution Abroad* 94, 96–97 (Louis Henkin and Albert J. Rosenthal eds., 1990).

In any case, influences and transplants tend to reflect transformation rather than mere copying. For example, the Indian rejection of a due process clause stemmed from a consideration of the American experience in enshrining substantive property norms in the early twentieth century. *See, e.g., Lochner v. New York*, in Chapter 10 (New York law limiting number of hours of work of bakery employees held to violate due process property rights of employers and employees). Although this interpretation of the Due Process Clause was repudiated by the USSC in the 1930s (see Chapter 10), the Indian framers, acting in the late 1940s, considered the American experience and specifically opted to exclude property due process rights from their new constitution to ensure against repeating the American *Lochner* experience. *See* Soli J. Sorabjee, *Equality in the United States and India*, 94, 96–97.

Perhaps the most daunting task confronting the comparativist is that of properly evaluating similarities and differences. Initial appearances may not prove accurate. *See* Michel Rosenfeld, *Justices at Work: An Introduction*, 18 Cardozo L. Rev. 1609, 1609–10 (1997). In part, however, as critical theorists have warned, comparativists may overestimate similarities for ideological reasons. *See* Günther Frankenberg, *Stranger than Paradise: Identity and Politics in Comparative Law*, Utah L. Rev. 259, 262–63 (1997) (criticizing mainstream comparativists as "Anglo-Eurocentric" paternalists prone to imposing Western hegemonic approaches on the subject and characterizing comparative law as "a postmodern form of conquest executed through legal transplants and harmonization strategies.") Critical scholars have also contended that domestic law is ideological. *See, e.g.,* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983). Are ideo-

logical distortions likely to be more problematic in the context of comparative law than in domestic law? Or are differences in ideology or perceptions of such differences likely to play similar roles in both fields?

B. WHAT IS CONSTITUTIONALISM?

“Constitutionalism” cannot be equated with “constitution,” though the two concepts are linked. At present, most countries—and numerous subnational political units, such as the states in the U.S., the *Länder* in Germany, and the cantons in Switzerland—have constitutions, but not all such constitutions satisfy the requirements of constitutionalism. Whether a country has a constitution is a question of fact, easily answered in most cases—particularly in those where an institutionalized, written constitution is involved. In contrast, whether a constitution conforms to the dictates of constitutionalism cannot be determined without some kind of *normative* evaluation. Constitutionalism is an ideal that may be more or less approximated by different types of constitutions and that is built on certain *prescriptions* and certain *proscriptions*. Determining whether a particular constitution approximates the ideal of constitutionalism, and to what extent, depends on an evaluation of how the institutions and norms promoted by the constitution in question fare in terms of the constitutionalist ideal.

What does the ideal of constitutionalism require? No consensus exists on this question. Consider, however, the following.

Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*

CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY:
THEORETICAL PERSPECTIVES

39, 40–42 (Michel Rosenfeld ed., 1994)

Sources of political ideas and models for institutions or instruments are rarely single or simple, and they are notoriously difficult to identify. The ideas that fed the spread of constitutionalism, and the earlier expressions of constitutionalism that shaped recent constitutions, cannot be determined with confidence. Locke, Montesquieu, Kant, Rousseau, and their successors (Bentham, Mill, the socialists) have fed the stream of relevant ideas, but contemporary framers of constitutions rarely go back to original sources for guidance. There can be little doubt, however, of the immediate influence of two prominent instruments of constitutional character: the United States Constitution and its Bill of Rights, now 200 years old, and the International Bill of Rights—the common designation for the Universal Declaration of Human Rights and the two principal international covenants on human rights¹ born in our times and still maturing.²

1. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71, (1948); International Covenant on Civil and Political Rights, Dec 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

2. No doubt other influences should be credited. England contributed to the idea of limited government, beginning with the Magna Carta, and to the idea of parliamentary government, through the Glorious Revolution and the Bill of Rights (1688). The French Declaration of the Rights of Man and of the Citizen helped spread the idea of inherent rights around the world. The French Declaration itself borrowed from American instruments. ***

In a number of respects, notably the movement to a Constitutional Court (as distinguished from

fine would be prohibited but not a retroactive civil law exposing citizens to huge monetary liability for acts that were entirely legal when performed? Can the distinction drawn pursuant to the U.S. Constitution be justified in terms of adherence to the rule of law? See Chapter 9.

D. CONSTITUTIONAL MODELS

Constitutions are structured in different ways, implemented through various means and imposed on those subjected to their prescriptions through distinct devices. Beyond that, the importance of a constitution can vary significantly from one setting to another. In some countries, including the U.S., the constitution plays a central role in the definition of the nation's identity, while in others it is a minor factor. See Tushnet, *The Possibilities of Comparative Constitutional Law*, 1270–71. Consequently, varying constitutional models and the different relationships between a constitution and the society in which it is embedded are bound to affect the nexus between constitutional and extraconstitutional norms. These issues are examined in this section, primarily through a focus on ways in which constitutional order has been structured and on how some prominent constitutional systems have integrated into their larger social and political milieu.

D.1. WRITTEN VERSUS UNWRITTEN CONSTITUTIONS

Eighteenth-century France and the U.S. provide the model for modern constitutions. Both adopted written constitutions after the violent overthrow of their previous regimes. In more recent times, many constitutions have not been immediately preceded by revolutionary violence and today, most countries have constitutions, most of them written. The United Kingdom, New Zealand, and Israel possess no written constitutions but are nonetheless considered constitutional democracies, subject to “unwritten” constitutions. See Colin Turpin, *British Government and the Constitutions: Text, Cases and Materials*, ch 1 (1999); New Zealand: *The Development of its Laws and Constitution* 1–39 (J. L. Robson ed., 1967); Jacobsohn, *Apple of Gold*, 4–9.

Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*

56 AMER. POL. SCI. REV. 853, 853–857, 861–862 (1962)

* * *

[T]he United Kingdom has a difficult and *sui generis* constitution, deriving from a tortuous sedimentation of common law, acts and conventional usage, partly legal and partly extra-legal, and despite the fact that, when one reads the British constitutional lawyers, one is often reminded of what was said in a review of Stirling's book, *The Secret of Hegel*: “never has a secret been better kept.”

For one thing, English constitutional lawyers appear to take a particular pleasure in pointing out to foreign jurists and political thinkers (beginning with Montesquieu) that their understanding of the English system is quite

wrong. To be sure, this has been and still is very often the case. But one remains with a feeling that the British find a special gratification in confounding alien scholars: there is an element of polemic coquetry in the emphasis they lay on the principle of the supremacy of Parliament (exhibited as being unlimited, arbitrary, omnipotent, *supra* and *contra legem*, etc); in the somewhat provocative and bold statement that, according to the American and French meaning of the term, the United Kingdom does not have a constitution[.] in the point that the British system is based not on the "division" but on the "fusion" of powers; or in the way in which Sir Ivor Jennings puts forward that, "Since Great Britain has no written constitution, there is no special protection for fundamental rights."⁴ And one could quote at length.

All these statements are, to be sure, true. But they are "literally true," and one is brought to wonder why the emphasis is laid on the *letter* so much more than on the *spirit* of the law of the constitution. * * *

[T]ake, for instance, the principle of the supremacy of Parliament. Would it be far from the mark to say that if the principle is related to the historical circumstances of its establishment, it hardly carries with it the dangerous implications that British scholars somewhat proudly expound? Parliament, in the English terminology, means the King, the Lords and the Commons acting together as the supreme governing body of the realm. Thus, if the principle of the supremacy of Parliament is translated into continental terminology, it amounts to what is otherwise called the "sovereignty of the State." * * * [W]hat it really meant * * * was that the King had no power *outside* of Parliament, that his prerogatives could only be exercised according to the formula of the King *in* Parliament. If this be so, would it be very wrong to conclude * * * that parliamentary sovereignty in England actually contradicts the idea of a "higher law" no more than any flexible constitution does, and that the conventions of the constitution hardly allow a parliamentary majority to pass any law whatever? * * *

* * *

[I]n the 19th century, all over Europe as well as in the United States, a general agreement prevailed as to the basic meaning of the term "constitution" * * * If, in England, "constitution" meant the system of British liberties, *mutatis mutandis* the Europeans wanted exactly the same thing: a system of protected freedom for the individual, which—according to the American usage of the English vocabulary—they called a "constitutional system" * * * [They] wanted a written document, a charter, which would firmly establish the overall supreme law of the land. The British too, however, had, from time to time, relied on particularly solemn written documents: the Magna Charta, the Confirmation Acts, the 1610–1628 Petition of Rights, the Habeas Corpus Act of 1679, the Bill of Rights, the Act of Settlement, etc. The circumstance that these British "supreme laws" are not collected in a single document does not really mean that England has an unwritten constitution. I would rather say that the English do not have a codified constitution, *i.e.*, that Britain has a constitution which is written only in part (or, even better, unwritten to a much greater extent than "written" constitutions are), in a piecemeal fashion, and scattered in a variety of sources.

4. *The Law and the Constitution*, 5th ed. (University of London Press, 1959), p. 40.

However * * * this question is of secondary importance. I mean that the written, complete document is only a means. What really matters is the end, the *telos*. And the purpose, the *telos*, of English, American and European constitutionalism was, from the outset, identical. * * * [T]his common purpose could be expressed and synthesized by just one word: the French (and Italian) term *garantisme*. In other terms, all over the Western area people requested, or cherished, "the constitution," because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government." * * *

[According to] Weare's definition * * * the English constitution is "the collection of legal rules and non-legal rules which govern the government in Britain." Or allow me to quote, as another instance, Jennings' definition, according to which a constitution is "the document in which are set out the rules governing the composition, powers and methods of operation of the main institutions of government."¹⁴ The peculiar feature of these definitions is * * * the silence which covers the *telos* of constitutionalism. Actually they are purely "formal" definitions, in the sense that they can be filled with any content whatever. We are thus faced, nowadays, with this puzzling situation: that the very inventors of the constitutional solution provide us with a definition which amounts to saying that any instrument of government, any "traffic rule," is a constitution. * * *

[I]f a constitution is defined as "any way of giving form to any State whatever," then the question "What is the role of a constitution in a political system?" either cannot be answered, or can be answered only country by country, and even then in a very uninteresting and banal way. For in this case the answer is that the constitution plays no role, properly speaking: It is only a shorthand report which may describe * * * the formalization of the power structure of the given country. * * *

[We need] a convincing answer to the question, "What is a constitution?" * * *

Basically we are confronted with three possibilities: (i) *garantiste* constitution (constitution, proper); (ii) nominal constitution; (iii) façade constitution (or fake constitution).

* * *

I call "nominal" the constitutions that * * * bear the "name" constitution. This amounts to saying that nominal constitutions are merely organizational constitutions, *i.e.*, the collection of rules which organize but do not restrain the exercise of political power in a given polity. Actually, nominal constitutions do not really pretend to be "real constitutions." They frankly describe a system of limitless, unchecked power. * * *

The façade constitutions are different from the nominal ones in that they take the appearance of "true constitutions." What makes them untrue is that they are disregarded (at least in their essential *garantiste* features). Actually they are "trap-constitutions." As far as the techniques of liberty and the rights of the power addressees are concerned, they are a dead letter. * * *

14. [*Id.*] pp. 33, 36.

There is often a considerable overlapping between nominal and façade constitutions. The distinction is nevertheless basic, for the two cases are indeed very different. Nominal constitutions actually describe the working of the political system (they do not abide by the *telos* of constitutionalism, but they are sincere reports), while the façade constitutions give us no reliable information about the real governmental process. In most cases one can clearly perceive * * * which is the prevalent aspect: I mean, whether a constitution is basically nominal or basically a disguise. At any rate * * * the distinction is serviceable for analytical purposes, that is, for dissecting the component parts of a "mixed type" (partly nominal and partly fake) of pseudo-constitution. * * *

Some troublesome problems arise when one focuses further attention on: (i) the *decalage* between the written and the living constitution, and on (ii) the frequent disregard of some of the constitutional provisions. In this connection the point can be made that a clear-cut distinction between real constitutions and façade constitutions is hardly realistic, since the real ones too come to differ widely, in practice, from their original formalization, or may not be fully activated (the former being usually the case with old constitutions, and the latter with recent ones).

Personally I am not dismayed by the first indictment. If a constitution is written, then, with the passing of time, the formal document and the living constitution inevitably come to be related much as the past is related to the present. (In this sense, then, written constitutions too become, in part, non-written.) However, as long as the spirit and the *telos* of the original document are maintained in the new circumstances, the *decalage* only affects the myth of a "fixed constitution"; and the American experience goes to show, if anything, that written constitutions can endure despite the anti-historical assumption upon which they have been conceived. * * *

The thorny point is instead the non-fulfillment of constitutional provisions not because of the time factor, because they have gradually become outdated, but with reference to norms that have never been activated owing to the unwillingness of the executive or of the legislative body to give them life. This problem cannot be dismissed lightly, if we consider that "delinquencies in the application" of the constitution (as Loewenstein calls them) are rather frequent in most countries. It is safe to ask: "Why?" Is it because the constitutional spirit * * * is withering away? Or is it because of other reasons?

It is well to remind ourselves that most countries have a recent constitution, either because they have re-written their previous charters, or because they have started anew. And contemporary constitutions are, as a rule, bad constitutions—technically speaking. They have come to include unrealistic promises and glamorous professions of faith on the one hand, and numberless frivolous details on the other. * * *

Eric Barendt, AN INTRODUCTION TO CONSTITUTIONAL LAW

26–34 (1998)

Does the United Kingdom Have a Constitution?

There is no document in the United Kingdom equivalent, say, to the United States Constitution of 1787 or to the Constitution of the Fifth Republic in France approved in September 1958. Nor, for that matter, is there a set of

Michel Rosenfeld, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT

Ch. 5 (2010)

One can distinguish at this writing seven distinct constitutional models. These are: the German, the French, the American, the British, the Spanish, the European and the post-colonial model. These models are prototypes constructed with reference to actual historical experiences. The first five refer to their country of origin. The sixth model, the European one, in contrast, refers to its transnational historical setting, the EU, and differs from the five preceding ones in that the actual constitutional experience to which it is linked is one that has arguably not yet borne fruit. [As discussed in D.3.1, below], the European Treaty Constitution approved by all the then EU member states in 2004 has not seen the light of day due to its rejection in the French and Dutch referenda of 2005. This notwithstanding, some have argued that the EU has been operating under a substantive as opposed to a formal constitution for numerous years [see D.3.1, below], and others believe that the future adoption of an EU constitution is imperative [*Id.*]. Finally, the seventh model, the post-colonial one, refers not to a single actual historical experience, but to a number of them in as much as newly independent former colonies have adopted constitutions that may differ significantly from one another but that nonetheless can be subsumed under the same overall model.

[1] *The German Constitutional Model*

The central defining feature of the German constitutional model is the *ethnos* which stands in sharp contrast to the *demos*, its counterpart in the context of the French model. As Ulrich Preuss notes, "Whereas in the French concept the nation is the entirety of the *demos*, in the German . . . concept the nation is a group defined in terms of ethnicity—the nation is *ethnos*" [Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 150 (1994)]. In essence, therefore, the German model is built upon the concept of self-governance by and for a single homogenous ethnic group.

Based on its reliance on *ethnos*, the German model imagines the existence of indissoluble pre-political bonds cemented through a common language, culture, ethnicity, religion, etc., which enjoy absolute primacy (*Id.*:152). Consistent with this, the ethnic-based nation is conceived as indivisible, homogenous, and fully formed prior to the adoption of any constitution or to the advent of the state. Within this perspective, recourse to a constitution is necessary for purposes of enabling an already existing clearly delimited nation to give expression to its will and to fulfill its own unique destiny through the instrumentalities of a suitably structured full functioning state. In the German model, therefore, the state figures as a mere vehicle at the disposal of an already well-defined nation rather than as an indispensable instrument for nation-building purposes. Consistent with this, and as envisioned by the German model's foremost constitutional theorist, Karl Schmitt, democracy and constitutionalism must be reinterpreted in ethnicist terms [Karl Schmitt,

Verfassungslehre (1928); Preuss, 153]. According to Schmitt's ethnicist conception, democracy and the constitution must produce an institutional framework capable of affording political expression to the nation's unique culture and character both as opposed to those of other ethnic groups and as distinguished from the liberal-universalist aspirations originating in the American and French revolutions [Preuss, 153–155] * * *.

[2] *The French Constitutional Model*

In contrast to the German model, in the French model, the nation is built upon the *demos* with the *ethnos* receding to the point of becoming almost invisible. Like the German model, the French conceives the constitutional polity on the scale of the nation-state. But whereas the German model is difficult to imagine beyond the confines of the nation-state given its inextricable grounding on *ethnos*, the French model's ties to the nation-state appear to be historically contingent. Indeed, the French model is grounded on democratic self-government for a polity of equal citizens bound together by a social contract. Consistent with this model, each citizen regardless of his or her ethnic origin, enjoys rights conceived as universal—significantly, as already noted, the 1789 Declaration refers to the rights of “man” and “citizen” rather than to those of “Frenchmen”—and contributes to the democratic shaping of the polity's general will as conceived in Rousseau's political philosophy [Jean-Jacques Rousseau, *The Social Contract* II.2 (1762)].

The French model is thoroughly individualistic and leaves no room at the constitutional level for recognition or deployment of group or national identity. As expressed in the famous dictum of Clermont-Tonnerre in connection with the emancipation of the Jews during the French Revolution, “Everything must be refused to the Jews as a nation and everything must be accorded to the Jews as individuals . . . they must be individual citizens . . . It would be repugnant to have groupings of non-citizens within the state, a nation within the nation”.⁸ In other words, to be a citizen as opposed to a *bourgeois* or purely private person, in a nation-state based on a Rousseauian *demos* [*Id.* II, 2–3], the Jew—and for that matter every one else—must shed his particularity and embrace the ideal of reason, equality among abstract individuals—that is, citizens pulled away from their actual historical circumstances and their multiple links of identity. The Rousseauian citizen must also strive for universality—in the sense that reason, individuality, equality, citizenship, and the democratic polity are conceived as being the same (or at least potentially the same) for everyone everywhere (as opposed to being differentiated in function to linkage to different particular ethnic identities).

The French revolutionary Abbé Sieyès envisioned the nation as “a body of associates living under common laws and *represented* by the same *legislative* assembly” [Emmanuel Joseph Sieyès, *What is the Third Estate?* 58 (1789)]. Within this conception, the constitution is meant to enshrine a democratic nation united through equal citizenship with a political framework suited to give an effective voice to the people as a whole. While Sieyès fitted the constitutional order within the bounds of the nation-state, there seems to be no logical impediment for a *demos* constructed along the lines suggested by Sieyès or Rousseau to become implanted beyond the confines of the nation-state, or

8. Cited in [Pierre Birnbaum, *Un Mythe Politique: “La République Juive”* 44–45 (1988)] (my translation).

even eventually to thrive on the scale of the planet as a whole * * *

[3] *The American Constitutional Model*

The American constitutional model is closer to the French than to the German. But whereas the French Model requires an existing nation * * * the American Model does not. Indeed, the “We the People” that stood behind the 1787 American Constitution were but an embryonic prefiguration of the America which was to be assembled gradually through multiple waves of immigration. For these highly diverse successive waves of immigrants to be able to cohere into “*E Pluribus Unum*”, the motto inscribed on the Great Seal of the United States, it would be first necessary for them to become immersed in a “melting pot” fueled by the norms and values enshrined in the U.S. Constitution. Consistent with this, in the American model, the constitution frames and provides a launching pad to the state and it precedes and anticipates the nation.

The “We the People” that stood at the source of 1787 American Constitution was largely a construct projected into the future in two crucial respects. First, at the time of the making of the constitution, there were no American people in the sense that there was a French people or a German people at the corresponding juncture in the constitutional journeys of those countries * * * [And], second, [t]oday’s multi-ethnic, multi-religious, multi-cultural American nation—unquestionably one of the most diverse nations on the globe due to its being from its very beginning above all a country of immigrants—is certainly very different from the population that might have been plausibly projected into the future as a nation in 1787 America. Again, set against the kind of identity and continuity characteristic of the British, French or German people (at least till the end of World War Two), the American people looms as striking in its diversity and its discontinuity * * *

What is crucial * * * and constitutes a key feature of the American constitutional model is the pivotal role that the Constitution and constitutional identity have had in transforming over time a diverse multi-ethnic and multicultural population * * * into a veritable people and into a unified distinct nation that coheres into a vibrant polity. * * *

[4] *The British Constitutional Model*

One may think that Britain does not have a constitution * * * British parliamentary sovereignty means that the laws of Parliament cannot be struck down for being inconsistent with higher constitutional authority as they can in France, Germany or the United States. Moreover, although Britain has had laws that are constitutional in nature going far back as the Magna Carta, these have not been gathered into a single written document [as emphasized by Barendt above].

From a functional standpoint, however, Britain does have a full-fledged constitutional system. Though formally unrestrained, pragmatically the British Parliament exercises significant self-restraint. Britain also has a long tradition of adherence to the rule of law and its governmental institutions have consistently afforded substantial protection to fundamental rights, even if these are not guaranteed by a higher law * * *

The British constitutional model is one of immanent constitutionalism that emerges gradually by means of a process of accretion. The British Con-

stitution is in part embodied in laws, but these laws stand for far less than the full constantly evolving story. Thus, for example, as one commentator has noted,

If someone had knowledge only of the law of the British Constitution, he or she would believe that the governmental system was much the same as it was in 1700 and be totally ignorant of the ceremonial character of the monarchy and of the country's parliamentary form of representative democracy. These immensely important institutions are regulated not by law but by constitutional conventions. . . . Such norms are part of the country's political culture . . . [William B. Gwyn, *Political Culture and Constitutionalism in Britain*, in *Political Culture and Constitutionalism: A Comparative Approach* 21 (Daniel P. Franklin and Michael J. Baun eds., 1994)].

This gradualism and organic growth is due to many factors peculiar to Britain and to its history. These include the existence of some form of representative government since the end of the thirteenth century, no conquest or domination by a foreign power since 1066, and a cautious common-sense oriented pragmatism that primes adaptation and abhors radical change and rupture (*Id.* 14) * * *.

It is peculiarly British that institutions that were traditionally incompatible with constitutionalism or democracy such as the Monarchy or the hierarchical and hereditary House of Lords, were gradually adapted to serve the institutional and political needs of a contemporary constitutional democracy. Today, the British Monarch plays a constitutional and institutional role that is largely equivalent to that of a president in a parliamentary democracy. The House of Lords, on the other hand, currently plays a role that is akin to that of the second chamber in many parliamentary democracies. And, far from pursuing policies for the privileged by birth, the House of Lords has on several occasions deployed constitution-like obstacles to slow down ill conceived measures resulting from unprincipled surrender to ephemeral majorities by the House of Commons.¹⁷

* * *[W]hat ultimately sets apart U.S. constitutionalism from the British model is that in the U.S. the constitution made in 1787 *transcends* the legal order in which it is deployed whereas under the British model the constitution remains *immanent* within the corresponding order * * *

The UK's constitutional picture is changing, primarily due to transnational legal developments that are, at least in part, constitutional in function even if not constitutional in form. Chief among these are the ECHR (incorporated into UK domestic law through the Human Rights Act of 1998) and various treaties relating to the EU, including the * * * 2007 Lisbon Treaty, which to a large extent amounts functionally to a constitution for the EU [see section D.3.1, below]. Whether these developments will eventually lead the UK to move beyond the British model, or whether they will lead to an "internalization" compatible with the functioning of that model, is impossible to predict at this writing * * *

[5] *The Spanish Model*

17. For example, on October 13, 2008, the House of Lords refused to extend the period of detention under the UK Counter-Terrorism Bill which had been approved by the House of Commons. *The Public Whip Online*.

The Spanish model is distinct in two principal ways. First, it sets a framework for a multi-ethnic polity. And, second, it imports transnational norms, which it incorporated within the ambit of the nation-state * * *

[O]ne of the most daunting challenges confronting the making of the 1978 Spanish Constitution was finding a proper balance between national unity and according a meaningful measure of autonomy to ethnic communities, such as the Basque and the Catalans, which had been suppressed ruthlessly during the Franco régime. The Spanish constituents found an ingenious solution that sought to bridge over contentious disputes over national identity—or more precisely, between national and sub-national identities—through masterful use of open-endedness and ambiguity. The Spanish Constitution provides for “autonomous communities” (*comunidades autonomas*) with significant, though by no means fully spelled out, regional self-government powers³¹ * * *

Although both Spain and the U.S. are multi-ethnic societies, the Spanish constitutional model is multi-ethnic whereas the American one is not. That is because through constitutional accommodation of sub-national ethnic groups, the Spanish model is suitable for a multi-ethnic *polity*. In contrast, the American Constitution and the American model are compatible with a multi-ethnic *society*, but not with a multi-ethnic *polity*. Under the Spanish model, constitutional identity is predicated on striking a balance between national identity and unity and a significant though loosely defined measure of sub-national ethnic identities. American constitutional identity with its heavy emphasis on individualism and on the country as a melting pot designed for the equal enjoyment of constitutional blessings, for its part, leaves little room for ethnic identities within its constitutional landscape.

The second important respect in which the Spanish model differs from the previously examined ones is in its incorporation of transnational (then European Community now) EU norms as part of its recasting the relationship between the Spanish nation and the Spanish state. In 1977, Spain requested admission to what is now the EU and membership in that transnational body became an important symbol in the quest to overcome Francoism * * * Accordingly, with a view to its incorporation into the larger European polity, Spain imported and internalized European democratic values. These values though “external” became easily “internalized” as they were highly consistent with the economic and cultural position that Spain had come to occupy in the mid 1970’s * * *

[6] *The European Transnational Constitutional Model*

[The project to institute a constitution for the EU is currently in flux, as discussed in section D.3.1, below] * * * [Nevertheless the EU experience to date] allow[s] for construction of a transnational constitutional model tailored * * * [to] constitutionalism in the EU.

In terms of erecting a viable constitutional framework and of sustaining a cohesive constitutional identity, the European attempt at transnational constitutionalism appears to suffer from many handicaps that do not affect the constitutional models tailored to the nation-state. * * * They all attempt to harmonize *ethnos* and *demos*, and they seek to adapt norms that are originally external to the relevant constitutional locus, or that exceed the latter

31. See 1978 Spanish Const., arts 143–158.

in their scope (e.g., tailoring universal rights to fit the needs of the French nation-state). The main difference between these models fitted to the nation-state concerns the relative importance that each gives to particular elements, such as *demos* or *ethnos*, and how each model combines or approaches the elements common to all. In contrast, the EU appears to lack a sufficient common *ethnos* or identity * * * Moreover, [EU] institutions may well [hinder] the development of a workable *demos*. It is of course possible that the EU constitutional project will ultimately fail for the above-mentioned reasons. But this need not be the case. Indeed, as illustrated by the American model, a constitutional order and identity can be projected, for the most part, into the future. * * * Why would an adequate, future-oriented constitutional model along comparable lines not work for Europe? * * *

Europe lacks a common *ethnos*. This by itself is not determinative as attested by the success of various constitutions that come within the ambit of the Spanish model. However, none of the working multi-ethnic constitutions on the scale of the nation-state involve as extended an area or anything approaching the number of languages or cultures as those found within the confines of the EU.

On the other hand, one can identify several aspects of a common European identity: common origins, common values, common destiny and a common differentiation from American identity [Armin von Bogdandy, *The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe*, 3 Int'l J. Const. L. (I·CON) 295 (2005)]. Can these, though insufficient for these purposes at present, nevertheless serve to sustain a viable constitutional identity through projection into the future along the lines of the American model? Whereas this possibility cannot be ruled out, the American model's capacity to leave certain crucial aspects of identity formation for the future is at best of limited relevance for Europe. This becomes apparent through a comparison of the American motto "*E Pluribus Unum*" with the EU motto "united in diversity" adopted in connection with the now failed Treaty-Constitution [see section D.3.1, below]. The American motto projects a dynamic and evolving image. With the Constitution acting as catalyst, the American melting pot will, over time, forge one nation from the multitude of diverse foreign nationals who have landed on American shores in successive waves of immigration. In contrast, the European motto aptly characterized as "weak" (von Bogdandy 360) is static and flat. Either the European peoples are already united in their diversity, in which case it is difficult to understand why their constitutional project is so problematic; or, the unity in question is a hope for the future, but rings hollow as nothing that has occurred thus far suggests how this abstract aspiration may be transformed into a concrete process of adaptation.

There may be another plausible interpretation of "unity in diversity" that could prove more productive. In this reading the unity in question would refer not merely to some kind of aggregation of member states. Instead, it could be taken to symbolize, as well, a dynamic process against Balkanization within, and, by extension, among, nation-states. Seen in this light, unity at the European level may serve to defuse tensions within multiethnic states and between individual states and their own ethnic minorities. By transferring some powers from the member states to the Union, more room may be made for greater regional autonomy and diversity. * * *

[A] narrative concerning origins is a crucial component of a viable constitutional identity, and the reference to Europe's "bitter experiences," introduced into the failed constitutional treaty's preamble, provides a promising starting point. Professor von Bogdandy is right that this reference is "minimal", but that may be more a virtue than a vice (von Bogdandy 310).⁸⁸ The reference itself does not provide a sufficient narrative, but it opens the door to one.

It is clear that Nazism and Soviet communism are both European phenomena and the main culprits behind most of the human-caused misery perpetrated in the twentieth century. Moreover, the European project arose on the ashes of Nazism and, recently, has been extended so as to incorporate within the Union the formerly communist countries of Eastern Europe. Accordingly, a European constitutional identity could easily ground its narrative of origins on a repudiation of Nazism and Soviet communism and on the need to create a political order that would minimize the chances of any return to tyrannical totalitarian rule. Such repudiation serves as a negation of a preconstitutional order that is, "preconstitutional" from the standpoint of Europe, not from that of the individual member states that could not ward off totalitarian rule. * * *

If Nazism is regarded as involving a pathological and highly disproportionate promotion of *ethnos*, and Soviet communism as fostering excessive suppression of it, a narrative of origins could link the repudiations, mentioned above, to the building of a transnational multiethnic order. An order such as this would promote a proper equilibrium among a multiplicity of diverse ethnicities. It would resemble the Spanish multiethnic model to some extent, but, by remaining transnational, it would avoid the seeming pitfalls of national multiethnic constitutional orders, such as those of Belgium or Canada.³⁹ * * *

The inclusion of German chancellor Gerhard Schroeder and Russian president Vladimir Putin in the 2004 commemoration of the sixtieth anniversary of the D-day invasion of Nazi-occupied Europe, in Normandy,⁴⁰ is consistent with the narrative of origins sketched above. The Allies who disembarked in Normandy in 1944 were waging war against Germany. Remarkably, however, Chancellor Schroeder stated that the Allied military success had not been a "victory over Germany, but a victory for Germany".⁴¹ Clearly, such a statement would seem most unlikely absent deployment of a narrative of new origins along the lines suggested above.⁴²

In conclusion, it is a quite possible that eventually the EU will create a European constitutional identity and lead to a new transnational European

88. Indeed remembering that the experiences were "bitter" is undoubtedly a potent incentive for cooperation and unity. Dwelling on who was ultimately responsible and on what led to that bitter experience in contrast, is still likely to be quite divisive.

39. The increasing tensions between French-speaking and Flemish-speaking population had led to an increasing fragmentation of the constitutional order in Belgium. In Canada, Quebec has yet to officially accept the 1982 Canadian Constitution, and periodically considers secession from Canada. See *Reference re Secession of Quebec* [1998] 2-S.C.R. 217 [excerpted in chapter 2].

40. See *Leaders and Veterans Mark D-Day*, BBC News UK Edition, June 6, 2004.

41. *Id.*

42. The new origins at stake in the construction of a European constitutional identity require reinterpretation of the "bitter experiences" of the twentieth century, but not of the many European wars that preceded them. For example, it seems highly implausible that a French President would characterize the decisive 1815 victory over Napoleon in Waterloo as a "victory for France."

constitutional model. That model, like the American, would be future oriented; like the Spanish, it would be multi-ethnic. Furthermore, for the European model to foster "unity in diversity," most likely it would not do for it to become a supranational version of a nation-state model. Instead, the European model would have to promote novel vertical and horizontal apportionments of powers allowing supranational, national, and infranational governance to work in harmony without being constrained by traditional forms of federalism or confederalism. The European model would have to find its own balance between *demos* and *ethnos* a balance that would not be like that of the French or the German. Whether a European constitutional identity and a European constitutional model will emerge depends on the EU's will and capacity to generate a genuine constitutional practice and culture. Whether that will actually happen, however, is still very much an open question.

[7] *The Post-Colonial Constitutional Model*

[U]nlike all the previously discussed constitutional models, the post-colonial one is not anchored in any single historical experience. * * * Furthermore, it is important to stress from the outset that the postcolonial model by no means extends to all constitutions adopted by former colonies. Indeed, the U.S., Canada, Australia, Mexico and Brazil are all former colonies that enacted post-colonial constitutions yet none of them fits within the post-colonial model. [T]he post-colonial model encompasses above all constitutions adopted by former colonies in Africa and Asia that achieved independence after World War Two, including India, Nigeria and several former French colonies in Africa. Finally, it is important to stress that whereas it was routine for former colonies to adopt a constitution upon achieving independence in the post World War Two period, many of these were purely nominal * * *

The most salient feature of the post-colonial model is that both * * * the constitutional order and identity of the newly independent former-colony are elaborated in a dialectical process involving an ongoing struggle between absorption and rejection of the former colonizer's most salient relevant identities. At the most abstract level, the former colony adopts a constitutional order fashioned in the image of that of its former colonizer and then seeks to fine tune it to serve its own institutional and identity-based needs. The latter, moreover, will require adjustments to, and departures from, the colonizer's constitutional framework, but the work needed to adapt the inherited constitutional legacy to the needs of the new polity will almost inevitably happen to be defined in terms of the colonizer's political and constitutional framework * * *

The case of India generally fits within this overall paradigm * * * In devolving power and granting India's provinces limited self-rule [during the colonial period], the UK produced a change within its own constitutional architecture (as small and peripheral as it may have been). From India's perspective, however, that change looms larger for at least two important reasons. First, it makes the colonial power's constitutional legacy not purely alien, and thus in embracing substantial portions of that legacy India was not merely incorporating the constitutional heritage of the (*its*) "other". And, second, the limited self-rule at the provincial level paved the way to the establishment of federalism in India, thus allowing for transformation and adaptation of the colonial institutional legacy to suit the particular constitutional needs of the newly independent former colony. From the British perspective, the grant of limited

provincial self-rule may have been for purposes of containment, co-optation and of dividing opposition within India to colonial rule. In contrast, for India besides facilitating the path to independence, provincial self-rule pointed to, and opened the doors towards, federalism which is itself traditionally “un-English”, but which would come to play a central role in India’s constitutional order, culture and identity.

India’s federalism has been the key to providing the (often-uneasy) requisite balance between the unity of the polity and the diversity of the country’s multiple ethnic, religious and linguistic communities. Established to map ethnic and religious communal divides in the 1950 Constitution, Indian federalism was reconfigured starting in 1953 to carve out federated units on a linguistic basis [S.D. Muni, *Ethnic Conflict, Federalism and Democracy in India*, in *Ethnicity and Power in the Contemporary World* (1996)]. This was done to downplay explosive ethnic and religious divisions that threatened to provoke separatism and disintegration (*Id.*).

What is important to retain for our purposes is the dynamic that has bound India’s journey to constitutional democracy to British constitutionalism through a process involving successive waves involving opposition, incorporation and transformation. This is perhaps best exemplified by India’s highly centralized federalism [Sankaran Krishna, *Constitutionalism, Democracy and Political Culture in India*, in *Political Culture and Constitutionalism: A Comparative Approach*, at 164]. Its seeds were implanted by the British administration; its structure and function adapted to the multi-ethnic needs of India’s highly diverse ethnic, religious and linguistic mosaic; and its centralized character with its strong national parliament and dominant prime minister necessary to preserve unity amidst great diversity firmly rooted in the Westminster parliamentary tradition.

In the last analysis, the post-colonial constitutional model is characterized by the predominance of a process involving an ongoing struggle between identification with, and differentiation from, the colonizer’s constitutional identity, through concurrent negation and affirmation of the latter. This model, as in the case of India, is likely to lead to success where a workable balance between acceptance, rejection and transformation of the colonizer’s constitutional culture can be achieved. * * *

Notes and Questions

1. The seven constitutional models discussed above should be regarded as prototypes. As countries change constitutions or as their constitutions evolve, they may deviate significantly or even abandon their original models. Thus, for example, Germany’s post-World War Two Constitution has departed from Schmitt’s conception of a constitutional order predicated exclusively on *ethnos*. Cf. Bernhard Schlink, *Why Carl Schmitt?*, 2 *Constellations* 429, 435 (1996) (stressing that the legal culture of postwar West Germany disavowed Schmitt’s views in order to ground the new legal system on the concept of right and just law). Germany’s current Constitution, the *Grundgesetz* (Basic Law), thus does not conform to the original model, in as much as it requires a filtering of the expression of ethnic identity through certain fundamental constraints, such as

the preservation of "militant democracy." See Basic Law, Arts. 18, 20; Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 37–38 (2nd ed., 1997); and, on respect for human dignity, see the Basic Law, Art. 1 (1) (discussed in Chapter 5). Some do argue that Germany continues to have a strongly ethnocentric constitutional conception of citizenship. See Preuss, *Patterns of Constitutional Evolution*, above, at 115.

2. Six of the seven constitutional models are meant for constitutional ordering within the nation-state. Many incorporate norms that purport to be more than national in scope. The French and American models embrace norms, such as liberty, equality, and democracy, that are envisioned as universal and thus enlist the constitution as a vehicle for the adaptation of universal values within the nation-state. On the other hand the Spanish model incorporates norms originating beyond the borders of the relevant constitutional polity, not so much because they are universal as because they are desirable to a nation-state's transnational objectives. In the case of post-Franco Spain, the transnational objective was membership in what is now the EU. See Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation*, 113 (1996). Similar transnational concerns played a significant role in shaping the postcommunist constitutions in countries in East and Central Europe. See Eric Stein, *International Law in Internal Law*, 88 A.J.I.L. 427, 448 (1994).

3. Do constitutions merely reflect a people's identity, or can they help transform it? Consider the case of Japan as presented by Beer and Itoh:

The barbarism of the Second World War ended with Emperor Hirohito's announcement of surrender on August 15, 1945; Japan has fought in no war since, despite the Cold War environment and the wars of Asian geopolitics. That is part of the remarkable story of constitutional transformation which began under the United State[s]-led Occupation (September 2, 1945–April 28, 1952) and continues on today. Peacefulness has replaced myopic nationalism and militarism at home and abroad; capricious authoritarianism in the name of the emperor is gone and a revolution for human rights, more democratic choice of leaders, and a responsible government of limited and divided powers has been institutionalized.

The Constitution of Japan was drafted, debated, approved by parliament, and promulgated by the emperor between February and November, 1946, in the form of a revision of the 1889 Constitution of the Empire of Japan (the so-called "Meiji Constitution"); it came into effect on May 3, 1947. However, radical systemic changes began in the fall of 1945 when personnel working in the General Headquarters (GHQ) of "SCAP" (Supreme Commander for the Allied Powers), General Douglas MacArthur, disassembled the old order and served as the catalyst for the new democratic order required by Japan's acceptance of the Potsdam Declaration. * * *

* * *

Japan's constitutional revolution since 1945 has fundamentally altered the status of the emperor (*tennō*), ordinary people and their rights, the military, the courts, and local government under the "new" constitution. By "Constitutional revolution" I mean a basic change in the primary pub-

lic values legitimized and served by law and constitution, values diffused throughout a nation's culture by public and private community means of education, persuasion, and coercion such as schools, religious institutions, the mass media, and administrative policies and processes. At the outset of Japan's revolution between 1945 and 1948 the primacy of the emperor and his state was replaced by the primacy of popular sovereignty, the individual person, and human rights, what I would call "human rights constitutionalism." As theory, "human rights constitutionalism" grounds government and law in recognition of the equal inherent dignity of each human and thus in a comprehensive notion of human rights and community responsibility to honor those rights.

* * *

What to do with the emperor may have been the most controversial question in 1946: Arrest him as a war criminal? Replace him with his young son Akihito? Abolish the imperial institution? Leave the emperor with some, most or none of his formal prerogatives under the Meiji Constitution? Or render him virtually powerless in real as well as formal terms, but preserve the dynasty; and in return require his support for a transition to a new and demilitarized democratic order? The latter option was chosen by Occupation policy makers to optimize chances for political stability in the challenging tumult of the early Occupation years.

* * *

Unique [to Japan's Constitution] is Chapter 2, "Renunciation of War," which consists of one provision, Article 9. Article 9 renounces war, military power, and "the threat or use of force as a means of settling international disputes." The presence of military officers in the Cabinet is also prohibited (Article 66, 2); in practice, the military is totally subordinate to civilian leaders, in contrast to its privileged status in pre-1945 modern Japan. In 1928 war was outlawed by the Kellogg-Briand Pact ratified by Japan, the United States, Germany, the United Kingdom, the Soviet Union and other countries. Although technically never revoked, the treaty was disregarded when the Second World War erupted in the 1930s. Particularly since the mid-1950s, Japan has gradually developed a modest military capacity, but as James Auer notes, Japan "simultaneously has attempted to live up to the ideals of the Constitution to a degree that the other signatories of the Kellogg-Briand Pact never have."

—Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* 3, 7, 10 (1996).

4. In addition to conforming to the requirements of constitutionalism and fulfilling the proper legitimating, integrative, and identity-related functions, a working constitution can thrive only so long as certain basic sociopolitical and material conditions prevail. Linz and Stepan include among these, a "free and lively civil society," the existence of a state bureaucracy usable by democratic government for the implementation of policy, and the presence of an "institutionalized economic society"—that is, one that mediates between state and market, as the authors assert that neither a state command economy nor a pure market economy is compatible with a consolidated constitutional democracy. See Linz and Stepan, *Problems of Democratic Transition*. 7–8, 56. Do

you agree? Are there differences among the various models mentioned above? Compare the views of Okoth-Ogendo relating to Africa, discussed above in section B, *Notes and Questions*.

D.3. CONSTITUTIONS BEYOND THE NATION-STATE?

As indicated in section A, since the end of World War Two, a trend has developed toward the internationalization of fundamental rights, on both a global and regional scale. Many of these rights can be called constitutional rights and in some cases, such as in the ECHR, are judicially enforced. In the EU, there are supranational governmental institutions, such as the European Parliament, the European Commission, and the European Council, and an independent judiciary, the ECJ. Are constitutions viable beyond the borders of the nation-state? Strictly speaking, supranational norms do not arise out of constitutions but out of international treaties and covenants. There is thus a question as to how they originate, and whether that eventually translates into democratic legitimacy, but also how they function. Do they or can they function as constitutions?

For example, the EU is based on a principle of limited powers—it may only do what the European treaty law allows for. Thus, it lacks the power over the military and foreign affairs that its members possess as nation-states, and it lacks considerable power over social issues. At least before the Lisbon Treaty entered into force, many also saw a “democratic deficit” because the European Parliament had little power compared with the Commission and the Council, formed by the member states rather than their peoples. See Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 Eur. L.J. 219, 232–35 (1995). On another level some argue that the EU and other supranational entities tend to lack the kind of common culture and national identity that they consider necessary to provide a unified framework and an important source of legitimacy to national constitutions.

The trend toward transnational constitutionalism thus comprises two distinct phenomena: First, the transnational constitution—such as in the EU; and second, the progressive concurrent internationalization of constitutional law and constitutionalization of international law. These are discussed below.

D.3.1. THE TRANSNATIONAL CONSTITUTION: THE EU CONSTITUTIONAL TREATY AND ITS AFTERMATH

The Treaty establishing a Constitution for Europe (TCE) was signed on October 29, 2004 by all (then) twenty-five members of the EU, but failed due to being rejected in ratifying referenda in France and the Netherlands. It was then reintroduced in a different wrapping—the Treaty of Lisbon, signed on December 13, 2007, which entered into force December 1, 2009. Like those that preceded the TCE—for example, the treaties of Maastricht (1992), Amsterdam (1997), Nice (2001)—the Lisbon treaty is a treaty *tout court*. It essentially preserves the constitutional substance contained in the TCE while

scrupulously avoiding references to the term "constitution." In the words of Valéry Giscard d'Estaing, president of the EU Constitutional Convention that culminated in the drafting of the TCE, "[t]he Treaty of Lisbon is the same as the rejected Constitution. Only the format has been changed to avoid referendums" (quoted in several major European newspapers on October 27, 2007). The Treaty of Lisbon was to enter into force after ratification by all EU member states, but the process again suffered setbacks as the Irish rejected ratification in a referendum in 2008, although they eventually agreed to it in a second referendum in 2009. Moreover, there have been challenges in national constitutional courts, such as those in Germany (see *The Lisbon Treaty Case* below) and the Czech Republic. Beyond these legal developments, there has been a long debate over whether the EU should have, can have, or already has, a genuine constitution.

Pavlos Eleftheriadis, *The Idea of a European Constitution*

27 OXFORD J. LEG. STUD. 1 (2007)

The idea of a European constitution is a puzzle. It seems a misnomer. States have constitutions. The European Union is not a state but a group of states joined together under international treaties for certain purposes. To avoid the difficulty we may say that the term constitution is used here in the sense that clubs or associations may have constitutions. They have documents outlining fundamental rules. * * * But once we choose the term constitution, it is hard to avoid a public law framework. The European Union is not a private association. It exercises some of the functions that normally belong to states. It makes laws through the Council of Ministers, the Parliament and other institutions. It has a court, the European Court of Justice, which delivers important rulings each year. Its parliament, the European Parliament, participates in law-making and regularly figures in political debates across Europe. Its executive, the European Commission, is the main spokesman for the Union and acts as an effective regulator of business life. So the Union must be accounted for with concepts and ideas borrowed from public law, not the law of contract or any other area of private law. * * *

1. The Problem

There is already a European Constitution. The European Court of Justice said in 1986 that the treaties were already the 'constitutional charter of the Community'.³ According to the Court's consistent doctrine the Union constitutes a new legal order for the benefit of which the states have limited their rights and under which EU law has immediate direct effect in domestic jurisdictions and is superior to any contrary national law. This is the standard account of the EU's legal order by the Court of Justice. * * * Nevertheless, it is questionable if this is the clearest or most appropriate theory of the Union's legal structures as they stand today.

One of the critics, Joseph Weiler, has asked if the very idea of European constitutionalism is just a set of 'new clothes' that lack 'an emperor'.⁴ Weiler has

3. Case 294/83, *Les Verts—Parti Ecologiste v European Parliament* [1986] ECR 1339, par. 23.

4. See Joseph H.H. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor?* and Other Essays on European Integration (1999) at 238–63 (hereafter Weiler, *The Constitution*).

argued that the official legal doctrine claims that the EU has a constitution, without at the same time meeting the required social and political conditions of constitutionalism. The constitutional analogy fails to capture, he argues, Europe's 'supranational citizenship'⁹ or the co-existence of multiple 'demoi'¹⁰ or any other of the complex institutional features that he calls 'supranational'.¹¹ These concerns follow from the fact that the EU is an entity with strong international features. Its citizenship is entirely reducible to the citizenship of the member states, there is no single hierarchy of courts or institutions, or a clear system of legal sources. Weiler's argument, I take it, is that on this basis the Union should be seen as a *sui generis* entity of international relations whose aim is the 'supranational' peaceful co-existence of autonomous political communities.

The emergence of the draft European Constitution has not changed the argument. Weiler has most recently written that, even after their codification in a new European Constitution, Europe's constitutional features still lack the authority of a constitution and are at most 'a constitution without some of the classic conditions of constitutionalism'.¹³

The standard theory of EU law offered by the Court of Justice can be broken down to these two steps. The Court's theory can be seen to proceed from the following general argument:

(1) The social and political domain of the EU is sufficiently close to that of ordinary politics.

(2) The point and purpose of the EU's institutions is the same or sufficiently similar to that of a domestic institution; the proper framework is that of public law and the proper ideals are those of legitimacy, representative democracy, equal citizenship, efficient law-making and the rule of law that we deploy in the normal domestic case.

*** As the various theories of the EU show, we are still relatively unsure about what the EU is and what it is supposed to do. It lies between domestic political life (the domain of ordinary politics) and international relations (the domain of diplomacy). It concerns economic and social policies as well as the foreign affairs of the member states. Notice how this unsettles our understanding of the law. ***

The most fundamental problem with a theory of European Union law is precisely this background social and political identity. The Union, as we have seen, has both domestic and international features. Its policies include trade, agriculture, environment, consumer protection, intellectual property, competition and many others that have effects for the lives of all citizens of the participating states. At this level, the Union's actions are those of ordinary political life. But this is also an area of international action, where decisions

tion of Europe). See also JOSEPH H.H. WEILER 'THE TRANSFORMATION OF EUROPE', 100 Yale LJ 2403 (1991).

9. Weiler, *The Constitution of Europe*, 342.

10. Weiler, *The Constitution of Europe*, 344.

11. Weiler, *The Constitution of Europe* 270 ff.

13. J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (2003) at 10. See also J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 563-80.

are made by government representatives in diplomatic conferences and take effect internationally. They are not subject to the ordinary separation of powers or to ordinary schemes of accountability and judicial control. Here is then the challenge of fixing the relevant domain: is the Union to be seen as something of an ordinary political institution or is it a phenomenon of international relations? The Court's doctrine of the 'new legal order' assumes, I think, that we may well say that it is close to an ordinary political institution or on the way to becoming one, as summarized in (1). * * *

The Court of Justice has, at least implicitly, said that the domain of EU law is that of ordinary politics, that the conceptual scheme is that of public law suitably adjusted and that the values are the political values of democracy, citizenship and individual rights. We are to test these positions one by one.

2. *The Analogy with Ordinary Politics*

The essence of (1) is that the European Union constitutes a set of institutions that exercise ordinary political power. Their ordinariness consists in the fact that they directly affect daily lives. This entails that the Union's institutions administer the functions normally expected of domestic institutions and are to be judged just like them. Over the years, this argument will go, the Communities have been transformed to a set of institutions that exercise real political power in social and economic fields so that they affect ordinary citizens immediately. The progressive strengthening and increased involvement of the European Parliament can be seen to complement the change. It is the institutional completion of this earlier development. The Union can accordingly be seen as an entity that exercises ordinary political power and begins to resemble a normal decision-making political entity, not a meeting of diplomats. * * *

The Union is at least functioning like a 'self-governing authority' in the following sense:

'The Treaty-[Constitution]' has long been recognised the status of 'basic constitutional charter' of the Union. It is the supreme law of an autonomous legal order endowed with independent judicial review. If the Union emanates from a heterogeneous source, it aims at functioning like a self-governing authority with its own rules of primary law.²¹

We find an even clearer expression of the same premise in a well-known essay by [a] Judge of the European Court of Justice, the late Federico Mancini. Judge Mancini draws an analogy of the Union with a state and argues that the Union will only succeed normatively in protecting its most appropriate values by becoming a democracy itself.

Today's European Union presupposes democracy as a heritage of values and institutions shared by its Member States in all of which the representatives of the people control the action of the executive branch; . . . but it is not itself democratic. Indeed, the Union is doomed never to be truly democratic as long as not only its foreign and security policies, which are openly carried out on an intergovernmental basis, but the very management of its supranational core, the single market, are entrusted, with or without

21. Koen Lenaerts and Damien Gerard, 'The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed' (2004) 29 *European Law Review* 289, at 299–300 (footnote omitted).

a circumscribed control by the European Parliament, to diplomatic round tables. In other words, democracy will elude Europe as long as its form of government includes rules and legitimises practices moulded on those of the international community.²²

The argument cannot make sense without the implicit premise that * * * the European Union already occupies the domain of ordinary political decision-making.

It is a questionable assumption. To determine the social and political domain of the Union we cannot just look at the legal doctrines. We should instead look at social and political realities. Once we peek outside the law, we find that the Union has not yet become a single social and political community of the kind that sustains a political society. There is a European Parliament, but its election is always a series of parallel national affairs, always subject to local conditions. The members of this parliament lack the power or status of their national colleagues. There is a European executive, the European Commission, but its members are appointed by the governments of the member states. There is a central court, the Court of Justice, but its jurisdiction does not extend to hearing appeals from national courts nor to direct actions from individuals against the Union, except in exceptional circumstances. There is the concept of 'European citizenship' but it is entirely dependent on national citizenship. In other words, some legal forms in the Union are analogous to those of a state but they never play the same social and political roles they do within states.

The Union remains socially and politically a coming together of states as independent political societies. As Andrew Moravcsik observes, the powers of the EU remain extremely limited when compared to those of the modern state.²⁴ They do not include, for example, taxation, fiscal policy, immigration, health care, pensions, defence or law and order. In a separate and detailed argument Larry Siedentop has shown that the necessary conditions for a truly European public life are missing.²⁵ There is neither a common language, nor a set of common political ideas nor the other conditions of mutual trust that make political communities possible. The various societies that compose the Union remain independent. Siedentop has famously concluded that Europe 'is not yet ready for federalism'. * * *

3. *The Argument from Sovereignty*

I would like now to address the opposite social and political view of the Union. It suggests that the nature of the Union is simple: it is a meeting of sovereign states. The social domain is therefore just that of international relations and its values are those appropriate to international relations. We may summarize this as follows:

(3) The domain of the Union is that of diplomacy.

22. G. Federico Mancini 'Europe: The Case for Statehood' (1998) 4 *European Law Journal* 29–42, at 41.

24. See Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 603–24 and Andrew Moravcsik, 'The European Constitutional Compromise and the Neofunctionalist Legacy' (2005) 12 *Journal of European Public Policy* 349–86.

25. Larry Siedentop, *Democracy in Europe* (2000).

(4) The conceptual scheme and the values are those of international relations and international law.

At its core, the argument goes, the Union remains an agreement between sovereign states that remain 'masters of the Treaties'. The argument is also that (4) follows from (3), again not logically but pragmatically. It is a view that is heard in the United Kingdom but which has met with very limited support among European observers. * * * Through the doctrine of direct effect, the treaties and the secondary legislation have changed many areas of social life in important ways. Under the principle of supremacy, such laws take precedence over any contrary national law, passed either before or after the EU measure. National courts have consistently given EU laws this force. For all practical purposes the legal order of the EU is one of 'pluralism' * * * These changes cannot be overlooked when we assess the nature of the Union. They have made the internal market possible and have shaped the economic and social life of every member state in profound ways. This is not the domain of diplomacy alone. And if (3) is false, so is (4).

4. A Union of its Own Kind

The failure of (1) and (3) is instructive. It suggests that the question of the relevant domain of this field of law is still open. There is insufficient evidence for drawing the analogy with ordinary political processes. And there is no reason to assume an entity of exclusively international relations. This is a result of the perplexing originality of this Union.

We may propose this new start. The domain of the Union is a mixed one; it combines features from ordinary politics and features from international relations. The features are truly mixed: there is both hierarchy and self-government. Neither is sufficiently strong to defeat the other. We then say that the domain is a mixed one, without specifying further:

(5) The European Union combines ordinary political processes and international relations in a novel arrangement of institutions and practices.

We are now faced, though, with a new set of questions. What conceptual scheme and what values follow from this ambivalent foundation? There is no clear inference from this description, no set of pragmatic considerations that lead to a unique conclusion. * * * Two relevant possibilities are open. They arise out of well-known theories of the international system, when applied to the case of a regional association of states. The first option is to follow a 'realist' international outlook and adapt it to the European Union. By realism I mean the group of theories that consider the appropriate aim of international society to be the construction of elementary rules for the peaceful coexistence of states. The key concept is statehood and the key ideal is peace. * * *

This common set of rules is international law, which accomplishes the authoritative resolution of disputes and the prevention of endless conflict. * * *

If we took this view, we could say something like this:

(6A) The EU is part of an institutional scheme under which the participating states secure both the clarity of their relations and their interdependence in the interest of peace. * * *

The second option from international normative theory has its origins in the liberal political thought of the Enlightenment. It offers a more subtle al-

ternative in the form of Kant's ideal of liberal peace.³¹ For this view, peace is a key value but it does not depend only on the diplomatic interactions of states. It is also dependent on domestic arrangements. Stable and just peace requires that states are good republics that undertake to engage with one another in a federation and treat foreigners with 'hospitality'. * * * [T]he argument is that war is unlikely when those who can decide to take a nation to war are democratically accountable to those who are most likely to suffer it. If this happens to both sides of a possible conflict, war is unlikely. * * *

(6B) The EU is a regional union of republics that respect each other and each other's citizens for the purposes of liberal peace.

The two frameworks, (6A) and (6B), are not far apart. * * * Nevertheless the Kantian framework has the clear advantage that it fits the existing practice closely. * * * EC law requires explicitly now that the member states be serious democracies. The treaties require that all members respect the mutual obligations to one another and to the Union's institutions—and entrusts the Commission with the task of enforcing them. Finally, the Union extends rights to the citizens of other states, through the Community freedoms and by means of numerous pieces of secondary legislation. Hence, all the requirements identified by Kant's liberal peace are met. * * *

5. Interpretations of EU Law

* * * There is a great deal of potential instability in the law as expounded by the Court of Justice. Supremacy, in the uncompromising way it was outlined by the ECJ, was a surprising doctrine. It required the compromise of national constitutional law in a serious way. Accordingly, no national court has accepted it, i.e. as an unconditional doctrine of supremacy as offered by the ECJ. This resistance is entirely consistent with national constitutional laws and was therefore entirely predictable. The resulting legal arrangement between the Union and the member states is one of legal pluralism: there is no secure way of choosing in law between the supremacy of the ECJ or the highest national courts.

Nevertheless, pluralism has not affected the progress of the law of the EU in substance. It seems that the EU has achieved the stable co-existence of states and international institutions without securing first the legal autonomy of the participating states. It has done so by other means. But the realist theory cannot explain how this is persistently achieved. If so, we cannot support (6A) as a full interpretation of EU law. This opens the way for (6B). If stability through independence does not work as an interpretation, we can then move on to the more substantive ideals. By including certain substantive principles we may be able to deal with the tensions created when the loose institutional structure is combined with direct effect and supremacy. The substantive principles are self-government, the rule of law and economic liberty. Self government, which often in EC law is analysed narrowly in terms of 'subsidiarity', protects the standing of states by allocating competences and outlining the scope of EC law. By contrast, the protection of the rule of law and economic liberty invite direct effect and supremacy. We may then say that there is no *a priori* higher status of the treaties towards national law. There

31. Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' in Kant, *Political Writings*, edited by Hans Reiss, trans. by H.B. Nisbet (1991) at 93–130.

is only supremacy in the fields determined by the substantive principles. EU rules prevail only when the subject matter so requires, e.g. in free movement of goods, services and persons. The areas that give rise to direct effect and supremacy are those that safeguard the rule of law and economic liberty and its value. Under this interpretation we consider the formal relation between the EC treaty and national law to be one of equality. Just like in a single constitution, we read the various provisions, as far as possible, as a harmonious whole. We allocate priority, if necessary, only according to content. We are to give effect to EC law only within its own sphere.

Under this reading the supremacy of EC law is conditional on substantive criteria. It is not unconditional, as often (but not always) provided for by the ECJ. It depends on the substantive principles of self-government, the rule of law and economic liberty.

This Kantian reading offers at a higher level of abstraction the same argument that has been offered by Neil MacCormick and Joseph Weiler. Both have criticized the doctrine of the new legal order of the Court of Justice on account of its formality. Neil MacCormick has written that substituting legal pluralism for the idea of a new legal order opens the way for interpreting the EU as a 'polyglot, multi-national and trans- or supra-national commonwealth committed both to democracy and to subsidiarity'.⁴² * * *

As we saw above, Joseph Weiler has also argued for a more substantive account of the Union, in terms of a peculiar constitutional path or '*Sonderweg*'.⁴⁴ Weiler argues that there cannot be a European constitution that follows the public law model as long as there is no prior 'constitutional demos'. Instead, the institutions of the European Union follow for Weiler a new principle, which he calls the principle of constitutional tolerance. The principle acknowledges that states open up their legal orders to Europe and accept the resulting instability for the sake of a substantive ideal. The ideal is one of mutual tolerance for the sake of mutual respect. * * *

Weiler does not elaborate on the content of the ideal of constitutional tolerance. But I believe it is co-extensive with the Kantian scheme of liberal cooperation. The Union's '*Sonderweg*' is the institutional ideal of liberal peace and justice under (6B).

6. *The Federalist Alternative*

There is still a third possibility. Following (5) we may say:

(6C) The EU is a union of states that ought progressively to adopt integrated institutions so as to approximate a federal union as much as possible for the sake of the Union's strength and the pursuit of social justice.

This roughly follows an argument put forward by Jürgen Habermas, the leading European philosopher.⁴⁹ Habermas argues that a European constitution will act as a catalyst for political integration. Its enactment will accelerate, he believes, the process of bringing the peoples of Europe together under

42. Neil MacCormick [Questioning Sovereignty: Law, State and Nation in the European Commonwealth (1999)].

44. J.H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (2003), 7.

49. Habermas, 'Why Europe Needs a Constitution' (2001) 11 *New Left Review* (Sep-Oct), 5.

a single set of political institutions. * * * Habermas' argument is [that] [o]ne ought to proceed with federalist-like structures precisely because the conditions of a united political community are not there. * * *

(7) The eventual formation of a federation is an end in itself.

For Habermas, a new constitutional framework will bring about a new common public sphere and will facilitate the further emergence of common political institutions that will strengthen the Union. Within this institutional framework the special aims of social justice would be much easier to achieve than in the fragmented world of separate states that are equally vulnerable to the forces of economic globalization. So the unity of the political communities is an aim for the sake of justice, not a precondition.⁵¹

[T]his argument is very difficult to put to work as a legal argument. It is a purely teleological argument that disregards ordinary constraints imposed on legal interpretation. It is an invitation to ignore the present allocation of powers between the member states and the union in search of a new allocation. But no legal argument can coherently set out to ignore the very institutions it seeks to interpret. Even a faintly federal system, hence even the weakest of the federalist's aims, will entail a different set of hierarchical relations between the centre and the parts and will undermine the autonomy of the states.

There is another way in which federalism violates the constraints imposed by the EU's domain. This is not just a problem of legal interpretation. Federalism seems the wrong ideal when it comes to understanding a union of states. * * *

[T]he circumstances in Europe are those of separate peoples. The member states remain independent political societies and their citizens do not see themselves as sharing in the same political and social life. * * * [T]he practice of European law confirms this observation. The legal concept of European citizenship is very thin and does not include the right to receive social assistance across states (while it does in federal states). The right of movement from one state to another exists mainly for those who are economically active or can otherwise support themselves, so as not to become a burden on the social welfare systems of the host countries. * * * Socio-economic justice for EC law does not extend beyond the limits of the independent political societies. The same applies to political justice. European citizens can vote and stand in European and local elections, but not in national legislative elections.

This then is the problem with the idea of a federal constitution for Europe as an eventual end, under (6C) and (7). Such an ideal seeks to create relations of citizenships across the various populations. It links the people of Europe with one another and with EU institutions directly, without the mediation of national institutions. It does so in the name of an eventual end of European integration. But such an argument is politically and legally suspect. Legally, because it goes well beyond what the treaties and EC laws permit. Politically, because it does not derive from a coherent view of the limits of political society. * * * Forcing European unity from above will just be a paternalistic imposition on independent political societies, not a moral victory for Europe. * * *

51. Habermas, 'Why Europe Needs a Constitution' 21.

7. Conclusion

*** The EU does not need a new and comprehensive catalogue of political principles that would perhaps simplify its structure. At its core lies a novel sharing of powers among democracies, a commitment to the rule of law and a recognition of economic liberty. Hierarchy and democratic accountability are involved, but so is the self-government of political societies organized as independent peoples. This is not a temporary accommodation but a permanent structure or the Union as a composite union of liberal peoples. ***

[T]he political values underpinning the European Union are as universal and as profound as are the domestic ideals of democracy, justice and liberty. They are answers to a new question, the question of how to secure stability and peace among democratic peoples that are willing to weaken sovereignty and open up their borders to each other for the sake of common values. The question was first put in Europe by Kant and until recently it was thought only a matter for utopian speculation, common in the age of Enlightenment. But in our own lifetimes we have observed this real union take shape and flourish as a political and economic project. Its origin is European, but the ideals of liberal peace that its institutions embody may be truly universal.

Notes and Questions

1. Whether the EU has a constitution or not, its legal regime has a substantial impact on the constitutional order of its member states. These developments have altered traditional conceptions of the sovereignty of the nation-state. *See generally* Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999). Unlike federalism, which can be said to split the atom of sovereignty but does so within the confines of a single constitutional order (see Chapter 4), supranational constitutions (or legal regimes with quasi-constitutional functions) seemingly fragment sovereignty. See Note 7, below. Does this reinforce or weaken constitutionalism and the spread of constitutional norms?

2. How do legal rights and obligations arising out of a treaty among nation-states extend rights to private parties? In the case of the Treaty of Rome, establishing the European Community (which has become the EU), member states argued that its provisions did not explicitly provide for such rights. The ECJ made history in the case of *Van Gend & Loos v. Netherland Inland Revenue Service*, a challenge brought by Dutch citizens against their own state, which, in conformity with the Dutch Constitution, imposed a duty in conflict with the Treaty. The ECJ upheld the challenge, specifying:

*** the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arrive not only where they are expressly granted by the Treaty but also by reason of obligations which

the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

* * *

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [the Treaty] to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, [it] must be interpreted as producing direct effects and creating individual rights which national courts must protect.

—*Van Gend & Loos v. Netherlands Inland Revenue Service*, ECJ 163 E.C.R. 1, 2 C.M.L.R. 105 (1963).

Does the fact that the ECJ held that the tariff prohibition resulted in rights for private parties suggest that the prohibition in question ought to be regarded as a constitutional norm?

3. Community law arguably incorporates certain constitutional precepts enshrined in each member state's national constitution. Advocate-General Roemer stated in *Erich Stauder v. City of Ulm*:

In the present case the Court is not, contrary to what one might think at first sight, being asked about the compatibility of a Community measure with national constitutional law. In fact in view of your previous case-law examination of such a question would be impossible. The court making the reference is asking for a decision on the legal validity of the Commission's decision in the light of 'the general legal principles of Community law in force'. As the ground of the order making the reference shows, the Verwaltungsgericht thus thinks that it must be guided by reference to the fundamental principles of national law. This is in line with the view taken by many writers that general qualitative concepts of national constitutional law, in particular fundamental rights recognized by national law, must be ascertained by means of a comparative evaluation of laws, and that such concepts, which form an unwritten constituent part of Community law, must be observed in making secondary Community law.^g Applying this test, there is accordingly every justification for seeking to test the validity of a Commission decision.

—*Erich Stauder v. City of Ulm*, ECJ, [1969] E.C.R. 419, [1970] C.M.L.R. 112.

Does this make the EU more of a constitutional regime or less than one, inasmuch as it seems partly dependent on the member states' constitutions for its own fundamental law?

4. Determining whether supranational norms are akin to constitutional norms depends, also, on how they are treated in the member states. In *Stauder* the ECJ avoided the conflict in the course of interpreting Community law at the request of a German court. But what about a national court confronting an allegation of conflict between Community law and its own constitution?

^g. Secondary Community law is that part of the Community (now Union) law that is enacted on the basis of the constituent treaties by the appropriate organs of the Community, on the basis of competences conferred by the treaties.

The German Constitutional Court addressed this issue in *Solange I*. Dealing with a potential conflict between secondary, non-treaty European law to be implemented by German administrative authorities and fundamental rights as protected by the German Basic Law, the court specified:

[19] 2. This Court—in this respect in agreement with the law developed by the European Court of Justice—adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source; for the Community is not a State, in particular not a federal State, but ‘a *sui generis* community in the process of progressive integration’, an ‘inter-State institution’ within the meaning of Article 24 (1) of the Constitution.

[20] It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Constitution, nor can [the GCC] rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law. This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. * * *

[22] 3. Article 24 of the Constitution deals with the transfer of sovereign rights to inter-State institutions. * * * But Article 24 of the Constitution limits this possibility in that it nullifies any amendment of the Treaty which would destroy the identity of the valid Constitution of the Federal Republic of Germany by encroaching on the structures which go to make it up. And the same would apply to rules of secondary Community law made on the basis of a corresponding interpretation of the valid Treaty and in the same way affecting the structures essential to the Constitution. * * *

[23] 4. The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by

the standard of the Constitution with regard to fundamental rights * * *

[24] Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.

* * *

Twelve years later the GCC found that the EU had instituted sufficient fundamental rights guarantees as to eliminate the potential for conflict addressed in *Solange I* in *Re the Application of Wunsche Handelsgesellschaft* [also known as *Solange II*], 73 BVerfGE 339 (1986). In so doing, the Court observed:

[A] measure of protection of fundamental rights has been established [since *Solange I*] within the sovereign jurisdiction of the European Communities which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Constitution. All the main institutions of the Community have since acknowledged in a legally significant manner that in the exercise of their powers and the pursuit of the objectives of the Community they will be guided as a legal duty by respect for fundamental rights, in particular as established by the *constitutions of member-States and by the European Convention on Human Rights*. * * *

[36] (aa) This standard of fundamental rights has in the meantime, particularly through the decisions of the European Court, been formulated in content, consolidated and adequately guaranteed.

* * *

[38] The European Court took the essential step (from the viewpoint of the Constitution) in its judgment in the *Nold* case^h where it stated that in relation to the safeguarding of fundamental rights it had to start from the common constitutional traditions of the member-States: 'it cannot therefore allow measures which are incompatible with fundamental rights recognized and guaranteed by the constitutions of those States'.

* * *

[40] The European Court has generally recognized and consistently applied in its decisions the principles, which follow from the rule of law, of the prohibition of excessive action and of proportionality as general legal principles in reaching a balance between the common-interest objectives of the Community legal system and the safeguarding of the essential content of fundamental rights * * *

[44] (e) Compared with the standard of fundamental rights under the Constitution it may be that the guarantees for the protection of such

h. J. Nold KG v. E.C. Commission (4/73): [1974] E.C.R. 491 at 507, [1974] 2 C.M.L.R. 338 at 354.

rights established thus far by the decisions of the European Court, since they have naturally been developed case by case, still contain gaps in so far as specific legal principles recognized by the Constitution or the nature, content or extent of a fundamental right have not individually been the object of a judgment delivered by the Court. What is decisive nevertheless is the attitude of principle which the Court maintains at this stage towards the Community's obligations in respect of fundamental rights, to the incorporation of fundamental rights in Community law under legal rules and the legal connection of that law (to that extent) with the constitutions of member-States and with the European Human Rights Convention, as is also the practical significance which has been achieved by the *protection* of fundamental rights in the meantime in the Court's application of Community law.

* * *

[48] (f) In view of those developments it must be held that, so long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution.

—*Internationale Handelsgesellschaft MbH v. Einfuhr- Und Vorratsstelle Für Getreide Und Futtermittel* [Solange I], 37 BVerfGE 271 (1974).

5. As the EU has become more politically integrated through a series of treaties, the concern from the standpoint of member state national constitutions tends to shift from fundamental rights to structural, sovereignty, and democracy issues. Moreover, concern over the latter would presumably have intensified had the TCE entered into force and will undoubtedly persist upon implementation of the Lisbon Treaty. Can a veritable EU constitution be envisaged without the member states becoming the equivalent of federated entities?

Consider the following cases.

MAASTRICHT TREATY CASE

Federal Constitutional Court (Germany)
89 BVerfGE 155 (1993)

[The German federal government signed the amendments of the European treaties and legal instruments at Maastricht in 1992, in order to achieve further integration on the social, monetary, and political levels of the European Community in a then-to-be European Union. Professors and politicians brought constitutional challenges to Germany's participation in the EU under the German Basic Law.]