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Generic Constitutional Law

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Public Law and Legal Theory Research Paper Series

September 2004

Generic Constitutional Law

David S. Law

GENERIC CONSTITUTIONAL LAW

*David S. Law**

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I. INTRODUCTION

A struggle is underway to preserve the domestic pedigree of American constitutional law. A number of justices – constituting a majority of the current Court – have demonstrated their willingness to treat foreign and international legal materials as both relevant and persuasive. They have done so, moreover, in such hotly contested areas of constitutional law as capital punishment,¹ gay rights,² and federalism.³ Justice Breyer is perhaps the Court's most frequent and outspoken proponent of comparative constitutional analysis⁴; likewise, Justices O'Connor⁵ and Ginsburg⁶ have called publicly upon both lawyers and judges to

¹ See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.) (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion of Stevens, J., joined by Brennan, Marshall & Blackmun, JJ.) (invoking international consensus against execution of juveniles, and reiterating "the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from denial of certiorari) ("[A]ttention to the judgment of other nations' ... can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.") (quoting THE FEDERALIST NO. 63 (James Madison)); *Knight v. Florida*, 528 U.S. 990, 995-97 (1999) (Breyer, J., dissenting from denial of certiorari) (noting the "growing number of courts outside the United States" that have held that lengthy delay in administering the death penalty can render the ultimate execution "inhuman, degrading, or unusually cruel," and observing further that "the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment").

² See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg & Breyer, JJ.) (citing, inter alia, an advisory committee report to the British Parliament, and *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981), a decision of the European Court of Human Rights).

³ See *Printz v. United States*, 521 U.S. 898, 977-78 (1997) (Breyer, J., joined by Stevens, J., dissenting) (suggesting that, "relevant political and structural differences" notwithstanding, European experience with federalism "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

⁴ See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402-03 (2000) (Breyer, J., concurring); *Foster v. Florida*, 537 U.S. at 993 (Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. at 995-97 (Breyer, J., dissenting); *Printz*, 521 U.S. at 977-78 (Breyer, J., dissenting); Stephen Breyer, *The Supreme Court and the New International Law*, Keynote Address to the 97th Annual Meeting of the American Society of International Law, Washington, D.C., Apr. 4, 2003, http://www.supremecourt.us.gov/publicinfo/speeches/sp_04-04-03.html ("What could be more exciting for an academic practitioner or judge than the global legal enterprise that is now upon us?"); see also Elizabeth Greathouse, *Justices See Joint Issues With the EU*, WASH. POST, July 9, 1998, at A24 (quoting Justice Breyer on the desirability of "cross-fertilisation of U.S.-EU. legal ideas"); Linda Greenhouse, *Appealing to the Law's Brooding Spirit*, N.Y. TIMES, July 6, 1997, § 4, at 4 (noting the "intrigued" reaction of legal academics to Justice Breyer's use of comparative constitutional law in his *Printz* dissent).

⁵ Justice O'Connor recently attracted attention for a speech given in Atlanta in late 2003 in which she commented: "I suspect that over time we will rely increasingly, or take notice at least increasingly, on international and foreign courts in examining domestic issues." Bill Rankin, *U.S.*

make greater use of foreign legal materials. Chief Justice Rehnquist has also dabbled in comparative constitutional law⁷ and even encouraged other judges to do the same.⁸ At other times, however, he has landed in the company of Justices Scalia and Thomas,⁹ who have reacted to the use of foreign jurisprudence with scorn.¹⁰ "We must never forget that it is the Constitution for the United States

justice is honored: O'Connor says court has its ear to the world, ATLANTA J.-CONST., Oct. 29, 2003, at A3. Much of the attention was negative. See, e.g., *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 1 (Mar. 25, 2004) [hereinafter *Hearing on H.R. Res. 568*] (opening Statement of Steve Chabot, Chairman of the Subcommittee on the Constitution) (quoting Justice O'Connor with disapproval); Jim Wooten, *Mass. ruling a powder keg*, ATLANTA J.-CONST., Nov. 23, 2003, at P6; *Danger from foreign legal precedent*, WASH. TIMES, Mar. 25, 2004, at A20 (same); Mark Steyn, *Gettin' with the beat*, NAT'L REV., Nov. 24, 2003, at 56 (same). Justice O'Connor's positive inclinations toward comparative legal analysis are not new and have not always attracted such criticism. See Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW., Sept. 1998, at 20-21 ("Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive, with systems that are able to cope with a rapidly shrinking world."); Greathouse, *supra* note 4, at A24 (quoting Justice O'Connor on the increased willingness of the Supreme Court to consult European Court of Justice rulings, and on the need for U.S. judges and lawyers to learn about European law).

⁶ See, e.g., Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) ("In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights"); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. ____ (forth coming 2004) (reproducing Justice Ginsburg's speech of August 2, 2003 to the American Constitution Society); see also *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., joined by Breyer, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination).

⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (Rehnquist, C.J.) (noting the degree of controversy engendered in other countries by the issue of physician-assisted suicide); *id.* at 734 (arguing in light of the Dutch experience with decriminalized euthanasia that physician-assisted suicide carries with it a "risk of abuse" to which legislatures may respond); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing German and Canadian decisions on abortion).

⁸ See William Rehnquist, *Constitutional Courts – Comparative Remarks*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – TURKISH-AMERICAN SYMPOSIUM 411-12 (Paul Kirchhof & Donald P. Kommers eds., 1993) ("[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."); Chief Justice William H. Rehnquist, *Foreword* to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, at viii-ix (Vicki C. Jackson & Mark Tushnet eds. 2002) [hereinafter Rehnquist, *Foreword*] ("I am simply repeating what I've said previously: it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process.").

⁹ See *Atkins v. Virginia*, 536 U.S. 304, 324-25 (2002) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting) ("I fail to see ... how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination.").

¹⁰ The depth of their scorn has been most apparent in death penalty cases. In one instance, Justice Scalia awarded the majority "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus'" for daring to invoke, inter alia, "the views of ... members of the so-called 'world community.'" *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting). Meanwhile, in their dashes over the constitutionality of lengthy execution delays, Justice Thomas has more than once taunted Justice Breyer for resorting to foreign jurisprudence. See *Knight v. Florida*, 528 U.S. at 990 (Thomas, J.,

that we are expounding," warns Justice Scalia; "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."¹¹ On questions of federalism, comparative analysis is simply "inappropriate to the task of interpreting a constitution."¹² In the Eighth Amendment context, "notions of justice" belonging to the "world community" are "irrelevant" because they "are (thankfully) not always those of our people."¹³ As for the constitutionality of laws against homosexual conduct, mere discussion of "foreign views" is not only "meaningless dicta," but also "dangerous,"¹⁴ lest the Court "impose foreign moods, fads, or fashions on Americans."¹⁵ Justice Scalia's battle cry has not gone unheard. In Congress, resolutions condemning judicial use of foreign law have been introduced¹⁶; some have even called for the impeachment of judges who

concurring in denial of certiorari) ("[W]ere there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."); *Foster v. Florida*, 537 U.S. at 990 n.* (Thomas, J., concurring in denial of certiorari) ("Justice Breyer has only added another foreign court to his list while still failing to ground support for this theory in any decision by an American court."). One commentator has likened the exchanges within the Court over the use of foreign legal materials to "a Punch and Judy show," in which "[j]ust about everytime the court cites foreign materials, Scalia and/or Clarence Thomas dissent." Tim Wu, *Foreign Exchange: Should the Supreme Court care what other countries think?*, SLATE, at <http://slate.msn.com/id/2098559> (Apr. 9, 2004). Notwithstanding the disdain he has often expressed for the use of foreign legal authority, however, Justice Scalia has himself invoked the practices of "foreign democracies" in dissent. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 381-82 (1995) (Scalia, J., joined by Rehnquist, C.J., dissenting) (citing the experience of England, Canada, and Australia as evidence that "the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections" and therefore constitutional).

¹¹ *Thompson v. Oklahoma*, 487 U.S. at 868 n.4 (Scalia, J., dissenting).

¹² *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.).

¹³ *Atkins v. Virginia*, 536 U.S. at 347-48 (Scalia, J., dissenting); *see also supra* note 10 (reviewing the reactions of Justices Scalia and Thomas to the use of foreign jurisprudence in Eighth Amendment cases).

¹⁴ *Lawrence v. Texas*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

¹⁵ *Id.* (quoting *Foster v. Florida*, 537 U.S. at 990 n.* (Thomas, J., concurring in denial of certiorari)).

¹⁶ Within the last year, no fewer than three such resolutions have been introduced in the House of Representatives. *See* Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003); H.R. Res. 468, 108th Cong. (2003); H.R. Res. 568, 108th Cong. (2004). House Resolution 468, for example, singles out Justices Kennedy, Stevens, Breyer, and Ginsburg by name for criticism. *See* H.R. Res. 468 at 3-4 (citing *Lawrence v. Texas*, 123 S. Ct. at 2483 (Kennedy, J.); *Atkins v. Virginia*, 536 U.S. at 316 (Stevens, J.); *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari); and a speech given by Justice Ginsburg, cited above in note 6). It further "reminds the Justices ... of the judicial oath they took as a precondition to assuming their responsibilities, and that "the executive and legislative branches ... are the only branches whose officers are elected by the people." *Id.* at 4. The most recent of these resolutions, dubbed the "Reaffirming American Independence Resolution" by its author and co-sponsored by fifty-nine other Republican members of the House, also singles out recent Supreme Court decisions by name and warns that "inappropriate judicial reliance on foreign judgments, laws, or

impose foreign law upon Americans.¹⁷ The barbarians, it would seem, are at the gate.

"We must never forget it is the Constitution for the United States that we are expounding": in certain senses, the warning is meaningless. Surely the members of the Court are at little risk of mistaking any other document for the Constitution. If the point is instead to emphasize that Americans must remain masters of their own destiny, no one on the Court has suggested otherwise. To acknowledge the propriety of comparative analysis hardly entails a surrender of sovereignty. As Justice Breyer has modestly observed:

[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. ... Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a "decent respect to the opinion of mankind."¹⁸

A fairer statement of Justice Scalia's position might be that the Constitution enshrines a set of uniquely American values and ideas, and *only* those values and ideas. But the connections between "our" law and "their" law cannot be avoided. The law of the Constitution is not free of outside influences; nor has it ever been. And if any of the ideas or values enshrined in the Constitution were ever unique,

pronouncements [sic] threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority." H.R. Res. 568 at 2-3; see Congressman Tom Feeney, *Should Americans Be Governed By the Laws of Jamaica, India, Zimbabwe, or the European Union?*, at <http://www.house.gov/feeney/reaaffirmation.htm> [sic] (last accessed Apr. 13, 2004); Wu, *supra* note 10. The resolution argues, inter alia, that "Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations." *Id.* at 2. It quotes Justice Scalia's opinion in *Printz* with approval, while citing *Lawrence v. Texas* as an example of illicit judicial reliance upon "the pronouncements of foreign institutions." *Id.* (quoting *Printz*, 521 U.S. at 921 n.11, and citing *Lawrence*, 123 S. Ct. at 2474). The Subcommittee on the Constitution of the House Judiciary Committee has held hearings on the resolution. See *Hearing on H.R. Res. 568, supra* note 5.

¹⁷ See *Hearing on H.R. Res. 568, supra* note 5, at 42-43 (statement of Representative Jerrold Nadler, Ranking Member of the Subcommittee on the Constitution) (quoting televised remarks of Representative Tom Feeney, and accusing the resolution's sponsors of engaging in "intimidation" of the judiciary by threatening impeachment); Conservative Alerts, *Tell Supreme Court to follow Constitution, NOT Europe: Support the 'Reaffirmation of American Independence Resolution'*, at <http://capwiz.com/sicminc/issues/alert/?alertid=5435001&type=CO> (last visited Apr. 13, 2004), cited in Wu, *supra* note 10.

¹⁸ *Knight v. Florida*, 528 U.S. at 997 (Breyer, J., dissenting from denial of certiorari) (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

this nation has endeavored only to spread them, not to monopolize them. Federal constitutional law influences, and is influenced by, other bodies of law. It both presupposes¹⁹ and invokes²⁰ English common law; it enjoys complex relationships of reciprocal influence with fifty bodies of state law²¹; abroad, it influences judges in the reasoned elaboration of legal principles that have in some cases been borrowed directly from the U.S. Constitution.²² Cross-border trade in constitutional thinking is a reality,²³ and the U.S. is a major participant – no less so because some of its judges may prefer to export than to import.²⁴

The interconnectedness of federal constitutional law to other bodies of law illustrates a broader phenomenon of constitutional adjudication. To expound a

¹⁹ See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 188 (1967); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 18-20 (1977); G. Edward White, *Recovering Coterminal Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 68 (Maeva Marcus ed., 1992) (quoting the view expressed by Chief Justice Oliver Ellsworth in his capacity as circuit judge in *United States v. Williams*, reported in *CONN. COURANT* (Hartford), Apr. 30, 1799, that "the common law of England had become part of the 'laws of the United States' within the meaning of Article III").

²⁰ See, e.g., U.S. CONST. amend. VII ("In Suits at common law, ... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *id.* amend. V (invoking, but not defining, "liberty," "property," and "due process of law").

²¹ See, e.g., Samuel C. Kaplan, "Grab Bag of Principles" or Principled Grab Bag?: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463 *passim* (1998) (emphasizing the influence of state common law upon federal constitutional law); Judith S. Kaye, *The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 738-52 (1992) (discussing whether state courts should employ common law or constitutional approaches in response to common legal questions, and whether such approaches should be federal or state in character); Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 *passim* (1993) (bemoaning the extent to which state courts have adopted federal constitutional doctrine as state constitutional law).

²² See, e.g., P.K. Tripathi, *Perspectives on the American Constitutional Influence on the Constitution of India*, in *CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE* 72-89 (Lawrence Ward Beer ed., 1979) (describing Indian borrowing of American fundamental rights doctrine as "direct and massive"); Susan Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415 *passim* (1999) (describing the post-war imposition of American constitutional ideals and language upon Japan).

²³ See, e.g., The Honourable Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16-27 (1998) (describing the "globalization" of human rights law, driven in part by increased "dialogue" among judges and courts); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192-204 (2003) [hereinafter Slaughter, *Global Community*] (describing a "global community of courts" that engages in "constitutional cross-fertilization"); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L. L. 1103, 1109-23 (2000) (describing "substantial and growing judicial cross-fertilization" in the areas of human rights law and constitutional law).

²⁴ See, e.g., Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 325 (1999); Slaughter, *Global Community*, *supra* note 23, at 199 (deeming it historically "unusual" that American courts are "beginning to borrow as well as to lend").

constitution – any constitution - is to draw upon and contribute to a body of principle, practice, and precedent that transcends jurisdictional boundaries. Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences, in response to shared theoretical and practical challenges. These commonalities are at points so thick and prominent that the result may fairly be described as *generic constitutional law* – a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction. The mere fact that courts borrow law from one another is unremarkable. But generic constitutional law exists for more systematic reasons having to do with interlocking relationships of history and sovereignty, adjudicative methodology, the broad normative appeal of various rights, and the tensions underlying judicial review itself. Some have suggested, to the contrary, that constitutional law is, for cultural and social reasons, less likely to be shared than other types of law.²⁵ Such factors undeniably justify or even necessitate departures from practice elsewhere; nor can the force of sheer nativism be disregarded.²⁶ The fact that profound dissimilarities and prejudices exist, however, only makes the phenomenon of generic constitutional law all the more remarkable.

A search of law journals on Westlaw and LexisNexis reveals very few appearances of the phrase "generic constitutional law," all of them the work of Justice Hans Linde of the Oregon Supreme Court, who has on occasion used the term as a mild epithet to criticize the manner in which state judges adopt federal constitutional formulae in lieu of ascertaining whether an approach specific to state law might be in order.²⁷ Even by itself, the word "generic" already carries

²⁵ See Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 256 (Joseph S. Nye ed., 2000) (finding "reason to suspect that the phenomenon of preferring indigenous law making for its own sake is especially true in the making of constitutions"); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 8 (2d ed. 1993) ("Societies largely invent their constitutions, their political and administrative systems, even in these days their economies; but their private law is nearly always taken from others.") (quoting S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW, at ix (1969)).

²⁶ Compare, e.g., Schauer, *supra* note 25, at 260 ("Clearly, in some political quarters, avoiding American influence just because it is American often appears to be a driving force.") with *supra* notes 9-14 and accompanying text (highlighting the views of Justices Scalia and Thomas).

²⁷ See Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 219-21 (1992), reprinted in Linde, *supra* note 21 ("[M]ost state courts do not free themselves from Supreme Court formulas but treat them as generic constitutional law."); Hans A. Linde, *E Pluribus – Constitutional*

unfavorable connotations: it can imply something undifferentiated, substandard, undistinguished. None of these critical or negative connotations are intended here. As used here, generic constitutional law is a descriptive concept, not a normative or evaluative one. Least of all does it comprise a grand theory of law. The claim that constitutional law across the globe is undergoing a process of teleological convergence is well beyond the scope of the concept. It is not argued that there exists a "universal natural law" of constitutional democracy - that certain constitutional principles are universally true or good, and that it is the task of judges worldwide to ascertain them.²⁸ Nor is it argued that constitutional principles - or constitutions themselves - inevitably serve certain goals that are conducive to human flourishing,²⁹ though the existence of generic constitutional law may be taken as inconclusive evidence in support of such arguments.

The goal of this essay is, instead, to explore why, as Justice Breyer puts it, "[j]udges in different countries increasingly apply somewhat similar legal

Theory and State Courts, 18 GA. L. REV. 165, 175 (1984) ("What should a state court do when faced with a constitutional claim that is phrased in federal terminology and cites only federal cases, though there could be an equivalent claim under the state constitution? ... Must constitutional claims be identified by brand, or is there such a thing as generic constitutional law?"); see also James L. Oakes, *Hans Linde's Constitutionalism*, 74 OR. L. REV. 1413, 1418 (1995) (quoting INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM 99 (Robert F. Nagel ed., 1995)); Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 236 n.15 (1998) (quoting Linde, *Are State Constitutions Common Law?*, *supra*, at 219); John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 231 n.16 (1994) (citing Linde, *Are State Constitutions Common Law?*, *supra*, at 219).

²⁸ Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-August 2004, at xx (opining that the use of foreign law as authority flirts with the "discredited" idea of "universal natural law"); see, e.g., Richard Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAPMAN L. REV. 1, 2, 7-8, 27-28 (2003) (arguing that natural lawyers identified "certain powerful principles" involving the protection of liberty and property "to which any conscientious application of constitutional discourse or doctrine must turn if it is to meet the minimum standards of intellectual coherence and practical common sense"). See generally Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819, 890 (1999) (describing the "universalist" school of constitutional interpretation and its normative premise that "the presence of a legal principle in many legal systems is evidence of its truth or correctness").

²⁹ See, e.g., RICHARD EPSTEIN, SKEPTICISM AND FREEDOM 19 (2003) ("[T]hose principles and practices that endure generally do so because they serve well the communities of which they are a part."); RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82-140 (1999) (arguing that constitutions cannot survive unless they coordinate behavior in a way that creates opportunities for mutual gain); Epstein, *supra* note 28, at 7-8, 27-28 (arguing that utility-maximizing legal arrangements that harness "the best in human nature" have been "intuited and acted upon by justices of all political persuasions"). See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238-69 (1999) (offering examples and critiques of "functionalism" in comparative constitutional analysis).

phrases to somewhat similar circumstances."³⁰ Three explanations are suggested here. First, constitutional courts experience a common theoretical need to justify the sometimes countermajoritarian institution of judicial review. This concern, and the stock responses that courts have developed, amount to a body of *generic constitutional theory*. Second, courts employ common problem-solving skills in constitutional cases. The use of these skills constitutes what might be called *generic constitutional analysis*. Third, courts face a tangle of overlapping influences, largely not of their own making, that encourage the adoption of similar legal rules. These similarities make up a body of *generic constitutional doctrine*. Each will be considered in turn. It is the contention of this essay that the combination of theory, methodology and doctrine amounts to nothing less than generic constitutional law. In closing, this essay discusses why the idea of generic constitutional law should matter to academics, and whether judges can or should resist its development.

II. GENERIC CONSTITUTIONAL THEORY

A. *The Ubiquity of the Countermajoritarian Dilemma*

What are the concerns of constitutional theory? Harry Wellington has suggested that the contemporary debate in this country centers upon a handful of interrelated questions:

[W]hat are the sources of law available to participants in constitutional adjudication? What is a good argument? ... What counts as the justification for a Supreme Court decision interpreting the Constitution? [B]y what right does the Court use a particular interpretive method? [H]ow are the other branches of government and individuals regulated by the Court to keep the justices in their place?³¹

There is nothing exclusively American about these questions. One can expect the relative emphasis that they receive to vary from place to place, along with the answers that happen to be in vogue, but such shifts in emphasis and intellectual

³⁰ Breyer, *supra* note 4.

³¹ HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION* 47 (1990).

fashion occur domestically as well. Some theoretical inclinations, such as interpretivism³² and originalism,³³ may for now be characteristically American. But the most fundamental of these concerns – the one from which the others derive their urgency – has a generic flavor, and that concern is the countermajoritarian dilemma. As John Hart Ely puts it, "the central function, ... is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."³⁴ Elsewhere as here, interference by unelected judges with the acts of elected officials is vulnerable to both popular opposition and theoretical criticism. This tension does not always express itself in the same conceptual vocabulary. These differences in vocabulary reflect in part the fact that judges face different points of departure when exploring the limits of their power: some inherit a position of

³² See David M. Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 136-37 (1996) (observing that, while most constitutional courts first resolve questions of textual interpretation then turn to apply principles of rationality and proportionality, the U.S. Supreme Court "typically understands its role as an interpretive one from beginning to end").

³³ See L'Heureux-Dubé, *supra* note 23, at 32-33 ("Originalism, an extremely controversial question in the United States, is usually simply not the focus, or even a topic, of debate elsewhere").

³⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 4 (1980); see, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-28, 128 (2d ed. 1986) (1962) ("[S]ome do and some do not care to recognize a need for keeping the Court's constitutional interventions within bounds that are imposed, though not clearly defined, by the theory and practice of political democracy."); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-6, at 302-11 (3d ed. 2000) (observing that, for decades, "many of the most prominent, and most skillful, constitutional theorists [have] treated the question of the legitimacy of judicial review as itself the central problem of constitutional law," and citing many examples); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 282-83 (1957) ("[T]o affirm that the Court supports minority preferences against majorities is to deny that popular sovereignty and political equality, at least in the traditional sense, exist in the United States[.]"). The tension between judicial review and democracy disappears, of course, if one incorporates judicial review into the very definition of democracy, as has often been suggested, under the rubric of "constitutional democracy" or otherwise. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 231-40 (1996 ed.) (arguing that "a democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself in a certain way," and that a supreme court helps to realize this ideal by employing "public reason," which citizens and legislators need not always do); ELY, *supra*, at 73-183 (articulating a "representation-reinforcing theory of judicial review" under which courts police and uphold the democratic process). Similarly, the tension abates to the extent that the views of the judiciary follow those of the electorate, whether as a consequence of direct or indirect popular control of judicial selection or otherwise, or to the extent that courts are simply ineffectual in the face of political opposition. See, e.g., Dahl, *supra*, at 284-86 (arguing that, owing to the regularity with which Supreme Court justices are appointed and the attention that is given to their views, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States"); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* *passim* (1991) (arguing that courts cannot usually effect social reform without the support of the elected branches).

strength relative to the elected branches, others a position of weakness. All of these points, however, fall along a single continuum. As Chief Justice Rehnquist has remarked of the proliferation of judicial review over the past half century: "The provisions of the constitutions vary, the structure of the court systems may differ, but the underlying ideas are the same."³⁵ Foremost among these ideas is the deceptively simple notion that "political power should be constrained by law."³⁶ All courts with the power of judicial review struggle to define the implications of this idea, and their struggles inevitably resemble one another.

Consider the United Kingdom, a country in which the countermajoritarian dilemma might be supposed not to exist. It is conventional wisdom that, in lieu of a written constitution, the U.K. possesses an unwritten constitutional order premised upon the doctrine of parliamentary sovereignty, or legislative supremacy.³⁷ The few known cases in which English judges have claimed the

³⁵ Rehnquist, *supra* note 8, at vii.

³⁶ *Id.*

³⁷ See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23-32, 39-70 (10th ed. 1959) (defining the English "constitution," and identifying parliamentary sovereignty as one of its components); JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT 1 (1999); SIR WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 25-31 (8th ed. 2000). The U.K.'s membership in the European Union and its adoption of the Human Rights Act 1998, c. 42 (Eng.), have strengthened the judiciary's hand but are, at least in theory, consistent with some notion of parliamentary sovereignty, albeit perhaps an attenuated one. In enacting the European Communities Act 1972, ch. 68 (Eng.), Parliament instructed domestic courts to give E.U. law precedence over domestic law, and the courts have responded by suspending and even striking down parliamentary legislation. As a consequence, the courts have suspended and struck down British legislation for incompatibility with EU law. See, e.g., *R. v. Sect'y of State for Transport ex parte Factortame Ltd.* (No. 2), [1991] 1 A.C. 603, 661-65, 676 (H.L.) (speech of Lord Goff) (granting injunctive relief against enforcement of a fishing vessel registration law); *R. v. Sect'y of State for Employment ex parte Equal Opportunities Comm'n*, [1995] 1 A.C. 1, 26-28, 31-32 (H.L.) (speech of Lord Keith) (holding that a British statute guaranteeing severance pay and compensation for unfair dismissal discriminated indirectly against female employees, in violation of E.U. law); Lord Irvine of Lairg, *The Development of Human Rights in Britain under an Incorporated Convention on Human Rights*, 1998 PUB. L. 221, 229. Judicial review of parliamentary legislation for conformity with EU law is said to be consistent with parliamentary sovereignty for the reason that Parliament itself chose to give EU law supremacy over domestic law and is free to revisit that decision. See P.P. Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, 11 Y.B. EUR. L. 221, 247-49 (1991) (discussing the opinion of Lord Bridge in *Factortame II*). Nevertheless, the fact that British courts may now "disapply" acts of Parliament amounts to a "revolutionary change" that casts doubt upon the "hallowed rule that Parliament cannot bind its successors." WADE & FORSYTH, *supra*, at 28. Moreover, further challenges to the traditional understanding of parliamentary sovereignty await. As Craig observes, if Parliament were explicitly to state its intent to depart from E.U. law in a particular context, "the courts might follow the national statute, but they might also state that this form of 'partial compliance' with [E.U.] law is not possible; that while the United Kingdom remains in the [E.U.] it cannot pick and choose which norms of [E.U.] law to comply with." *Id.* at 253. At the extreme, parliamentary sovereignty may itself fall victim to the passage of time "if it ever comes to be generally accepted by British legal

ability to strike down legislation are several centuries old.³⁸ In particular, Chief Justice Coke's opinion in *Bonham's Case*³⁹ has sometimes been read as asserting a power on the part of judges to "controul Acts of Parliament" contrary to natural law.⁴⁰ Whatever Coke may have originally intended, however, the interpretation that has since prevailed is that *Bonham's Case* merely establishes a rule of statutory construction.⁴¹ Indeed, Coke himself offered this interpretation in later years.⁴² It is natural to think, moreover, that the Glorious Revolution of 1688 resolved any lingering doubts in favor of Parliament.⁴³ In short, *Bonham's Case* is no *Marbury v. Madison*.⁴⁴

officials that Parliament has lost its authority to withdraw Britain from the European Community." GOLDSWORTHY, *supra*, at 244.

The Human Rights Act 1998, in turn, is the means by which the U.K. has chosen to incorporate the European Convention on Human Rights into domestic law. The Act does not empower judges to strike down parliamentary legislation. Instead, it directs judges either to interpret challenged legislation in a manner consistent with the Convention or, if that is not possible, to issue a nonbinding "declaration of incompatibility" upon which it is in Parliament's sole discretion whether to act. If Parliament does not respond to a domestic ruling with appropriate amending legislation, however, the result is likely to be an adverse ruling by the European Court of Human Rights that binds the U.K., as a signatory to the Convention. See, e.g., Lord Irvine, *supra*, at 225-29; Lord Lester of Herne Hill QC, *Human Rights and the British Constitution*, in THE CHANGING CONSTITUTION 105 (Jeffrey Jowell & Dawn Oliver eds, 4th ed. 2000); Geoffrey Marshall, *The United Kingdom Human Rights Act, 1998*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 8, at 108-114 (criticizing the Act on the grounds that it fails, both in theory and in practice, to incorporate the Convention into British law).

³⁸ See Lord Irvine of Lairg, *Judges and Decision-Makers: The Theory and Practice of Wednesbury Review*, 1996 PUB. L. 59, 61 (discussing *Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610), and *Day v. Savadge*, Hob. 85, 80 Eng. Rep. 235 (K.B. 1614)).

³⁹ 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).

⁴⁰ See, e.g., GOLDSWORTHY, *supra* note 37, at 6 & n.34 (deeming this view a "historical myth[]"); David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 884-89, 958 (2003) (noting that "subsequent interpretations, or misinterpretations," of *Bonham's Case* have "asserted the primacy of higher legal principles over contrary acts of Parliament," but also arguing that Coke's view implicitly "support[s] a limited constitution based upon democratic legitimacy"). Coke soon thereafter repeated his suggestion that judges might strike down statutes on the basis of the common law. See *id.* at 888 n.189 (discussing *Rowles v. Mason*, 2 Brownl. & Golds. 192, 198, 123 Eng. Rep. 892, 895 (C.P. 1612)).

⁴¹ See, e.g., Lord Irvine, *supra* note 38, at 61; Jenkins, *supra* note 40, at 887-88; Paul Craig, *Public Law, Political Theory and Legal Theory*, 2000 PUB. L. 211, 213 ("[M]any contend that Coke was arguing for no more than a strong rule of construction, rather than a power to invalidate as such.").

⁴² See Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 3-4 (2001).

⁴³ See *id.*; Lord Lester, *supra* note 37, at 90.

⁴⁴ 5 U.S. (1 Cranch) 137, 173-80 (1803) (establishing the power of the federal judiciary to invalidate legislation on constitutional grounds). The English judiciary has, however, demonstrated that the power of interpretation may be used so aggressively as to nullify statutory language. The well known *Anisminic* case concerned the ability of the judiciary to review the decisions of a commission charged with deciding claims for compensation respecting property seized by the Egyptian government in the prelude to the Suez Crisis. In blunt and unambiguous terms, the

In fact, there exists a thriving debate in the U.K. over the normative foundations and proper extent of judicial review.⁴⁵ A detour into English administrative law is necessary to illustrate the origins of the debate – though, as will become apparent, no firm distinction can be drawn in the U.K. between administrative and constitutional law. In the U.K. as in the U.S., it is routine for judges to review the substance of administrative action. In the U.S., such review ordinarily occurs at the federal level under the comprehensive scheme established by the Administrative Procedure Act and thus requires no special normative justification. English judges, however, lack such a general statutory warrant, and the standards they apply are of their own creation. In the absence of an express statutory mandate, the question therefore arises: what is the justification for administrative review?

The conventional justification is the so-called *ultra vires* doctrine. The argument is a simple one. It is the role of the courts to police the adherence of executive action to its legislative bounds. To this uncontroversial premise, the English courts add a variety of assumptions as to legislative intent. One particular assumption – the proverbial nose of the camel under the tent – enables them to review the substance of executive action: when the legislature confers discretion upon the executive, it is presumed to intend that the discretion be exercised reasonably.⁴⁶ Champions of the *ultra vires* doctrine deem it decisive

relevant statute precluded all judicial review of the commission's decisions: "The determination by the commission of any application made to them under this Act shall not be called into question in any court of law." Inevitably, a disappointed claimant sought judicial review of the commission's decision. The House of Lords, in its capacity as the nation's highest court, did not purport to strike down the language in question, but instead manipulated the distinction between jurisdictional error and legal error to read the ouster clause into oblivion. See *Anisminic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147, 169-75 (H.L.) (speech of Lord Reid); *id.* at 206-10 (speech of Lord Wilberforce); see also J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 106-08 (5th ed. 1997) (observing that *Anisminic* "shows how, on occasion, the courts will resist the strongest efforts of the government to exclude them from reviewing executive discretion"); The Rt. Hon. Lord Woolf of Barnes, *Droit Public – English Style*, 1995 PUB. L. 57, 69 (noting with satisfaction that Parliament has not since dared to enact similar language).

⁴⁵ See Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 CAMBRIDGE L.J. 63 *passim* (1998) (providing an overview of the debate); Craig, *supra* note 41, at 231 & n.4 (canvassing prominent literature on both sides).

⁴⁶ The relevant standard of review is phrased in highly deferential terms and is known as *Wednesbury* review, named for the decision in *Associated Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223. See DAVID ROBERTSON, *JUDICIAL DISCRETION IN THE HOUSE OF LORDS* 238-62 (1998) (discussing *Wednesbury* review and its variants); *infra* notes 217-221 and accompanying text (describing *Wednesbury* review, and contrasting it with the more stringent proportionality review of the kind common elsewhere in Europe).

that the doctrine is consistent with parliamentary sovereignty: because parliamentary sovereignty is a fact of the unwritten constitution – indeed, the touchstone of legitimacy – conformity to parliamentary sovereignty is the sine qua non of any theory of judicial review. On this view, even if it is a legal fiction on the part of judges to impute an entire body of procedural and substantive requirements to legislative intent, the fiction is a useful and indispensable one.⁴⁷ It dictates, however, that courts are powerless to strike down legislation openly.

Others criticize the ultra vires doctrine as a malign fiction from which the courts must liberate themselves if they are to fulfill their true role in the constitutional order.⁴⁸ These critics – a number of prominent judges among them – emphasize that the courts are in truth engaged in the enforcement of substantive legal norms, notwithstanding the intent of Parliament, and have been at this task for centuries. The legitimacy of this enterprise, they argue, rests upon the normative force of the legal principles themselves. It is a logical extension of the argument to insist that some principles are so compelling that neither the executive *nor the legislature* may override them. Indeed, on this view, the notion of parliamentary sovereignty is itself contingent upon adequate normative justification.⁴⁹ In the words of High Court judge Sir John Laws, the absence of a

⁴⁷ See, e.g., Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 CAMBRIDGE L.J. 122, 136 (1996) ("No one is so innocent as to suppose that judicial creativity does not form the grounds of judicial review; but by adhering to the doctrine of ultra vires the judiciary shows that it adheres to its proper constitutional position[.]"); Mark Elliott, *The Ultra Vires Doctrine In a Constitutional Setting: Still the Central Principle of Administrative Law*, 58 CAMBRIDGE L.J. 129, 134-58 (1999) (acknowledging "shortcomings" of "traditional" ultra vires doctrine, but urging a "modified version" based upon the "rule of law" in lieu of "taking the constitutionally unacceptable step of challenging the sovereignty of Parliament").

⁴⁸ See, e.g., Craig, *supra* note 41, at 231-37; The Hon. Sir John Laws, *Law and Democracy*, 1995 PUB. L. 72, 78-79 & 79 n.23; Lord Woolf, *supra* note 44, at 65-69 (likening the ultra vires doctrine to a "fairy tale," and arguing that courts need not uphold legislation that undermines or destroys the "rule of law").

⁴⁹ See, e.g., Craig, *supra* note 45, at 86-90 (arguing that judicial review "can only be legitimated ... by asking whether there is a reasoned justification which is acceptable in normative terms"); Craig, *supra* note 41, at 230-31 (arguing for the view that "Parliament has sovereign power, provided that there is the requisite normative justification for that power"); Laws, *supra* note 48, at 86-87 ("[T]he doctrine of Parliamentary sovereignty cannot be vouched for Parliamentary legislation; a higher-order law confers it, and must of necessity limit it."); The Hon. Sir Stephen Sedley, *Human Rights: a Twenty-First Century Agenda*, 1995 PUB. L. 386, 389-91 (describing a "new and still emerging constitutional paradigm" of "bi-polar sovereignty" and "fundamental human rights" predicated upon "shared perceptions" of society's needs); Lord Woolf, *supra* note 44, at 67-69 (arguing that parliamentary sovereignty must yield to the "rule of law," upon which "parliamentary democracy" is premised).

"sovereign text" means that "the legal distribution of public power consists ultimately in a dynamic settlement, acceptable to the people, between the different arms of government."⁵⁰

There is a "clear parallel," as Lord Irvine has observed, "between the debate in America about the powers of the courts in relation to the Constitution, and the discourse in Britain concerning the desirability of parliamentary sovereignty."⁵¹ The difference is one of vocabulary and degree, not kind. At the heart of both debates lie the same questions: "How much power should the courts have over the other branches of government? And in what circumstances, if any, is it appropriate for the judicial branch to overrule elected legislators and administrators in order to safeguard individual or group interests?"⁵² Indeed, the example of the U.K. suggests a broader point: if a country with no written constitution and a tradition of legislative supremacy nevertheless generates debate over the extent to which judges can and should invalidate legislation, such conflict may be expected in other countries as well.⁵³

B. Two Approaches to the Definition and Justification of Judicial Power

The debate in the U.K. highlights not only the core challenge of generic constitutional theory – namely, the articulation and justification of the limits of judicial power – but also the two basic approaches that may be adopted in response. The first may be called the hierarchy of laws approach; the second, the core interests approach. Under the *hierarchy of laws* approach, legal rules fall within categories – constitutional, legislative, or judicial – according to their formal status or origin. These categories constitute a simple hierarchy that, if observed, keeps both judicial and legislative power within the limits of legitimacy: constitutional law trumps legislation, which in turn trumps judge-

⁵⁰ Laws, *supra* note 48, at 81.

⁵¹ Lord Irvine, *supra* note 42, at 6.

⁵² *Id.*

⁵³ Cf. Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 599 (1999) (comparing Canada and the U.S.) (noting that "issues of the legitimacy and the scope of judicial activism and of deference to legislative judgments can emerge early even in new constitutional systems.").

made or common law. In the event of conflict between two legal rules, one need only determine the nature of the relevant rules – constitutional, legislative, or judicial – in order to know which rule, and which branch of government, prevails.⁵⁴ This hierarchical sorting approach is implicit among the champions of

⁵⁴ The executive branch and administrative agencies are obviously an important source of law as well, but their position in the hierarchy is hardly enviable: in theory and in practice, administrative lawmaking is subject to both constitutional and legislative restraints, as defined and enforced by the judiciary. Administrative law possesses, at best, the force of legislation and, at worst, no legal force at all, depending upon the extent to which the judiciary decides that the legislature has delegated lawmaking authority. Moreover, in the inevitable absence of precise statutory standards to guide judicial review of agency action, administrative law tends in practice to amount to a body of judge-made law, as illustrated by the British example. See *supra* text accompanying note 46 (discussing how British courts have fashioned principles of administrative law using the fiction of legislative intent). For these reasons, the position of administrative law within the hierarchy is very much within the control of the judiciary.

Courts control the scope of agency decisionmaking in two steps, both of which entail the exercise of considerable judicial discretion. First, they determine the extent of the agency's discretion by interpreting the relevant statute. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (requiring reviewing courts to defer to "reasonable" agency interpretations of governing statutes if Congress has not "directly spoken to the precise question at issue," but begging the question of what constitutes a "reasonable" interpretation). Second, they determine whether the agency has remained within the (judicially defined) limits of its discretion. See, e.g., Administrative Procedure Act § 706(2), 5 U.S.C. § 706(2) (2004) (directing courts to set aside "agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). In France, for example, administrative judges are very reluctant to find that the executive enjoys absolute discretion. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 254, 257 (5th ed. 1998). To a greater extent than might be expected in the U.S. or U.K., French administrative courts are apt to conclude that the administration possesses no discretion whatsoever, and to substitute their own judgment for that of the administration. See, e.g., *Société Civile Sainte-Marie de l'Assomption*, Conseil d'État, Oct. 20, 1972, Lebon 657, concl. Morisot, discussed in Sophie Boyron, *Proportionality in English Administrative Law: A Faulty Translation?*, 12 OXFORD J. LEGAL STUD. 237, 248 (1992) (assessing, de novo, whether and to what extent construction of a major motorway could infringe upon the grounds of a mental hospital, and ultimately authorizing the expropriation of a building, but not the construction of a road junction); *Dame Ebri et Union Syndicale de Défense des propriétaires du Massif de la Clape*, Conseil d'État, May 2, 1975, concl. Guillaume, in 1975 L'ACTUALITÉ JURIDIQUE-DROIT ADMINISTRATIF 311, discussed in Boyron, *supra*, at 242 (deciding, de novo, whether eight hectares of land constituted a "picturesque site" that could not be modified without special authorization); *Gomel*, Conseil d'État, Apr. 4, 1914, Lebon 488, discussed in BROWN & BELL, *supra*, at 258 (deciding, de novo, whether there existed a view of "architectural value" that justified building restrictions). In intermediate situations, when the administration enjoys limited discretion, the courts will visit the merits of agency decisionmaking under an "*erreur manifeste*" standard, BROWN & BELL, *supra*, at 256-58, that is reminiscent, at least in language, of the "arbitrary or capricious" standard imposed in this country by the Administrative Procedure Act. Even when a matter has been committed wholly to the discretion of the executive, however, the administrative courts will ensure that the administration has "committed no error of law or fact," *id.* at 254 (emphasis added), and has acted for a proper purpose, *id.* (citing the doctrinal rule against *détournement de pouvoir*). The fact that the judiciary exercises control over administrative decisionmaking in two stages can make judicial supervision especially difficult to restrict. Courts can manipulate the distinction between the two stages to their own advantage: if the legislature does not permit the courts to review *how* an agency has exercised its discretion, the courts may nevertheless strike at what the agency has done simply by narrowing the *limits* of the agency's discretion. See, e.g., *Bromley London Borough Council v.*

parliamentary sovereignty, for whom the legislative pedigree of a rule is enough to establish its dominance over any common law rule, however ancient the latter may be. In the same vein, it is conventional in this country to say that legislation must yield to the Constitution; indeed, to assert otherwise is to incur a heavy burden of explanation.

Under the *core interests* approach, by contrast, courts resolve interbranch conflict by looking not to the origin of legal rules, but to their substantive content. Interests that are seen as intrinsically deserving of judicial protection will be given such protection. The authorship or pedigree of the legal rules purporting to uphold or restrict those interests may be relevant but need not be decisive. In the U.K., for example, this approach is exemplified by those who argue that the courts possess the power to review legislation for consistency with fundamental legal principles, notwithstanding the absence of a written constitution. The core interests to be protected may be those of the governed, or those of the branches themselves, though judges have an incentive to blur the distinction when their own interests are at stake. Courts have equated their own interests with those of the people by arguing, for instance, that a strong judiciary is required to vindicate the rights of individuals,⁵⁵ or the rule of law,⁵⁶ or democracy itself.⁵⁷ These arguments are unsurprising insofar as they make

Greater London Council, [1983] 1 A.C. 768, 814-20, 823-30, 843-46 (H.L.) (U.K.) (speeches of Lords Wilberforce, Diplock and Scarman) (holding that the meaning of the word "economic" in the governing statute precluded London public transit authorities from reducing fares and generating a revenue shortfall, to be recovered via surcharges upon local governments); *supra* note 44 (discussing *Anisminic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147 (H.L.) (U.K.)); *see also* PAUL P. CRAIG, *ADMINISTRATIVE LAW* 818 (4th ed. 1999) (contrasting the British judiciary's "jurisdictional control" over agency action with its power to review such action for "error within jurisdiction").

⁵⁵ *See, e.g.*, The Hon. Sir John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?*, 1993 PUB. L. 59, 69-79 (arguing that the judiciary must scrutinize governmental action more closely when "fundamental rights" are implicated); Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2026-27 (1996) (arguing that the Supreme Court should and does invoke the separation of powers to defend its ability to vindicate the rights of individual litigants).

⁵⁶ *See, e.g.*, Lord Woolf, *supra* note 44, at 68-69 (commending *Anisminic's* refusal to respect jurisdiction-stripping legislation as an example of the judiciary taking a rare stand in defense of the rule of law).

⁵⁷ *See, e.g.*, Laws, *supra* note 48, at 81, 84-91; *Reynolds v. Sims*, 377 U.S. 533, 566, 568-69 (1964) (holding that the Equal Protection Clause requires apportionment of state legislatures on a population basis) ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.").

judicial assertions of power appear normatively desirable rather than self-serving. Nevertheless, the core interests approach exposes constitutional courts to attack both for the blatantly countermajoritarian way in which it settles the countermajoritarian dilemma, and for the subjectivity inherent in any judicial effort to select and prioritize interests for protection. Judges may seek to downplay the subjective element of this approach by insisting, for example, that they are constrained in their determinations by history and tradition⁵⁸ or text,⁵⁹ or that they will choose only the most incontrovertibly cherished interests for protection.⁶⁰ At root, however, the core interests approach invites judges to define the extent of their own power on the basis of their own value judgments.

C. *The Indeterminacy of the Hierarchy of Laws*

This is not to suggest that the hierarchy of laws approach relieves judges of the obligation – or the opportunity – to define the limits of their power. Legal rules and principles may not be fixedly constitutional, legislative, or judge-made

⁵⁸ See, e.g., *Rochin v. California*, 342 U.S. 165, 169 (1952) (observing that the Due Process Clause protects those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (remarking that limits on substantive due process come from "respect for the teachings of history [and] solid recognition for the basic values that underlie our society") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices.").

⁵⁹ See, e.g., *Rochin*, 342 U.S. at 176-77 (Black, J., concurring) (preferring the judicial enforcement of "express constitutional guarantees" to the "accordion-like" quality of substantive due process analysis); *Griswold*, 381 U.S. at 509 (Black, J., dissenting) (objecting to the tactic of "diluting or expanding a constitutionally guaranteed right" by "substitut[ing] for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning"); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-29, 37-41 (1997) (arguing for textualism in constitutional interpretation). Notably, even the fact that the text imposes too little constraint can be construed as a constraint. See *Nixon v. United States*, 506 U.S. 224, 230 (1993) (holding that the word "try" in the Impeachment Clause lacks "sufficient precision to afford any judicially manageable standard of review," and that the claim that the Senate had failed to "try" an impeachment because it had not provided a full evidentiary hearing was therefore nonjusticiable).

⁶⁰ See, e.g., Lord Woolf, *supra* note 44, at 68-69 (arguing that Parliament cannot repudiate the "rule of law," such as by "removing or substantially impairing the entire reviewing role of the High Court"); The Rt. Hon. Sir Robin Cooke, *Fundamentals*, 1988 N.Z. L.J. 158, 164 (arguing that judges should strike down laws that undermine either "the operation of a democratic legislature" or "the operation of independent courts"); *Glucksberg*, 521 U.S. at 721 (observing that the Due Process Clause only protects "those fundamental rights and liberties which are, objectively, ... 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed'" (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937))).

in character. Because they decide where in the hierarchy particular legal rules and principles belong, judges can effectively manipulate the hierarchy to suit their own ends. The distinction between judge-made law and legislation, for example, might seem to leave relatively little room for doubt. Unlike constitutional law and common law, which are both announced by judges, legislation and judge-made law might at least be distinguished on the basis of authorship. This difference in authorship is the very basis for giving legislation priority over common law. In practice, however, authorship is a vexed question. In the U.K., the courts have employed the device of legislative intent to read into legislation a body of judge-made law that is then used to strike down administrative action. In effect, the judiciary has claimed power over the executive in the name of the legislature. Similarly, though judicial review of administrative action in the U.S. enjoys a legislative touchstone of legitimacy in the form of the Administrative Procedure Act,⁶¹ the looseness of its operative terms has required judges to articulate the actual body of law under which they strike down executive action. More broadly, American legislatures have blurred the distinction between statutory and judge-made law by systematically codifying the rules of the common law.⁶² As Gilmore observes, it was once a hallmark of American legal formalism to posit a sharp hierarchical distinction between the judicial and legislative functions: "Only the legislature could change the rules; when the legislature had spoken, the courts were bound to carry out the legislative command."⁶³ Over the last century, however, "[w]e have come to see that such a distinction is not, and never was, tenable."⁶⁴

The relationship between legislation and constitutional law is also ambiguous. In some cases, the categories overlap; in others, they may be synonymous. It is routine to observe that Britain's unwritten "constitution" includes statutes old and new,⁶⁵ from the Habeas Corpus Acts of 1640⁶⁶ and

⁶¹ 5 U.S.C. §§ 551-559, 701-706 (2004).

⁶² See GILMORE, *supra* note 19, at 15.

⁶³ *Id.* at 14.

⁶⁴ *Id.* at 15.

⁶⁵ See, e.g., RETT R. LUDWIKOWSKI & WILLIAM F. FOX, JR., *THE BEGINNING OF THE CONSTITUTIONAL ERA 1-18* (1993) (listing "a number of important documents" that, together with certain "constitutional conventions" and common law principles, "might well be referred to as the British

1679⁶⁷ and the Act of Settlement 1701⁶⁸ to the European Communities Act 1972 and the Human Rights Act 1998.⁶⁹ By comparison, Canada has a written constitution, but that constitution is itself an act of legislation that confers constitutional status upon a host of other legislation: the Constitution Act 1982 defines the "Constitution of Canada" as including an entire schedule of statutes both British and Canadian in origin.⁷⁰ Even in the U.S., statutes may sometimes be said to affect the content of constitutional law. The Supreme Court has insisted, for example, that Congress may not use its enforcement powers under section 5 of the Fourteenth Amendment⁷¹ to effect "substantive change" in constitutional law, yet by the Court's own admission, the line between congressional enforcement and substantive constitutional law "is not easy to discern."⁷² Conversely, the Court has itself fashioned constitutional standards that rest upon the content of ordinary legislation.⁷³ More generally, it can be argued that certain landmark statutes – what Eskridge and Ferejohn call "super-statutes" – occupy "the legal terrain once called 'fundamental law'"; the prominence of such statutes, and their influence upon the evolution of constitutional law itself, may be said to imbue them with "quasi-constitutional"

constitution"); DICEY, *supra* note 37, at 6-7 (noting that there exists no "test by which to discriminate laws which are constitutional or fundamental from ordinary enactments").

⁶⁶ 16 Car. 1, c. 10.

⁶⁷ 31 Car. 2, c. 2.

⁶⁸ 12 & 13 Will. III, c.2.

⁶⁹ See *supra* note 37 (discussing the European Communities Act 1972, the Human Rights Act 1998, and their consequences for judicial review in the U.K.).

⁷⁰ See CAN. CONST. (Constitution Act, 1982) pt. VII, § 52(2) & sched.; PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, §§ 1.2-1.6, at 2-11 (student ed. 2002).

⁷¹ "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

⁷² *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

⁷³ Consider *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in which the Court held that state and local governments may not engage in affirmative action absent a "prima facie case of a constitutional or statutory violation" that is to be remedied. *Id.* at 500. In dissent, Justice Marshall criticized the majority's adoption of a constitutional standard predicated upon the content of civil rights legislation:

If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964 -- or alternatively, if it repealed that legislation altogether -- the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.

Id. at 556 (Marshall, J., dissenting).

status.⁷⁴ In both their substance and their objects of concern, laws such as the Civil Rights Act of 1964 and Administrative Procedure Act might be considered the functional equivalent of constitutional law over which judges and legislators alike exert some degree of control. To the extent that lawmaking power in areas of constitutional concern can be shared in this manner, countermajoritarian concerns are allayed.⁷⁵

The distinction between constitutional law and judge-made law is, however, the most obvious and promising candidate for self-interested judicial manipulation. Even in theory, it is unclear how constitutional law and mere judge-made law may be distinguished. No written constitution is complete unto itself. Like any legal document, a constitution inevitably presupposes some background body of understandings that gives meaning to its terms, and to which it may even refer explicitly. The choice and use of these background understandings is left to judges. Such is clearly the case with the U.S. Constitution, for example, which invokes "the rules of the common law"⁷⁶ and manages in the space of a single sentence to deploy such concepts as "liberty," "property," and "due process."⁷⁷ Similarly, the Canadian Constitution includes both common law principles and constitutional "conventions" based upon custom and tradition⁷⁸; though mere "conventions" are said to be judicially unenforceable,⁷⁹ the Canadian Supreme Court does enforce "unwritten constitutional principles,"⁸⁰ and the line between enforceable and unenforceable constitutional law is itself for judges to draw. Constitutional law is the product of judicial choice – constrained choice, perhaps, but choice nonetheless. To wield the power of constitutional interpretation is to determine the content of constitutional law.

⁷⁴ William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216-17 (2001).

⁷⁵ See *id.* at 1275-76 ("Prescriptively, super-statutes mediate the tension between democracy or popular accountability and the evolution of higher law at the hands of unelected judges.").

⁷⁶ U.S. CONST. amend. VII.

⁷⁷ U.S. CONST. amend. V.

⁷⁸ See Reference re Amendment of the Constitution of Canada (Patriation Reference), [1981] 1 S.C.R. 753, 876; *id.* at 853 (Laskin, C.J., Estey & McIntyre, JJ., dissenting).

⁷⁹ See *id.* at 774-75; HOGG, *supra* note 70, § 1.10, at 18-27.

⁸⁰ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 32, 52-54, 88-93, at 239-40, 248-50, 265-68 (holding on the basis of "unwritten constitutional principles" of federalism and democracy that the federal government and other provinces are obligated to negotiate if a "dear majority" of Quebec's population votes unambiguously to secede)

The arbitrariness of the distinction between (binding) constitutional law and (nonbinding) judge-made law enables courts to calibrate the boundary between judicial and legislative power in a highly deliberate manner. Indeed, it would be surprising if, in choosing whether to decide cases on constitutional or common law grounds, judges did *not* consider the consequences for legislative power. Judge Kaye of the New York Court of Appeals has described both the openness of the choice that state judges face, and the potential consequences for other institutions:

Clearly, there are matters that must stand as constitutional, beyond ready revision. Constitutional issues cannot be avoided, or constitutional principles diluted, or the law manipulated, or responsibility shirked or deflected to other institutions by resort to the common law for core policies of that nature. But which are the core policies of that nature? Where there is no clear discontinuity between common law and constitutional law, the difficult question is one of definition.

When is a matter properly one of common law and when does it cross the threshold of constitutional law? A court's stated desire to preserve flexibility and options by common law solutions is as much a consequence as a cause for choosing one ground over the other. The shifts and vacillation among courts, even within courts, between constitutional and nonconstitutional premises suggests that a rationale has yet to emerge.⁸¹

Three lessons can be drawn from this passage. First, courts inevitably confront cases in which they must choose between a common law holding that is subject to legislative revision, and a constitutional holding that is not. Second, courts have not, in fact, made this choice in any consistent manner. Third – and most importantly – in the absence of any "clear discontinuity" between common law and constitutional law, there is little to prevent courts from "deflecting" – or reserving – the final decision to elected officials as they wish.

The hierarchy of laws that might be supposed to delimit judicial power is so elastic, in fact, that courts need not even choose between the categories of constitutional and common law. They may instead combine the two to produce nonbinding constitutional law, or what Henry Paul Monaghan calls

⁸¹ Kaye, *supra* note 21, at 751-52.

"constitutional common law."⁸² As he observes, not only may courts fail to make clear the extent to which a decision is "constitutional" (binding on the legislature) or "common law" (nonbinding); they may *deliberately* fail to do so. Why so? Though Monaghan himself says surprisingly little on the subject,⁸³ such deliberate obscurity seems above all to enable the judiciary to manage the limits of legislative power with greater precision than might otherwise be possible - all the while speaking the language of legislative deference and judicial restraint. In rhetorical terms, the judiciary can claim, plausibly, that it has left the legislature room to maneuver. In substance, however, the judiciary has merely invited the legislature to labor within judicially specified limits, while reserving the right to reject the fruits of those labors. Consider *Miranda v. Arizona*,⁸⁴ described by Monaghan as fashioning a "constitutionally inspired," yet "subconstitutional," rule of criminal procedure.⁸⁵ The Supreme Court recently rejected an alternative scheme devised by Congress on the grounds that it was not "at least as effective" as the *Miranda* rule at preventing coerced confessions.⁸⁶ On the one hand, proclaimed the Court, "*Miranda* announced a constitutional rule that Congress may not supersede legislatively."⁸⁷ On the other hand, it refused to hold that *Miranda* warnings are actually required by the Constitution⁸⁸ - a fact bitterly emphasized by Justice Scalia in dissent.⁸⁹ With its elusive non-distinctions between constitutional and common law - and, indeed, between "constitutional" and "constitutional" law - constitutional common law is in practice a finely tuned instrument of judicial control over legislative power, an act of deference and an act of veto in one, much like *Marbury* itself.

In sum, the notion that there exist hierarchically ordered categories of laws and lawmakers does little to guide or constrain judges in deciding the limits

⁸² Henry Paul Monaghan, *The Supreme Court 1974 Term - Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

⁸³ See *id.* at 31 (implying that the making of such distinctions may not be a good use of time on the part of a "busy" court).

⁸⁴ 384 U.S. 436, 467-77 (1966) (requiring police officers to advise criminal suspects of their constitutional rights upon arrest).

⁸⁵ Monaghan, *supra* note 82, at 19-20.

⁸⁶ See *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (quoting *Miranda*, 384 U.S. at 467).

⁸⁷ *Id.* at 444.

⁸⁸ See *id.* at 442 (expressly declining to hold that "nothing else will suffice to satisfy constitutional requirements").

⁸⁹ See *id.* at 446, 450-57 (Scalia, J., dissenting).

of their own power. The boundaries between the categories are unsettled even in theory, and this uncertainty enables judges to circumvent and even invert the hierarchy. Judicial enforcement of the hierarchy might be analogized to a game of rock-paper-scissors between elected lawmakers and judges, but with a twist: the judiciary also acts as referee and can declare rock to be paper, paper to be rock, or even that it has played some combination of rock *and* paper. The potential for abusive unfairness in this game lies, of course, in the fact that the judiciary acts as judge in its own cause, but some form of self-policing is inescapable: any institution assigned the task of allocating public power will possess both the means and the incentive to favor itself. Ultimately, it may be unrealistic to think that there exists any foolproof formula by which the watchmen of governmental power can be expected to watch themselves. Indeed, a rigid formula may be not only implausible, but also undesirable. Evolving challenges of governance may demand flexibility in the allocation of public power, as reflected in this country, for example, by the rise of the administrative state and the decline of nondelegation doctrine.⁹⁰ Formalistic adherence to a hierarchical categorization of lawmakers and laws can prove a hindrance even to those atop the hierarchy: to accomplish such crucial goals as accession to the European Union, the entrenchment of human rights, and the release of former colonies, the British Parliament must make commitments that limit its own power, yet parliamentary sovereignty, strictly understood, renders all such commitments revocable at any time.⁹¹

⁹⁰ See, e.g., STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 17-35 (5th ed. 2002) (reviewing the rise of administrative regulation); *id.* at 43-87 (discussing nondelegation doctrine, and opining that it "has had only one good year" – namely, the year in which *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), was decided); THEODORE J. LOWI, *THE END OF LIBERALISM* 92-126, 300-13 (2d ed. 1979) (criticizing the rise of the administrative state as nothing less than the demise of liberalism and the rule of law, and urging a return to nondelegation doctrine).

⁹¹ The doctrine of parliamentary sovereignty requires courts not only to uphold whatever Parliament commands, but also to obey the wishes of the current Parliament, regardless of what any past Parliament has done. Because a past Parliament cannot bind a future Parliament, the courts have normally adhered to the principle of *lex posterior derogat priori*: an inconsistency between past and present legislation is construed as an implied repeal of the past legislation. Legislative entrenchment is supposed to be impossible. See DICEY, *supra* note 37, at 62-64; see also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 400-01 (2003) (commenting on legislative entrenchment in the U.S.); Eric A. Posner & Adrian Vermeuele, *Legislative Entrenchment: A Reappraisal*, 111 YALE

D. The Supposed Requirements of Judicial Legitimacy

In light of these difficulties, it is understandable if courts happen to employ the hierarchy of laws less as an analytical device than as a legitimating fiction. What is meant by judicial legitimacy? It is discussed obsessively, as if it were a precious commodity to be hoarded,⁹² yet for the most part goes undefined - perhaps for fear that merely to explain judicial legitimacy in plain terms is to undermine it. In practical terms, it can be described as the ability of courts to secure compliance with their decisions, absent the powers of the purse or the sword.⁹³ An obvious way in which courts secure such compliance is on the strength of their respective reputations: however uncertain their basis in positive law, the pronouncements of a judiciary known for fairness and rectitude stand some chance of a sympathetic public reception. In India, for example, the judiciary enjoys a unique reputation for integrity in a political environment rife

L.J. 1665, 1677-78 (2002) (doing the same, and citing the union of England and Scotland as a specific example). As discussed above, the European Communities Act 1972 and Human Rights Act 1998 both strain the meaning of parliamentary sovereignty, in theory as well as in practice, by instructing the courts to give nondomestic law some measure of superiority over past, present, and future domestic law. See *supra* note 37. Unless the courts understand parliamentary sovereignty as allowing Parliament to impose upon itself formal and procedural requirements - such as a dear statement rule - Parliament runs a continual risk of inadvertently repudiating European law. See GOLDSWORTHY, *supra* note 37, at 15, 244-45.

In theory, parliamentary sovereignty also renders Parliament unable to rid itself of legislative power over former British colonies that wish to gain their independence by peaceful and legal means. It calls into question, for example, the validity of § 2 of the Canada Act 1982, by which Parliament purported to renounce any further legislative power over Canada. See HOGG, *supra* note 70, § 3.5(d), at 57-58 (discussing § 2 of the Canada Act 1982 and its questionable legality as a matter of British constitutional law); see also GOLDSWORTHY, *supra*, at 244 (discussing the same problem as raised by the Australia Act 1986).

⁹² See, e.g., *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) (describing "the public's confidence in the Court" as "a public treasure," "built slowly over many years"); *Planned Parenthood v. Casey*, 505 U.S. 833, 864-69 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (deeming it "imperative to adhere to the essence" of *Roe v. Wade*, 410 U.S. 113 (1973), for fear of otherwise inflicting "profound and unnecessary damage to the Court's legitimacy"); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (arguing that the Court should abstain from "injecting itself into the clash of political forces" lest it endanger "sustained public confidence in its moral sanction").

⁹³ See, e.g., MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 13-14 (1981) ("Courts, we are repeatedly and rightly told, have neither the purse nor the sword. ... Most court systems seem to operate on the assumptions that both parties consent sufficiently to comply voluntarily as long as some vague threat of further judicial action is maintained."); THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The judiciary ... has no influence over either the sword or the purse[,] and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

with corruption.⁹⁴ This fact alone may both explain and sustain the tendency of the Indian bench toward micromanagement of public affairs to an extent that might not be tolerated elsewhere.⁹⁵ Sheer tradition may also play a part in the acceptance of judicial decisionmaking. Once judicial review has been in place for some time - as in the U.S. - its continued acceptance may in part reflect Burkean conservatism on the part of a citizenry bound to dislike particular decisions yet unwilling on the whole to jettison a venerable institution. What constitutional courts generally cannot claim in support of their activities, however, is an electoral mandate.⁹⁶ The countermajoritarian dilemma is considered a dilemma because, whenever constitutional courts dare to do more than validate an existing consensus, they are subject to a supposedly withering retort: "we did not elect you, so why should we listen to you?" In less colloquial terms, it is thought

⁹⁴ See George H. Gadbois, Jr., *The Institutionalization of the Supreme Court of India*, in *COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS* 126 (John R. Schmidhauser ed., 1987). As even the President of India has remarked:

It is not an exaggeration to say that the degree of respect and public confidence enjoyed by the Supreme Court is not matched by many other institutions in the country. The judiciary in India has become the last refuge for the people and the future of the country will depend upon the fulfilment of the high expectations reposed by the people in it.

K.R. Narayanan, Speech on the occasion of Golden Jubilee celebrations of the Supreme Court of India (Jan. 28, 2000), <http://www.india-seminar.com/2000/487/487%20narayanan.htm>.

Analogously, it has been suggested that the Israeli judiciary enjoys "considerable political power" because of its reputation for nonpartisanship in a rampantly partisan society. Martin Edelman, *The Changing Role of the Israeli Supreme Court*, in *COMPARATIVE JUDICIAL SYSTEMS*, *supra*, at 97-98; cf. ROBERT A. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 13 (rev. ed. 2003) (calling the Supreme Court of Israel "the most activist, anti-democratic court in the world").

⁹⁵ For example, students who have been turned away from examinations for failure to attend school have been known to obtain *ex parte* stays from Indian courts by challenging the propriety of the procedures by which attendance rules were adopted. See Tripathi, *supra* note 22, at 60. In response to environmental concerns, the Supreme Court of India has appointed experts to inspect mines and quarries and ordered the closing of those found not to be in compliance with relevant safety standards. See *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, [1987] 1 S.C.R. 641, 647-50. Other courts have enforced environmental statutes by banning specific makes, models, and vintages of taxicabs. See, e.g., *Smoke Affected Residents v. Municipal Co.*, Writ Petition No. 1762/1999 (Apr. 10, 2002), <http://www.elaw.org/resources/text.asp?ID=1361&lang=es> (banning all "Premier 137-D Model" taxis and "all taxis over the age of 15" except those converted to run on natural gas).

⁹⁶ There are, of course, exceptions. Judges of the Japanese Supreme Court, for example, may be removed by majority vote. Article 81 of the Japanese Constitution subjects them to retention votes at the first general election following their initial appointment, and at ten-year intervals thereafter. See *KENPO* [Constitution] art. 81 (Japan). For discussion of various means by which the ruling party is said to influence the Japanese judiciary, see Brown Hamano, cited above in note 22, at 442-59.

that unelected judges risk disobedience because they cannot directly invoke the legitimating device of majoritarian consent.⁹⁷

The two qualifications in this statement - "directly" and "majoritarian" - merit notice. First, even the most independent of judiciaries is subject to political control, if only because judges must be continually appointed and replaced. The political character of this control is simply more obvious in some cases than in others. For example, the members of the German Constitutional Court, the Bundesverfassungsgericht, are elected by the federal legislature on the basis of interparty bargaining and with the input of major interest groups.⁹⁸ In more subtle but equally effective fashion, the members of France's Conseil Constitutionnel, though appointed for fixed terms, are chosen from the political milieu and are known for exercising judgment with political sensitivity - that is, in a manner sensitive to the needs and priorities of the elected government.⁹⁹ In this country, it has been an empirical fact that unelected judges with life tenure are chosen and replaced in a frequent and systematic way by elected officials. Between the inescapable fact of turnover and periodic expansions of the bench, even the relatively independent federal judiciary is decisively reshaped by elected officials on an ongoing basis.¹⁰⁰

⁹⁷ See, e.g., Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1154 (1993) (arguing that the federal judges appointed by recent Republican administrations "view the judiciary as an undemocratic institution within a political order premised on the idea that governmental legitimacy is derived from the consent of the majority").

⁹⁸ See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 21-22 (2d ed. 1997); David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1826-29 (1988).

⁹⁹ See John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1763, 1781-86 (1988) (noting that, although the Conseil Constitutionnel has not become a "straightforwardly partisan political body," a heavy premium is placed in the selection process upon both "legal and political skills").

¹⁰⁰ Political scientists have been better attuned to this fact than legal academics. In an influential and early article, Robert Dahl noted the frequency and regularity with which Supreme Court justices have historically been replaced, and deemed it "most unrealistic" that the Court would, "for more than a few years at most," resist major policy changes sought by a lawmaking majority. See, e.g., Dahl, *supra* note 34, at 284-95. The same observations apply with greater force to the lower federal courts. Barrow, Zuk and Gryski observe, for example, that "the combination of new positions and swelling numbers of vacancies, owing especially to retirements," has enabled modern presidents "to change anywhere from 35 to 60 percent of the membership on the lower federal courts during their stay in office." DEBORAH J. BARROW, GARY ZUK & GERARD GRYSKI, *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* 12 (1996). Thus, "with 9 out of every 10 appointees sharing the partisan attachment of the chief executive," "gargantuan swings in the political composition of the bench become commonplace." *Id.*; see also Gary Zuk, Gerard S. Gryski & Deborah J. Barrow, *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM. POL. Q. 439

Second, the legitimating power of majoritarian decisionmaking should not be overestimated; nor should popular acceptance of judicial review be underestimated. Elections do not reflect universal consent - indeed, perhaps not even plurality consent.¹⁰¹ Every popular decision leaves in its wake a minority. Countermajoritarian judicial decisionmaking may beg the question of its legitimacy in the eyes of the majority, but majoritarian electoral decisionmaking also begs the question of *its* legitimacy in the eyes of the minority.¹⁰² Neither form of decisionmaking is effective at resolving political disagreement absent the acceptance of both the winners and the losers.¹⁰³ It may be, in fact, that neither form is widely acceptable without the other. Judging from the institutional arrangements that have proven popular and durable, it seems likely that democratic polities accept, if not prefer, some mixture of popular and countermajoritarian decisionmaking, the critical question being one of relative degree. The fact that minority protections are written into a constitution may be evidence of such acceptance. The fact that such protections are found in a written constitution may even create a certain amount of the necessary

passim (1993). Without emphasizing the mechanisms of judicial appointment and replacement, Gerald Rosenberg has urged the related view that the Court cannot resist lawmaking majorities or effect social change in the face of political resistance on more than a sporadic basis. See ROSENBERG, *supra* note 34, *passim* (arguing that courts cannot usually effect social reform without the support of the elected branches); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 *passim* (1992) (assessing the judicial response to "Court-attacking bills" over the last two centuries, and concluding that the Court has rarely resisted the preferences of elected lawmakers acting in concert). Collectively, these findings constitute a direct assault upon the notion that the Framers created a judicial branch capable of withstanding lawmaking majorities for any meaningful period of time.

¹⁰¹ See *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (observing that "we may never know with complete certainty the identity of the winner" of the 2000 presidential election). For the sake of simplicity, it may be assumed that those who do not vote consent to whatever happens, though the alacrity with which nonvoters criticize their government suggests otherwise.

¹⁰² Indeed, as political scientists and economists have long observed, majoritarian decisionmaking mechanisms often do not even reflect the wishes of the majority. See, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 65-136 (1982) (discussing the instability of collective choice mechanisms as demonstrated by Kenneth Arrow and others, and illustrating that the outcome of voting among three or more alternatives depends upon the order in which alternatives are considered, the method of voting used, the manner in which preferences are measured, and other factors); David Brady & Mark A. Morgan, *Reforming the structure of the House appropriations process: the effects of the 1885 and 1919-20 reforms on money decisions*, in CONGRESS: STRUCTURE AND POLICY 207-33 (Mathew D. McCubbins & Terry Sullivan eds., 1987) (describing how the power of the House Appropriations Committee affects the extent to which other congressional committees spend on behalf of special interests).

¹⁰³ Cf. SHAPIRO, *supra* note 93, at 1-8 (discussing the "triadic logic" of conflict resolution and the precariousness of third-party adjudication absent the actual consent of the parties to such adjudication).

acceptance, perhaps by serving as a reminder of principles adopted upon careful reflection in calmer times.¹⁰⁴ But whether a written constitution exists, and what it says, are neither necessary nor sufficient conditions for the acceptance of judicial review in practice. That acceptance may exist even in the absence of a written constitution that styles itself supreme, as Paul Craig and Sir Laws and Lord Woolf have in essence argued.¹⁰⁵

Given the choice, however, constitutional courts tend not to stake their efficacy solely on the normative appeal of the decisions they render, or on the acceptance of judicial review itself. The explication of those interests entitled to judicial protection - those "implicit in the concept of ordered liberty,"¹⁰⁶ or "deeply rooted in this Nation's history and tradition,"¹⁰⁷ for example - is consistently the task of judges, and it is by nature a heavily subjective one. Nevertheless, judges go to considerable lengths to tether their efforts to their respective constitutions. If they are fortunate, they may have available to them some slender snippet of vague but actual text, such as "due process," from which entire vistas of possibility unfold; if they have the nerve, they may even liken what they do to scientific inquiry.¹⁰⁸ Elsewhere, judges may have to make do with "unwritten constitutional principles,"¹⁰⁹ or the "basic structure" of the

¹⁰⁴ As Stephen Holmes puts it: "A constitution is Peter sober while the electorate is Peter drunk." Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 196 (Jon Elster & Rune Slagstad eds., 1988).

¹⁰⁵ See *supra* note 48 and accompanying text.

¹⁰⁶ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.), *quoted in, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) and *Lawrence v. Texas*, 123 S. Ct. 2472, 2492 n.3 (2003) (Scalia, J., dissenting).

¹⁰⁷ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.), *quoted in, e.g.*, *Washington v. Glucksberg*, 521 U.S. at 720-21.

¹⁰⁸ Consider Justice Frankfurter's efforts in *Rochin v. California*:

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

342 U.S. 165, 172 (1952).

¹⁰⁹ See, e.g., Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 32, 52-54, 88-93, at 239-40, 248-50, 265-68 (holding on the basis of "unwritten constitutional principles" of federalism and democracy that the federal government and other provinces are obligated to negotiate if a "dear

constitution,¹¹⁰ or the "governmental framework."¹¹¹ From such unpromising materials, the audacious may find a way to strike down constitutional amendments.¹¹² Those truly favored by history may even have the opportunity

majority" of Quebec's population votes unambiguously to secede); H.C. 98/69, *Bergman v. Minister of Finance*, 23(1) P.D. 693 (1969) (Isr.), available in translation at http://62.90.71.124/files_eng/69/980/000/z01/69000980.z01.pdf (last visited May 21, 2004), at 6 (recognizing "the equality of citizens before the law as a fundamental principle of [Israel's] constitutional regime," and enjoining enforcement of campaign finance legislation on that basis, notwithstanding the absence of a written constitution or of any statutory language providing for judicial review).

¹¹⁰ See *Kesavananda Bharati v. State of Kerala*, (1973) Supp. S.C.R. 1, 163-66 (India) (opinion of Sikri, C.J.) (holding unconstitutional a constitutional amendment intended to curtail judicial review of constitutional amendments); see also *infra* note 108 (placing the *Kesavananda Bharati* decision in context).

¹¹¹ *Raven v. Deukmejian*, 801 P.2d 1077, 1080, 1086-89 (Cal. 1990) (invalidating part of a ballot proposition on the grounds that it effected "such a far-reaching change in our governmental framework as to amount to a qualitative constitutional revision, an undertaking beyond the reach of the initiative process").

¹¹² See, e.g., *id.* at 1086-89; *Kesavananda Bharati*, (1973) Supp. S.C.R. at 163-66. In its original form, Article 368 of the Constitution of India simply described the means by which Parliament may amend the Constitution, subject in enumerated cases to heightened supermajority requirements. The Supreme Court of India initially took the view that constitutional amendments adopted by Parliament pursuant to Article 368 were not themselves subject to judicial review. See *Shankari Prasad v. Union of India*, (1952) S.C.R. 89, 105; *Tripathi*, *supra* note 22, at 95. In a series of cases beginning with the *Golak Nath* decision of 1967, however, the Court repeatedly rebuffed constitutional amendments enacted under Article 368 as unconstitutional. In *Golak Nath v. State of Punjab*, (1967) 2 S.C.R. 762, the Court took the position that any amendment that "takes away or abridges" "fundamental rights" is unconstitutional under Article 13(2), which provides that "[t]he State shall not make any law which takes away or abridges" "fundamental rights." *Id.* at 787-805 (opinion of Subba Rao, C.J.); INDIA CONST. art. 13(2). Parliament responded by amending both Articles 13 and 368 to preclude judicial review of constitutional amendments. In *Kesavananda Bharati*, the Supreme Court softened its position but nevertheless held the amendments unconstitutional, on the grounds that Parliament cannot amend the Constitution in a manner that impairs its "basic structure." *Kesavananda Bharati*, (1973) Supp. at 165-66 (opinion of Sikri, C.J.). Once again, Parliament responded by amending Article 368, and once again, in *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206, the Supreme Court declared the amendments unconstitutional. See *id.* at 246-59.

The extent and desperation of Parliament's efforts to preclude judicial review of constitutional amendments are tragicomic. In relevant part, Article 368 currently reads as follows:

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

...

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution ... shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

INDIA CONST. art. 368. To understand the political context of the struggle between Parliament and the Supreme Court, see *Gadbois*, cited above in note 94, at 115-16.

to reject an entire *constitution* on constitutional grounds.¹¹³ The more extreme the case, the clearer it becomes that judges do not obey or interpret constitutions so much as they *make* constitutions.¹¹⁴ Yet whatever license judges can (or cannot) find in the text for their activities, a written constitution that provides, at least arguably, for judicial review gives them an answer of childlike simplicity to the critical question of "legitimacy": "we did not elect you, so why should we listen to you?" By invoking the hierarchical superiority of constitutional law to all other law, a judge says, in effect: "Don't blame me. The constitution made me do it." (Or, as a British judge might say to the executive, "Parliament made me do it" – an especially transparent fiction given that the executive leads the Parliament.¹¹⁵) To use a constitution in this way amounts to a form of ventriloquism: an inanimate text can speak, it turns out, to a bewildering range of questions and under sociopolitical conditions its authors could not have foreseen, so long as judges supply the words. Perhaps a certain amount of such obfuscation is necessary if courts are to secure compliance with controversial decisions, or even to reach *popular* decisions that also satisfy the internal standards of the legal

By way of comparison, when faced with an analogous question, the Canadian Supreme Court disavowed any power to review the substance of legislation that overrides the Canadian Constitution. Section 33 of the Canadian Constitution, the so-called "notwithstanding clause," empowers the legislature to override certain constitutional rights and specifies the means by which it may do so. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. In *Ford v. Quebec*, [1988] S.C.R. 712, the Court held that § 33 imposes "requirements of form only" and specifically rejected the argument that the override power may only be exercised following a "fully informed democratic process" in which both the right at stake and its proposed infringement are drawn to the attention of the legislature and the public. *Id.* at 740-42.

¹¹³ See *Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SALR 744 *passim* (CC) (holding that the proposed constitution of 1996 failed to satisfy the requirements of the interim constitution of 1994, and requiring the formulation of a new constitutional text); Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT'L L. & POL. 695 *passim* (1996) (discussing the adoption and certification of the South African Constitution).

¹¹⁴ See, e.g., J.W. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 125 (11th ed. 1988) (quoting Woodrow Wilson's observation that the Supreme Court has acted as a "constitutional convention in continuous session"); Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 S. CT. REV. 311, 330 (noting that in the European Community, "the protection of individual rights becomes the task of judges who must develop a common law of basic rights by reference to exceedingly vague notions of shared values").

¹¹⁵ See, e.g., WADE & FORSYTH, *supra* note 37, at 28-30; Laws, *supra* note 48, at 90 & n.51 (quoting Lord Hailsham's notorious description of Parliament as an "elective dictatorship"); Lord Lester, *supra* note 37, at 90-92 (same).

community. Perhaps such obfuscation is inherently undesirable.¹¹⁶ Perhaps it has no effect at all on how people feel about constitutional courts or judicial review.¹¹⁷ Whatever the case may be, judges do not seem prepared to do without it.

Four generic propositions about constitutional adjudication can now be offered. First, because they cannot compel obedience, constitutional courts and judges are preoccupied with the problem of their own efficacy. This concern is frequently expressed in terms of "legitimacy," which refers in practice to the acceptance of judicial review, by the polity or by elites, in whatever combination happens to be necessary. Second, when performing judicial review, judges invoke their respective constitutions in an effort to win this acceptance. Whether this tactic is effective - or even necessary - is an empirical question,¹¹⁸ not one that can be resolved by constitutional theory, but judges appear to believe, at least, that it cannot hurt. Third, the act of judicial review is constrained only loosely by the constitutional text. Indeed, it can occur in disregard or even direct defiance of the constitutional text, though judges are anxious to dispel the appearance thereof. Fourth, what courts actually do when they perform judicial review is to identify and articulate the interests they deem important enough to deserve protection from interference by the other branches of government: that is, they practice what has here been labeled the core interests approach. This approach goes by various names in practice but varies little in substance. It is to the nature and ubiquity of core interests analysis that we turn next.

¹¹⁶ See, e.g., BICKEL, *supra* note 34, at 62 (arguing that no court should "tell itself or the world that it draws decisions from a text that is incapable of yielding them").

¹¹⁷ As Judge Posner has argued:

There is no evidence that [public confidence in the courts] depends on the scrupulousness with which courts confine themselves to fair interpretations of commands laid down in the texts - about which the public knows little - as distinct from notions of justice or fairness that are independent of fidelity to texts.

RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 136 (1990) (citing, inter alia, Richard Lehne & John Reynolds, *The Impact of Judicial Activism on Public Opinion*, 22 AM. J. POL. SCI. 896 (1978)).

¹¹⁸ See *supra* note 117.

III. GENERIC CONSTITUTIONAL ANALYSIS

Consider the following passage:

Challenges to governmental action require the reviewing court to evaluate the importance of the right or interest upon which the government has infringed, the importance of the government's goal, and the extent to which that goal justifies the government's choice of means. When important rights or interests are at stake, the government's goal must be of comparable importance, and a close fit must exist between that goal and the means chosen to achieve it. Similar requirements apply when the governmental action in question is aimed at certain vulnerable or disadvantaged groups.

This passage describes the practice of judicial review in which of the following?

- (a) The United States.¹¹⁹
- (b) The United Kingdom.¹²⁰

¹¹⁹ See, e.g., *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[C]ertain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."); *Chicago Police Dept. v. Mosely*, 408 U.S. 92, 95, 99 (1972) (observing that "all equal protection cases" pose the question whether there exists "an appropriate governmental interest suitably furthered by the differential treatment"); *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972) (observing that "a weighing process has long been a part of any determination" of the requirements of procedural due process); see also, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 792-94 (2d ed. 1988) (observing that First Amendment claims follow one of two "tracks" depending upon the intent of the governmental restriction, but that "determinations of the reach of first amendment protections on either track presuppose some form of 'balancing' whether or not they appear to do so"); Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 73 HARV. L. REV. 1, 17-18 (1972) (describing the Court's movement toward "sliding scale" equal protection review).

¹²⁰ Though the United Kingdom lacks a written constitution, its courts perform substantive review of both executive and legislative action under a combination of domestic and European legal standards reminiscent of the passage above. First, as a matter of domestic law, British courts engage in substantive review of executive action, in reliance upon judicially fashioned principles of administrative law. See *infra* notes 217-218 and accompanying text (describing *Wednesbury* review). As a matter of practice, if not also formal doctrine, the extent to which they scrutinize such action varies with the importance of the interests at stake. "It is now common to acknowledge that the courts apply the principles of judicial review, including the *Wednesbury* test, with varying degrees of intensity depending upon the nature of the subject-matter." CRAIG, *supra* note 54, at 583. In particular, governmental action that interferes with human rights attracts heightened judicial scrutiny. See *id.* at 546-48, 582-84 (discussing cases).

Second, British courts now review both executive action and parliamentary legislation for compatibility with both E.U. law and the European Convention on Human Rights. To the extent that claims are raised under E.U. law or the Convention, the courts must engage in

- (c) Canada.¹²¹
- (d) Germany.¹²²

proportionality review of the kind employed by the European Court of Justice and the European Court of Human Rights, respectively. *See id.* at 559-63, 585-86 (discussing domestic application of the Convention via the Human Rights Act 1998); *id.* at 589-98 (discussing the use of proportionality under E.U. law by domestic courts); *see also supra* note 37 (discussing the consequences of incompatibility between parliamentary legislation, on the one hand, and E.U. law or the Convention, on the other). Proportionality review can be expressed in different ways but invariably denotes judicial attention to the importance of the competing interests, the extent to which those interests are at stake, and the care taken by the government in its choice of means. *See infra* notes 121-124 (discussing Canadian and European implementations of proportionality review); text accompanying notes 151-154 (synthesizing the various strains of proportionality review).

Third, many have suggested that proportionality review is being adopted – or has already been adopted – by the English courts as a matter of domestic law, to be applied even in the absence of a claim under E.U. law or the Convention. *See id.* at 585-89, 600; Jeffrey Jowell & Anthony Lester Q.C., *Proportionality: Neither Novel Nor Dangerous*, in *NEW DIRECTIONS IN JUDICIAL REVIEW passim* (Jeffrey Jowell & Dawn Oliver eds., 1988); *infra* notes 219-222 and accompanying text (discussing the extent to which *Wednesbury* review is converging – or has already converged – upon proportionality review of the European variety).

¹²¹ The Canadian Constitution explicitly provides that the rights and freedoms it guarantees are subject to "such reasonable limits ... as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), § 1. To justify the impairment of a constitutionally guaranteed right or freedom, the government must establish that its objective is "pressing and substantial," that the means it has chosen are "rationally connected" to its objective, that the right or freedom in question has been impaired "as little as possible," and that the negative impact upon the right or freedom is "proportional" to the government's objective. *R. v. Oakes*, [1986] 1 S.C.R. 103, 138-40 (citing *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 352). In practice, the Court has not actually required the government's choice of means to impair rights or freedoms "as little as possible"; rather, it has employed "a more flexible analysis of whether the degree of impairment of protected rights is justifiable, considering the importance of the right, the degree of intrusion, and the nature of the asserted government interest." Jackson, *supra* note 53, at 608 (citing *R. v. Keegstra*, [1990] 3 S.C.R. 697).

¹²² Germany is credited with the invention of proportionality review, or *Verhältnismässigkeit*, which has since been adopted by other courts such as the European Court of Justice. *See* T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 148 (4th ed. 1998); PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 372 (3d ed. 2003). In substance, "the German approach is not so different from the methodology often employed by the United States Supreme Court in fundamental rights cases." KOMMERS, *supra* note 98, at 46. As practiced in Germany, proportionality review is a three-step process. First, the requirement of *Eignung*, or suitability, entails that "the means used must be appropriate ... to the achievement of a legitimate end." *Id.* Second, *Erforderlichkeit* is a measure of necessity and refers to the requirement that the means adopted by the government "must have the least restrictive effect ... on a constitutional value." *Id.* By way of comparison with American constitutional law, Kommers indicates that this standard is in practice less demanding than the narrow tailoring requirement of strict scrutiny, but would not be satisfied by rational basis review. *See id.* Third, the principle of *Zumutbarkeit* requires that "[t]he burden on the right must not be excessive relative to the benefits secured by the state's objective." *Id.*

Justice Helmut Steinberger of the Bundesverfassungsgericht has suggested that, because they share "certain basic institutional and functional elements" – namely, "federal structures, a system of checks and balances, and independent courts armed with judicial review of the constitutionality of acts of public power" – the American and German constitutional systems are both characterized by "functionally equivalent standards of evaluations, methodological approaches, and substantive solutions, although their articulation and the ways and means to arrive at them may differ." Helmut Steinberger, *American Constitutionalism and German*

- (e) France.¹²³
- (f) The European Court of Human Rights.¹²⁴

Constitutional Development, in CONSTITUTIONALISM AND RIGHTS; THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 216 (Louis Henkin & Albert J. Rosenthal eds., 1990).

¹²³ French judicial reasoning is not characterized by the explicit articulation or use of doctrinal tests; rather, by common law standards, French decisions have an unfamiliar tendency to proceed directly from statements of fact to conclusions of law. Explication of French constitutional doctrine is further frustrated both by the exceptional brevity of French judgments, and by the extraordinary habits of grammar and organization that they exhibit. See, e.g., JOHN BELL, FRENCH CONSTITUTIONAL LAW at v (1992) (noting ruefully the "difficult," "almost incomprehensible structure" of French judgments); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 596 n.47 (1999); Mitchel de S.-O.-l'É. Lasser, "Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 HARV. L. REV. 689, 695-96 (1998) (noting that French judicial decisions take the form of a single sentence). Nevertheless, the case law of the Conseil Constitutionnel evidences application of the same tests of constitutionality encountered elsewhere. The first major piece of legislation to be reviewed by the Conseil, in the 1981 *Security and Liberty* case, included a provision authorizing police to conduct identity checks, and to detain persons "for the period necessary to check his identity," up to a maximum of six hours. See Decision No. 80-127, Cons. const., Jan. 19 & 20, 1981, D. 1981, 15, translated in BELL, *supra*, at 308-15. In upholding the provision, the Conseil stressed entirely familiar considerations – namely, the importance of the government's objectives, the degree to which the provision impaired the right in question, and the tailoring of the law to its objectives. On the one hand, it characterized the government's goals – "the pursuit of criminals, and the prevention of threats to public order" – as "necessary for the implementation of principles and rights of constitutional value." *Id.* ¶ 56, at 314. On the other hand, the Conseil found that the degree of "inconvenience" to freedom of movement was "not excessive," *id.*, in light of the various ways in which the provision had been narrowly tailored: individuals had the right to establish their identity "by any means," detention was authorized only in cases of "necessity," and detainees enjoyed a variety of safeguards including, but not limited to, the six-hour time limit. *Id.* ¶¶ 54-56, 64, at 313-14.

The Conseil Constitutionnel does not review the constitutionality of executive action; that task belongs exclusively to the French administrative courts, which are wholly independent of the Conseil Constitutionnel. See Justice Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1058-60 (2000); Bell, *supra* note 99, at 1760-63, 1781-83; see also *infra* note 244 (describing consequences of France's divided judicial system). The Conseil d'État is known for applying proportionality review in substance, if not in name. See BROWN & BELL, *supra* note 54, at 233-35, 263 (noting that proportionality has "assumed increasing importance" in France, and likening review for *erreur manifeste* to proportionality review); Jowell & Lester, *supra* note 120, at 54-56; Boyron, *supra* note 54, at 239-54.

¹²⁴ The European Court of Human Rights (the "E.C.H.R.") is responsible for interpreting the European Convention on Human Rights (the "Convention") and applying it to the member states of the Council of Europe (which is not to be confused with the European Union). See Breyer, *supra* note 123, at 1057-58. Most of the rights provisions of the Convention expressly permit such governmental interference as is "necessary in a democratic society in the interests of public safety for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS as amended by Protocols Nos. 3, 5, 8 & 11, Nov. 4, 1950, art. 10(2), <http://www.echr.coe.int/Convention/webConvenENG.pdf> [hereinafter EUROPEAN CONVENTION]; see *id.* arts. 6(1), 8(2), 9(2), 11(2) (containing similar language). Accordingly, the general approach of the E.C.H.R. is to balance the rights at stake against the justifications offered by the government, subject to a "margin of appreciation" that affords national governments a measure of deference in their assessment of means and objectives. See, e.g., *Otto-Preminger Inst. v. Austria*, 325 Eur. Ct. H.R. 1, 17-21 (1995) ("weighing up the conflicting interests" of freedom of

- (g) The European Union.¹²⁵
- (h) Israel.¹²⁶
- (i) South Africa.¹²⁷

expression and the right of others to "proper respect" for their religious beliefs, and upholding the seizure of a film offensive to Catholics from a non-profit cinema). As in other jurisdictions, the degree of judicial scrutiny varies with the importance of the interest at stake. *See, e.g., id.* at 19 (remarking that judicial review must be "strict" when freedom of expression is at stake, in light of its importance); *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 30-31, 45-46, 56-62 (1995) (holding that the use of potentially lethal force "must be strictly proportionate" to the government's aims, and ruling, by a vote of 10-9, that British authorities used unnecessary force in killing IRA terrorists who had prepared a car bomb for use at a parade).

¹²⁵ The European Court of Justice (the "E.C.J.") applies proportionality review whenever the legality of either Community or member state action is challenged, but the intensity of review varies with the subject matter. When reviewing "policy measures," it will only consider whether the choice of means was "manifestly inappropriate" to achieve the objectives; when "fundamental freedoms" are implicated, however, it applies a standard of "necessity" and demands use of the "least restrictive alternative." *See, e.g., TAKAS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW* 90 (1999); CRAIG & DE BÚRCA, *supra* note 122, at 371-79; Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105, 148 (1993) ("[T]he more important the particular right or the particular Community interest affected, and the greater the adverse or restrictive impact on it, the more closely the Court of Justice is likely to search for the existence of less restrictive alternatives"). Proportionality review by the E.C.J. resembles the German model: it combines tests of suitability and necessity with an overall assessment of proportionality. *See TRIDIMAS, supra*, at 91-92; CRAIG & DE BÚRCA, *supra*, at 372. The E.C.J.'s use of proportionality review in human rights cases is likely to be reinforced by Article 52 of the new Charter of Fundamental Rights of the European Union, which expressly ties the meaning and scope of rights in the Charter to that of corresponding rights in the European Convention on Human Rights. *See CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION*, Dec. 7, 2000, art. 52, O.J. (C 364) 1 (2000); *supra* note 124 (describing proportionality review under the Convention). The Charter is not yet legally binding, but it already influences the E.C.J.'s interpretation of E.U. treaties and laws. *See CRAIG & DE BÚRCA, supra*, at 43.

¹²⁶ The Israeli Supreme Court considers the importance of the governmental objective, the importance of the interest at stake, and the proportionality of the governmental objective to the extent of the harm inflicted. For a vivid example of such balancing and proportionality analysis, see H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel* (1999), *available in translation at* http://62.90.71.124/files_eng/94/000/051/a09/94051000.a09.pdf (last visited May 21, 2004), in which the Court considered the legality of physical torture as a means of interrogation:

On the one hand, lies the desire to uncover the truth, in accord with the public interest in exposing crime and preventing it. On the other hand is the need to protect the dignity and liberty of the individual being interrogated. [T]hese values are not absolute. [A] democratic society ... is prepared to accept that an interrogation may infringe the human dignity and liberty of a suspect - provided that it is done for a proper purpose and that the harm does not exceed that which is necessary.

Id. ¶ 22, at 21-22. The Court concluded that the interrogation methods in question were prohibited, *see id.*, but that officials who nevertheless employed them and thereafter faced prosecution might be able to invoke a defense of necessity, if the means used were "inherent to the very essence of an interrogation" and "both fair and reasonable." *Id.* ¶ 38, at 36.

¹²⁷ Like section 1 of the Canadian Constitution, section 33 of the South African Constitution provides that constitutional rights are subject to such limitations as are "reasonable" and "justifiable in an open and democratic society based upon freedom and equality." S. AFR. CONST. § 33. Analysis under section 33 of governmental action that impairs a constitutional right

- (j) India.¹²⁸
- (k) Japan.¹²⁹

There is, of course, no single correct answer. What the passage describes is nothing less than generic constitutional analysis. To be sure, every jurisdiction has its own magic words: constitutions employ different language, and courts have different ways in which they prefer to formulate their tests of constitutionality. A constitution may speak of "equal protection,"¹³⁰ or "equality"

"involves the weighing up of competing values, and ultimately an assessment based on proportionality." *State v. Makwanyane*, 1995 (3) SALR 391, 436 (CC) (Chaskalson, P.).

¹²⁸ When a "fundamental right" is impaired, Indian courts will consider "the nature of the right, the interest of the aggrieved party, and the degree of harm resulting from the State action." MAHENDRA P. SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA 33 (10th ed. 2001) (discussing INDIA CONST. art. 13). Certain fundamental rights, such as freedom of expression, are expressly made subject by the Constitution to "reasonable restrictions." INDIA CONST. art. 19. In determining whether a restriction is "reasonable," the courts apply general tests of proportionality and rationality: the restriction "should not be greater than what is required by the circumstances," and there should exist a "proximate connection between the restriction and the object sought to be achieved." SINGH, *supra*, at A-53.

¹²⁹ Like many of the constitutions discussed above, the post-war Constitution of Japan contains explicit limitation clauses that require the balancing of individual rights against the "public welfare." See KENPO arts. 12, 13 (Japan), translated in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at app. 3, at 655 (1996). As elsewhere, the intensity of review varies with the nature of the individual right or interest at stake. Under the Japanese "dual standard" approach, restrictions on property rights and economic legislation receive less scrutiny. Mindful of America's experience with the *Lochner* era, the drafters of the Japanese Constitution rendered protection of economic and property rights subject to "public welfare" exceptions in a way that "life" and "liberty" protections are not. See Nobushige Ukai, *The Significance of the Reception of American Constitutional Institutions and Ideas in Japan*, in CONSTITUTIONALISM IN ASIA, *supra* note 22, at 120-22 (comparing articles 29 and 31 of the Japanese Constitution). In the equal protection context, the Supreme Court "has never resorted to strict judicial scrutiny and has been reluctant to develop standards from which heightened judicial scrutiny might be derived." Hidenori Tomatsu, *Equal Protection of the Law*, in JAPANESE CONSTITUTIONAL LAW 202 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds. 1993). It is consistently observed that judicial review in Japan is extremely deferential in practice. See, e.g., BEER & ITOH, *supra*, at 24 (noting only six cases, over forty-five years, in which the Supreme Court has invalidated legislation); DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 121 (1995) ("Among comparativists, constitutional review in Japan is regarded as the most conservative and cautious in the world."); Brown Hamano, *supra* note 22, at 443; Kazuyuki Takahashi, *Why Do We Study Constitutional Laws of Foreign Countries, and How?*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 8, at 47 ("We are concerned ... about a court so subdued as to deprive judicial review of all its significance."); Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, in JAPANESE CONSTITUTIONAL LAW, *supra*, at 178 ("[T]he Supreme Court of Japan has almost no idea that government action should be bound strictly by the Constitution."). Even if the Court fails to strike down a law, however, it will perform proportionality review of the manner in which the government applies the law. See Brown Hamano, *supra*, at 445-46 (discussing *Toyama v. Japan*, 20 Keishu 8, 901 (Sup. Ct., Oct. 26, 1966), translated in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970: SELECTED SUPREME COURT DECISIONS, 1961-70, at 85 (1978)).

¹³⁰ U.S. CONST. amend. 14.

and "equal protection,"¹³¹ or "equal protection and equal benefit."¹³² Rights may be subject to "reasonable restrictions,"¹³³ or such limitations that are "necessary in a democratic society"¹³⁴ or required by the "public welfare."¹³⁵ Around the world, constitutional courts apply different levels of scrutiny keyed to the importance of the interests at stake, but not all use the word "proportionality" to describe this form of analysis.¹³⁶ Some constitutional texts are more comprehensive than others, but a shorter constitutional text does not imply fewer or simpler constitutional concepts. A laconic constitution may simply require judges to furnish a greater proportion of the requisite vocabulary.¹³⁷

Such variations in text and terminology do not appear to engender deep dissimilarities in the analytical structure of rights adjudication. Just as there are only so many institutional configurations available to a constitutional democracy,¹³⁸ there may only be so many ways to perform judicial review of legislation. General patterns of judicial review are not difficult to discern. What

¹³¹ INDIA CONST. art. 14.

¹³² CAN. CONST. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), § 15.

¹³³ INDIA CONST. art. 19(2)-(6) (qualifying rights of expression, assembly, movement, and profession).

¹³⁴ EUROPEAN CONVENTION, *supra* note 124, arts. 6(1), 8(2), 9(2), 10(2), 11(2); *see supra* note 124.

¹³⁵ KENPO arts. 12, 13, 22, 29 (Japan).

¹³⁶ *See* David Beatty, *Protecting Constitutional Rights in Japan and Canada*, 41 AM. J. COMP. L. 535, 544 (1993) ("[T]he American multi-tiered framework of judicial review is simply the balancing and proportionality principles by other names. ... In substance, the criteria of constitutionality are exactly the same.").

¹³⁷ The U.S. Constitution, for instance, is under 8,000 words long, including all amendments. By comparison, the Indian Constitution weighs in at over 22,000 words, excluding schedules and appendices; as originally published with all accoutrements, it ran to 254 pages. *See* Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 122, at 448-49. Brevity is arguably a virtue in constitution-writing. *See* LUDWIKOWSKI & FOX, *supra* note 65, at 201 (contrasting the U.S., Indian and Soviet constitutions, and arguing that shorter constitutions tend to be more "effective"). It is a consequence of brevity, however, that the U.S. Supreme Court "has taken what is unquestionably the world's shortest and most laconic constitutional statement of human rights and engrafted on it a set of rules, and a framework of analysis, that is as complex and doctrinaire as the jurisprudence written by any court in the world." DAVID M. BEATTY, *CONSTITUTIONAL LAW IN THEORY AND PRACTICE* 112 (1995). For example, while other constitutions frequently contain express language limiting the rights found therein, *see* L'Heureux-Dubé, *supra* note 23, at 31-32 (discussing the ubiquity in modern constitutional texts of "justification provisions" that expressly allow such limitations upon rights as can be justified); *supra* notes 133-135 and accompanying text (describing various limitations clauses), the Court has been required to articulate and impose such limits itself, "as a matter of 'judicial legislation' and without any express direction in the Bill of Rights." HOGG, *supra* note 68, § 35.1, at 765; Peter W. Hogg, *Canada's New Charter of Rights*, 32 AM. J. COMP. L. 283, 297 (1984).

¹³⁸ *See* Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in NOMOS XXXVIII: POLITICAL ORDER 175, 183-86 (Ian Shapiro & Russell Hardin eds., 1996).

Donald Kommers says of the Bundesverfassungsgericht might equally be said of other courts: "In much of its work, the court seems less concerned with interpreting the Constitution – that is, defining the meaning of a documentary text – than in applying an ends-means test for determining whether a particular right has been overburdened in the light of a given set of facts."¹³⁹ Canadian scholar David Beatty makes the point forcefully:

What is striking about this jurisprudence of constitutional rights when it is examined comparatively is how, even though the courts generally do not frequently refer to each other's judgments, the reasoning they follow and the doctrines they develop to define their powers are virtually identical.¹⁴⁰

[T]he rules of constitutional law can be reduced to two basic principles or tests. To establish the constitutional pedigree of a law it must be shown, first, that the public interest or purpose of the law is of sufficient importance that it offsets (justifies) whatever limitation or restriction it imposes on individuals or groups or other orders of government. Some might call this a utilitarian standard of constitutionality, or a test of 'proportionality,' or balance. [T]he courts also insist that the means, or particular method, that it employs meet a basic standard of 'rationality' - or necessity - as well. ...

Together, these two basic principles require those who have been entrusted with the powers of the state to act with a measure of moderation and proportion.¹⁴¹

The difficulty with Beatty's argument lies in the manner in which it elides the descriptive and the normative. There is a reason why Beatty identifies the generic "tests" of constitutionality as "basic principles": his argument is not merely that constitutional courts employ generic analytical methods, but rather that these methods are intrinsically desirable. In his view, the ubiquity of particular tests reflects an "overarching, unified method of constitutional review that does distinguish, in an objective and principled way, between laws that are constitutional and those that are not."¹⁴² That is, he identifies the actual with the good, in a manner that implies the actual exists *because* it is good. Sujit Choudhry

¹³⁹ KOMMERS, *supra* note 98, at 46 (likening the German and American approaches to constitutional adjudication).

¹⁴⁰ Beatty, *supra* note 32, at 133.

¹⁴¹ BEATTY, *supra* note 129, at 15-16.

¹⁴² *Id.* at 15.

astutely characterizes Beatty's argument as an example of "universalism," defined by the normative premise that the mere existence of a legal principle in many legal systems is evidence of its "truth or correctness."¹⁴³ A strictly descriptive formulation of generic constitutional analysis might therefore do best to avoid such terms as "proportionality" and "rationality" that double as normative principles. What is sought is an account of what constitutional courts do, not an argument that what they do is in some sense good.

Such an account might go like this. The rights and protections that constitutions confer are inevitably subject to such restrictions as courts consider justifiable. In deciding whether a particular restriction is tolerable, courts employ the two means of problem-solving that are perhaps most familiar to lawyers, balancing¹⁴⁴ and means-end analysis.¹⁴⁵ Balancing requires the court to evaluate both the relative importance of the conflicting interests at stake, and the extent to which these interests are at stake. In the context of rights adjudication, the interests to be balanced will typically be the government's objectives, on the one hand, and individual rights or protections, on the other: the more important the latter, the more important the former must be to justify their infringement. This balancing is qualified by the extent to which each interest is implicated: a search of one's person and possessions strikes more deeply at privacy and property interests when conducted at home, for example, than when conducted at the airport, while the government's interest in public safety follows the opposite pattern. As the interests to be weighed are incommensurable, however, judicial balancing is not merely imprecise; it is incapable of precision. The notion of balancing presupposes weighing and measurement, yet the only metric available to judges is that of analogy. The other technique in the judicial repertoire, means-end analysis, is concerned not with the nature of the governmental objective, but with how that objective is achieved. Courts will attempt to determine whether the objective could have been satisfactorily

¹⁴³ Choudhry, *supra* note 28, at 890.

¹⁴⁴ "[L]awyers who are typically trained to resolve conflicts will be inclined to think that balancing competing interests is the most rational way of resolving problems." Tushnet, *supra* note 24, at 336.

¹⁴⁵ "[M]eans-end rationality is closer to the center of the legal enterprise than logic, [o]r than reasoning by analogy." POSNER, *supra* note 117, at 107-08.

achieved in a manner less injurious to the individual interest at stake: the more important the interest, the less that unnecessary impairment of it will be tolerated.

This two-part account of generic constitutional analysis mirrors Justice Breyer's own description of what constitutional courts do when faced with important conflicting interests. *Nixon v. Shrink Missouri Government PAC*¹⁴⁶ required the Court to revisit the tangled thicket of campaign finance regulation, in which rights of speech and association coexist uneasily with restrictions intended to combat corruption and secure public confidence in democratic processes. In a concurring opinion joined by Justice Ginsburg, Justice Breyer identified balancing and means-end analysis as the Court's two tasks in complex cases:

[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).¹⁴⁷

The generic character of this approach was not lost on Justice Breyer, who proceeded to describe it as "consistent with that of other constitutional courts facing similarly complex constitutional problems," and to offer decisions of the European Court of Human Rights and the Canadian Supreme Court by way of example.¹⁴⁸ Elsewhere, Justice Breyer has spoken of the dawning "global legal enterprise,"¹⁴⁹ an ominous phrase to those who fear the judicial imposition of foreign law.¹⁵⁰ The enterprise that he describes, however, may be a naturally

¹⁴⁶ 528 U.S. 377 (2000).

¹⁴⁷ *Id.* at 402 (Breyer, J., concurring).

¹⁴⁸ *Id.* at 403 (citing *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1998), and *Libman v. Quebec*, [1997] 3 S.C.R. 569 (Can.)).

¹⁴⁹ Breyer, *supra* note 4.

¹⁵⁰ See *Hearing on H.R. Res. 568*, *supra* note 5, at 7 (opening statement of Representative Tom Feeney) (quoting Justice Breyer's language with disapproval).

occurring one, insofar as it is defined not by common results, but by the problem-solving skills shared by lawyers everywhere.

Whether balancing and means-end analysis can or should be described as proportionality review is a question of terminology.¹⁵¹ The term "proportionality" is fraught with difficulty. In part because it is so widely used by different courts, the term has defied consistent definition. Allowing for differences in the ways that courts formulate their approaches, however, proportionality consistently emerges as an umbrella term that implies both identification and weighting of the relevant conflicting interests, and evaluation of the extent to which the conflict may be minimized by careful choice of means. For purposes of conceptual clarity, it may be better to speak separately of balancing and means-end analysis. There is no set sequence in which courts will perform these steps, under the name of proportionality or otherwise; nor are they always kept distinct.¹⁵² Some courts may impose threshold tests of weighing or balancing¹⁵³; others may be prepared to assume implicitly that a governmental objective is sufficiently weighty to justify some restriction in principle, but hold that the means adopted is unnecessarily injurious to the individual interest at stake.¹⁵⁴ Whether or not one agrees with Beatty that these techniques amount to an "objective and principled" way of deciding constitutional questions, their sheer ubiquity suggests that courts resort to them for lack of better alternatives. The heuristics available to the legal mind in the face of normative conflict are few. Though there exist verbal formulae that purport to define the tasks of balancing and means-end analysis, these definitions – and the variations among them – may not make much practical difference. Judges are inevitably required

¹⁵¹ See Jackson, *supra* note 53, at 609 ("While the language of 'proportionality' is not generally used in the United States, the underlying questions - involving the degree of fit between the claimed objective and the means chosen, and a concern for whether the intrusion on rights or interests is excessive in relation to the purpose - are already an important part of some fields of U.S. constitutional law[.]").

¹⁵² See CRAIG & DEBÚRCA, *supra* note 122, at 372 (noting that the E.C.J. will sometimes collapse the second and third stages of the proportionality inquiry); TRIDIMAS, *supra* note 125, at 92 (same).

¹⁵³ In Canada, for example, the government must first proffer a "pressing and substantial objective" capable of justifying an infringement upon a fundamental right or freedom before the court will perform any balancing or means-end analysis. *R. v. Oakes*, [1986] 1 S.C.R. 103, 138-39. In practice, however, few cases are decided on the basis of this threshold requirement. See HOGG, *supra* note 70, §§ 35.8, 35.9(b), at 779-80, 784.

¹⁵⁴ See, e.g., Gunther, *supra* note 119, at 26-30 (discussing cases in which the U.S. Supreme Court has engaged in means scrutiny to avoid reaching the merits of difficult constitutional claims).

to exercise that subjective and therefore distrusted quality known as judgment. It is the irony of constitutional adjudication that judges are so often reluctant to advertise their reliance upon the very quality for which they are most required.

IV. GENERIC CONSTITUTIONAL DOCTRINE

A. *The Varying Uses of Foreign Doctrine*

It is very common for constitutional courts to consider what courts elsewhere have done. Some, such as the Israeli Supreme Court, borrow systematically from other countries¹⁵⁵; the U.S. Supreme Court, by comparison, considers the constitutional law of other jurisdictions only sporadically.¹⁵⁶ Indeed, the mere mention of foreign case law in a Supreme Court decision attracts attention in this country precisely because it is so rare.¹⁵⁷ To discuss what other courts have done, however, is not necessarily to imitate them. The uses to which judges put foreign legal materials are varied. No one supposes that foreign case law ever constitutes controlling authority; nevertheless, the mere fact that a court somewhere has reached a particular conclusion may imbue the conclusion with some vestige of authority or precedential value.¹⁵⁸ Alternatively, a foreign decision can be treated as nothing more than a potential source of persuasive reasoning, akin to an academic treatise, or it can be used for reasons having nothing at all to do with either its precedential or persuasive value. Foreign materials can be used in merely evidentiary fashion: Justice Kennedy's oft-criticized references in *Lawrence v. Texas* to European case law and British legislative materials¹⁵⁹ were made not to harmonize American constitutional law

¹⁵⁵ See Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284, 285 (1999) (describing the Israeli Supreme Court as "the most important comparative constitutional law institute of the world").

¹⁵⁶ See L'Heureux-Dubé, *supra* note 23, at 37-38.

¹⁵⁷ See *id.* at 38; Greenhouse, *supra* note 4, § 4, at 4.

¹⁵⁸ See Posner, *supra* note 28, at xx (stressing the "essential distinctions" "between citing a decision as controlling authority and as authority that is not controlling, and between citing a decision as either kind of authority and as no authority at all").

¹⁵⁹ See *Lawrence*, 123 S. Ct. at 2481 (citing an advisory committee report to the British Parliament and the E.C.H.R.'s decision in *Dudgeon v. United Kingdom*). For criticism of the *Lawrence* majority's use of foreign materials, see, for example, Steyn, cited above in note 5, at 56; Wooten,

with foreign law, but rather to refute historical assertions upon which *Bowers v. Hardwick* had relied.¹⁶⁰ In fact, Justice Kennedy has publicly defended the Court's resistance to the influence of European case law.¹⁶¹ References to foreign legal materials may simply be a form of courtesy: as Justice O'Connor has put it, to take notice of other courts may help to "create that all-important good impression" among them.¹⁶² Such courtesy is not necessarily idle: the appearance, if nothing more, of engaging in international judicial dialogue may increase a court's own influence and prestige.¹⁶³ Not least of all, comparison often teaches courts not what to emulate, but what to avoid. Other courts have explicitly considered the U.S. approaches to hate speech, pornography, and capital punishment, only to reject them¹⁶⁴; nor are they anxious to recreate

cited above in note 5, at P6; and the congressional resolutions and testimony discussed above in note 16.

¹⁶⁰ 478 U.S. 186 (1986); see Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 75-75, 80 (2004) (noting that international materials were "used defensively" in *Lawrence* to "defeat unsupported claims" about the universality of opposition to sodomy); *Hearing on H.R. Res. 568*, *supra* note 5, at 17 (prepared statement of Vicki C. Jackson) (noting that the use of foreign materials in *Lawrence* was partly to "to correct or clarify the historical record referred to in Chief Justice Burger's opinion in *Bowers v. Hardwick*").

¹⁶¹ See BORK, *supra* note 94, at 24-25 (describing how Justice Kennedy "bore the brunt of the attack on the Court's alleged 'insularity'" at the American Bar Association's 2000 meeting in London, but "did not succumb" to this "insolent foreign browbeating").

¹⁶² Rankin, *supra* note 5, at A3 (quoting a speech given by Justice O'Connor in 2003).

¹⁶³ See Wu, *supra* note 10 (describing the Supreme Court's references to foreign materials as "a useful courtesy" by which the Court "increases its intellectual influence," even if it "proceed[s] to ignore their reasoning"); L'Heureux-Dubé, *supra* note 23, at 37-39 (observing, from the vantage point of the Canadian Supreme Court, that the Rehnquist Court's "failure to take part in international dialogue" has impaired its influence); Slaughter, *Global Community*, *supra* note 23, at 198 (suggesting that Canadian and South African courts have been rewarded with disproportionate influence for their ability "to capture and crystallize the work of their fellow constitutional judges around the world"); cf. Schauer, *supra* note 25, at 258-59 (suggesting that nations seek to maximize their "international legal influence" and shape their constitutional law "to maximize the likelihood" of such influence).

¹⁶⁴ See Schauer, *supra* note 25, at 22-23; L'Heureux-Dubé, *supra* note 23, at 26-27, 36-37 ("Cross-pollination helps not only when we *accept* the solutions and reasoning of others, but when we *depart* from them, since even then, understanding and articulating the reasons a different solution is appropriate for a particular country helps make a better decision."); Rapaczynski, *supra* note 137, at 405, 407-08 (noting that the U.S. Constitution has exerted upon other constitutions both "positive influence" of the kind that inspires imitation, and "negative influence" of the kind that prompts pursuit of a different approach); Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 8, at 63 ("In recent decades, ... the U.S. Constitution has served mainly as a negative model of constitutional governance around the world, not only with respect to governmental structures and relationships, but also ... with respect to certain guaranteed rights.").

Lochner-style¹⁶⁵ restrictions upon government regulation in their own countries.¹⁶⁶

Precisely because courts consult foreign doctrine to varying degrees and make inconsistent uses of what they observe, the mere fact that they acknowledge one another does not by itself predict the emergence of generic constitutional doctrine. It is not self-evident that deliberate comparative constitutional analysis, by itself, will lead courts to converge rather than to diverge. Much has been made, by supporters and critics alike, of the extent to which communication and doctrinal borrowing have increased among judges and courts.¹⁶⁷ The full panoply of homogenizing pressures at work, however, may escape the recognition and control of the judges themselves. Most notably, the manner in which constitutional courts share common theoretical concerns and analytical methods, as discussed above, is likely to yield doctrinal similarities regardless of whether judges consciously interact with one another. Other reasons to expect generic constitutional doctrine include the extent to which constitutional language and history are shared by different jurisdictions; the recurring practical challenges of governance that courts must confront; the influence of legal scholarship; the homogenizing tendencies of federal and supranational structures; and the desire of courts with overlapping jurisdictions to avoid conflict. These factors, and others, will be considered below.

B. Judicial Communication + Ad Hoc Borrowing = Global Law?

It has been suggested that we are witnessing, as Justice Breyer puts it, the dawning of a "global legal enterprise."¹⁶⁸ Similarly, if less stirringly, Justice Ginsburg and Canadian Justice Claire L'Heureux-Dubé speak of an

¹⁶⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶⁶ See Anthony Ogus, *Property Rights and Freedom of Economic Activity*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 122, at 129, 142-43 (noting "the reluctance of constitutions and judges to pursue freedom of contract ideals" in light of *Lochner*); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. ____ (forth coming 2004).

¹⁶⁷ See *infra* Part IV.B.

¹⁶⁸ Breyer, *supra* note 4.

"international dialogue" on human rights questions.¹⁶⁹ It is unclear, however, what the nature or consequences of this global judicial "enterprise" or "dialogue" happen to be. Anne-Marie Slaughter writes, for example, of a "global community of courts," of judges experiencing "a change in their own consciousness" as they "increasingly com[e] to recognize each other as participants in a common judicial enterprise."¹⁷⁰ But the reality that she describes is, by comparison, less exalted:

[Constitutional judges] are coming together in all sorts of ways. Literally, they meet much more frequently in a variety of settings, from seminars to training sessions and judicial organizations. Figuratively, they read and cite each other's opinions, which are now available in these various meetings, on the Internet, through clerks, and through the medium of international tribunals that draw on domestic case law and then cross-fertilize to other national courts.¹⁷¹

In other words, judges communicate, both directly and indirectly, more extensively than before. On this account, the "global community of courts" sounds more like a literary salon writ large than a global judicial body that will fashion and impose an internationally harmonized body of constitutional law. Critics, nevertheless, have predicted the direst of consequences. Robert Bork warns that judges everywhere are in thrall of what he calls the "New Class," comprised of socialist and anti-religious "faux intellectuals" who "hope[] to outflank American legislatures and courts by having liberal views adopted abroad and then imposed on the United States."¹⁷² John McGinnis, meanwhile, has testified before Congress that "citing foreign cases ... might seem very chic to the cogniscenti [sic], but that cosmopolitan style comes with a price": it "has the potential to alienate our citizens from their own Constitution" – which, in turn, undermines the stability of the Republic.¹⁷³ Not to be outdone, Jeremy Rabkin has alleged that the European Union "is really set on undermining American

¹⁶⁹ See Ginsburg & Merritt, *supra* note 6, *passim*; L'Heureux-Dubé, *supra* note 23, *passim*; The Honourable Claire L'Heureux-Dubé, *From Many Different Stones: A House of Justice*, 41 ALTA. L. REV. 659, 667-68 (2003).

¹⁷⁰ Slaughter, *Global Community*, *supra* note 23, at 192, 194.

¹⁷¹ *Id.* at 192-93.

¹⁷² BORK, *supra* note 94, at 2-16.

¹⁷³ See *Hearing on H.R. Res. 568*, *supra* note 5, at 29 (statement of John Oldham McGinnis) ("Our citizens' affection for their own Constitution is one of the things that keeps our republic stable.")

sovereignty" and seeks to do so by "infiltrat[ing] into our judicial system this idea that our judges need to listen to what their judges say."¹⁷⁴

In this country, at least, such drastic consequences seem unlikely to result from increased judicial communication alone. More plausibly, those justices who travel frequently to international conferences will become more likely to indulge research on the part of their clerks into the case law of courts whose members they have met, and which they now hold in intellectual esteem. The relevant thought process, if read aloud, might go something like this:

I have now met a number of the English (or Canadian, or German) judges and found them clever and capable. I think I shall make a point of reading their opinions in the future. I may want to borrow ideas from them, and perhaps even cite them as persuasive authority, if and when it seems relevant and appropriate to do so - which admittedly may never be the case, even putting aside the criticism I will attract for considering such materials at all.

Professional admiration and courtesy aside, the use of foreign materials may also be encouraged by the "law of the instrument."¹⁷⁵ Having a hammer leads one to ask not how problems can best be solved, but whether they can be solved with a hammer; similarly, merely knowing how another court has dealt with a problem can make that approach attractive. If it turns out, for instance, that the Canadian Supreme Court has "appl[ie]d somewhat similar legal phrases to somewhat similar circumstances,"¹⁷⁶ a ready-made and therefore attractive solution arguably exists. The extent of such ad hoc borrowing, however, will depend upon what judges know about the work of other courts. By the judges' own admission, that knowledge is likely to be limited in this country, no matter how it may be valued in principle.¹⁷⁷ Unlike its Israeli counterpart, the U.S. Supreme

¹⁷⁴ *Id.* at 49.

¹⁷⁵ See ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE* 28 (1964) ("'[T]he law of the instrument,' ... can be formulated as follows: Give a small boy a hammer, and he will find that everything he encounters needs pounding."); cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) (noting that the common law style of constitutional adjudication prevalent in this country values ready-made solutions for the sheer reason that they are ready-made).

¹⁷⁶ Breyer, *supra* note 4.

¹⁷⁷ See *id.* ("Neither I nor my law clerks can easily find relevant comparative material on our own."); Posner, *supra* note 158, at xx ("[T]he judicial systems of the rest of the world are immensely varied and most of their decisions inaccessible, as a practical matter, to our monolingual judges and law clerks").

Court does not hire clerks from other countries to assist with the task of comparative analysis.¹⁷⁸ The sheer difficulty of the task is incentive enough for the justices to stick with domestic materials.

C. *Generic Text, Generic Doctrine*

Apart from ad hoc communication and peer pressure among judges, there do exist more systematic and profound reasons to expect the emergence of generic constitutional doctrine. Perhaps the most obvious reason is the extent to which constitutions themselves borrow from one another. The cumulative result of such borrowing amounts, arguably, to a lingua franca of constitutional provisions. The Canadian Charter of Rights and Freedoms, for example, borrows from international human rights documents; the constitutions of South Africa and Israel, in turn, borrow both from those same international documents and from the Canadian Charter.¹⁷⁹ The South African Constitution even obligates courts to consider "international law" and encourages them to consider "foreign law" when interpreting rights provisions.¹⁸⁰ Having been imposed by the U.S. after World War II, the Japanese Kenpo is influenced by American constitutional law, to say the least.¹⁸¹ India's constitution was not adopted under compulsion but bears both British and American imprints; indeed, in many cases, its text was modified to better reflect the constitutional jurisprudence of the U.S. Supreme

¹⁷⁸ See Somek, *supra* note 155, at 285 (observing that the Israeli Supreme Court's strength in comparative constitutional analysis stems in part from its "practice of employing clerks from all over the world, who do the research work on their country of origin").

¹⁷⁹ See L'Heureux-Dubé, *supra* note 23, at 24; Lorraine Weinrib, *The Canadian Charter as a Model for Israel's Basic Laws*, 4 CONST. F. 85, 85-87 (1993) (suggesting that the Canadian Charter offered Israel an attractive example because it is a "coherent national statement" of values and priorities found more generally in the "post-World War Two family of rights-protecting instruments"); John Claydon, *International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms*, 4 SUP. CT. L. R. 287, 295-302 (1982) (noting the influence of the European Convention on Human Rights, the U.N. Universal Declaration of Human Rights, and other international human rights instruments upon the Canadian Charter).

¹⁸⁰ S. AFR. CONST. § 39(1).

¹⁸¹ See, e.g., Brown Hamano, *supra* note 22, at 426-42; Lawrence W. Beer, *Constitutionalism and Rights in Japan and Korea*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 122, at 230-43; Takahashi, *supra* note 129, at 41-47; Rapaczynski, *supra* note 137, at 429-433 (observing that the "Preamble alone contains echoes of the U.S. Constitution, the Declaration of Independence, the Gettysburg Address, and other U.S. documents, and no echoes of any Japanese sources").

Court.¹⁸² Even the U.S. Constitution did not spring forth from a vacuum; America did not invent such concepts as habeas corpus¹⁸³ or trial by jury.¹⁸⁴ It would be surprising if courts entirely failed to interpret similar or even identical constitutional language in similar ways. Historical linkages – such as those between the U.K. and other common law jurisdictions – may heighten the similarities, especially to the extent that courts are disposed toward originalism, though this tendency may be unusually or even uniquely American.¹⁸⁵

D. Generic Concerns, Generic Doctrine

Courts may also develop generic constitutional doctrine in response to common theoretical and practical concerns. The countermajoritarian dilemma is one such concern: as discussed in Part II, courts feel compelled to define and justify their power in such a way as to secure widespread acceptance. One way in which they may attempt to do so is by refusing to decide what they consider "political questions." As Beatty observes, American and Japanese courts have fashioned "political question" doctrines that immunize from judicial review "almost all issues of foreign affairs, national security and the operational structures of government"; they have done so, moreover, despite the fact that neither constitution calls for judicial abstention on such questions.¹⁸⁶

¹⁸² See Tripathi, *supra* note 22, at 62-79. Notably, even the Indian Constitution's failures to emulate the U.S. Constitution reflected profound American influence. Its drafters had initially planned to include a due process clause along the lines of the Fifth Amendment but abandoned the idea after consultations with Justice Frankfurter and instead adopted phrasing drawn from the Japanese Constitution – which had itself been written by Americans. In a further twist of irony, the adoption of the Japanese version did not prevent the Indian Supreme Court from introducing American-style due process jurisprudence. See Rapaczynski, *supra* note 137, at 450-51. American justices and law professors were also influential in persuading the drafters not to adopt American-style federalism. See *id.* at 449 n.219.

¹⁸³ Compare U.S. CONST. art. I, § 9, d. 2 with, e.g., The Habeas Corpus Act, 1679, 31 Car. 2 c. 2 (Eng.).

¹⁸⁴ Compare U.S. CONST. art. VII with, e.g., The Bill of Rights, 1689, 1 W. & M., sess. 2, c. 2, § I (Eng.) ("Jurors ought to be duely impannelled and returned, and Jurors which passe upon Men in Trialls for High Trason ought to be Freeholders.").

¹⁸⁵ See L'Heureux-Dubé, *supra* note 23, at 33-34 (contrasting American with Canadian and Australian perspectives on the relevance of original intent to constitutional adjudication).

¹⁸⁶ See Beatty, *supra* note 32, at 133-34; Beatty, *supra* note 136, at 537-38; see also, e.g., Brown Hamano, *supra* note 22, at 447-52 (discussing the Japanese Supreme Court's refusal to decide cases under Article 9 of the Kenpo).

Constitutional courts must also shape constitutional doctrine to reflect the extent of market regulation and income redistribution in modern economies. Unless courts wish to attempt the dismantling of the administrative state or welfare state – in the face of what is likely to be insurmountable opposition – they must accommodate property rights to a wide range of governmental restrictions beyond those necessary for the prevention of force or fraud. Some constitutions facilitate this task by qualifying economic interests in ways that they do not qualify other interests. The Canadian Charter of Rights and Freedoms, for example, does not even contain the words "property" or "contract,"¹⁸⁷ while the Japanese Kenpo explicitly subjects property rights, but not other types of rights, to regulation consistent with the "public welfare."¹⁸⁸ By contrast, there exists no comparable textual basis in the U.S. Constitution for the disfavoring of property rights relative to other liberty interests. Nevertheless, it is by now well established that freedom of contract, though constitutionally protected, will ordinarily be required to yield to legislation that furthers the general welfare.¹⁸⁹ Regardless of constitutional text, the consistent pattern among courts is to employ varying levels of scrutiny, and to reserve the least stringent scrutiny for economic regulation.

Another practical concern that courts confront is the fact that governments must allocate finite resources in pursuit of competing goals. Scarcity of resources dictates the underenforcement of social and economic rights, relative to traditional civil and political liberties¹⁹⁰ that can be upheld at little or no economic cost to the state. Thus, though many constitutions contain provisions that purport to direct or obligate the state to pursue particular social welfare goals, these provisions tend by their own terms to be judicially unenforceable.¹⁹¹

¹⁸⁷ See CAN. CONST. (Constitution Act, 1982) pt. I.

¹⁸⁸ See KENPO art. 29 (Japan) ("Property rights shall be defined by law, in conformity with the public welfare."); *id.* art. 31 (providing that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law," but omitting any mention of "property"); *supra* note 129 (discussing the "dual standard" approach of Japanese courts).

¹⁸⁹ See, e.g., *United States v. Cardene Products Co.*, 304 U.S. 144, 152 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379, 391-92 (1937); *Nebbia v. New York*, 291 U.S. 502, 510-11, 537 (1934).

¹⁹⁰ On the distinction between "civil-political" and "economic-social" rights, see Louis Henkin, *Introduction*, in *CONSTITUTIONALISM AND RIGHTS*, cited above in note 122, at 8-9, 14-15.

¹⁹¹ See, e.g., INDIA CONST. art. 37 (providing that the "Directive Principles of State Policy" found in Part IV of the Indian Constitution, unlike the "Fundamental Rights" set forth in Article III, "shall

In this country, the outcome has been the same: the Constitution expresses no social or economic policy objectives in the first place, and the Court has explicitly rejected the idea that the Due Process Clause affirmatively guarantees "minimal levels of safety and security."¹⁹² By contrast, the Japanese Kenpo explicitly provides that "[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living,"¹⁹³ without in any way limiting judicial enforcement of this right. Not surprisingly, the Japanese Supreme Court quickly cast doubt upon the enforceability of this provision.¹⁹⁴

E. The Influence of Legal Scholarship

A historically significant reason why jurisdictions have shared legal doctrine with one another, in the absence of any formal compulsion or overarching authority, has been the influence of doctrinal legal scholarship. For centuries, the blend of Roman and canon law known as the *ius commune* – literally, the "common law" – observed no national boundaries and found explication not in judicial opinions, but in a body of legal commentary and in the curricula of European universities.¹⁹⁵ In the Anglo-American tradition as well,

not be enforced in any court"; IR CONST. art. 45 (setting forth "principles of social policy ... intended for the general guidance of the legislature" that "shall not be cognisable in any Court"); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 52 U. CHI. L. REV. 519, 525-27 (1992) (noting that post-World War II European constitutions have often supplemented "traditional negative liberties" with "affirmative social and economic rights or obligations," yet "no democratic country has placed social and economic rights on precisely the same legal footing as the familiar civil and political liberties").

¹⁹² *DeShaney v. Winnebago County Dep't of Social Svcs.*, 489 U.S., 189, 195 (1989).

¹⁹³ KENPO art. 25 (Japan).

¹⁹⁴ See Glendon, *supra* note 191, at 528-30 (discussing Article 25 of the Kenpo and the Japanese Supreme Court's decision in *Asahi v. Japan*); Beer, *supra* note 181, at 237 & 256 n.48 (remarking that Article 25 is "in some cases justiciable" but remains the subject of "serious debate" in Japan).

¹⁹⁵ See R.H. Helmholtz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 964 n.12 (1990) (describing the *ius commune* as "the law studied in European universities and regularly applied in continental courts in the absence of local statute or custom to the contrary"); M.H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 754 (2002) (defining the *ius commune* as a mixture of Roman and Canon law that dominated western Europe from the late eleventh through the fifteenth centuries); H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 266-68 (1987) (describing the historical European view of Roman law as "universal learning" that defied national boundaries and which relied for its content not upon judicial opinions, but rather upon a legal literature consisting of "questions, with attempts at reasoned responses").

some prominent works have come to enjoy authority in their own right.¹⁹⁶ For a variety of reasons, doctrinal scholarship seems unlikely to recapture those halcyon days of influence.¹⁹⁷ Nonetheless, insofar as treatises, Restatements, Model Codes, and the like have fostered interstate uniformity in areas of private law, it is reasonable to suspect that legal scholarship may also have encouraged uniformity in the development of public law.

The American experience, at least, suggests that doctrinal writing is indeed a force for homogenization in the constitutional arena. To the extent that state courts consult the academic literature, they are likely to find either that their own state constitutions are not discussed at all,¹⁹⁸ or that their constitutional law is fungible with that of other states - if not also with federal constitutional law. In the nineteenth century, for example, anyone who consulted Cooley's treatise on state constitutional law¹⁹⁹ - the best-selling law book of its time, and widely

¹⁹⁶ See, e.g., A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 635-36, 667 (1981) (noting the recognition in English legal argument of certain "works of authority," and offering as an example Littleton's *Tenures*, circa 1481, which came to be "treated as though it were itself law" and "regarded with a reverence approaching that accorded an actual statute").

¹⁹⁷ See, e.g., Christopher D. Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1150-51 (1981) (describing the disfavor into which treatise-writing, and even "mastery of any body of law," has fallen among legal academics); Glenn, *supra* note 195, at 287 ("[L]egal writers in the United States have ... become largely preoccupied with giving 'an account of what is happening amongst themselves' and accusations of narcissism, personal bias, and self-interest are now common coin in United States legal discourse[.]") (quoting Stone, *supra*, at 1151); Simpson, *supra* note 196, at 677-79 (speculating that Legal Realism has negatively affected the American treatise-writing tradition by undermining the notion that judicial opinions express "some rational scheme of principles").

¹⁹⁸ Justice Linde makes the point forcefully:

Constitutional specialists ... need to overcome the ingrained assumptions that constitutional law means the decisions of the United States Supreme Court, that for a national career, in a "national" law school, professional scholarship means adding one more ream to each year's paper mountain of commentary on those decisions, and that attention to the constitutional law of a state, including the state where the law school happens to be located, or to the treatment of one issue in several states, is for ambitious professors and law review editors a distinctly minor league game. These self-perpetuating biases are hard to overcome.

Linde, *supra* note 21, at 936; see also, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 770 (1991) (characterizing state constitutional discourse as "impoverished" relative to federal constitutional discourse).

¹⁹⁹ 1-2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Walter Carrington ed., 8th ed. 1927) (1868). Cooley's *Constitutional Limitations* first appeared in 1868 and was last published, as a two-volume set, in 1927. The last edition to be released in his lifetime was the sixth edition, published in 1890, upon which the citations in this essay rely. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF

cited by judges and practitioners alike²⁰⁰ - would have found, at best, decisions from individual states used to illustrate generic propositions of state constitutional law²⁰¹ and, at worst, Supreme Court decisions on *federal* constitutional law used to explain principles of *state* constitutional law, with passing references to state court decisions added in the manner of an afterthought.²⁰²

It has been suggested that the tendency of constitutional scholarship to favor federal over state law has more to do with the incentives and desires of legal scholars than with any characteristic of the subject matter itself.²⁰³ The suggestion is not without merit: from a market perspective alone, doctrinal writing that purports to be comprehensive, and to synthesize the law of many jurisdictions, is likely to have greater appeal to a broader audience than scholarship that dwells upon the doctrinal niceties of one jurisdiction among

THE AMERICAN UNION (Alexis C. Angell ed., 6th ed. 1890) (1868) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890)].

²⁰⁰ See Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 759 (1967); Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 496-97 (1997). In the words of one contemporary reviewer, Cooley's *Constitutional Limitations* was "not only a standard authority, but almost exclusively sovereign in its sphere": "It is cited in every argument and opinion on the subjects of which it treats, and not only is the book authoritative as a digest of the law, but its author's opinions are regarded as almost conclusive." *Id.* at 497 (quoting Book Note, 27 ALB. L.J. 300 (1883)); see also, e.g., *id.* at 528 & n.249 (canvassing the various left-wing criticisms attracted by right-wing judicial uses of Cooley's treatise); Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1059-60 & 1060 n.421 (1991) (noting state court acceptance of Cooley's views across a range of nineteenth-century constitutional questions, and quoting Edward Corwin's description of Cooley's treatise as "the most influential treatise ever published on American constitutional law").

²⁰¹ See, e.g., COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890), *supra* note 199, at 192-214 (discussing the power of state courts to invalidate legislation); *id.* at 238-69 (discussing the plenary nature of state control over municipal governments); see also, e.g., THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 180-87 (John Norton Pomeroy ed., 2d ed. 1874) (1857) (reviewing decisions from four states and concluding that courts have "no right whatever" to invalidate legislation on the grounds of "natural right, abstract justice, or sound morality").

²⁰² In chapter four, for example, Cooley discusses the weight to be given a contemporaneous or long-accepted construction of a state constitution by dedicating several pages of description to a trio of Supreme Court decisions - *Stuart v. Laird*, *Martin v. Hunter's Lessee*, and *Bank of United States v. Halstead* - then citing in the text of the discussion only two state decisions, from Massachusetts and Maryland, as confirmation of the point already made using federal constitutional law. See COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890), *supra* note 199, at 82-85.

²⁰³ See *supra* note 198 (quoting Justice Linde's criticism of the strong federal bias in contemporary constitutional scholarship).

many. It is doubtful whether Cooley or Sedgwick²⁰⁴ would have enjoyed the same measure of commercial success or intellectual influence had they confined themselves to the constitutional law of Michigan or Massachusetts. Whatever the explanation, the tendency of legal scholarship either to discuss state constitutional law in a totalizing way or to neglect it entirely has hardly helped state courts to pursue unique constitutional approaches.

F. The Homogenizing Tendencies of Federal and Supranational Structures

A particular challenge is to unravel the complex and overlapping ways in which federal and supranational structures foster constitutional homogenization. The most obvious path that constitutional doctrine travels within such structures is a vertical one, from top to bottom, as when federal or supranational law is formally binding upon state or national courts. Unremarkably, British courts enforce E.U. law as announced by the European Court of Justice and now must also apply the jurisprudence of the European Court of Human Rights.²⁰⁵ In this country, the extent to which federal constitutional doctrine protects a given right amounts to a floor beneath which state constitutional law cannot fall - if not also a ceiling above which it cannot rise.²⁰⁶ Of greater interest is the tendency of member states to adopt federal or supranational doctrine in the absence of any formal obligation to do so. It is in this context, after all, that Justice Linde employed the term "generic constitutional law" to criticize the indiscriminate adoption of federal constitutional doctrine by state courts²⁰⁷; as James Gardner puts it, state courts have "borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of lingua franca of constitutional argument generally."²⁰⁸ Paul Kahn has argued that state and federal courts are in fact partners in a common "interpretative

²⁰⁴ SEDGWICK, *supra* note 201.

²⁰⁵ See *supra* note 37 (discussing the European Communities Act 1972 and the Human Rights Act 1998).

²⁰⁶ Federal constitutional rights may limit the content of state constitutional rights if the two happen to conflict. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83-84 (1980) (holding that the state constitutional right of picketers to enter a privately owned shopping center did not itself amount to a violation of the Takings Clause).

²⁰⁷ Linde, *supra* note 21, at 942.

²⁰⁸ Gardner, *supra* note 198, at 766.

enterprise" of "American constitutionalism," which "seeks to understand the appropriate role for the rule of law in a democratic order."²⁰⁹ It is unclear, however, what makes such a lofty enterprise specifically American: few constitutional courts would disagree that they seek to articulate "the appropriate role for the rule of law in a democratic order." Kahn's "interpretive enterprise" might thus be treated as another interpretation of Justice Breyer's mysterious "global legal enterprise."

The U.K.'s history with the European Court of Human Rights (the "E.C.H.R.") illustrates a number of pressures toward conformity that supranational law can exert upon domestic jurisprudence. The U.K. was, in 1951, the first country to ratify the European Convention on Human Rights (the "Convention"),²¹⁰ which included as one of its enforcement mechanisms the establishment of the E.C.H.R. at Strasbourg.²¹¹ Subsequently, the U.K. accepted the right of individual petition, which enabled individuals to sue the U.K. in the E.C.H.R. for violations of the Convention.²¹² At no time, however, did the U.K. incorporate the Convention itself into domestic law. As a result, individual litigants could win binding judgments against the U.K. in Strasbourg but could not invoke the Convention in domestic courts. From that point, the U.K. proceeded to compile the worst losing record of any nation before the E.C.H.R. - a bitter irony for a country that had played a significant role in drafting the Convention.²¹³ Lord Browne-Wilkinson spoke for many in expressing a combination of dismay and injured pride:

It is a most singular feature that the law of this country, which has for so long prided itself on protecting individual freedom, has been

²⁰⁹ Kahn, *supra* note 97, at 1156.

²¹⁰ See Lord Lester, *supra* note 37, at 93-94.

²¹¹ See EUROPEAN CONVENTION, *supra* note 124, § II.

²¹² See Lord Lester, *supra* note 37, at 94-95.

²¹³ See *id.* at 95-96 (describing "some sixty judgments" against the U.K. in a wide variety of contexts); The Right Honourable Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights*, 1992 PUB. L. 397, 398; WADE & FORSYTH, *supra* note 37, at 183-85 & 183 n.11 (noting that the U.K. has been found in breach of "nearly all the Convention rights," and that, by 1995, it had lost nearly half of its cases before the E.C.H.R.); see also BORK, *supra* note 94, at 33 ("It is not dear why most of the [E.C.H.R.]'s decisions on cultural matters appear to involve the United Kingdom."). *But see Bringing Rights Home*, ECONOMIST, Aug. 26, 2000, at 45, 45-46 (calling Britain's record before the E.C.H.R. an "international embarrassment," especially in light of the British role in drafting the Convention, but stating, contrary to Lord Browne-Wilkinson, that the U.K. "does not have the worst record on compliance").

found to be in breach of the [Convention] on more occasions than any other signatory. ...

It was those very freedoms enjoyed by us over the centuries which were principal sources of the [Convention] itself. How can it be, then, that our own system of law is unable to protect those freedoms which in 1950 this country agreed to abide by in signing the [Convention]?²¹⁴

Some judges sought to salvage the situation by insisting – as Lord Browne-Wilkinson did – that the principles found in the Convention already existed in the common law:

It is now inconceivable that any court in this country would hold that ... individual freedoms of a private person are any less extensive than the basic human rights protected by the [Convention]. Whenever [its] provisions ... have been raised before the courts, the judges have asserted that the Convention confers no greater rights than those protected by the common law.²¹⁵

To the relief of many, Parliament enacted the Human Rights Act 1998, which incorporated the Convention into domestic law and directed the courts to give it effect, albeit within limits.²¹⁶ Yet adoption of the Convention appears to have heightened, not relieved, the harmonizing pressures of supranational law upon British constitutional law. Traditionally, British courts have decided challenges to governmental action under a highly deferential standard known as

²¹⁴ Lord Browne-Wilkinson, *supra* note 213, at 398, 404.

²¹⁵ *Id.* at 405; *see also, e.g.,* Laws, *supra* note 55, at 61 (arguing that the contents of the Convention "largely represent legal norms or values which are either already inherent in our law, or ... may be integrated into it"). A prominent decision that adopted this strategy was *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534 (H.L.), in which the House of Lords affirmed a decision by the Court of Appeal that local authorities could not bring defamation actions: whereas the Court of Appeal had relied upon the Convention's guarantee of freedom of expression, Lord Keith emphasized that he relied exclusively upon the English common law in reaching the same conclusion. *See id.* at 550-51 (speech of Lord Keith); *see also, e.g.,* Lord Lester, *supra* note 37, at 96-97 (noting that courts made use of the Convention and E.C.H.R. case law "as sources of principles or standards of public policy" "when common law or statutory law was ambiguous, or where the common law was undeveloped or uncertain"); CRAIG, *supra* note 54, at 552 (describing the "growing list" of uses to which courts put the Convention).

²¹⁶ *See, e.g.,* CRAIG, *supra* note 54, at 552-73; Lord Lester, *supra* note 37, at 100-10. The Act does not empower the courts to strike down incompatible parliamentary legislation, in light of concerns expressed by the judicial leadership that such a power would be inconsistent with parliamentary sovereignty and thus unpalatable to many. *See id.* at 98; *supra* note 37 (discussing judicial application of the Human Rights Act). For this reason and others, it has been objected that the Act did not truly incorporate the Convention into domestic law. *See* Marshall, *supra* note 37, at 108-14.

"*Wednesbury* unreasonableness,"²¹⁷ which has been described by supporters and critics alike as nothing more stringent than an "irrationality test."²¹⁸ By contrast, both the E.C.H.R. and the European Court of Justice (the "E.C.J.") apply proportionality review: the E.C.J. does so when violations of E.U. law are alleged, while the E.C.H.R. does so the context of Convention rights. As a result, when governmental action is alleged to violate both domestic law and E.U. law or the Convention – as is often the case – U.K. courts are required to apply both *Wednesbury* and proportionality analyses to the same set of facts. A number of British judges have chafed against this arrangement and sought to incorporate proportionality review into domestic law. Some have argued that *Wednesbury* review can and should be stretched into something resembling proportionality review; others have simply equated proportionality with *Wednesbury* review.²¹⁹

²¹⁷ *Wednesbury* review, also known as *Wednesbury* unreasonableness or the *Wednesbury* principle, derives its name from the decision in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223, in which Lord Greene M.R. observed that British courts will overturn a governmental decision only if it is "so absurd that no sensible person could ever dream that it lay within the powers" of the decisionmaker. *Id.* at 229. In Lord Diplock's influential reformulation, *Wednesbury* unreasonableness "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question ... could have arrived at it." *Brind v. Sec'y of State for the Home Dep't*, [1991] 1 A.C. 696, 765 (H.L.) (speech of Lord Lowry) (quoting *Council of Civil Service Unions v. Minister for the Civil Serv.*, [1985] A.C. 374, 410 (H.L.) (speech of Lord Diplock)); *see also supra* note 46 (discussing *Wednesbury* review).

²¹⁸ *Brind*, [1991] 1 A.C. at 757 (speech of Lord Ackner); *see, e.g.*, ROBERTSON, *supra* note 46, at 238-39; Sir Stephen Sedley, *The Sound of Silence: Constitutional Law Without a Constitution*, 110 LAW Q. REV. 270, 278 (1994) ("Far from being the point at which public law woke up, the *Wednesbury* case is a snore in its long sleep[.]"); SHAPIRO, *supra* note 93, at 111-24 (arguing that English courts do not, in practice, invalidate executive action by the national government). Lest it be suggested that the *Wednesbury* standard is insufficiently deferential to governmental decisionmakers, the House of Lords has also enunciated what commentators have dubbed the "*Super Wednesbury*" test: where intricate questions of policy are involved, the courts are to investigate the propriety of a decision "only if a *prima facie* case were to be shown for holding that the [decisionmaker] had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses." ROBERTSON, *supra*, at 260-61 (quoting *Nottinghamshire County Council v. Sec'y of State for the Env't*, [1986] A.C. 240, 247 (speech of Lord Scarman)). *But see, e.g.*, WADE & FORSYTH, *supra* note 37, at 355-56, 364-66 (observing that, though the language of *Wednesbury* itself suggests that executive decisionmaking "could almost never be found wanting" "the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behavior"); Sir John Laws, *The Limitations of Human Rights*, 1998 PUB. L. 254, 262 (observing that *Wednesbury* review is not "monolithic" and has been sharpened in cases involving human rights); *infra* notes 219-222 and accompanying text (describing efforts to elide *Wednesbury* and proportionality review in cases involving human rights).

²¹⁹ *See R. v. Chief Constable of Sussex ex parte Int'l Trader's Ferry Ltd.*, [1998] Q.B. 477, 495 (C.A.), *aff'd*, [1999] 2 A.C. 418 (H.L.) (quoting Lord Hoffmann's observation that it is "not possible to see daylight" between the two forms of review); WADE & FORSYTH, *supra* note 37, at 368-69. A third approach has been to argue that proportionality is different from *Wednesbury* review, but has in

The House of Lords and the E.C.H.R. have since foreclosed the latter approach; both have indicated that proportionality review is more stringent than *Wednesbury* review.²²⁰ Disagreement abounds, however, over both the extent of the disparity and the pace at which it may be eliminated.²²¹ Lord Slynn, for example, has made increasingly little effort to hide his own impatience:

There is a difference between [proportionality] and the approach of the English courts [under] *Wednesbury*[.] But the difference in practice is not as great as is sometimes supposed. [E]ven without reference to the [Human Rights Act], the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with [E.U.] acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the [Human Rights Act] however makes it necessary that the court should ask whether what is done is compatible with [C]onvention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.²²²

fact been practiced by English judges. See Jowell & Lester, *supra* note 120, at 59-69 (reviewing cases in which English judges have in substance engaged in proportionality review, and arguing that "*Wednesbury* camouflage" should be abandoned for the sake of the "legitimacy and integrity of the judicial process").

²²⁰ See *Brind*, [1991] 1 A.C. at 748 (speech of Lord Bridge); *id.* at 750 (speech of Lord Roskill) (refusing to exclude the "possible future development" of proportionality review as domestic law on a "case by case basis"); *id.* at 766 (speech of Lord Ackner) ("[T]here is *no* authority for saying that proportionality ... is part of the English common law and a great deal of authority the other way." (emphasis in original)); *Smith & Grady v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45, 92-96 (holding that *Wednesbury* review is less stringent than proportionality and fails to constitute an "effective domestic remedy" for breaches of the Convention); see also Lord Lester, *supra* note 37, at 97 (discussing *Brind* and the E.C.H.R.'s response).

²²¹ See, e.g., CRAIG, *supra* note 54, at 598-603 (arguing that proportionality is likely to be adopted as a matter of domestic law, in part because "the *Wednesbury* test itself is moving closer to proportionality"); Laws, *supra* note 218, at 261-62 ("The extent to which the judges have *already* modified the *Wednesbury* test ... has been more striking than is sometimes appreciated."); Lord Irvine, *supra* note 37, at 231 (noting "much argument" over the status of proportionality in domestic law, and the "undeniable" convergence of common law principles of judicial review with "their continental cousins"). Compare, e.g., *Brind*, [1991] 1 A.C. at 748-49, 751 (speeches of Lords Bridge and Templeman) (arguing that, in human rights cases, *Wednesbury* review merely requires courts to ask whether a "reasonable" official, "on the material before him, could reasonably" conclude that the interference with rights was justifiable) with *id.* at 764-67 (speech of Lord Lowry) (quoting traditional, more restrictive formulations of *Wednesbury* review, and criticizing the use of proportionality review as an arrogation of judicial power).

²²² *R. (Alconbury Devs. Ltd.) v. Env't Sec'y*, [2003] 2 A.C. 295, 320-21 (2001) (H.L.) (speech of Lord Slynn); see also *R. v. Chief Constable of Sussex ex parte Int'l Traders Ferry Ltd.*, [1999] 2 A.C. 418, 439 (H.L.) (speech of Lord Slynn).

The British experience, first with the Convention and now with proportionality review, suggests several reasons to expect the harmonization of domestic and supranational constitutional law - the effect of shaming in the human rights context, the law of the instrument, and the appeal of the simplicity that comes with adoption of a single standard or approach. First, there can be little doubt that the embarrassment of repeated losses in Strasbourg encouraged Parliament to enact the Human Rights Act.²²³ Had it not done so, judges might well have continued to incorporate the Convention piecemeal into domestic law themselves, under the guise of articulating the common law²²⁴ or even E.U. law.²²⁵ Moreover, the shaming effect was not simply a consequence of domestic courts looking to other countries in an ad hoc manner and arriving at some subjective impression as to the underprotectiveness of British law. Rather, the U.K. belonged voluntarily to a predefined reference group of nations and faced a supranational scorekeeper in the form of the E.C.H.R.: in other words, the U.K. was a laggard by defined standards, relative to a peer group of its own choosing. Comparative shaming may be especially effective with respect to jurisdictions that pride themselves on a constitutional tradition of freedom, a category into which the U.S. and U.K. both fall. It is equally plausible, though, that countries with less of a constitutional tradition, or a troubled past, would for that very reason be anxious to define constitutional rights aggressively and expansively; Schauer suggests South Africa as a possible example.²²⁶ In either case, when it

²²³ See WADE & FORSYTH, *supra* note 37, at 182-83 (noting the "international notoriety" attracted by British violations of the Convention, and the constant criticism of the U.K.'s failure to make the Convention domestically enforceable); *Bringing Rights Home*, *supra* note 213, at 45 (noting that incorporation of the Convention will help the U.K. to "avoid international embarrassment").

²²⁴ See *supra* note 215 (discussing *Derbyshire County Council v. Times*).

²²⁵ Unlike the Convention, E.U. law has always been directly enforceable by U.K. courts. The E.C.J., in turn, is required to ensure that E.U. institutions "respect fundamental rights, as guaranteed by the ... Convention." TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. 6(2), O.J. (C 325) 5 (2002) [hereinafter TREATY ON EUROPEAN UNION]; see *id.* art. 46(d) (conferring jurisdiction upon the E.C.J. over Article 6(2)); see also, e.g., Case 17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, 2000 E.C.R. I-665, ¶¶ 8-9, at I-670-71 (E.C.J.); CRAIG & DE BÚRCA, *supra* note 122, at 350-54 (discussing the possibility that the E.U. itself may accede to the Convention); *supra* note 125 (discussing Article 52 of the E.U. Charter of Fundamental Rights). Thus, regardless of the Human Rights Act, U.K. courts could enforce the Convention in the areas reached by E.U. law, on the grounds that the Convention is effectively a part of E.U. law. See Lord Browne-Wilkinson, *supra* note 213, at 401 (describing E.U. law as a "backdoor" to incorporation of the Convention).

²²⁶ See Schauer, *supra* note 25, at 259.

comes to the protection of rights and freedoms, no country, or court, is likely to want the booby prize.

Second, the law of the instrument predicts the domestic adoption of supranational constitutional standards. As Paul Craig puts it, the repeated use of proportionality review, as required by E.U. law and now by the Human Rights Act, "will acclimatise our judiciary to the concept" and thereby encourage its incorporation into domestic law as a "general standard of review."²²⁷ Even Lord Irvine, who as Lord Chancellor was responsible for introducing the Human Rights Act, expressed doubt that the courts would continue to "restrict their review to a narrow *Wednesbury* approach" once they became "used to inquiring more deeply in Convention cases."²²⁸ To know and apply a legal standard, it seems, is to grow to like it. A third reason to expect constitutional harmonization might be called the "law of just one instrument": why use two tools when one will do? Many judges would undoubtedly agree with Lord Slynn that it is "unnecessary" and "confusing" for a court to apply two standards of review to the same claim raised under two parallel bodies of law. To that confusion must be added the further indignity that will result if U.K. judges find themselves forced by their own *Wednesbury* standard to deny rights claimed under U.K. law, only to uphold those same rights under standards mandated by courts in France and Luxembourg. To date, British courts have been reluctant to concede that their own law offers less protection than European law.²²⁹

G. Reciprocal Influence and Doctrinal Recursion

Constitutional influences can be expected to percolate upward as well as downward. Thus, while incorporation of the Convention into U.K. law

²²⁷ CRAIG, *supra* note 54, at 600.

²²⁸ Lord Irvine, *supra* note 37, at 235.

²²⁹ See, e.g., *M. v. Home Office*, [1992] Q.B. 270, 306-07 (C.A.) (speech of Lord Donaldson) (calling it "anomalous" and "wrong in principle" that U.K. courts have the power to issue injunctions against the government when E.U. law has been violated, but not when U.K. law has been violated); *Woolwich Equitable Building Soc'y v. Inland Revenue Comm'rs*, [1993] A.C. 70, 177 (speech of Lord Goff) ("[A]t a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid [taxes] were to be more restricted under domestic law than it is under European law."); Lord Irvine, *supra* note 37, at 230-32 (discussing *M. v. Home Office*, *Woolwich*, and other cases).

exemplifies supranational influence upon domestic constitutional law, the views of British courts on the Convention can now, in turn, be expected to influence the E.C.H.R.: as Lord Irvine humbly puts it, British judges "will bring to the application of the Convention their great skills of analysis and interpretation" and "our proud British traditions of liberty."²³⁰ Perhaps this is merely to say that courts may lead by example as well as by hierarchy, which is hardly a novel idea; the very idea of persuasive authority presupposes as much.²³¹ A different kind of upward influence is evident when the U.S. Supreme Court "constitutionalizes" state common law: for example, the Court has employed state common law to fashion hearsay exceptions under the Confrontation Clause, to define property rights for purposes of the Takings Clause, and to govern review of punitive damage awards under the Due Process Clause.²³² Alongside borrowing, the Court also practices headcounting: whether the question is one of "evolving standards of decency" or the content of "ordered liberty," the Supreme Court has been known to formulate federal constitutional doctrine on the basis of a purported state consensus - the result of which is to enforce the majority view upon outlier states.²³³ These uses of state law to define federal constitutional doctrine, when combined with the tendency of state courts to treat federal constitutional doctrine as generic constitutional law, create a homogenizing feedback loop. The Supreme Court draws from state law, then imposes its genericized version of state law back upon the states in the form of federal constitutional law. But state courts then treat what the Supreme Court has done as "generic constitutional law" - an ever-increasingly accurate description - and incorporate it into state law. As federal and state courts look to each other for guidance on a continual and cumulative basis, the constitutional doctrine that is passed between them becomes increasingly generic.

²³⁰ See Lord Irvine, *supra* note 37, at 236.

²³¹ See Glenn, *supra* note 195, at 297 (describing the "perspective on law," prevalent outside the United States, that is characterized by resistance to "definitive statements of law" and openness to "persuasive authority from abroad").

²³² See Kaplan, *supra* note 21, *passim*.

²³³ See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2479-81 (2003) (citing the fact that Texas was among a small minority of states to punish same-sex sodomy as evidence of an "emerging recognition" of a protected liberty interest "in matters pertaining to sex"); *Atkins v. Virginia*, 536 U.S. 304, 321-22 (2002) (Rehnquist, C.J., dissenting) (objecting that there does not exist a "national consensus" among the states against the execution of the mentally retarded).

Whereas the Supreme Court is not required to constitutionalize state law but does so as a matter of self-imposed interpretive strategy,²³⁴ the European Court of Justice is expressly obligated to fashion generic constitutional law from the laws of twenty-five nations. Article 6(2) of the Treaty on European Union requires the E.U. and its institutions to "respect fundamental rights, as guaranteed by the European Convention [on] Human Rights ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law."²³⁵ In practice, Article 6(2) requires the E.C.J. to construct generic rights doctrine both from "constitutional traditions common to the Member States," and from the Convention, which is itself an amalgamation of rights doctrine from an even larger number of European nations.²³⁶ If this provision were not enough, the E.C.J. faces further pressure from national courts to build an overarching body of European constitutional law. National courts have proved reluctant to embrace the supremacy of E.U. law, which is not explicitly stated in any treaty but instead stands as an interpretive accomplishment on the part of the E.C.J.²³⁷ German courts have been especially insistent upon their own prerogatives: in particular, the Bundesverfassungsgericht has warned that if the E.C.J. fails to "generally safeguard the essential content of fundamental rights," it will exercise its inalienable jurisdiction to test E.U. law for consistency with Germany's own Grundgesetz.²³⁸ That is, the E.C.J. risks open judicial rebellion if it fails to

²³⁴ See Kaplan, *supra* note 21, at 464-69, 525-29.

²³⁵ TREATY ON EUROPEAN UNION art. 6(2). Article 46(d) of the same treaty confers jurisdiction upon the E.C.J. to enforce Article 6(2) against E.U. institutions. See *id.* art. 46(d); *Emesa Sugar (Free Zone) NV v. Aruba*, 2000 E.C.R. I-665, ¶ 9, at I-670-71 (E.C.J.).

²³⁶ The Council of Europe, which predates the E.U. and was responsible for promulgating the European Convention on Human Rights, has a membership of 49 nations, 44 of which have signed the Convention. See Council of Europe, *About the Council of Europe*, at http://www.coe.int/T/e/Com/about_coe/ (last updated Jan. 2004). As of May 1, 2004, the E.U. has 25 member states, all of which happen to belong to the Council of Europe, though there is no formal requirement that states must belong to the Council before joining the E.U. See Europa: Gateway to the European Union, *The European Union at a glance*, at http://europa.eu.int/abc/index_en.htm (last visited Apr. 23, 2004). The Council of Europe is independent of the E.U. but can potentially be confused with the very similarly named European Council, which is an E.U. institution.

²³⁷ See CRAIG & DE BÚRCA, *supra* note 122, at 278-79.

²³⁸ See *Re Wünsche Handelgesellschaft ("Solange II")*, BverfGE 73, 339 (387) (F.R.G.), translated in 1987 (3) C.M.L.R. 225, 265; see also CRAIG & DE BÚRCA, *supra* note 122, at 289-98, 319-26 (discussing the E.C.J.'s many skirmishes with the German courts).

discern, then adopt as constitutional doctrine, the "essential content of fundamental rights" throughout Europe.

The recursive doctrinal loop described earlier between federal and state law in the U.S. can be expected in the E.U. as well. For example, Article 288 of the EC Treaty renders the E.U. liable in damages for unlawful conduct by E.U. actors and requires the E.C.J. to define the scope of this liability "in accordance with the general principles common to the laws of the Member States."²³⁹ As former Advocate-General Walter van Gerven has observed, it is unrealistic to expect the E.C.J. to examine the sovereign liability doctrine of twenty-five nations (and counting) and identify "general principles" that are truly common to all yet provide some measure of actual guidance. Instead, the E.C.J. will inevitably use the language of Article 288 as a pretext to articulate principles that are *sufficiently* familiar in *most* countries to gain acceptance.²⁴⁰ The result is, of course, generic constitutional law. Member states, in turn, will be likely to adopt these generic rules.²⁴¹ Though the language of Article 288 refers only to E.U. actors, the E.C.J. has held in the *Francovich* case that member states are liable in the same manner as E.U. institutions for violations of E.U. law.²⁴² The immediate result of *Francovich* is to replace each member state's liability rules with generic sovereign liability rules abstracted from the laws of all the member states – at least to the extent that the member state breaches E.U. law. Insofar as the same conduct also breaches the member state's *own* law, however, national liability will still be governed by national standards. If the British experience with *Wednesbury* and proportionality review is any indication, national courts are unlikely to relish the

²³⁹ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, art. 288, cl. 2, O.J. (C 325) 33 (2002) [hereinafter EC TREATY] ("In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.").

²⁴⁰ See Walter van Gerven, *The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution*, in TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 135-36 (Duncan Fairgrieve, Mads Tønnesson Andenas & John Bell eds., 2002).

²⁴¹ See Walter van Gerven, *Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe*, 1 MAASTRICHT J. EUR. & COMP. L. 6, 36, 39-40 (1994) (arguing that national judges can and should not merely "harmonize" E.U. and national liability rules, but instead "merge them into a common legal system").

²⁴² See *Francovich & Bonifaci v. Italian Republic*, Cases C-6/90 & C-9/90, 1991 E.C.R. I-5357, ¶¶ 31-35, at I-5413-14 (holding that member state liability in damages for violation of E.U. law is "inherent in the system of the Treaty").

application of two sets of sovereign liability rules to the same act of governmental misconduct. The fact that one set of rules is ostensibly based on the other only makes their mutual existence seem that much more unnecessary and confusing. As in the British example, both the "law of the instrument" and the "law of just one instrument" suggest that national judges will abandon uniquely national doctrine. And, as in the American example, the result is a homogenizing feedback loop. First, Article 288 obligates the E.C.J. to homogenize the sovereign liability laws of the member states into a body of generic doctrine. Second, under *Francovich*, the E.C.J. imposes this generic doctrine upon the member states in cases involving the violation of E.U. law. Third, national judges incorporate the generic doctrine into domestic law. Finally, to complete the loop, the E.C.J. refines its already generic doctrine in light of newly homogenized national law, and produces doctrine that is even more generic than before.

To generalize from the U.S. and E.U., some form of homogenizing doctrinal recursion may be endemic to federal and supranational legal structures that require state (national) courts to apply federal (supranational) law. The process begins when federal (supranational) courts fashion generic rules from state (national) materials, then impose those rules upon state (national) courts as a matter of federal (supranational) law. Once forced to apply a generic rule on questions of federal (supranational) law, state (national) courts find it attractive to adopt the generic rule for parallel questions of state (national) law as well. Further use of state (national) law by federal (supranational) courts to fashion federal (supranational) law both continues the expungement of impurities from the generic doctrine and begins the process anew.

H. Generic Doctrine as a Remedy for Lateral Judicial Conflict

Generic constitutional doctrine may be both a boon and a necessity when supranational structures collide. The coexistence of the E.C.J. and E.C.H.R. raises the question of how coordination is to be achieved between two courts with

overlapping jurisdictions²⁴³ but no formal hierarchical relationship.²⁴⁴ The emergence of generic European rights jurisprudence would ameliorate the risk of conflict between the two courts, yet if such generic jurisprudence is to emerge, both courts must coordinate upon its creation. As previously described, Article 6(2) of the Maastricht Treaty obligates the E.C.J. to enforce "fundamental rights, as guaranteed by the European Convention [on] Human Rights," but does not specify that the E.C.J. must accept the E.C.H.R.'s *interpretations* of the Convention. The E.C.J. has in practice sought to avoid conflict with decisions of the E.C.H.R.,²⁴⁵ but disagreements have inevitably arisen.²⁴⁶ Although the potential for conflict could be eliminated if the E.U. were simply to accede to the Convention, the E.C.J. has held that the E.U. currently lacks the legal power to do so.²⁴⁷ For its part, the E.C.H.R. has not always made coexistence easy. In a trio of

²⁴³ See *supra* note 236 (describing the overlapping memberships of the Council of Europe and the European Union).

²⁴⁴ The problems of disuniformity that are created when courts share territorial jurisdiction but lack formal hierarchy are not limited to supranational courts. In France, for example, the Cour de Cassation sits atop the regular judiciary but lacks jurisdiction over questions of administrative law, on which the Conseil d'État is supreme. Neither court, in turn, has the power to review the constitutionality of legislation, which is the exclusive responsibility of the Conseil Constitutionnel. These courts can neither reverse nor hear appeals from one another, although the Conseil Constitutionnel's decisions do have res judicata effect upon other courts confronted with identical questions. See BROWN & BELL, *supra* note 54, at 21 & n.20; Bell, *supra* note 99, at 1759; Breyer, *supra* note 123, at 1058-60. At one point, the Conseil d'État and Cour de Cassation held opposite positions on the effect to be given E.U. law. The Conseil d'État took the position that it simply could not consider the consistency of French legislation with E.U. law because it lacked the power to review legislation, whereas the Court de Cassation held the view that it could resolve conflicts between E.U. law and other legislation because E.U. law had been incorporated into domestic law. Compare *Syndicat Général de Fabricants de Semoules de France, Conseil d'État, Mar. 1, 1968, Lebon 149, translated in 1970 (9) C.M.L.R. 395, 403-05 (submissions of Commissaire Questiaux) with Administration des Douanes v. Société Cafés Jacques Vabre, Cass. ch. mixte, May 24, 1975, D. 1975, 497, translated in 1975 (2) C.M.L.R. 336, 363-64 (submissions of Procureur Général Touffait)*. No doubt mindful of the "absurd practical consequences for the citizen" that had been created by the two inconsistent lines of case law, David Pollard, *The Conseil d'État is European - Official*, 15 EURO. L. REV. 267, 273 (1990), and spurred by decisions of the Conseil Constitutionnel indicating an obligation to apply international treaties, the Conseil d'État eventually capitulated. See *id.* at 267-74 (discussing Raoul Georges Nicolò, Conseil d'État, Oct. 20, 1989); CRAIG & DE BÚRCA, *supra* note 122, at 285-89.

²⁴⁵ See Lord Browne-Wilkinson, *supra* note 213, at 401.

²⁴⁶ See CRAIG & DE BÚRCA, *supra* note 122, at 367 (citing cases).

²⁴⁷ See Opinion 2/94, Accession by the Community to the ECHR, 1996 E.C.R. I-1759, ¶¶ 23-26, at I-1787-89 ("No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field."); CRAIG & DE BÚRCA, *supra* note 122, at 351-54.

decisions culminating in *Vermeulen v. Belgium*,²⁴⁸ the E.C.H.R. held that a longstanding feature of Belgian judicial procedure violated the Convention right to a fair trial by denying litigants the opportunity to respond to the opinion of the *procureur général's* department, which renders legal opinions to the Belgian courts and participates in their deliberations.²⁴⁹ Needless to say, the E.C.J. itself utilizes a procedure extremely similar to the one at issue in *Vermeulen*.²⁵⁰ Confronted with *Vermeulen*, the E.C.J. satisfied itself, in an awkwardly reasoned decision, that its own procedures did not violate the Convention.²⁵¹ The very awkwardness of its reasoning, however, is a touching testament to the E.C.J.'s desire to remain at least nominally faithful to E.C.H.R. jurisprudence – whatever embarrassment the E.C.H.R. may inflict upon it in the process. In all likelihood, the E.C.J. has grasped that overlapping jurisdictions leave the two courts little practical choice but to agree upon the content of constitutional rights doctrine – even if, in practice, one of the two must do most of the agreeing.

²⁴⁸ *Vermeulen v. Belgium*, 1996-I Eur. Ct. H.R. 224. The two previous cases were *Delcourt v. Belgium*, 11 Eur. Ct. H.R. (ser. A) at 5 (1970), and *Borgers v. Belgium*, 214 Eur. Ct. H.R. (ser. A) at 25 (1991).

²⁴⁹ See *Vermeulen*, 1996-I Eur. Ct. H.R. at 234.

²⁵⁰ Compare *Vermeulen*, 1996-I Eur. Ct. H.R. at 231-34 (describing the Belgian Cour de Cassation's use of the *procureur général*) with Case 17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, 2000 ECR I-665, ¶¶ 11-15, at I-671-72 (describing the E.C.J.'s use of its Advocates-General). The EC Treaty itself mandates the participation of Advocates-General in E.C.J. proceedings:

The Court of Justice shall be assisted by eight Advocates-General. ...

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement.

EC TREATY art. 222.

²⁵¹ See *Emesa Sugar*, 2000 ECR I-665 *passim*; CRAIG & DE BÚRCA, *supra* note 122, at 368 ("Not all commentators are convinced by this judgment, ... or by the assertion of compatibility with the [Convention] with the role of the Advocate-General in ECJ proceedings."). The E.C.J. attempted to distinguish its own procedure from the Belgian procedure in a few ways. It asserted, for example, that unlike the Belgian *procureur général*, the Advocate-General neither constituted nor represented a separate department of government; rather, his authority stemmed directly from the court itself. See *Emesa Sugar*, 2000 ECR I-665, ¶¶ 12, 14, at I-671-72. It also suggested that the Advocate-General's opinion did not conclude the adversarial hearing portion of the proceedings, as in the Belgian case, but instead formed a part of the court's deliberations. See *id.* ¶¶ 14-15, at I-672. The E.C.J. could not, however, disguise the fact that its litigants are denied opportunity to respond to the Advocate-General's submissions – the very fact upon which the E.C.H.R. had rested its holding in *Vermeulen*. See *Vermeulen*, 1996-I Eur. Ct. H.R. at 234 ("[T]he fact that it was impossible for Mr Vermeulen to reply to [the *procureur général's* submissions] before the end of the hearing infringed his right to adversarial proceedings.").

I. Generic Constitutional Doctrine: A Systematic and Organic Occurrence

Diversity in constitutional doctrine is in no danger of disappearing. Nor should we wish for its demise. Courts must fashion and apply unique constitutional rules as circumstances require. It is as unwise for judges to imitate slavishly, as to be contrarian for the sake of contrariness, or to ignore the experience of other jurisdictions entirely. In an ideal world, judges would earn their keep by determining in every case whether borrowing is sensible or unwise. In many cases, that task is likely to be impossible. It is difficult even to articulate a coherent set of criteria that might govern the adoption or rejection of foreign examples.²⁵² The comparative study of public law is plagued, if not defined, by fundamental disagreement over the extent to which legal thinking can or should be transplanted from elsewhere. Indeed, scholars cannot even agree over what the theoretical alternatives happen to be.²⁵³

It has been the contention of this essay, however, that generic constitutional doctrine develops and thrives for reasons that presuppose little or no conscious coordination or agreement on the part of courts or judges as to the proper manner or extent of doctrinal borrowing. As human decisionmakers faced with complexity and uncertainty of both normative and factual varieties, judges can be expected to gravitate toward the path of least resistance, as defined by considerations of ease and simplicity. In constitutional adjudication, the path of least resistance – intellectually, if not also practically – tends to be that of homogeneity, not heterogeneity, for several reasons. First, people minimize effort by making use of what is at hand; that is, they obey the law of the

²⁵² Cf. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 72 (2004) (arguing that American courts should not use international materials to define domestic constitutional rights absent a "fully articulated theory" that identifies both the materials to be used and the manner of their use "in a way that can be applied consistently from case to case," but declining to articulate such a theory).

²⁵³ See, e.g., MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 8-11 (2d ed. 1994); KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 11-12, 15-31 (Tony Weir trans., 3d rev. ed. 1996) (stating, inter alia, that preparation for the "international unification of law" is among the functions and aims of comparative law); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 *passim* (1999) (describing "expressivist," "functionalist," and "bricolage" approaches to comparative constitutional analysis); Choudhry, *supra* note 28, *passim* (contrasting "universalist," "genealogical," and "dialogical" uses and justifications of comparative constitutional jurisprudence).

instrument. Judges do so by copying what other judges have done. In legal parlance, one might prefer to say, as David Strauss does, that the common law style of constitutional adjudication values the existence of ready-made solutions for their own sake.²⁵⁴ Alternatively, one might say that legal argument fails to reward, and sometimes even penalizes, originality. The underlying idea remains the same: courts will tend to adopt doctrines employed by other courts simply because they are available for adoption. This tendency will only be encouraged to the extent that other courts offer an appealing combination of experience, intellectual firepower, and prestige. Second, there is a natural inertia to imitation: borrowing rewards further borrowing. Shared constitutional provisions and historical lineages not only reflect past influence, but also beget continuing influence. It is difficult even for skeptics of comparative analysis to dispute that courts may look abroad when asking "the same question about the same legal text or concept as foreign courts or other institutions have previously asked."²⁵⁵ Third, the prevalence of federal, supranational, and international law engenders legal complexity and conflict by requiring courts to apply multiple sets of rules to the same dispute. When jurisdictions overlap, generic doctrine becomes inherently attractive to courts because it both promotes analytical simplicity and reduces the risk of conflict among judicial and legal systems. Federal and supranational structures, in particular, create strong incentives for courts to consult one another in self-reinforcing and even recursive ways. In such situations, doctrinal heterogeneity can only be maintained with effort - if it can be maintained at all. Indeed, even in the absence of any global supercourt capable of imposing common legal solutions, the same dynamic has developed at the international level as well. As Jackson and Tushnet have observed, there already exists an "upward-and-downward flow" between domestic and

²⁵⁴ See Strauss, *supra* note 175, at 891 (observing that the "conventionalist" aspect of "common law constitutional interpretation" "emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready-made solutions to problems that otherwise would be too costly to resolve").

²⁵⁵ *Hearing on H.R. Res. 568, supra* note 5, at 22 (statement of Michael D. Ramsey) (emphasis omitted).

international human rights law that amounts to a recursive doctrinal loop of the kind discussed above.²⁵⁶

V. CONCLUSION

It is one thing to suggest a new way of describing constitutional law; it is another thing to have a reason for doing so. What is the point of generic constitutional law as an intellectual concept? Does it have any practical implications? Imagine the following scenario. One day, instead of offering classes in "Constitutional Law" and "Comparative Constitutional Law" – the former implying the rigorous study of a defined body of law, the latter implying comparison without a firm sense of purpose²⁵⁷ – law schools would instead offer classes in "Constitutionalism" and "American Constitutional Law." Such a minor adjustment in nomenclature would denote a significant shift in thinking about the very nature of constitutional law. Much as first-year courses in contracts and property cover general principles of law without purporting to explain the law of every state, courses in "constitutionalism" would cover the doctrines, methods, and justifications commonly employed by judges in reviewing governmental action. As things stand, "comparative constitutional law" occupies an uncertain place in the American law school curriculum; it is tolerated yet marginalized,²⁵⁸

²⁵⁶ Vicki C. Jackson & Mark Tushnet, *Introduction* to *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 8, at xiv-xv. Though they do not speak of doctrinal recursion *per se*, what Jackson and Tushnet describe is precisely this phenomenon at an international level: "some aspects of international human rights law have developed initially by flowing *up* from domestic legal systems into the international arena and then *down* to domestic legal systems, sometimes even those systems that were sources for the international human rights norms in the first place." *Id.* at xiv.

²⁵⁷ *Cf.* WATSON, *supra* note 26, at 1-9 (questioning whether "Comparative Law" constitutes a "method" or a "technique," noting disagreement over "what – if anything – Comparative Law is or should be as an academic activity," and opining that the boundaries of the discipline "have been drawn too widely").

²⁵⁸ Albeit from the not especially marginalized position of an endowed professorship at Yale Law School, John Langbein offers these sad observations:

[L]aw school catalog descriptions of comparative law courses conceal a curricular Potemkin Village. What you cannot know from a mere reading of the catalogs is that virtually nobody – only a handful of students – actually takes these courses. The vast majority of American law students graduate in complete ignorance of comparative law. Thereupon they join the American legal profession, where they can remain in blissful ignorance that the rest of the civilized world disdains many of the attributes of a legal system that Americans take for granted.

and perhaps not without reason. If the notion of "comparative constitutional law," with its emphasis upon the activity of comparison, can be set aside, the study of how courts review governmental action might assume its place. Just as first-year property courses do not gloss over the fact that states have different ways of registering title to land or dividing property upon divorce, a law school course in constitutionalism need not deny the fact of diversity in order to equip students with a broad understanding of constitutional argument and reasoning – of what sorts of governmental actions are likely to be invalidated by judges, and how judges are likely to decide such questions.

As a practical matter, the incentive already exists for law schools to redefine their understanding of constitutional law along the lines suggested here. By way of analogy, self-consciously "national" law schools do not teach the property law of just one state because they seek for reasons both self-interested and intellectual to train lawyers who can and will take lucrative or at least prestigious jobs in major cities nationwide. Similarly, as global legal practice becomes more common, self-consciously "global" law schools will aspire to train lawyers who will take lucrative or at least prestigious jobs in major cities worldwide, at which point generalist – or generic – training in constitutional law may begin to demonstrate its appeal. Let us hope only that the global law school of tomorrow does not forsake the study of national constitutional law the same way that the national law school of today has forsaken the teaching of state constitutional law.

Within the intellectual life of the American legal academy, comparative law is a peripheral field. Questions of comparative and foreign law seldom figure in the conversation about law and law-related subjects that comprises the common intellectual life of an American law faculty. Like a child in Victorian England, the comparativist on an American law faculty is expected to be seen but not heard.

John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546 (1995). The plight of comparative public law, in particular, may be even worse than that of comparative law as a whole. See John E. Finn & Donald P. Kommers, *A Comparative Constitutional Law Canon?*, 17 CONST. COMMENTARY 217, 226 (2000) (noting the "relative invisibility" in this country of the "international community of academics, judges and lawyers" that wrestles with "transnational" constitutional problems); Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 61 (deeming the release of VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999) an "important publishing event" because it "represents a healthy shift from the overwhelming emphasis among comparative legal scholars on private law").

But what of the normative questions posed by the idea of generic constitutional law? This essay has argued that constitutional courts share similar theoretical concerns, analytical methods, and substantive doctrine for reasons that are not entirely within their control. The question is, how far should they take these similarities? Should American judges, in particular, succumb to comparative constitutional analysis? To borrow, or not to borrow: that is the question.

Resistance to the influence of foreign case law is nothing new. Following the Revolution, a number of states barred outright citation of English judicial decisions and even treatises.²⁵⁹ Such a position would probably be unthinkable today: those who object most vocally to the Court's uses of foreign jurisprudence, have also evinced an interpretive commitment to originalism, which presupposes historical inquiry into the English legal backdrop against which the Constitution was adopted.²⁶⁰ With the benefit of two centuries of separation, English jurisprudence and legal values, at least, no longer seem especially threatening; nor, indeed, do we regard them as foreign, insofar as they have been adopted (or at least not disavowed) in this country. In reading the transcript of recent congressional hearings on a resolution condemning the judicial use of comparative legal materials,²⁶¹ however, it is difficult not to be reminded of the visceral fear of foreign influence that once led states to prohibit judges from citing Blackstone's *Commentaries*. One might also wonder whether opposition to comparative constitutional analysis does not simply mask ideological

²⁵⁹ See GILMORE, *supra* note 19, at 22-23 (citing a New Jersey law enacted in 1799 which forbade citation of any English case decided after July 4, 1776, as well as "any [English] compilation, commentary, digest, lecture, treatise, or other explanation or exposition of the common law"); Glenn, *supra* note 231, at 277 (noting prohibitions imposed in the early 1800s by New Jersey, Kentucky, and Pennsylvania on the use of English case law); ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 117 (1921) (same).

²⁶⁰ See, e.g., H.R. Res. 568, 108th Cong. at 3 (2004) (allowing that courts may consider the "judgments, laws, or pronouncements of foreign institutions" insofar as they "inform an understanding of the original meaning of the laws of the United States"); *Hearing on H.R. Res. 568*, *supra* note 5, at 5 (statement of Representative Tom Feeney) (emphasizing that the "Reaffirming American Independence Resolution" "doesn't prohibit any court from ever looking at foreign laws as long as those laws inform an understanding of the original meaning").

²⁶¹ See, e.g., *Hearing on H.R. Res. 568*, *supra* note 5, at 1-4 (statement of Steve Chabot, Chairman, Subcommittee on the Constitution) (quoting the Declaration of Independence, and objecting that Americans "are not subject to the dictates of one world government"); *id.* at 49 (testimony of Jeremy Rabkin) (arguing that the European Union "is really set on undermining American sovereignty"); *supra* note 16 (discussing the "Reaffirming American Independence Resolution").

disagreement with particular decisions that happen to include references to foreign materials. For example, though the Republican members of the Subcommittee make repeated and unfavorable references to *Lawrence v. Texas*²⁶² and *Atkins v. Virginia*,²⁶³ no one makes any mention of Chief Justice Rehnquist's opinion in *Washington v. Glucksberg*,²⁶⁴ which cites Canadian case law, invokes a "norm among western democracies," and discusses the Dutch experience with euthanasia in rejecting the existence of a constitutional right on the part of the terminally ill to physician-assisted suicide.²⁶⁵ Nor is *Glucksberg* the exception to the rule: as Michael Ramsey observes, "in most historical examples the Court has used international materials to deny a proposed right."²⁶⁶ Indeed, he argues that "rigorous use" of international materials is inherently likely to favor rights-constriction over rights-expansion.²⁶⁷

Ramsey is profoundly skeptical, however, that the Court has made, or will make, "rigorous use" of international materials. In his view, if international materials are to enjoy "a meaningful place in constitutional adjudication," judges must not use them simply to engage in "opportunistic advocacy."²⁶⁸ To that end, he offers the following suggestions:

First, there must be a neutral theory as to which international materials are relevant and how they should be used. Second, we must be willing to "take the bitter with the sweet" - that is, to use international materials evenhandedly to constrict domestic rights as well as to expand them. Third, we must get the facts right by engaging in rigorous empirical inquiry about international practices rather than making facile generalizations. And fourth, we must avoid easy shortcuts to international practice that rely on unrepresentative proxies such as United Nations agencies.²⁶⁹

²⁶² 123 S. Ct. 2472 (2003) (striking down laws against same-sex sodomy).

²⁶³ 536 U.S. 304 (2002) (holding that execution of the mentally retarded constitutes "cruel and unusual" punishment prohibited by the Eighth Amendment).

²⁶⁴ 521 U.S. 702 (1997).

²⁶⁵ *Id.* at 710 n.8; *see id.* at 734. The *Glucksberg* opinion cites the Canadian Supreme Court's opinion in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (1993), which itself canvasses the laws of Austria, Spain, Italy, the U.K., the Netherlands, Denmark, Switzerland, and France. *Glucksberg* specifically quotes with approval the Canadian court's conclusion that "a blanket prohibition on assisted suicide . . . is the norm among western democracies." *Glucksberg*, 521 U.S. at 710 n.8 (quoting *Rodriguez*, [1993] 3 S.C.R. at 521).

²⁶⁶ Ramsey, *supra* note 252, at 72.

²⁶⁷ *Id.* at 81.

²⁶⁸ *Id.* at 80.

²⁶⁹ *Id.* at 69-70.

Ramsey's guidelines raise a host of interrelated questions. First, would it be desirable to implement them? In some cases, the answer is clearly yes. It is difficult to argue that generalizations about foreign law should be facile, or that the United Nations is in fact a representative proxy for legal practice around the world. Second, is it *possible* for judges to implement his suggestions? For example, what if American lawyers and judges are not capable of anything but "facile generalizations" about international practice? What if they prove to be as amateurish at comparative legal analysis as they are at, say, history²⁷⁰ or economics²⁷¹? As difficult as these questions are, they are also mercifully simple insofar as they might conceivably be answered in an empirical way; other questions turn, however, upon the notion of "neutrality," which amounts to an essentially contested concept in Gallie's sense of the term.²⁷² Is it possible to articulate a "neutral theory" of comparative analysis – or, indeed, of any approach to constitutional adjudication? Indeed, what is a "neutral theory" in constitutional adjudication? Does any ostensibly neutral theory face the same suspicions and criticisms attracted by other ostensibly "neutral" methodologies such as textualism, or originalism, or law and economics? Third, assuming that judges are capable of following Ramsey's suggestions, is it *plausible* that they will actually do so? Will either judges or the lawyers who appear before them actually engage in "rigorous empirical inquiry" into foreign law? If it is somehow possible both to formulate and to apply a "neutral theory" of comparative analysis, will judges do so faithfully? Finally, if implementation of Ramsey's suggestions is unlikely or even impossible, what is to be done instead? What is our theory of the second-best? If neutrality in adjudication and skilled

²⁷⁰ See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 4-11 (1996) (observing that originalism, as a strategy of constitutional interpretation, is at odds with the professional historian's attention to ambiguity and nuance, and criticizing the Supreme Court's use of "originalist evidence" as "a mix of 'law office history' and justificatory rhetoric"); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119 *passim* (surveying the Court's long tradition of twisting history to its own purposes, and assessing the results as "very poor indeed," from a "professional point of view").

²⁷¹ See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114-65 (1987) (critiquing at length both the normative and empirical assumptions underlying "Chicago school" law and economics).

²⁷² See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956) ("There are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.").

comparative analysis are beyond judicial reach, is the answer to abandon the effort altogether, as Ramsey argues?²⁷³ Or does constitutional adjudication already consist of "opportunistic advocacy," with or without a foreign flair? For that matter, is there any kind of advocacy other than the opportunistic kind?

In arguing for adoption of a "neutral theory as to which international materials are relevant and how they should be used," Ramsey sets an impossible goal. He does so, moreover, in response to a concern that is no way unique to comparative constitutional analysis. According to Ramsey, having a neutral theory – namely, one "that can be applied consistently from case to case" – "confirms that we are not merely pursuing our own moral preferences."²⁷⁴ As he acknowledges,²⁷⁵ this is the same view that Herbert Wechsler took decades ago in his celebrated article, *Toward Neutral Principles of Constitutional Law*.²⁷⁶ The argument is that judges must decide constitutional cases on the basis of "neutral principles" formulated without regard to the result in any particular case, if they are to claim that what they do rises above ordinary political decisionmaking.²⁷⁷ To be sure, one could keep worse intellectual company than Herbert Wechsler. Unfortunately, Ramsey's rendition of Wechsler's argument is open to the same objections as the original, and those are many.²⁷⁸ The principal objection goes something like this. The Wechslerian argument envisions that we begin with the "special values" embodied in the Constitution²⁷⁹ and extract from these values "neutral principles" which are then used to decide cases. This process requires, first, identification of the relevant values; second, the extraction of principles from those values; and third, the application of principles to facts, which will by

²⁷³ See *id.* at 72.

²⁷⁴ *Id.*

²⁷⁵ See *id.* at 72 n.18 (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)).

²⁷⁶ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

²⁷⁷ See *id.* at 12, 15-16.

²⁷⁸ Criticism of Wechsler's argument was quickly forthcoming even at the time. See Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 *passim* (1960). More broadly, Wechsler's argument places him squarely within the so-called Legal Process school of thought, which has endured decades of criticism from critical legal scholars and others without disappearing. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 34-37, 82-93 (1996); William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* at c-xxxiv (William N. Eskridge & Philip P. Frickey eds., 1994) (tentative ed. 1958).

²⁷⁹ Wechsler, *supra* note 276, at 19.

definition be principled and therefore not result-oriented. At every step of this process, however, substantive disagreement rears its ugly head – at the identification of values, at the extraction of principles, and at the application of principle to fact. The result can be called neutral neither in theory nor in application. When people disagree over what it means to be neutral, there can be no such thing as neutrality.

Ramsey does identify what he calls a "neutral principle" implicit in the Court's recent decisions – namely, that international materials can be used either to defeat or (with greater difficulty) to support "abstract claims" as to the "universality" or "inevitable consequences" of particular constitutional rules.²⁸⁰ This principle, he suggests, "would provide a defensible basis for the use of international materials."²⁸¹ But does this principle exhaust the realm of neutral possibilities? For the most part, Ramsey maintains, with Wechsler, that a neutral principle is simply one that is formulated without regard to the result in any particular case. If so, is there any use of international materials that could not be considered "principled"? For example, may international comparisons be made for the purpose of shaming judges to action? If, as a society, we aspire to enjoy constitutional protections second to none, and to lead other societies by *positive* example, is it not principled to pursue those goals by means of comparison?²⁸² Perhaps it is a healthy pride that shames English judges into reading Convention principles into the common law²⁸³; perhaps it would reflect a similar, widely shared pride in our own Constitution if our judges were shamed into prohibiting the execution of juveniles.²⁸⁴

At some points, Ramsey appears to equate "neutrality" with "evenhandedness," as when he says international materials must be used "evenhandedly to constrict domestic rights as well as to expand them."²⁸⁵ But "neutrality," defined as this sort of Solomonic evenhandedness, is then simply a

²⁸⁰ Ramsey, *supra* note 252, at 75.

²⁸¹ *Id.*

²⁸² See ROBERT F. DRINAN, S.J., THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS 193 (2001) (lauding groups such as Human Rights Watch for their deliberate use of shame, and clinging to the hope that "lying deep within the American soul is the desire to provide leadership and moral ideals").

²⁸³ See *supra* note 215 and accompanying text (discussing *Derbyshire County Council v. Times*).

²⁸⁴ See *Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting).

²⁸⁵ Ramsey, *supra* note 252, at 70.

preference that international materials not be used in a way that favors the expansion of rights. Shaming may be principled, but it is not "neutral" if neutrality is defined in this manner. By its very nature, shaming is a one-way ratchet: we may be shamed into expanding constitutional protections, but it is difficult to see how we could be shamed into contracting them. It *sounds* neutral to say that we must either follow the lead of other countries faithfully, or not follow their lead at all. But what is really neutral about opposing the idea that constitutional comparisons should only be performed for the limited purpose of shaming? Does neutrality require that we fetishize consistency with other countries for its own sake? Either we must adopt a substantive position in order to give "neutrality" meaning – in which case we are no longer "neutral" – or neutrality means nothing at all.

The use of foreign legal materials does raise a legitimate concern, but the true nature of this concern emerges only if all pretense of neutrality is dropped from constitutional argument. As a means of interpreting the constitution, comparative legal analysis may well be irreducibly non-neutral or prone to opportunistic use – but so is any other ostensibly neutral approach to constitutional adjudication that might be imagined. The real question is, does comparative analysis pose any special risk of abuse not posed by other approaches? Is foreign or international law a uniquely harmful or dangerous source of persuasive authority in constitutional adjudication, as compared to other sources? Is the siren song of foreign authority so alluring that it renders American judges incapable of judgment, such that its use should be prohibited? Judges draw upon a variety of sources in deciding cases – not merely (or even frequently) from the case law of the Canadian Supreme Court, but also from treatises,²⁸⁶ and dictionaries,²⁸⁷ and microeconomics,²⁸⁸ and studies of how

²⁸⁶ For example, a LexisNexis search of Supreme Court decisions for "Hart & Wechsler" – as in RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) – turns up no less than 77 cases in which this casebook and its precursor editions appear. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 31-32 & 31 n.6, 34 n.7 (1995) (Stevens, J., dissenting); *Withrow v. Williams*, 507 U.S. 680, 694 (1993) (majority opinion of Souter, J.); *id.* at 719, 721 (Scalia, J., concurring in part and dissenting in part). Similarly, a search for "Tribe, American Constitutional Law" – as in *TRIBE*, cited above in note 34, and earlier editions – yields 62 results.

²⁸⁷ See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (using Webster's Second New International Dictionary (1950) to define the term "representatives" as it appears in §

children play with dolls,²⁸⁹ and public opinion polls,²⁹⁰ and the kind of historical research that actual historians deride as "law office history,"²⁹¹ to name a few of the more obvious culprits. By what right do judges allow *any* of these sources to influence the interpretation of the Constitution and laws of the United States?

The indisputable answer is the tautological one: it is acceptable for judges to use that which is acceptable, whereas it is unacceptable for judges to use anything that is unacceptable. To be more precise, the authority of judges to use any source – domestic or foreign, legal or nonlegal – always rests upon the same considerations: first, the legal community's internal standards of what constitutes persuasive argument; and second, the accountability of judges to a wider audience.

1. *The legal community's internal standards of persuasiveness.* -- To some extent, this check upon what constitutes persuasive constitutional argument is circular: insofar as the Supreme Court has the final word on what constitutes a winning constitutional argument, it is within the power of the Supreme Court to remake the standards of acceptable argument. Justice Breyer can make it acceptable to cite international case law simply by doing so repeatedly, if only because he has one-fifth²⁹² of the final say over what constitutes a winning constitutional argument in this country. Nor is he in the minority on the relevance of foreign case law. No prudent advocate can ignore the numbers –

2 of the Voting Rights Act); Ellen Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 *passim* (1998).

²⁸⁸ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* *passim* (6th ed. 2002) (guaranteeing himself at least one judicial adherent); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* *passim* (1970) (same).

²⁸⁹ See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing research by Kenneth and Mamie Clark on the preference of black children for white dolls); RICHARD KLUGER, *SIMPLE JUSTICE* 315-36, 573-74, 705-07, 718-22 (1977) (discussing Kenneth Clark's influence on the *Brown* litigation and decision); MICHAEL COLE & SHEILA R. COLE, *THE DEVELOPMENT OF CHILDREN* 398 (3d ed. 1996) (reviewing scientific debate over the Clark studies).

²⁹⁰ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (arguing that "polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong"); *id.* at 325-37 & app. (Rehnquist, C.J., dissenting) (producing the raw polling data on this very question, and raising a variety of methodological objections to the majority's use of the data).

²⁹¹ E.g., RAKOVE, *supra* note 270, at 11 (quoting yet another historian, Leonard Levy); Kelly, *supra* note 270, at 132.

²⁹² It is fitting to say one-fifth, not one-ninth, because decisionmaking by the Court requires the agreement of only five justices.

namely, that there are nine justices, and that the number six is greater than the number three.²⁹³

On the other hand, there is nothing to prevent judges who disagree with any particular approach from fighting back. And they do. There is no enforceable code of conduct in constitutional argument – or, for that matter, in intellectual argument – that excludes the use of any particular authority. There is only what David Mamet calls "the Chicago way." Mamet is the author of the line delivered by Sean Connery's character, crusty Irish cop Jim Malone, to Kevin Costner's Eliot Ness, on how to deal with Al Capone, in the 1987 film version of *The Untouchables*: "If he pulls a knife, you pull a gun. If he sends one of yours to the hospital, you send one of his to the morgue. That's the Chicago way."²⁹⁴ Thus, Justice Breyer cites the Supreme Court of Zimbabwe, and Justice Thomas publicly ridicules him for doing so.²⁹⁵ That, too, is the Chicago way. Both sides of the debate would be foolish not to use all the authority and rhetorical weaponry at their disposal, subject to their own calculations that the persuasive benefits from doing so will outweigh the losses inflicted by the other side in response.²⁹⁶ That is all the restraint that constitutional adjudication requires - or,

²⁹³ See Vicki Jackson, *Yes Please, I'd Love to Talk With You*, LEGAL AFFAIRS, July-August 2004, at xx (counting six members of the current Court – Chief Justice Rehnquist and Justices Stevens, Scalia, Kennedy, Ginsburg and Breyer – who have in recent years "referred, in limited ways, to foreign or international legal sources"); *supra* notes 1-10 and accompanying text (describing the current division on the Court). Whatever lingering doubts advocates may harbor as to the practical value of comparative arguments, Justice Breyer has done his best to dispel them:

Neither I nor my law clerks can easily find relevant comparative material on our own. The lawyers must do the basic work, finding, analyzing, and referring us to, that material. I know there is a chicken and egg problem. The lawyers will do so only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there.

Breyer, *supra* note 4.

²⁹⁴ THE UNTOUCHABLES (Paramount Studios 1987). The Court itself has been known to champion the Chicago way on occasion. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (Scalia, J.) (invalidating hate speech ordinance on First Amendment grounds) ("St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.").

²⁹⁵ See *supra* note 10 (describing exchanges between Justices Scalia and Thomas, on the one hand, and Justice Breyer, on the other, in the death penalty context).

²⁹⁶ Judge Posner's account of how judges use authority comports with the account of constitutional argument offered here, though he is more inclined to criticize than to accept what he sees. In his words, the citing of foreign case law

is one more form of judicial fig-leaving, of which we have enough already. ... In-depth research for a judicial opinion is usually conducted after rather than before the judges have voted, albeit tentatively, on the outcome. Citing foreign decisions is probably best understood as an effort, whether or not conscious, to further

indeed, permits, given that there is no appeal from the Supreme Court. A judge who is willing to resort to international materials enjoys no unfair advantage over colleagues disinclined to do the same. The use of such materials does not render him immune from criticism, or have a chilling effect on his critics, or shock the opposition into silence. If anything, the opposite is true.

Any victory won by opponents of comparative constitutional argument may, however, be Pyrrhic. Insofar as their goal is simply to prevent judges from cloaking arguments in the prestige and authority of other courts or jurisdictions,²⁹⁷ anti-comparativists may well succeed. Criticism may dissuade judges from citing foreign jurisdictions openly. But no amount of criticism is likely to prevent judges from plagiarizing covertly. There is no effective way to distinguish in substance between the decision of a judge who has arrived independently at what he believes to be a reasonable and appropriate approach, and that of a judge who has silently considered the approaches adopted by other jurisdictions and selected what he believes to be the most reasonable and appropriate of them. Nor have the critics of comparativism mounted any convincing argument that judges must fashion constitutional doctrine that is wholly original and unique to this country. It is one thing to object to imitation for the sake of imitation; it is another thing to object to adoption of an intrinsically sensible approach simply because it has already been adopted elsewhere. The result may ultimately be to invite subterfuge on the part of comparison-minded judges.²⁹⁸

2. *Judicial accountability to a wider audience.* – It is an open secret that judges are accountable for the quality and nature of their arguments not just to one

mystify the adjudicative process and disguise the political decisions that are the core, though not the entirety, of the Supreme Court's output.

Posner, *supra* note 28, at xx.

²⁹⁷ See *id.* at xx (criticizing the use of foreign case law as "authority" or "precedent," but not as a source of "persuasive reasoning").

²⁹⁸ The risk that judges will resort to covert borrowing in the face of resistance to explicit comparative analysis is more than hypothetical. Edward McWhinney relates the example of Canadian Supreme Court Justice Ivan Rand, a Harvard Law School graduate who discovered that other members of the court were resistant to the notion of emulating American approaches to constitutional questions. Rand ultimately succeeded in adopting a number of those approaches for the court – in part by failing to acknowledge their American origins. See Edward McWhinney, *Judicial Review in a Federal and Plural Society: The Supreme Court of Canada*, in *COMPARATIVE JUDICIAL SYSTEMS*, *supra* note 94, at 69-70.

another, but also to the rest of us. The idea of judicial independence is something of a sacred cow, even though the judiciary in this country is not independent of political forces and has never been - not since the Jeffersonians sought to rescind the appointment of a federal magistrate named Marbury. By contrast, the very notions of judicial accountability and responsibility are regarded with distrust; they conjure up unhappy images of judges criticized or pressured into resigning, or even threatened with impeachment for unpopular decisions.²⁹⁹ But to dwell upon judicial independence without thinking about judicial accountability is to harp upon the separation of powers without regard to the fact that the Constitution also establishes checks and balances. As argued above,³⁰⁰ the power of the president to nominate federal judges, and the Senate's powers of advice and consent, are mechanisms that ensure the composition of the bench reflects the dominant forces of American political life. It has been nearly fifty years since Robert Dahl observed that the members of the Supreme Court are replaced with such regularity "that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."³⁰¹ He - and the political scientists who have followed in his footsteps³⁰² - still await a strong empirical rebuttal.³⁰³ And they shall continue to

²⁹⁹ A disquieting example is that of Clinton district court appointee Harold Baer, who was threatened by Republican congressional leaders with impeachment over an evidentiary ruling in a drug case, *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), which Judge Baer subsequently recanted, 921 F. Supp. 211 (S.D.N.Y. 1996). The Clinton White House contributed to the furor by insinuating that it would request Judge Baer's resignation if he did not reverse himself. See Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156 *passim* (1997); Joan Biskupic, *Hill Republicans Target 'Judicial Activism'*, WASH. POST., Sept. 14, 1997, at A1; Ann Devroy & John M. Goshko, *President Answers GOP, Other Critics on Judiciary*, WASH. POST., Apr. 3, 1996, at A3. Another prominent example is that of the attempt made by House Republicans to impeach Justice William O. Douglas, ostensibly for the offense of publishing excerpts from his book in a magazine that featured sexually explicit material. Gerald Ford, then House Minority Leader, led the effort and declared at the time that "an impeachable offense is anything a majority of the House of Representatives considers [it] to be at a given moment in history." JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 128 n.11 (1993).

³⁰⁰ See *supra* note 100 and accompanying text.

³⁰¹ Dahl, *supra* note 34, at 285.

³⁰² See Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 613 *passim* (2001) (discussing the intellectual legacy of Dahl's article); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE MODERN COURT* 68-70 (1989) (same); *supra* note 100 (discussing the work of Dahl, Rosenberg, and Barrow et al.).

³⁰³ This is not to suggest that Dahl's line of argument has escaped critical empirical evaluation. See Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 *passim* (1976). Casper takes Dahl to task for using the invalidation of federal legislation as his sole

wait, for the last five decades have been kind, on the whole, to Dahl's argument. Who, today, is prepared to argue that the ideological balance of the bench does not reflect an ongoing struggle between political actors who have sought to tip it one way or the other?

It is the premise of so much constitutional theory that we cannot accept judicial review unless we believe in the independence of judicial decisionmaking from political influence.³⁰⁴ That premise is questionable. As reasons to accept judicial review go, judicial independence may be overrated, while judicial accountability may be underrated.³⁰⁵ In this post-*Bush v. Gore*,³⁰⁶ post-*Roe v. Wade*-then-*Planned Parenthood v. Casey*,³⁰⁷ post-*Bowers*-then-*Lawrence*³⁰⁸ age, in which presidential candidates openly campaign on the composition of the Supreme Court, and circuit and even district court nominees face defeat on ideological grounds,³⁰⁹ it cannot be assumed that people think judges are even capable of political neutrality. Yet no widescale repudiation of judicial review appears to be forthcoming. It did not take the National Guard to enforce any of these decisions³¹⁰ - not even the one that decided a presidential election against a majority of actual voters. No one has proposed a new Court-packing plan.³¹¹ Why so? The indisputable answer is, again, the tautological one: the Court has

measure of the extent to which the Court has followed (or resisted) the prevailing lawmaking majority, to the exclusion of cases involving statutory construction or the constitutionality of state laws. See *id.* at 56-60. Nevertheless, Casper deems much of the extended evidence inconclusive and concludes that, "[i]n some areas, the pattern Dahl suggests does seem apposite: unpopular decisions become part of the country's political agenda, and changes in political regimes affected recruitment to the Court." *Id.* at 59.

³⁰⁴ See, e.g., Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571-73 (1988) (observing that "several generations of political theorists and academic lawyers" have struggled to reconcile "democratic premises" with the notion that "an independent judiciary, unco-opted by the political aims of the ruling majority and willing to defend individuals' rights against government abuse, seems crucial to liberal democracy" - then attempting the same task).

³⁰⁵ Cf. Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 629-31 (1996) (arguing that "if the public is to continue to grant authority to the courts, it will be on the basis of decisional independence accompanied by a accountability").

³⁰⁶ 531 U.S. 98 (2000).

³⁰⁷ *Roe v. Wade*, 410 U.S. 113 (1973), *overruled in part*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

³⁰⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁰⁹ See David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. ___ (forth coming 2004).

³¹⁰ See KLUGER, *supra* note 289, at 753-54 (noting Eisenhower's reluctance to deploy troops to Little Rock in the wake of *Brown v. Board*).

³¹¹ See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 124, 155 (2000) (discussing Franklin Roosevelt's infamous proposal to increase the membership of the Court in order to overcome its resistance to the New Deal).

not in recent decades sufficiently antagonized enough people, for long enough, to provoke such extreme reactions. That it has not done so, however, may have something to do with the fact that political actors have paid careful attention to the views of those they appoint, such that the views represented on the bench reflect the political forces of the day (and those of the recent past³¹²). Perhaps the time has come to celebrate, not criticize, the scrutiny given to judicial nominees. A newfound popular appreciation of the extent to which political forces determine both the composition of the bench and the direction of constitutional adjudication may actually imbue judges with some measure of the democratic legitimacy that they so often claim to lack.³¹³ The fact that the judiciary is subject to political control - even if only indirectly and with some lag - is a respectable reason to tolerate the judicial invalidation of statutes.

The fact of accountability means that, when constitutional questions arise, we have good reason to prefer that they be decided by a federal judge in Saint Louis than by a multinational panel of judges in Strasbourg. Though we may not like to dwell upon the power that we enjoy over our independent judges, it is simply the case that the judge in Saint Louis is more accountable to us for the exercise of her power than any number of judges in Strasbourg. Through our representatives, we determine her appointment, her replacement, and even, in the extreme, her impeachment. The marriage of power to accountability is again a respectable reason, free of xenophobia or nativism, to submit to a judge in Saint Louis, but not to a judge in Strasbourg. For our judge in Saint Louis merely to *cite* a judge in Strasbourg, however, does not diminish her responsibility to us for what she does. In citing foreign case law, she relinquishes to Strasbourg neither the power to interpret the Constitution nor responsibility for the decision reached. International legal materials do not apply themselves to domestic legal disputes; neither, for that matter, do dictionaries, or the Federalist Papers, or

³¹² See Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 805-06 (1975) (confirming Dahl's hypothesis that, "during periods of electoral and partisan realignment," there exists a "lag period" owing to the life tenure of the justices during which time the Court is more likely than usual to be "out of line" with the lawmaking majority).

³¹³ Judge Posner has made a similar claim, and he has done so without invoking the empirical research on the extent and regularity of judicial turnover and replacement. See Posner, *supra* note 28, at xx (observing that direct and indirect popular controls over the selection of state and federal judges imbues them with "a certain democratic legitimacy" lacking in foreign judges).

microeconomic concepts. A judge is responsible for her own choice and use of persuasive authorities; the burden and responsibility of judgment remain inalienably her own.