

## FOREIGN TO OUR CONSTITUTION

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“[King George III] has combined with others to subject us to a Jurisdiction foreign to our Constitution.”

—*The Declaration of Independence*<sup>1</sup>

### INTRODUCTION

The current enthusiasm among academics for using contemporary international and foreign law to interpret and supplement the Constitution is, in one sense, part of a tradition as old as this *Law Review*. Since the Progressive era, those rejecting the values reflected in the Constitution, such as federalism and economic liberty, have sought to make room for political principles more congenial to them. First, Charles Beard attempted to discredit the Framers as plutocrats who wrote a Constitution to protect their own interests,<sup>2</sup> and the Progressives accordingly suggested that these old provisions should not prevent the democratic and often centralizing reforms of their day.<sup>3</sup> Later critics emphasized that African Americans and women did not participate in the Founding<sup>4</sup> and that the Constitution should be reshaped to protect their inputs in the democratic process. Now the focus on international and foreign law reminds us that not only were the Framers of

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<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

<sup>2</sup> See CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

<sup>3</sup> See David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 815 (1998) (noting that because Progressives wanted to avoid “the dead hand of the . . . past,” they wanted to amend or ignore the Constitution).

<sup>4</sup> See, e.g., Thurgood Marshall, *Commentary, Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

the Constitution of the United States rich and dead white males, they also labored under the disadvantage of being merely Americans.<sup>5</sup>

But in another sense, the movement for the use of international and foreign law in constitutional interpretation differs substantially from those old attacks, and tells us a great deal about the distance constitutional theory has traveled in a hundred years. The Progressive Era attacks attempted to enlarge the scope of democratic lawmaking by shrinking the enforcement of past constitutional mandates.<sup>6</sup> They thus focused on a serious problem of constitutional theory: why should we follow the constitutional rules of the past when they conflict with the democratically made law of the present? I believe that this question, which remains the most central in constitutional law, can be answered.<sup>7</sup> Nevertheless, it is not implausible to believe that laws fashioned through a contemporary, democratic process will better address the problems of the moment than ancient rules formulated by our be-wigged ancestors.

Similarly, the more recent movement to use judicial review to refine and reinforce basic democratic principles also seems consistent with some version of democratic theory. If a large centralized government is constitutional and indeed socially desirable, the judiciary should police the inputs to make sure that minorities are not excluded and that votes are counted equally. Only in that way can the results be considered the product of a truly democratic process. John Hart Ely's *Democracy and Distrust*, the most distinguished work of constitutional theory in the last half century, is the most famous example of shaping a Constitution to perfect social democracy.<sup>8</sup>

Contemporary international law and foreign law, however, is not being touted as a means of unshackling democratic deliberations or improving democratic inputs, but instead, of providing an impetus to overturn democratic decisions so that American law reflects the values of the wider world community. The most explicit advocates of this mechanism for displacing domestic law are in the academy. Dean Harold Koh of Yale is perhaps the leader, arguing that the recent Supreme Court decisions in *Lawrence* and *Atkins* herald the death of "national jurisprudence" and suggesting that the

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<sup>5</sup> For further discussion of the political principles that the use of contemporary international and foreign law may promote, see *infra* notes 59–60.

<sup>6</sup> Bernstein, *supra* note 3, at 815–16.

<sup>7</sup> For a full discussion of this point and a defense against the claim that the Constitution's provisions are fatally flawed because of the exclusion of women and African Americans in the process that generated them, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 791–802 (2002) [hereinafter McGinnis & Rappaport, *Our Supermajoritarian Constitution*].

<sup>8</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

time is near when transnational legal materials<sup>9</sup> will regularly provide precedents to move our own law closer to that embraced in other nations.

But the enthusiasm for international and foreign law in constitutional construction is more than academic. In speeches, several Supreme Court Justices have also welcomed the systematic consideration of foreign authority. Stephen Breyer has embraced such law as persuasive authority.<sup>10</sup> Justice Ruth Bader Ginsburg, in a recent speech to the American Society of International Law, suggested that we refer to foreign decisions as “basic denominators of common fairness between the governors and the governed.”<sup>11</sup> Both Justices, to be sure, disclaim using foreign law as “controlling authority,” but even the Court’s own precedent is not controlling, as its many reversals of past precedent show. Moreover, even if an authority is not controlling, it can still affect the outcome of the case and may indeed tip the scales in favor of the decision the Court makes. The salient point, as I will discuss below, is that both Justices permit these materials the status of authority.<sup>12</sup>

Most importantly, the Court has used such transnational materials as authority in three court decisions that invalidated domestic law. Notably, in *Lawrence v. Texas*, the Court cited a decision of the Court of the European Union in an opinion that prevented a state legislature from regulating sexual conduct: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>13</sup> Of course, one cannot say that this citation was decisive in the outcome, but one cannot be

<sup>9</sup> See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 52–57 (2004). Transnational legal materials include both international and foreign legal authority. I believe that international and foreign legal materials raise somewhat distinct legal issues. The movement to understand them in a single category, however, seems to me emblematic of the new academic movement to displace democratic decisionmaking.

<sup>10</sup> Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer at American University Washington College of Law on the Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), <http://domino.american.edu/AU/media/mediaref.nsf/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> [hereinafter Breyer Discussion] (arguing that lawyers cite to foreign law because it is useful, not because it is binding).

<sup>11</sup> Ruth Bader Ginsburg, Keynote Address at the American Society of International Law Annual Meeting: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html>.

<sup>12</sup> For further discussion of this point, which I see as central to the debate over the use of international and foreign law, see *infra* notes 27–29.

<sup>13</sup> *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Some have suggested that *Lawrence* only cited foreign law to show that the Court in *Bowers v. Hardwick* was factually mistaken about the universality of the condemnation of laws against homosexuality, but the quotation in the text shows that its use was more ambitious. Actually, *Lawrence*’s claim about *Bowers* is itself mistaken: the *Bowers* Court said that the prohibitions had ancient roots, not that they were universal. See *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986).

certain that any particular Supreme Court precedent was decisive in that case either.<sup>14</sup> In the same term, *Atkins v. Virginia* used the views expressed in the laws of “the world community” as a factor (albeit lodged in a footnote) in its decision to prevent the execution of those with lesser mental abilities.<sup>15</sup> And most recently, the Court prominently cited international law itself in the text as “confirmation” of its decision to ban the execution of juveniles.<sup>16</sup>

It is striking that current use of international law and foreign law in constitutional interpretation is used to strike down legislation to advance supposedly transcendent values. It was not always so. Before the modern era, international law was generally deployed in support of the constitutionality of legislation.<sup>17</sup> For instance, in the Progressive and New Deal eras the Court sometimes noted in the course of upholding a state practice challenged under the due process clause that it was similar to some practices of foreign nations.<sup>18</sup> But current reliance on contemporary international and foreign law is now part of the same constitutional sensibility that gave us *Roe v. Wade*, because these materials are used to invalidate the results of the democratic process based on some notion of evolving standards. It is these uses on which I want to focus in this Essay.<sup>19</sup>

Originalists have a relatively straightforward response to the use of contemporary international and foreign law. Such laws should not be used as authority, not because they are foreign or international, but because they

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<sup>14</sup> For a discussion of the difficulty of understanding the underpinning of the *Lawrence* opinion, see Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004) [hereinafter Lund & McGinnis, *Judicial Hubris*].

<sup>15</sup> *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

<sup>16</sup> *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005). There, to be sure, Justice Kennedy suggested in the decision that the materials were not “controlling,” but merely confirmatory of the decision the Court would have reached anyway through consideration of American materials alone. *Id.* But confirmation is a form of authority and there seems little reason to cite international materials so extensively if they form no part of the authority offered for the Court’s judgment. See *infra* notes 27–29 and accompanying text.

<sup>17</sup> I have drawn this conclusion from reviewing the cases using foreign and international law in Steven G. Calabresi & Stephanie Zimdahl, *Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. (forthcoming Dec. 2005). Another important difference, discussed above, is that citations to international law in many of the previous decisions involved principles of international law that were extant at the time of the Framing.

<sup>18</sup> *Id.*

<sup>19</sup> Other uses may well be unobjectionable. For instance, contemporary international law could well be useful in defining the international relations terms in the Constitution. Even an originalist might well agree, for instance, that the term “treaty” would have to take account of the contemporary usage of treaty to understand its practical scope just as the term “army” would have to take account of the contemporary function of the armed forces. Moreover, international law may sometimes be a fact of which the Court’s jurisprudence needs to take account, just as it must take account of other facts. See *infra* note 79 and accompanying text.

are contemporary and in the ordinary case shed no light on the original understanding of the Constitution.<sup>20</sup> For originalists, using foreign or international law from the time a provision was framed can advance our understanding of the original meaning of the Constitution if it bears on the understanding of those who framed the provision.<sup>21</sup> In fact, the Framers may themselves have used international and foreign law as policy arguments when they debated the ratification of the Constitution. But such uses do not provide a justification for a broader use of such sources in constitutional interpretation.<sup>22</sup> The Framers were engaged in a policy rather than a jurisprudential debate, in making a constitution rather than interpreting one.<sup>23</sup>

In this Essay, however, I will accept for purposes of argument a “justice-seeking” interpretation of the Constitution that seeks the best rules, even if they depart from the original understanding.<sup>24</sup> Even under that more

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<sup>20</sup> Thus, those who suggest that objections to foreign or international law necessarily rest on xenophobia are analytically mistaken. Originalists would object to contemporary American sources for the same reasons.

<sup>21</sup> I do not have space in this anniversary Essay to consider which constitutional provisions call for such references, but there clearly are some. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power “[t]o define and punish . . . Offenses against the Law of Nations”). Nor do I consider whether there are specific provisions that expressly contemplate being updated by reference to contemporary social norms. For reasons discussed below, however, it is doubtful that the Framers would want to make the evolution of our Constitution depend on the legal norms of other regimes which they knew to be hardly republican in practice or in spirit. *See infra* notes 65–67 and accompanying text.

<sup>22</sup> Some have argued that the Framers were so respectful of the law of nations that they would have wanted to interpret the Constitution in congruence with that law when possible. But the Framers viewed the law of nations as a limited set of principles that were a category of natural law. Blackstone, for example, described the law of nations as “a system of rules, deducible by natural reason,” and said that it “results from those principles of natural justice, in which all the learned of every nation agree.” WILLIAM BLACKSTONE, 4 COMMENTARIES \*66–67; *see also* Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 509–11 (1998). But defenders of the use of contemporary international law want to use evolving standards of an international law that has grown in scope to become a kind of local municipal law and changed in nature from natural to positive law. In this respect, modern international law does not resemble the law of nations known to the Framers. I do not believe there is evidence that the Framers wished to use this distinct brand of international law to interpret the Constitution.

<sup>23</sup> Some have also suggested that the *Charming Betsy* canon of construction, which requires statutes to be construed where possible in accordance with international law, be applied to constitutional construction as well. *See* Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT’L & COMP. L. 421 (2004). But this canon rests on the separation of powers consideration that it should be the political branches, not the courts, which make the decision to violate international law. *See* Bradley, *supra* note 22, at 525–29. Thus, the canon should not be applied to the Constitution because its application would interpret the Constitution to accord with international law and thus tend to deprive the political branches of the opportunity to decide whether they want to violate international law.

<sup>24</sup> In doing so, I am not conceding that this methodology is the best way to obtain justice. In my view, just as the best way to obtain happiness is to follow moral rules rather than to seek happiness directly, the best way to obtain justice is to follow the rules of our generally sound Constitution rather than to seek justice directly.

open-ended kind of constitutional methodology, I will show that foreign and international law should not generally be used as legal authority in constitutional interpretation.

Displacing democratic norms requires a thicker justice-seeking justification than adhering to democratic norms. To argue that democratically made laws should not be constrained by the Constitution simply requires one to argue that those ancient provisions are less likely to be good than contemporary democratic ones. But to argue that international law or foreign court decisions should be used as a factor to displace democratic decisions, one must argue that those decisions are sufficiently good that any incongruence between them and our democratically made rule should make us doubt the latter's beneficence. The basic problem posed by the use of international and foreign law in a justice-seeking interpretation of the Constitution is that, unlike a proposition of a good moral or economic theory used to displace democratically made law, the mere fact that a law is foreign or international does not make it intrinsically good. And, unlike democratically made laws or constitutions, transnational legal materials currently do not derive from a process that gives us reason to believe that they are good enough to impeach the presumptive beneficence of our own democratic law. In short, international and foreign law in this context falls between the two stools of what can make a norm good—a good process for generation or a claim that the norm is intrinsically good. It thus should not be used as authority in American constitutional law for the displacement of presumptively good democratic norms.

In Part I, I discuss the *pons asinorum* of the subject—the threshold issue of what is the authority of international and foreign law in constitutional interpretation that its proponents are claiming. My position is that the use of a proposition of international law or foreign law as a gloss on the interpretation of our Constitution is objectionable only if that proposition has real authority by virtue of its international or foreign law status. A proposition has such authority only if it has weight in the sense that the case could have come out differently in the absence of the existence of the proposition of international or foreign law, and if the authority of the proposition derives directly from its position in international or foreign law.

In Part II, I separately address arguments based on international law and those based on foreign law. There is no reason to think that foreign laws, including foreign judicial decisions, contain better norms for the United States than those made democratically in the United States, because they do not purport to be good norms for the United States, but instead emerge from complex social structures that are different from those in the United States. Moreover, to avoid selection bias, a court committed to the use of foreign law as an aid to interpretation would have to review the laws of all nations to determine whether, as a whole, they are incongruent with our own laws, taking into account the relevant differences between our nations. That, to put it mildly, would be a daunting enterprise incompatible

with the nature of judicial review—a task that on a serious, single issue would be difficult, if not impossible, to answer in a lifetime of sustained scholarship.

As to international law, I discuss the main reason that international law might be thought to be useful as a factor to impeach conflicting United States law—its norm universality. I will then show that this claim is undercut by international law's democratic deficit. It may be universally supported by nation-states, but there is often no reason to believe its universality rests on foundations of popular support, at least at the current time.<sup>25</sup> Finally, I show that using international or foreign law to displace American law on most subjects (and all the subjects on which the Court has used it) has other substantial costs that militate against its use in even a pragmatic constitutional calculus. It decreases the diversity of global rules and undermines American experimentation that has in the past paid dividends to the entire world. It undermines self-governance by giving incentives to interest groups, domestic and foreign, to frame international and foreign law with a view toward influencing our domestic law.

In Part III, I address some of the principal defenses of the use of foreign and international law. Finally, in Part IV, I describe the real function that the use of international and foreign law serves in our contemporary system of constitutional adjudication—as the manner in which the aristocratic element of a mixed regime makes judgments that it does not want to defend on its own authority.

#### I. THE QUESTION OF AUTHORITY

Before entering into the substance of the debate about international and foreign law, we must first settle what we are debating. My objections are limited to the use of propositions of international and foreign law as authority in constitutional interpretation when that authority is derived from their international and foreign status. Thus, to be objectionable in my view the propositions of international and foreign law must, first, have some weight in constitutional interpretation. That is, in some range of cases the Constitution would be interpreted differently but for the existence of the proposition of foreign or international law. Second, the proposition must be relied on by virtue of its status under foreign or international law. Of course, the proposition may be relevant to constitutional interpretation for some reason other than this status, but the validity of such reasons is not a concern here. I will address each issue in turn.

Surprisingly, there is much confusion about what it means that a proposition of international or foreign law has authority in constitutional interpretation. Some defenders of its use note that international and foreign

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<sup>25</sup> I concede that it is possible to imagine a world where the process for generating international law is sufficiently good that it can be used to impeach our own law, but that is not our world.

law cannot be controlling authority. But this is a straw man, as very little authority is controlling in the Supreme Court, not even the Court's own precedent. Others note that it is being used as persuasive authority—a concept that is not entirely clear.<sup>26</sup> If persuasive authority means that international or foreign law has no weight and that the case would always come out the same whether or not international or foreign law is cited, then these materials will have no effect on the course of constitutional interpretation.

The only reason to object to such an essentially decorative use of international and foreign law is that adding such citations renders opinions less transparent. It is hard to know what is doing the analytic work in the opinion if some of the materials cited have no weight. Making clear to citizens in a republic the essence of a court's reasoning has substantial virtues. Still, here I will only confront the more important arguments presented by the claim that foreign and international law should have weight in our constitutional interpretation.

Second, persuasive authority might mean that the material has no authority of its own and merely provides an argument that the Court adopts for some other reason, such as the view that the proposition correctly construes the constitutional text or represents a sound moral vision, where text, morality, or both are justified bases of authority. This distinction is not peculiar to the issue of the use of foreign or international law. Any material (not only foreign or international law) can be used for its informational value (it provides a good argument), or its disposition value (by virtue of its own authority it helps dispose of the case).<sup>27</sup> Material only has dispositional value when the authoritativeness of its material comes from its status. The Supreme Court, for instance, generally relies on its own precedent not simply for informational value, but for disposition value. Precedent has intrinsic weight by virtue of its status as precedent, regardless of the merits of the arguments (about text or other matters) that it contains. It is the disposition value of international or foreign law that is objectionable.

It is, of course, true that foreign law could have informational value in that it could contain principles that the Court could embrace on the basis of some other authority. But so could law reviews or the Bible or the Koran. (Indeed, the latter two may have a particular claim to our attention as useful sources of information, because they embody norms that, unlike much of modern international and foreign law, have stood the test of time.) If a Court cited a law review, it would be relatively clear that it was not relying on it as an authoritative source of constitutional interpretation, but merely finding an argument that it could make on its own authority. If the Court cited the Bible or the Koran for a proposition, the status of the book's au-

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<sup>26</sup> Breyer Discussion, *supra* note 10.

<sup>27</sup> See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1544 (2000) (distinguishing the information and disposition functions of precedent).

thority in constitutional law might not be as clear, but I think that even those who want the Court to rely on foreign and international law (perhaps particularly such people) would think the Court should make clear that it was citing to these passages only for information value and not as authority that has weight by virtue of where it appeared.<sup>28</sup> The Court would then have to defend those principles by grounding them in some matrix of justice it independently defines.

Thus, if the Court is simply citing foreign law to show where it found a principle it justifies on other grounds—to show, as it were, the scratch book of its research—the better practice would be to make clear the limited purpose for which foreign law is cited. But here I object only to the reliance on propositions that have weight by virtue of their status as international and foreign law.

## II. THE CASE AGAINST THE USE OF INTERNATIONAL AND FOREIGN LAW

### A. *Foreign Law*

Foreign law should not be used to cast doubt on the constitutionality of our own law because it emerged from a structure designed to generate norms for another nation, not our own. A foreign law, including a foreign court decision, is simply not framed with reference to being applied anywhere but to its own nation. Even if its decision is the product of a democratic consensus or some other process that creates good norms for the foreign nation, the content of that consensus is that the norm should be applied in its own nation. Any conflict between that law and our own thus does not suggest on its face that our law is not beneficial as applied here. In this sense, reliance on foreign law is much less plausible as a basis to displace our own constitutional norms than reliance on international law, because the latter at least purports to have universal scope.

A related difficulty with the use of foreign law is that any such law is part of a complex system of related norms and foreign structures in that nation. The laws of a nation, and the norms those laws advance, may be appropriate for that nation but out of place in nations with different governmental structures. *Lawrence's* use of European Union decisions is exemplary of this difficulty. European traditions are more favorable to the imposition of elite moral views. Indeed, the European notion of human rights is the product of a search for eternal normative truths to be imposed against democracy.<sup>29</sup> This conception differs from the American conception

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<sup>28</sup> I have found that Orin Kerr has made an analogy between the citation of religion and foreign law as well. See Posting of Orin Kerr to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2005\\_04\\_10-2005\\_04\\_16.shtml#1113424503](http://volokh.com/archives/archive_2005_04_10-2005_04_16.shtml#1113424503) (Apr. 13, 2005, 16:35 EST).

<sup>29</sup> See Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 24–25.

of rights as products of democracy, albeit the special democratic processes that produce the state and federal constitutions and their amendments.<sup>30</sup> Moreover, the United States has a structure of federalism and more general traditions of decentralization that are important processes for testing the content of rights.

Thus, foreign constitutional norms do not just reflect certain views about substantive rights; they also reflect a foreign mode of defining them. Any judicial opinion from another culture is the culmination of a complex institutional structure of producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that may be incompatible with American institutions. This does not necessarily mean that the American political system as a whole is better, but it does show that the foreignness of a law or judicial decision is a factor that prevents it from having any special force in undermining democratically made American norms.

Moreover, differences between the facts on the ground in other nations and our own naturally lead to differences in norms. For instance, it may be that in many nations traditional societal norms impose substantial constraints on the behavior of juveniles. But in our more atomistic, laissez-faire, success-driven society, such norms have much less constraining power. We may therefore need the death penalty for deterrence where most other nations do not. If differences in factual circumstances can lead to appropriate differences in norms, it is not possible to infer that norms are deficient from the mere fact of difference. In answer to some of the defenses of the use of foreign law, I discuss below whether a more sophisticated version of deploying foreign law in constitutional interpretation can correct for this defect, but the Court has certainly not yet attempted to do so.<sup>31</sup>

### B. *International Law*

Those who seek to defend the use of international law in constitutional interpretation point to its “norm universality.”<sup>32</sup> Because those principles that are accepted as part of international law are a product of a universal consensus either as realized through customary international law or treaty, they should trump or at least cast doubt on parochial judgments, like those embodied in our state or federal law. Note that this use of international law differs from the argument that the United States should be bound by the treaties it signs. If the United States were to sign a self-executing treaty, it would be bound as a matter of contractual obligation, and this obligation would trump conflicting United States law without any need to refer to the

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<sup>30</sup> *Id.*

<sup>31</sup> See *infra* notes 62–65 and accompanying text.

<sup>32</sup> For a discussion of this basis for the claim of relevance of international law in constitutional interpretation, see Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 73–80 (2004).

Constitution.<sup>33</sup> The question in constitutional interpretation arises not from the use of international law as a contractual obligation but as an epistemic aid in determining whether our own Constitution should be construed to displace our own law.

The intuition in favor of resorting to international law seems akin to other claims that a process that leads to consensus in the wider world might trump more localized judgments. Thus, if a norm elicits greater consensus, by which we generally mean agreement by more people, it may be likely to be superior. Under formal conditions, such claims are mathematical: if people are more likely than not to choose true facts and values, the greater proportion of people who agree to a proposition independently, the more likely it is to be right.<sup>34</sup>

But the problem with this argument is that international law, both formally and practically, represents the consensus of states, not people, and thus there is much less reason to think it should trump or even cast doubt on the judgments reached by democratic deliberations in particular nations. Because the theoretical arguments for international law rest substantially on the claim that norms universally accepted undermine the presumptive beneficence of democratically made American law, it is worth demonstrating at some length that, both formally and informally, international law does not depend on any notion of a global, democratic consensus.

Formally, modern international law is not based on democratic consensus. Modern international law rests on a pluralist system for forging international rules based on respect for the sovereignty of different states.<sup>35</sup> As a result, sovereign states are the building blocks of the modern international order and international rules must reflect their agreement. But there is no requirement that the international agreement reflect the democratic consensus in those nations.

Here, I briefly review the process for generating both customary international law and multilateral treaty law to show that both these kinds of processes have theoretical and practical democratic deficits that make them unsuitable for use as factors in displacing decisions made by our own democratic process.

Customary international law requires that the international custom reflect the widespread practice of states that follow the practice out of a sense of legal obligation.<sup>36</sup> There is nothing that suggests that the decisions to fol-

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<sup>33</sup> This point is discussed *infra* notes 50–53 and accompanying text.

<sup>34</sup> Such process-based defenses of democracy are often associated with Condorcet. See DENNIS C. MUELLER, PUBLIC CHOICE III 128 (2003).

<sup>35</sup> See Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 952 n.126 (1998) (stating that since the peace of Westphalia, “the principles of the territorial sovereignty and the jurisdiction of states have been two of the most fundamental principles of international law” (quoting MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 322–23 (2d ed. 1993))).

<sup>36</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT] (requiring widespread acceptance of a rule for it be customary law).

low the practice should be in keeping with the democratic sentiments of their people. Moreover, as a practical as well as a theoretical matter, customary international rules cannot be counted on to reflect democratic deliberation.<sup>37</sup> For instance, under modern customary international law, a state can be deemed to assent to a rule if it fails to persistently object.<sup>38</sup> A failure to object obviously does not generally require any democratic deliberation, even in a democratic society. Thus, customary international law does not have to elicit the kind of democratic deliberation that might give us confidence in its beneficence.

But the democratic deficit of customary international law is even deeper than the problem created by the nondemocratic nature of the state practices it embodies.<sup>39</sup> Unlike a provision in a constitution, customary law is nowhere written down. Some institution or set of individuals must infer the existence of a rule from the welter of states' practices and determine, in addition, whether those practices are taken out of a sense of obligation. Those responsible for collating state practices and turning them into a rule are publicists or international courts. Both have substantial problems of representativeness, creating high agency costs.

Publicists are essentially international law professors. As a group they are not required to be representative of the views of their nation's citizens nor are they likely to be so. We have evidence, for instance, that elite international law professors in the United States are very unrepresentative of popular opinion, leaning Democratic rather than Republican by a ratio of over eleven to two.<sup>40</sup> International law judges are no more likely to be representative. Some are appointed by nations whose leaders are not elected. Moreover, they are biased toward discovering consensus among states even when it does not exist to create more international law and thus more power for themselves.<sup>41</sup>

Thus, whether looked at formally or pragmatically, customary international law cannot be understood to represent a global consensus that by virtue of democratic authority should be thought to supplant or undermine laws made through domestic democratic deliberations.<sup>42</sup>

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<sup>37</sup> I discuss the democratic deficit of customary international law at length in John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229 (2003) [hereinafter McGinnis, *Appropriate Hierarchy*].

<sup>38</sup> See RESTATEMENT, *supra* note 36, § 102.

<sup>39</sup> McGinnis, *Appropriate Hierarchy*, *supra* note 37, at 239–46.

<sup>40</sup> See John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEO. L.J. 1167 (2005) [hereinafter McGinnis et al., *Patterns and Implications*].

<sup>41</sup> McGinnis, *Appropriate Hierarchy*, *supra* note 37, at 243 n.42.

<sup>42</sup> For another kind of attack on the use of customary international law in constitutional interpretation, see Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1304–09 (2004). Certainly, this is also a plausible line of attack, although it is

Formally, multilateral treaties are no more required to reflect global democratic will than is customary international law. The validity of international treaties does not depend on the democratic bona fides of their signers, let alone on democratic ratifications of their terms. One might argue practically, however, that as the world becomes increasingly democratic, more sovereign parties to treaties are democratically elected, and that, in fact, many nations, such as our own, have processes for treaty ratification that assure a relatively thorough democratic vetting of their terms.

However powerful that argument may become for the citation of treaties made in the future, it does not reflect the reality of most multilateral treaties which are in being today.<sup>43</sup> For instance, the terms of multilateral treaties that had to be negotiated with the Soviet bloc and other communist nations do not have special force by virtue of the process that brought them into being. Some provisions may well be the product of compromise with those discredited regimes. Indeed, were we talking about treaties to which Nazi Germany and Fascist Italy were parties, I imagine that many of the most enthusiastic supporters of today's international law would be the first in line to raise questions about their process of generation and they would be correct to do so.

To be clear, the terms of a multilateral treaty are not necessarily bad because totalitarian nations had a significant place at the negotiating table. They may very well be good. It is just that we cannot easily conclude that the terms are good based on the process by which they were fabricated. And the reliance on international law by virtue of its being international law is the issue here, not whether a term that has international law bona fides has some other kind of justification.<sup>44</sup>

Even were treaties to be the outcome of a more democratic consensus, it remains questionable whether that consensus would call for courts to displace national laws that conflicted with the consensus. It simply does not follow that nations that have agreed to a consensus on certain substantive norms are also agreeing to a procedure by which those norms should be enforced. The argument that a consensus should trump or be used as a factor to displace a domestic law in a judicial proceeding is far stronger if that function were an objective of the consensus. This is not an argument unique to the question of the displacing power of international law. The authority of the original understanding of the Constitution gains force from

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not clear that it is more indeterminate than the economic and moral theory that justice-seeking interpretations of the Constitution also employ.

<sup>43</sup> For instance, in *Roper v. Simmons*, the Court relied on both the International Covenant on Civil and Political Rights and on the United Nations Convention on the Rights of the Child, which were negotiated and came into being at a time when the Soviet bloc was still a party to negotiation. 125 S. Ct. 1183, 1199 (2005); see International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; United Nations Convention on the Rights of the Child, *entered into force* Sept. 2, 1990, 1577 U.N.T.S. 3.

<sup>44</sup> For fuller discussion of this point, see *supra* notes 27–29 and accompanying text.

the recognition that those voting for the Constitution and its amendments understood that the Constitution would automatically displace contrary law.<sup>45</sup>

But many, if not most, legal systems are dualist with respect to international law. In dualist systems, international legal obligations are separate from domestic legal obligations and do not displace contrary domestic law without action by the domestic government to enact international law as domestic law.<sup>46</sup> Thus, even democratic ratification by dualist nations does not show that its citizens wish to have international law enforced by the judiciary without intermediate steps by their own domestically elected representatives. Nations could have many reasons for refusing to implement the international rules of treaties without going through their own process of democratic lawmaking. They could regard international law, particularly when human rights are involved, as aspirational. Or they could believe that the international rules are too vague or open-ended to be given effect without being actualized through domestic enactment. Whatever the reason, the failure of other nations to deploy international law as a rule to unsettle their own domestic settlements detracts from the argument that the global consensus on the norm is a *displacing* consensus. When nations do not agree to have international law trump their own law, international law is, in economic terms, “cheap talk,”<sup>47</sup> and is thus a less plausible source of norms to displace those by which a democratic nation actually agrees to be bound.<sup>48</sup>

This point has particular force when the Court looks to treaties that are non-self-executing for a gloss on the meaning of the United States Constitution. In this case, the President has signed and the Senate has ratified a treaty, whose principles are not to be judicially enforceable directly.<sup>49</sup> If other nations also do not directly enforce these norms judicially, it is strange indeed for the Court to use the international consensus on a substantive set of norms without reference to the fact that there is no consensus

<sup>45</sup> See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 7, at 806.

<sup>46</sup> See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314 (1992).

<sup>47</sup> As economists explain, cheap talk is the opposite of costly signaling. See Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA L. REV. 1417, 1446 (2003). There is much less reason to believe that ratifying a treaty represents the real preferences of the domestic polity if the members of the polity are not willing to have the rules enforced against themselves.

<sup>48</sup> Note that the undemocratic and “cheap talk” nature of international law is contingent. It could be that international law at some point in the future will follow a more democratic process of generation and carry with it more costly, and thus more trustworthy, signals of its beneficence. In those circumstances, a “justice-seeking” interpretation of the Constitution would have more reason to embrace it. There would remain the pragmatic costs discussed *supra* Part I.C.

<sup>49</sup> See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 696 (1995) (“The doctrine of self-executing treaties thus serves to distinguish those treaties that require an act of the legislature to authorize judicial enforcement from those that require an act of the legislature to remove or modify the courts’ enforcement power (and duty).”).

that they be judicially enforced.<sup>50</sup> And it will almost inevitably be the case that only non-self-executing treaties will be relevant to constitutional interpretation. If the treaties are self-executing, they will almost invariably provide a rule of decision which litigants can use to displace state law, and indeed invariably so if one believes that the treaty clause is not subject to the other restrictions of the enumerated powers.<sup>51</sup> Self-executing treaties will displace federal law if later in time.<sup>52</sup>

If, on the other hand, the federal law is later in time, one would have to ask whether the international treaty in question has a dead hand problem. International law treaties, once made, can only be changed by the consent of the parties and thus it is likely that they will have more difficulty than domestic law in generating new norms to meet contemporary problems. That, of course, was part of the Progressives' own critique of the dead hand of the Constitution.<sup>53</sup>

One possible objection is to concede that international law lacks democratic legitimacy, but to argue that a justice-seeking view of the Constitution accepts many nondemocratic sources of law, like moral theory, or efficiency considerations.<sup>54</sup> But these kinds of considerations have their own justifications as good criteria. Economic considerations are justified by the evidence that they lead to the objective of creating greater wealth, and moral considerations by the authority of the arguments that lead us to believe that these are good principles. These goods may be strong enough on a justice-seeking view that they should be factors in trumping democratic law, whose claim to beneficence derives from its process of generation and not some independent theory of the good. The difficulty for international law is that nothing about its process of generation should lead us to believe that it should be used as a trumping factor over our own domestic

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<sup>50</sup> Sometimes the United States takes a reservation to a specific provision of a treaty. That also makes it even more important to inquire into whether other nations are willing actually to make that provision automatically binding on their polities. Of course, there are other more formal objections to the use of treaties with reservations by the United States on the relevant point of constitutional interpretation, see Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 63 (2004), but in this section I am ignoring formalist objections.

<sup>51</sup> For the debate on this issue, compare David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000), with Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998). For structural reasons, I am inclined to Professor Golove's view. See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 7, at 761–62 (stating that the two-thirds supermajority requirement was introduced as a compensating limitation on the scope of a treaty power unlimited by the enumerated powers).

<sup>52</sup> When a statute and treaty conflict as federal rules of decision, it is the later in time that controls. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

<sup>53</sup> See John H. Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 952 (1999) (describing Progressive attacks on the dead hand problem of constitutionalism).

<sup>54</sup> Cf. Koh, *supra* note 9, at 55.

processes, nor is there anything about international or indeed foreign law that should make us consider it intrinsically good, apart from its process of generation.<sup>55</sup>

To be clear, these objections to the use of international law in constitutional interpretation are contingent on the process by which international law is now generated. One can imagine a world (not our own) in which democratic nations ratify treaties through democratic processes and are willing to let their own judiciaries apply these pacts to displace their own laws. There would then be greater epistemic value to international law in constitutional interpretation.

### C. *Costs to Diversity and Self-Governance*

The use of international or foreign law to make our Constitution conform to foreign ways has other costs. First, it reduces the diversity of the world's political approaches. As discussed above, a diversity of approaches creates more information and experimentation.

When the matters to be regulated, like most but not all human rights, do not impose externalities on other nations,<sup>56</sup> there is a clear potential loss from freezing in place an international rule.<sup>57</sup>

The extent of the potential loss in this context no doubt depends on how likely the United States is to generate useful rules that may vary from the international consensus and in time supplant that consensus. Zimbabwe has a different approach to law and so does China, but in the end one may have doubts that they will add much to the stock of useful information and experimentation. But the history of the United States suggests that from the revolution onward it has pursued unique or unusual approaches that later command broad consensus and improve the world's welfare. The United States had one of the first written constitutions. Other nations followed. The United States has historically had one of the most deregulated market economies: it consistently delivered some of the highest sustained growth rates in the developed world and has reached one of the highest standards of living. The United States has governmental mechanisms that allow for swift and efficient war-making capabilities. It thus has rescued the world from totalitarian nightmares. In the sphere of human rights, the United

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<sup>55</sup> I discuss below the argument that international law should be used as such an interpretative source because it inherently promotes a good, namely our interests in the international sphere. I argue that the political branches are better than the judiciary in evaluating the extent to which this might be true. See *infra* notes 73–78 and accompanying text.

<sup>56</sup> For a discussion of the importance of limiting international law to cases of clear externalities, see John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381 (2000).

<sup>57</sup> Some human rights abuses, like genocide, may be so destabilizing that they create long term risks to international peace. The issues that the Court has taken up—the death penalty and the regulation of sexual activity—obviously do not impose such global externalities.

States originated written protections for free speech and continues to have one of the broadest charters for free expression in the world.

One's attitude toward the need to create constitutional space for American difference depends directly on whether that difference will be a force for the good.<sup>58</sup> It thus implicates directly the question of American exceptionalism. As such, it gets to the heart of some of the motivation in the debate over the use of foreign and international law. Many of those who would like to use foreign and international law are often less pleased with American distinctiveness and would like to move the United States to become more like Europe, in particular, with its more socialist and *dirigiste* economy, a social life less subject to moral regulation and religious influence, and a government less capable of unilateral military action.<sup>59</sup>

Another cost to using foreign and international law to interpret the Constitution is the creation of a dynamic for undermining self-governance. The use of contemporary and foreign law to interpret the Constitution provides perverse incentives to both our own domestic interest groups and to foreigners to influence American decisionmaking by changing rules over which Americans in general have no control. Citizens who cannot succeed in the domestic political process can go abroad to influence our laws through the backdoor. And it will give incentives to foreigners to frame their law with an eye toward affecting ours. Since citizens do not vote for most of those involved in international and foreign legal processes and because they are relatively opaque to the average citizen,<sup>60</sup> this development will, at the margin, transfer more power over our polity to select groups of our citizens and to foreigners. This process result underscores the anti-democratic and frankly un-American nature of the use of foreign and international law as a routine method of constitutional interpretation.

### III. THE WEAKNESS OF THE APOLOGISTS' RESPONSES

Now let me turn to some objections to this discussion of the problems of using international and foreign law. First, it may be conceded that international rules and foreign law rules cannot be automatically applied as a factor in constitutional interpretation simply by virtue of their international or foreign pedigree. But that criticism merely shows that a simple minded application of foreign and international law is a mistake. More sophisti-

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<sup>58</sup> Harold Koh in fact would like to cabin American exceptionalism through the use of transnational materials to assure that American principles would cohere more with the rest of the world. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

<sup>59</sup> Michael Ignatieff notes that American exceptionalism is marked by opposition to what he understands to be predominant adherence to such political principles. *Id.* at 1482–83 (quoting Michael Ignatieff, *American Exceptionalism and Human Rights* (Feb. 12, 2002) (unpublished manuscript, on file with Harold Hongju Koh)).

<sup>60</sup> See John O. McGinnis & Mark L. Movsesian, *Commentary, The World Trade Constitution*, 114 HARV. L. REV. 511, 558 (2000) [hereinafter McGinnis & Movsesian, *World Trade Constitution*] (observing that the average citizen has a harder time following activities in Geneva than in Washington).

cated judges, no doubt with the help of sophisticated advocates, could determine whether the particular bit of international law actually reflected a democratic consensus sufficient to be a factor trumping domestic rules. They thus could assess whether foreign legal systems taken as a whole were sufficiently similar to the United States and sufficiently democratic to form a relevant democratic consensus.

It should be noted that the Court has not engaged in this kind of analysis. Instead it has cited to foreign and international law without undertaking the hard work of interrogating the nature of the international law at issue or surveying the field of all relevant foreign law. In *Lawrence*, for instance, it cited to European law without considering relevant differences between the United States and Europe, either in culture or legal system, or providing a rule of decision about why the different laws of other nations might be more relevant.

But more fundamentally, judges would have very limited ability to make these kinds of determinations. To understand whether a foreign law casts doubt on the wisdom of our own law, one would have to undertake a systematic comparative enterprise of the two different cultures and legal systems to determine whether the other legal culture had sufficiently good methods of rule generation, and whether the systems were sufficiently alike that it made sense to conclude that the difference between their rules and ours on an issue cast doubt on the beneficence of ours. The question is not a strictly legal one but demands comparative cultural sociology as well as comparative law. Moreover, one could not pick out one or a few other nations for comparisons to ours because that would be selection bias. All nations, including those agreeing with our approach, would have to be factored into any calculus, again after making allowances for relevant difference in circumstances. This enterprise, a kind of global regression analysis, seems beyond judicial competence, particularly if it were done according to some set of neutral principles, on all constitutional issues or even all issues involving substantive due process.<sup>61</sup> Even a justice-seeking conception of the Constitution must take seriously questions of institutional competence.

Some might suggest that one could simplify the process by only considering the law of nations that are most similar to the United States. But defining “similarity” without very substantial, issue-specific investigation is a deeply problematic and ideological step.<sup>62</sup> Is France currently more simi-

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<sup>61</sup> At the moment, the Supreme Court only seems to undertake citation to foreign law when it believes it will bolster its result. For instance, our abortion jurisprudence may well be an outlier from other nations, and there the Court has not cited to foreign law. Thus, in addition to its other problems, the decision to cite foreign law does not follow neutral principles. *See also* Larsen, *supra* note 42, at 1325–26 (criticizing those who want to expand rights through the use of foreign and international law as employing a one-way ratchet).

<sup>62</sup> The practice of one state citing to another state’s constitution is very different, because states within the United States, particularly in contemporary times, participate in a common culture. Neverthe-

lar to the United States than India in ways that count for important legal issues, like the regulation of morals and economy? Unlike the United States, France is predominantly a post-religious civilization with a *dirigiste* economy resistant to reform.<sup>63</sup> Like the United States, India is more religious and has recently been more open to laissez-faire reform. In any event, since the beginning of the United States, when Federalists and Republicans disagreed on whether we should look to Britain or France as models for our own development, the choice of foreign models has been deeply and ideologically divisive. It seems inappropriate as a mechanism of constitutional interpretation for that reason alone.<sup>64</sup>

Determining the democratic consensus behind a treaty would likewise demand wide-ranging investigations. It would require assessing whether nondemocratic nations' participation changed the terms of the treaty at issue. This would be hard to find in fact and maybe impossible to find in theory since it would be an inquiry into counterfactuals. In any event, the answers would be radically indeterminate. To understand whether other treaties' ratifications were the equivalent of cheap talk because they did not have the power to displace the nation's own legal system would require the investigation of the domestic legal effects of particular treaties in scores of jurisdictions.

Another argument in support of relying on foreign and international law often references the Declaration of Independence. Some, including some Justices, have suggested that a "decent respect to the opinions of [man]kind" requires the Court to take account of the force of foreign cases and laws.<sup>65</sup> Using the admittedly sonorous phrase of our founding document as a rhetorical trope for following foreign or international law seems a curious strategy. First, the Declaration makes clear that this "decent respect" requires us to explain our own views to the world, not accept the views of others.<sup>66</sup> More fundamentally, the Signers appealed to a combination of natural law and their historic rights as justification for their break

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less, if I were a state judge I would not generally be enthusiastic about citing another state's contemporary law to interpret my own state constitution, for fear that it would be hard to understand all the relevant differences between our constitutions. Of course, if one state's constitution is used as a model for another's, it may well be wise to use it as a source of constitutional law, but that kind of deployment is completely consistent with originalism. See *supra* notes 21–22 and accompanying text.

<sup>63</sup> On the dramatic difference between the United States and Europe in terms of religious observance and influence, see Brian C. Anderson, *Secular Europe, Religious America*, PUB. INT., Spring 2004, at 143.

<sup>64</sup> For a discussion of the partisan divisions in considering revolutionary France, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 311–30 (1993).

<sup>65</sup> See Ginsburg, *supra* note 11.

<sup>66</sup> See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (noting that "a decent respect to the opinions of mankind requires that [Americans] should declare the causes which impel them to separation").

with the mother country.<sup>67</sup> They did not refer to foreign and international law as support for their position and for good reason. Powerful sovereigns at the time from Carlos II of Spain to Louis XVI of France were not noticeably solicitous of the rights, like representation and freedom from unreasonable searches, that the Framers thought their birthright. Nor were such governmental infringements of such rights proscribed at international law.<sup>68</sup> If the Signers had followed the predominant norms in foreign jurisdictions, we might well still be part of the United Kingdom.

Moreover, as I note in the epigraph for this piece, the Framers specifically objected to being subject to foreign jurisdiction by George III: “He has combined with others to subject us to a jurisdiction foreign to our constitution.” The foreign jurisdiction referenced was the British Parliament.<sup>69</sup> Jefferson understood parliament as representative of a separate political community who should not have authority over Americans.<sup>70</sup> He viewed it as foreign, despite the fact that it was the political community from which most Americans came and which was at the time obviously closest to the United States in political and cultural values. How much more foreign are most of the nations today around the world! Of course, the Supreme Court is not giving foreign nations total authority over Americans in the way in which the Declaration complains. But insofar as the Court relies on foreign law as authority that may tip the scales of its decision, it is engaged in the same kind of enterprise, just to a lesser degree. It is perverse to use the Declaration of Independence as support for this method of judicial interpretation.

Another version of this argument is not historical but based on realpolitik. By interpreting our Constitution in closer accordance with foreign or international law, we will curry favor abroad and create a greater spirit of amity toward the United States, and, at the margin, make other nations more amenable to its foreign policy goals.<sup>71</sup> But the Supreme Court does not have a comparative institutional advantage in determining what will usefully forward United States foreign policy goals. Its own jurisprudence recognizes the superiority of other branches in these matters by deferring to

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<sup>67</sup> See PAULINE MAIER, *AMERICAN SCRIPTURE, MAKING THE DECLARATION OF INDEPENDENCE* 87, 125 (1997) (discussing the influence of natural law and the English Declaration of Rights).

<sup>68</sup> This point is discussed in detail in Eugene Kontorovich, *Disrespecting the Opinions of Mankind*, 8 GREEN BAG 2d 261 (2005).

<sup>69</sup> THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

<sup>70</sup> *Id.*

<sup>71</sup> See Sandra Day O'Connor, Remarks at the Southern Center for International Studies 2 (Oct. 28, 2003), available at [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf) (suggesting that citation to foreign and international courts “may not only enrich our own country’s decisions: it will create that all important good impression”).

the political branches in matters of foreign affairs.<sup>72</sup> If the incongruence of a state or federal law with foreign or international law is undermining our foreign policy, Congress is in a better position to identify and address it.<sup>73</sup> If it is a problem of federal law, Congress can simply repeal the law. Under current federalism doctrine, Congress has ample tools at its disposal, such as imposing conditions on federal spending to make the states fall behind any foreign policy imperative.<sup>74</sup>

Recently, in *American Insurance Ass'n v. Garamendi*,<sup>75</sup> to be sure, the Court suggested that the concept of foreign policy preemption would allow the President in certain circumstances to override state law himself when these state laws are in tension with foreign policy imperatives. But whatever the merits of that decision, it gives power to the President as well as to Congress to negate judgments of the states when they seem to undermine our foreign policy. The authority of the Supreme Court to displace state laws on the basis of foreign policy concerns becomes, on pragmatic grounds, even less necessary the more other branches are empowered to restrict the operation of state laws that conflict with foreign policy considerations, including compliance with international law.<sup>76</sup>

Some might argue that citing foreign law or international law has benefits in addition to the congruence among legal regimes it promotes. One kind of benefit would again be the good will that such citations garner abroad. But these benefits seem slight and would seem to be as substantial from decorative citations as the kind I am objecting to here—ones that may have weight in our decisionmaking. Another kind of benefit would be bolstering the authority of foreign courts. But this seems even more debatable. The United States is not popular everywhere, and thus citation by an instrumentality of the United States government may undermine rather than

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<sup>72</sup> See *Baker v. Carr*, 369 U.S. 186, 213–15 (1962) (talking about judicial deference to the political branches in foreign affairs). For discussion of the reasons for this deference, see Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 944–45 (2004).

<sup>73</sup> See also Larsen, *supra* note 42, at 1318 (noting that political branches have historically addressed foreign policy concerns).

<sup>74</sup> It is true that in the dormant foreign commerce clause the Court acts in the absence of a congressional statute. But the pragmatic reason for this doctrine is that consensus in favor of free trade among the states is a very strong one. There is no similar consensus on following foreign or international law on the endless variety of subjects on which sources may take positions. And most fundamentally, the Court's judgment on the dormant commerce clause, unlike interpretations of the Constitution influenced by foreign law, do not bind Congress. One could similarly respond to analogies between the use of foreign and international laws to interpret the Constitution and federal common law. The fabrication of federal common law depends on clearer directions from Congress for its fabrication and it exists only at the sufferance of Congress.

<sup>75</sup> 539 U.S. 396 (2003).

<sup>76</sup> Recently, President Bush acted on at least as broad a reading of executive authority to preempt state action as offered by *Garamendi* when he ordered Texas to comply with the judgment of the ICJ requiring that states permit foreign nationals to consult with their consuls in death penalty cases. See Memorandum on Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

bolster the authority of courts abroad and, at worst, give rise in fact to conspiracy theories. In any event, both these arguments suffer from a similar flaw as other foreign affairs based arguments—the Court by its own acknowledgement is not an expert in such calculations. This kind of analysis in fact provides a better rationale for the executive branch than the courts to cite foreign and international law in the interpretation of the Constitution because the executive is charged with integrating foreign policy considerations.<sup>77</sup>

A final kind of objection would suggest that it is inevitable that the Court will use international and foreign law in a highly globalized world. For instance, the government might offer compliance with international law as a compelling interest justifying a law that restricts certain demonstrations around embassies.<sup>78</sup> It is true that in this case the Court might have to consider international law and its effects on our own embassies overseas to determine whether this is a compelling circumstance. But here the Court is merely considering international law as fact to be put in a preexisting constitutional framework, not using it as a gloss on the meaning of the Constitution. If the United States were saying it had to pass a law restricting speech because otherwise another nation would invade, the Court might well evaluate the strength of this claim, but the threat of this other nation would hardly be considered a source of our constitutional law. Foreign and international law may well be facts to which existing constitutional rules must be applied in order to reach decisions. They are not for that reason a mechanism of constitutional interpretation, like the constitutional text, or the Federalist Papers, or our own judicial precedent.

#### IV. FOREIGN AND INTERNATIONAL LAW AS A COVER FOR THE ARISTOCRATIC ELEMENT OF THE MIXED REGIME

If the use of contemporary foreign and international law cannot be justified as constitutional authority for displacing our own law, even on pragmatic, let alone originalist, grounds, what explains its new popularity? I have suggested above that the most obvious grounds for enthusiasm would come from those who are most unhappy with the values in our Constitution or those expressed through our domestic process. People who want a more social democratic society (i.e., one that combines more regulation of economic life and less regulation of moral life) will often find such values reflected in some bits of international and European law, which is the foreign law most ready at hand. That may explain the great enthusiasm in the aca-

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<sup>77</sup> The executive branch has an independent duty to interpret the Constitution and sometimes has reason to engage in distinctive methodology. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 397–99 (1993).

<sup>78</sup> The facts of this hypothetical are loosely based on *Boos v. Barry*, 485 U.S. 312 (1988).

demic world for this approach.<sup>79</sup> But the important reason for the Justices' embrace of this methodology stems from the nature of the modern Supreme Court.

The essential problem, both psychological and sociological, of the modern Supreme Court is that it has become the aristocratic element of a mixed regime, but one that cannot openly claim that function. As discussed above, with *Roe v. Wade* and the rise of fundamental due process and allied doctrines such as the evolving standards of decency doctrine under the Eighth Amendment, the Court now replaces democratic decisions with its own values. No longer can its function in its most controversial decisions be understood as that of maintaining the mandates made through a higher democratic process (the enterprise of originalism) or of removing roadblocks to democratic decisionmaking (the enterprise of democracy reinforcing constitutionalism). It is now neither the enforcer of superdemocracy nor the perfecter of ordinary democracy, but instead the fabricator of higher law.

The best defense of elite value imposition is one with ancient roots—the theory of mixed regime. Aristotle thought a mixed regime superior to democracy,<sup>80</sup> and many Renaissance political theorists agreed.<sup>81</sup> Pure democracy is prone to rash and vulgar judgments which an aristocracy can temper. There is even some evidence that some of our Framers may have thought that the judiciary should play this role. They were concerned to protect at least some property rights against the fickleness of the mob. And judges, who they naturally believed would be the brothers of merchants and property owners, drawn from the same class and serving these worthy gentlemen as clients before ascending to the bench, would be well positioned to perform this function.<sup>82</sup>

But these Framers were hardly explicit about this function and Hamilton, in fact, was at pains to note, at least in public, that the judicial power

<sup>79</sup> The legal academy is overwhelmingly left liberal, see McGinnis et al., *Patterns and Implications*, *supra* note 40, and would thus be particularly unsympathetic to the conservatives' current political domination of the United States.

<sup>80</sup> ARISTOTLE, *ACTUAL CONSTITUTIONS AND THEIR VARIETIES*, reprinted in *THE POLITICS OF ARISTOTLE* 177–78 (Ernest Barker trans., Oxford University Press 1948) (n.d.) (“It is a good criterion of a proper mixture of democracy and oligarchy that a mixed constitution [i.e., a polity] should be . . . described indifferently as either. When this can be said, it must obviously be due to the excellence of the mixture. It is a thing which can generally be said of the mean between two extremes: both of the extremes can be traced in the mean . . .”).

<sup>81</sup> See, e.g., NICCOLO MACHIAVELLI, *THE DISCOURSES* 104–11 (Bernard R. Crick ed., Leslie J. Walker trans., 1970) (n.d.) (proposing a mixed regime comprising aristocratic, democratic, and monarchic elements, with each element held in check by the other two); see also MONTESQUIEU, *THE SPIRIT OF LAWS* 200 (David Wallace Carrithers ed., 1977).

<sup>82</sup> Cf. R. KENT NEWMYR, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 82 (2001) (discussing John Marshall as part of the legal aristocracy that serviced the merchants and planters).

would be circumscribed by traditional methods of interpretation.<sup>83</sup> In any event, today the sociology of the mixed regime is very different from the time of the founders. Judges are not representatives of real property owners or merchants because that class is no longer the real aristocracy of our society. Instead, our aristocracy is the cognitive elite. Those with the strongest intellectual endowments and best education dominate our professions and particularly what might be called the symbolic class—those who make their living by the manipulation of symbols.<sup>84</sup> Lawyers are an important part of this symbolic class and, together with other members like academics and the press, they determine the reputation that life tenured jurists seek to maximize.<sup>85</sup>

But apologists for the Court's substantive due process jurisprudence and other doctrines of value imposition today rarely defend the Court's imposition of values based on the theory of the mixed regime. The reason for this is that operative principles of America, as observers from Alexis de Tocqueville on make clear, are politically equalitarian and democratic. It is thus difficult for the aristocratic element of a mixed regime to speak its name in public.

Because of these operating principles, some members of the Court naturally turn for aid to international and foreign sources of law. As described above, international principles might appear on their surface and to the uninitiated to incorporate a democratic consensus, although we have seen they really do not. The foreign authorities cited from other democratic jurisdictions have a democratic valence on the surface, even if the decisions themselves are judicially activist. Reliance on such authorities also is equalitarian in the sense that it places the law of others on a more equal footing with our own. Most importantly, it also serves the function of providing cover for the elite values of the Court itself. In relying on the law of other nations, Justices dilute the sense that they are responsible. Thus, they help in the Justices' own minds and, at least for a time, to the inattentive public, to provide some resolution of the tension of being an aristocratic element of a mixed regime in a nation that is operationally democratic.

At a more sociological level, the citation of foreign sources of law reflects the globalization of the judiciary. Supreme Court judges interact with their peers in other nations on a more regular basis. Their long summer recess is a perfect time to make the acquaintance of justices in their favorite

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<sup>83</sup> THE FEDERALIST No. 78, at 506–07 (Alexander Hamilton) (Robert B. Luce, Inc., 1976) (comparing the method of constitutional review to traditional statutory interpretation).

<sup>84</sup> It is important to emphasize that by saying that the modern elite has higher intellectual endowments, I am not suggesting that they possess greater wisdom and are thus a natural aristocracy of the highest order. In many ways, the “chattering” classes are as conventional an elite as the old landowning nobility and gentry. And they tend to embrace conventional wisdom.

<sup>85</sup> See Frederick Schauer, *Incentives, Reputation and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 628–30 (2000) (suggesting that such groups as editorialists and academics determine the reputation that judges seek to maximize).

nations. Lake Como or the south of France provides a good atmosphere for bonding. All of us seek approval from our peers and the Justices would naturally regard foreign justices as their equals. These peers would appreciate the citing of their handiwork. In a sense, the meeting and cross-fertilization of constitutional justices is not different in kind from the similar interactions of other regulators who are now said to form global regulatory networks in the aid of global governance.<sup>86</sup>

Thus, it should not be a surprise that many Supreme Court Justices have employed the strategy of using foreign and international law as their cloak for aristocratic influence. They will not face substantial resistance from the bar, because anything that complicates constitutional law and potentially expands its scope is good for the pecuniary interests and status of lawyers, even if it is against the public interest.<sup>87</sup>

But just as the global networks of international regulators can be criticized for making decisions in a manner that will be more opaque to citizens who understand the workings of Washington better than they understand the workings of Geneva,<sup>88</sup> so too can the Court be criticized for relying on international and foreign law, whose production process cannot be easily understood, let alone influenced, by the average citizen. While the use of international and foreign law to provide cover for elite judgments may seem to make their judgments less like that of the aristocratic element, in the long run, it may make that kind of constitutionalism even more unpalatable to a democratic regime for two reasons.

First, it distracts the Justices from giving their own reasons for their pragmatic judgments.<sup>89</sup> Ultimately, the Court can best sustain the aristocratic model of the Supreme Court only if it persuades the public to defer to it by virtue of greater wisdom, which is a basis for giving power to an aristocratic element in society. Whether such deference is compatible with American democracy is open to question, but there is no reason in principle that the people themselves could not reach a consensus that the Court is simply better at reaching some kinds of decisions than they are. But in the long run they are far more likely to do so if the Court relies on reasons of its

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<sup>86</sup> For a discussion of these networks, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>87</sup> See John O. McGinnis, *Lawyers as the Enemies of Truth*, 26 HARV. J.L. & PUB. POL'Y 231, 232–34 (2003) (showing that lawyers have incentives to expand and complicate law at the expense of the public interest). This view of lawyers is nothing new. Alexis de Tocqueville thought lawyers formed a party “that acts upon the country imperceptibly, [and] finally fashions it to suit its own purposes.” 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 358 (Francis Bowen ed., Boston, John Allyn, 6th ed. 1876).

<sup>88</sup> See McGinnis & Movsesian, *World Trade Constitution*, *supra* note 60, at 558.

<sup>89</sup> And while international law may at the moment function largely as cover for their judgments, it may be that over time we will get a reticulated jurisprudence of international and foreign law complete with its own balancing tests. But that will only serve to put Justices at even greater distance from what a justice-seeking jurisprudence should seek to construct—a persuasive metric of substantive justice for overturning democratically made laws.

own—either facts or principles—that the people have missed in their democratic process rather than trying to prop up their own judgments with references to international and foreign law that at best is relatively obscure and at worst seems to make law in the United States dependent on the judgment of foreign powers.

Second, frequent resort to international and foreign law will gnaw away at one of the foundations of the stability in our constitutional system—Americans' pride in their system because it is their own. This point, noted by de Tocqueville,<sup>90</sup> goes to the heart of a problem of any political system. How does it maintain itself? A political system cannot be maintained by self-interest because citizens would then free ride off of the efforts of others. Thus, if self-interest is the only perspective that individuals have toward constitutionalism, the attitude adopted will be at most benign neglect and at worse alienation. One important American tradition that overcomes this potential constitutional tragedy of the commons is the bond of affection that citizens have for their founding document.<sup>91</sup> As foreign and international decisions become more central to American constitutional law, citizens, except for the most cosmopolitan, will lose a measure of identity with that common bond.<sup>92</sup> The result will facilitate harsh attacks on our constitutional system even as it drains away the reservoir of affection created by the emphatically American nature of our founding document.

It may at first seem strange that Justices would choose a strategy that may in the long run undermine the status which their judgments imply that the Court should enjoy in American society. But the key is that these are long-run effects that will take perhaps several decades to be seen. Similarly, for instance, judicial activism on social issues was able to continue for decades before it began to have very severe effects on the confirmation process. It is only today that the effects are being felt not only in the Supreme Court confirmation process, but in the process for confirmation of lower court judges. Life tenure is too long in some ways,<sup>93</sup> but it is too short in another. Justices are interred before the harm that they do courses through the life of the body politic.

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<sup>90</sup> See 1 Alexis de Tocqueville, *Respect for Law in the United States*, in *DEMOCRACY IN AMERICA* 247, 248 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835).

<sup>91</sup> Years ago this enthusiasm was actually marked by celebrations and even parades for the Constitution in particular. WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 233 (1994) (discussing “Constitution Day” celebrations).

<sup>92</sup> Cf. Lund & McGinnis, *Judicial Hubris*, *supra* note 14, at 1607 (“Flaunting a cosmopolitan sensibility may be quite chic, but this high style comes with a price.”).

<sup>93</sup> See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 *HARV. J.L. & PUB. POL’Y* (forthcoming June 2006) (arguing that life tenure in the Supreme Court has unfortunate effects).

## CONCLUSION

It is obvious that the use of contemporary international and foreign law is in tension with originalism. What is less obvious is that this use does not have a place in a justice-seeking construction of the Constitution and that, in the long run, it may even be damaging to a discretionary jurisprudence in which the Supreme Court functions as the aristocratic element of a mixed regime. Of course, it might seem to count against the aristocratic mode of construing the Constitution that it cannot proceed more openly, but needs to move by stealth—in this case, the cloak of foreign and international law. A mark of the soundness, in my view, of a constitutional theory is whether the judges who follow it do so openly and transparently. Under that test, originalism fares best, progressive theories of democratic deference and democratic reinforcing theories follow a little behind, and implicitly aristocratic theories are far in the rear. But the honesty of a jurisprudence is probably not a comprehensive test of whether it will have good effects. For that determination, we will have to await the verdict of the 200th year symposium.

