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NARRATIVES OF FEDERALISM: OF CONTINUITIES AND COMPARATIVE CONSTITUTIONAL EXPERIENCE

VICKI C. JACKSON†

INTRODUCTION

The dramatic title of the conference for which this Essay was written raises the question, what is the Constitution “in exile” from?¹ The “Constitution in Exile” might refer to an entire set of doctrines and principles purportedly banished from constitutional discourse in the post–New Deal era. On the possible claim that this “exiled” Constitution is being repatriated, there is, on the one hand, little doubt that the Court has embarked on a revival of federalism as a judicially enforceable constraint on national power. Working from the infrequently changed text of an old, written constitution, the Supreme Court in the last decade has engaged in a substantial reworking of the outlines of the federal and state governments’ relative constitutional powers. The Court’s rather stark departures from an earlier, post–World War II era federalism landscape include its implicit abandonment of the premise of *Garcia v. San Antonio Metropolitan Transit Authority*,² which primarily relied on the political process to

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† Professor of Law, Georgetown University Law Center. This Essay is based on a paper presented at the Constitution in Exile conference hosted by the Program in Public Law at Duke University School of Law on October 5–7, 2000. Thanks to Evan Caminker, Jeff Powell, Bob Taylor, Bill Treanor, and Mark Tushnet for very helpful comments on earlier drafts, to Barry Carter and Jane Stromseth for helpful discussions, as well as to the organizers and participants in the Program in Public Law conference and to the participants in the Chicago-Kent School of Law Research Workshop where a version of the paper also was presented. I also am grateful to my research assistants, April Gassler and Kevin Lippert, and to the editors of the *Duke Law Journal*, for their able assistance.

1. The conference title, “The Constitution in Exile: Is It Time to Bring It in From the Cold?,” was inspired by Judge Douglas Ginsburg’s book review, Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, No. 1, 1995 at 83, 84 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) (referring to a “Constitution-in-exile”).

2. 469 U.S. 528 (1985).

protect the role of the states in the union,³ and its reinvigoration of a categorical, line-drawing approach to defining federal power, an approach that has historically proven unstable.⁴ The Court has invoked a divide between economic and noneconomic activity that does little more than attempt to capture (and not entirely accurately)⁵ those areas in which Congress has hitherto exercised its Commerce Clause power, a divide that may also significantly disable Congress from using the commerce power to protect the economy from harms generated by barriers to the full participation in the national economy by historically disadvantaged groups.⁶ The Court has thereby retreated from its earlier views that Congress has the power to protect the nation's economy from injury, whatever the source.⁷ Moreover, the Court has extended states' immunity from ordinary liability under valid federal law, even where states are competing against private en-

3. Cf. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1333–34 (1997) (arguing that *Garcia* is no longer good law with respect to judicial review of federalism questions).

4. Compare, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895) (suggesting that Congress lacks the power to regulate manufacturing because it is distinct from commerce), with *Standard Oil Co. v. United States*, 221 U.S. 1, 68–69 (1911) (rejecting a constitutional argument based on *Knight*, stating that “[this] view . . . [has] been so necessarily and expressly decided to be unsound as to cause the contention to be plainly foreclosed and to require no express notice”).

5. For cases upholding the application of a federal statute in the absence of commercial activity, see *Caminetti v. United States*, 242 U.S. 470, 484–86 (1917) (upholding a statute prohibiting interstate transportation of women for, inter alia, “any . . . immoral purpose”); *United States v. Bitty*, 208 U.S. 393, 394–95 (1908) (upholding a ban on the importation of alien women for, inter alia, “any . . . immoral purpose”). Although under *United States v. Lopez*, 514 U.S. 549, 559, 561 (1995), the statutes involved in these cases concerned interstate movement of persons and thus might be constitutionally evaluated under the “instrumentalities” of commerce rather than the “substantial effects” test, it is nonetheless worth noting that an objection to the application of the federal statute absent commercial purposes was rejected by the *Caminetti* Court despite being raised in a dissent. 242 U.S. at 497–98 (McKenna, J., dissenting).

6. See *United States v. Morrison*, 529 U.S. 598, 625–27 (2000) (invalidating a federal remedy for victims of gender-motivated assaults). For further discussion of *Morrison*, see Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

7. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that Congress's power “may be exerted to protect interstate commerce ‘no matter what the source of the dangers which threaten it’” (quoting *Second Employers' Liab. Cases*, 223 U.S. 1, 52 (1912))); *Second Employers' Liab. Cases*, 223 U.S. at 51 (upholding the implementation of an eight-hour workday for railroad employees and rejecting an argument that would treat “the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power”).

tities,⁸ and has created an immunity from federal “commandeering” of state officers unjustified by constitutional text, structure or history.⁹

On the other hand, and notwithstanding this revival of judicially enforceable federalism limits on national power, the metaphor of exile obscures important continuities in the Court’s federalism jurisprudence over time. Exile is also too war-like a metaphor to describe the largely peaceful processes of constitutional contest and change that have characterized the development of constitutional law for much of the last century. Although the Court’s recent federalism cases represent an important shift, the Constitution being elaborated these days was never in “exile.” Rather, it was sustained in dissent throughout most of the last sixty years. Exile and dissent are different modalities.¹⁰ And dissent, unlike exile, is an important tool for the reconstruction of constitutional law—a tool that offers some hope for the future to those in disagreement with the Court’s current approach to national power. In Part I, I discuss these points.

There is a second sense in which the Constitution might be thought of as being in a kind of exile, for the Court has largely held itself aloof from engaging with the practice of constitutional adjudication in other nations. The metaphor of “exile” might imply a self-imposed isolation, a being “out in the cold,” and thus may accurately capture the relationship of the United States’s constitutional law to constitutional developments elsewhere in the world. U.S. constitutional decisions, majority as well as dissenting opinions, lack a rich tradition of engagement with the reasoned elaboration of constitutional norms around the world. Justices’ opinions veer between what we might call forms of “legally autonomous” reasoning, in which results are presented as if derived from legal texts and precedents alone, and more “contextualized” reasoning that places legal decisions in

8. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999).

9. See *Printz v. United States*, 521 U.S. 898, 916–25 (1997). For more discussion and critique of *Printz*, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2183–2213 (1998).

10. An exile is a “forced” or “voluntary absence from one’s country or home”; to exile someone is to “banish or expel from one’s own country or home.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 406–07 (10th ed. 1999). A dissent is a “difference of opinion,” and “to dissent” is “to withhold assent” or “to differ in opinion.” *Id.* at 336; see also 5 OXFORD ENGLISH DICTIONARY 540–41 (2d ed. 1989) (stating that an exile is an “enforced removal from one’s native land according to an edict or sentence” and to exile someone is to “compel [a person] by decree or enactment to leave his country”); 4 *id.* at 837 (stating that a dissent is a “difference of opinion or sentiment,” and to dissent is to “withhold assent or consent from a proposal”).

some broader context—of history, political economy or comparative government.¹¹ But even when the Court has considered the constitutional experiences of other nations, it almost never has engaged the reasoning of other constitutional courts. In this respect (at least with regard to questions of individual rights), the Court's interpretive methodologies are more self-contained and autonomous than those of many other constitutional courts. In Part II, I suggest that, notwithstanding possible objections, there are a number of benefits for U.S. constitutional adjudication from more engagement with the relevant constitutional experiences of other nations and their tribunals.

I go on to ask whether it may prove more difficult to learn directly from other nations' constitutional courts' decisions on federalism than from comparative constitutional law on issues of individual human rights. Federal systems are built on inherently political compromises, often quite particularly contextualized, and consist of interdependent "packages" whose particular features may function quite differently in connection with other federalism "packages." Yet there is much to be learned from the constitutional experiences of other nations, both generally and on questions of judicial enforcement of constitutional federalism. I end with a brief discussion of what we might learn from the constitutional experiences of other federal nations that might assist in developing more judicially manageable standards for review of federalism challenges to national action in the United States.

The metaphor of "exile," then, invites two different comparisons—of the current Court's constitutional interpretations compared to those of earlier Courts in the United States, and of U.S. constitutional decisions compared to those of the influential constitutional courts of other nations. Yet as I will suggest below, there is a sense in which the Court's revival of judicially enforceable limits on national power and its reluctance to invoke comparative experience may be related. Both may result in part from a degree of institutional insecurity and a related compensatory assertiveness, reflected in the construction of a legal narrative that seeks to appear autonomous from

11. Paradoxically, as will appear below, in some settings appeals to transnational constitutional law can be understood to reinforce and in other settings to undermine the perceived integrity and autonomy of law. *See generally* Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000).

influence by the political branches of the national government and from the decisions of other nation's constitutional courts.¹²

I. DISSENT, NOT EXILE: THE CONSTITUTION AS A PLACE OF CONTEST OVER FEDERALISM NARRATIVES.

The phrase "Constitution in exile" implies that there have been "different" constitutions at different moments. To the extent that this implication resonates with Bruce Ackerman's argument that the Constitution has actually been amended in "constitutional moments," such as the New Deal, through a combination of political and judicial activity outside of Article V,¹³ I want to mildly resist both the description and the claim, at least with respect to questions of federalism. Rather, I would suggest, beginning in the early 1990s, themes that had resided primarily in separate or dissenting opinions in prior decades assumed ascendancy. While it is a far stretch from the closely divided 1903 decision in the *Lottery Case*¹⁴ to the Court's unanimous 1942 decision in *Wickard v. Filburn*¹⁵ to the again closely divided 1995 decision in *Lopez*,¹⁶ it is in many ways recognizably the same Constitution, and the same constitutional provisions, around which controversy revolves, with similar arguments being worked and reworked. The reported "death" of federalism¹⁷ is in this sense quite different from the death of legally approved racial apartheid that resulted from *Brown v. Board of Education*.¹⁸

12. This Essay was originally prepared for a conference in October, 2000, well before the election of 2000 and the decision in *Bush v. Gore*, 531 U.S. 98 (2000). I do not seek to integrate that decision into the analysis presented, other than to note that the assertiveness of the Court's posture toward Congress noted in this Essay is not inconsistent with the Court's failure to treat the questions before it in *Bush v. Gore* as "political" questions committed to Congress by the Constitution in Article II, Section 1 and the Twelfth Amendment.

13. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 22 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 312-44 (1998).

14. 188 U.S. 321, 354 (1903) (upholding a federal prohibition on the interstate transport of lottery tickets).

15. 317 U.S. 111, 127-29 (1942) (upholding a federal regulatory scheme limiting the amount of wheat that could be grown on a home farm for consumption on the farm).

16. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down the Gun-Free School Zones Act as beyond congressional power under the Commerce Clause).

17. See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1711 (1985).

18. 347 U.S. 483, 495 (1954) (holding that "separate but equal" as applied to public education violates the Equal Protection Clause). Although *Brown* did not explicitly overrule *Plessy v. Ferguson*, 163 U.S. 537 (1886), after *Brown*, *Plessy* and the constitutional rule of "separate but equal" were not again asserted on the Court as a basis to uphold segregation or racial classifications. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) ("[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities.").

A. Federalism and Dissent

Although the Court's unanimity in cases like *Wickard* and *Darby v. United States*¹⁹ might be regarded as the signal of a new constitutional regime, it is worth remembering that those cases were decided in the face of a major world war, when the apparent importance of sustaining the powers of the national government may have been heightened by the perceived imperatives of wartime. Federalism concerns about the scope of national power soon reemerged. Within a year of the war's end, in 1946, the Court fractured about the scope of national power in holding that a state's sale of mineral water could be subject to federal taxation in *New York v. United States*,²⁰ with Justices Douglas and Black in dissent. In 1948, while the Court upheld federal rent control legislation under the war powers in *Woods v. Cloyd W. Miller Co.*,²¹ Justice Jackson—author of the unanimous opinion in *Wickard*—concurring separately to express his concern about expansive use of the war powers (albeit primarily out of concern for individual liberties).²² In 1953, Justice Jackson's opinion in *United States v. Five Gambling Devices*,²³ resting the decision on statutory grounds, indicates that its interpretation was strongly influenced by constitutional federalism concerns about the scope of federal power to require reporting on intrastate gambling deals.²⁴

19. 312 U.S. 100, 124–25 (1941) (upholding a federal minimum wage law). For an argument that it was in *Wickard* and *Darby* that the Court made more radical changes in doctrine than in the 1937 cases, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 224–25 (1998) (“[I]t was only after overcoming severe personal doubts that even four of the Roosevelt appointees were prepared to reach the result in *Wickard*. . . . [O]ne may reasonably doubt that the justices of the 1937 Court would have reached the same conclusions had death and retirement not spared them such dilemmas.”).

20. 326 U.S. 572, 573–84 (1946) (holding that New York's mineral water bottling operation was not exempt from a federal sales tax).

21. 333 U.S. 138, 144 (1948) (recognizing that “if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well,” but asserting that “[t]here are no such implications in today's decision”).

22. *Id.* at 146 (Jackson, J., concurring) (expressing “misgivings” about war powers).

23. 346 U.S. 441, 449–52 (1953) (Jackson, J., announcing the judgment of the Court) (construing a federal statute that required dealers in gambling devices to register with the attorney general not to apply absent specific showing of connection to interstate commerce). Justice Jackson's opinion was joined only by Justices Frankfurter and Minton, *id.* at 442, with Justices Black and Douglas concurring in the judgment on other grounds, *id.* at 452, and with four Justices in dissent supporting application of the statute to the facts before the Court, *id.* at 454.

24. *See id.* at 446–48:

No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce [T]his Court will construe a statute in a man-

Ensuing decades likewise saw federalism objections to exercises of national power expressed in dissents, concurrences, and a majority opinion. Although the Court unanimously upheld the 1964 Civil Rights Act's public accommodations provisions under the Commerce Clause,²⁵ the validity of another provision of the 1964 Act (construed to nullify prior convictions arising from sit-ins to protest discriminatory denials of service)²⁶ prompted two dissents, both relying in part on federalism grounds.²⁷ The constitutionality of the extension of the Fair Labor Standards Act (FLSA) to a limited group of state and local government employees was upheld in *Maryland v. Wirtz*²⁸ in 1968, but only over the dissent of two Justices.²⁹ Three years later, in *United States v. Perez*,³⁰ the Court upheld a federal loan-sharking statute as applied to entirely intrastate transactions, but over Justice Stewart's dissent, which raised familiar federalism concerns about the absence of any line dividing federal from state power in the Court's rationale.³¹ *National League of Cities v. Usery*³² struck down the extension of the FLSA to state employees on federalism grounds, disagreeing with the approach of the majority in *Maryland v. Wirtz*, albeit over strong dissents.³³ In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,³⁴ Justice Rehnquist concurred separately in order to argue that only a "substantial" effect on interstate commerce warrants federal regulation of intrastate activities.³⁵ Four years later, *Garcia v. San Antonio Metropolitan Transit Authority*,³⁶ which reversed *National League of*

ner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative.

25. *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

26. *Hamm v. City of Rock Hill*, 379 U.S. 306, 317 (1964) (construing Title II of the Civil Rights Act to require the vacation of sit-in convictions then pending on appeal).

27. *See id.* at 320 (Black, J., dissenting) (expressing "grave doubt" about the power under the Commerce Clause to require abatement of convictions for action taken before enactment of the federal law); *id.* at 325 (Harlan, J., dissenting) (stating that evidence that past state trespass convictions would burden present interstate commerce "would be a prerequisite to the validity of any purported exercise of the Commerce power").

28. 392 U.S. 183, 198–99 (1968).

29. *See id.* at 201 (Douglas, J., joined by Stewart, J., dissenting) (arguing that the Act's extension to state and local government employees was "not consistent with our constitutional federalism").

30. 402 U.S. 146 (1971).

31. *Id.* at 157–58 (Stewart, J., dissenting).

32. 426 U.S. 833 (1976).

33. *Id.* at 858 (Brennan, J., dissenting); *id.* at 880 (Stevens, J., dissenting).

34. 452 U.S. 26 (1981).

35. *Id.* at 310–11 (Rehnquist, J., concurring).

36. 469 U.S. 528 (1985).

Cities and upheld application of the FLSA to the states, evoked vigorous dissents on federalism grounds from four Justices.³⁷ The idea that federalism was “exiled” from constitutional discourse is at odds with this record.

I do not mean to suggest that the Court’s recent federalism cases are not significant. They are quite significant and they do represent a change. The Court is embarked on a self-conscious effort to resurrect what it may regard as a lost or threatened understanding of constitutional first principles, and it is prepared to invalidate significant numbers of federal laws touching important areas of federal interest. The Court is assertive in relying on its new federalism jurisprudence to invalidate federal laws, not merely in areas of apparently novel “expansions” of federal regulation to areas traditionally regulated by state or local government, but also in areas that have long been within the exclusive jurisdiction of the federal government, such as the patent laws. These decisions, moreover, are already having an effect that extends, on the Court, beyond the five-Justice majority in *Lopez* and *Morrison*.³⁸ Yet the change, while dramatic, is not wholly outside the realm of long-standing discourse on federalism in the United States that has appeared, at least in dissent, for much of the nation’s history.

Looking even further back than the New Deal, much is familiar, suggesting the enduring appeal of federalism values and themes in U.S. constitutionalism. It is striking the degree to which the most telling critiques of the Court’s recent decisions echo opinions of long ago, suggesting the cyclical character of the Court’s federalism narratives. Consider this dissenting voice: “The convention did not deter-

37. *Id.* at 557 (Powell, J., dissenting); *id.* at 579 (Rehnquist, J., dissenting); *id.* at 580 (O’Connor, J., dissenting). Justice Powell’s dissenting opinion was joined by the other dissenters, including Chief Justice Burger. *Id.* at 557.

38. See *Jones v. United States*, 529 U.S. 848 (2000). *Jones* held that, as a matter of statutory law, the federal arson statute did not extend to arson of an owner-occupied residential home, rejecting the government’s argument that the statutory requirement that the property be “used in” commerce was met by the property’s receipt of gas from an interstate grid, its mortgage being held by an out-of-state company, and its insurance coverage by an out-of-state insurance company. *Id.* at 855–57. The Court relied strongly on the principle of construing the statute to avoid constitutional doubts, which the Court said were raised by *Lopez*, concerning the constitutionality of applying the statute to arson of a private home. *Id.* at 857–59. *Jones* was written by Justice Ginsburg and represented the unanimous views of the Court. *Id.* at 850. It is unlikely that such an opinion would have been written, much less have been unanimous, prior to *Lopez* and *Morrison*. At the same time, it also appears that the Court has shown no consistent trend in its preemption cases of contracting the scope of federal vis-à-vis state authority, as Professor Tushnet discusses in a recent essay on federalization and globalization. See Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 12–14, 24–26 (2000) (discussing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000)).

mine how interstate commerce should be regulated, but rather who should regulate it,” leaving “the necessity, extent and nature of the regulation to the contemporaneous knowledge, wisdom and discretion of the body in whom the power was vested.”³⁹ This voice is not from the dissents in *Morrison*, *Alden*, *Seminole Tribe*, or *Lopez*—which sound similar themes⁴⁰—but from Justice Moody’s 1907 dissent in the first *Employers’ Liability* case,⁴¹ resisting the majority’s conclusion that the Commerce Clause did not support a federal Act because the Act failed to distinguish between railroad workers engaged in interstate and intrastate activities.⁴²

To take another example, the Court in *Florida Prepaid Post-secondary Education Expense Board v. College Savings Bank*⁴³ held that Congress lacked power to provide for suits against states for patent infringement in federal courts because, even if patents are property of which a person might be deprived through state infringements, it could not be assumed that the states would fail to provide proper remedies in their own courts; thus, there was no basis for thinking that the mere presence of an infringement would rise to the level of a due process violation.⁴⁴ Consider in this regard Justice Harlan’s dissent in the 1883 *Civil Rights Cases*:⁴⁵ “The theory of the . . . majority . . . is, that the general government cannot, in advance of hostile State laws or hostile State proceedings, actively interfere for the protection of any of the rights, privileges and immunities secured by the Fourteenth Amendment,”⁴⁶ a theory he proceeded to attack as giving

39. *Employers’ Liab. Cases*, 207 U.S. 463, 520 (1907) (Moody, J., dissenting).

40. See *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) (arguing that whether an activity substantially affects interstate commerce is “not an issue for courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours”); *Alden v. Maine*, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (“The resemblance of today’s state sovereign immunity to the *Lochner* era’s industrial due process is striking.”); *Seminole Tribe v. Florida*, 517 U.S. 44, 165–69 (1996) (Souter, J., dissenting) (comparing the Court’s decision in *Seminole Tribe* to the Court’s effort in *Lochner v. New York*, 198 U.S. 45 (1905), to treat common law background as constitutionally required); *United States v. Lopez*, 514 U.S. 549, 603–05 (1995) (Souter, J., dissenting) (arguing for deference to rational legislative judgment).

41. 207 U.S. at 504 (Moody, J., dissenting).

42. *Id.* at 508–09.

43. 527 U.S. 627 (1999).

44. *Id.* at 643–44.

45. 109 U.S. 3, 24–26 (1883) (holding unconstitutional provisions of the Civil Rights Act of 1875 prohibiting racial discrimination in certain public accommodations).

46. *Id.* at 44–45 (Harlan, J., dissenting).

no meaning to Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the rights set forth in Section 1.⁴⁷

The same point can be made from another perspective: the concerns of today's majorities echo the concerns of yesteryear's dissents. Thus, the dissenting Justices in *Ex parte Virginia*⁴⁸ predicted the demise of the federal system from the majority's decision to uphold the constitutionality of a federal criminal statute applied to convict a state court judge of failing to call any but white persons to serve as jurors.⁴⁹ The dissenters argued that "[n]othing . . . could have a greater tendency to destroy the independence and autonomy of the States" than to uphold Congress's "exercise [of] coercive authority over judicial officers of the States in the discharge of their duties under State laws," a doctrine that would lead toward consolidation of a "similar coercive authority over governors and legislators of the States."⁵⁰ Similarly, the four dissenting Justices in the *Lottery Case*⁵¹ argued that

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. *It is a long step in the direction of wiping out all traces of state lines*⁵²

State lines have survived, despite the *Lottery Case*, but the concerns of those dissenters resonate in today's majority's explanations of their decisions.⁵³

47. *Id.* at 44–47. Justice Harlan went on to emphasize the importance of Section 5 as a power in Congress additional to the prohibitions of Section 1, rejecting the majority's analogy to the nonimpairments of the Contracts Clause. *Id.* at 45 (“[A] prohibition upon a state is not a power in Congress or in the national government.”).

48. 100 U.S. 339 (1879).

49. *Id.* at 348–49.

50. *Id.* at 358–59 (Field, J., dissenting); see also *id.* at 362 (Field, J., dissenting) (arguing that Congress cannot “prescribe the duties of the state legislature and the rules it should follow . . . for the independence of the legislature is essential to the independence and autonomy of the State,” and that Congress cannot “lay down rules for . . . the State judiciary” because “the independence of a State consists in the independence of its legislative, executive, and judicial officers, through whom alone it acts”).

51. 188 U.S. 321 (1903).

52. *Id.* at 371 (Fuller, C.J., dissenting) (emphasis added).

53. For examples of recent scholarship devoted to establishing the judicial enforceability of federalism-based limits on national power, identifying a judicially enforceable division of federal from state power, or explicating the “original” meaning of the Commerce Clause, see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA

One final example of an older dissent with contemporary echoes, especially in the Court's recent decision in *United States v. Morrison*,⁵⁴ is found in Justice Holmes's opinion in the *Northern Securities* case.⁵⁵ Disagreeing with the majority's interpretation of a statute in part on the ground that it raised constitutional doubts, Holmes explained, "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."⁵⁶ Holmes argued that if the government's logic were carried forward, he could "see no part of the conduct of life with which on similar principles Congress might not interfere."⁵⁷ The oral argument in *Lopez*, and again in *Morrison*, reads like an echo of this Holmes's dissent,⁵⁸ as does the majority's insistence that there must be *something* that Congress cannot regulate under its commerce power.⁵⁹

I do not mean to suggest that there is nothing new in the Court's federalism cases, but only that much of what one sees there is the revival of a longstanding interpretive tradition in American constitutional law—with, of course, its own distinctive features as discussed below.

B. *Judicial Anxiety and Institutional Competition*

I focus here on five characteristics of the Court's recent case law on federalism as a constraint on national power. First, today's cases insist on the separation of the "local" from the "truly national" and on the need for a separate sphere of state authority, an area in which state legislative authority is exclusive. Invocation of "separate spheres" of dual sovereignty was a familiar feature of nineteenth cen-

L. REV. 1 (1999); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

54. 529 U.S. 598, 601–02 (2000) (invalidating the federal remedy for victims of gender-motivated assaults).

55. *N. Sec. Co. v. United States*, 193 U.S. 197, 400–11 (1904) (Holmes, J., dissenting).

56. *Id.* at 402.

57. *Id.* at 402–03.

58. See, e.g., Transcript of Oral Argument, *United States v. Lopez*, (No. 93-1260), 1994 U.S. Trans. LEXIS 107, at *4 (Nov. 8, 1994) ("What is there that Congress could not do, under this rubric, if you are correct?"); Transcript of Oral Argument, *United States v. Morrison*, (No. 99-5), 2000 U.S. Trans. LEXIS 22, at *8, (Jan. 11, 2000) ("[U]nder your theory . . . if there's bias against women and they're not receiving adequate alimony . . . then it would also have an effect on commerce. Would it not?"); *id.* at *16 ("[Y]our approach . . . would justify . . . a Federal remedy for alimony or child support . . .").

59. *Morrison*, 529 U.S. at 617–18 (noting that the Constitution requires a distinction between what is "truly local" and "truly national"); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (same).

tury cases—both as to Congress’s powers and as to implied restrictions on state powers.⁶⁰ The assertion that certain areas are reserved exclusively to the states is not new. What is new is the modern sensibility that accompanies the assertion. As some Justices in the current majority acknowledge, there are plausible readings of the scope of national power under the Commerce Clause that would render almost all state powers concurrent, rather than exclusive, since the economy has expanded to the point where all economic activity can be seen as interconnected, and “noneconomic” activity is understood to have significant effects on the operation of that economy.⁶¹ While older cases anticipated this logic,⁶² Justice O’Connor’s acknowledgment that the nation’s economy has changed⁶³ makes more palpable the strain in the effort to reassert older divisions.⁶⁴ The line that is being defended has moved from the line earlier generations defended,⁶⁵ but the asserted need to draw a categorical line is a familiar move.

60. See, e.g., *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 405–06, 410 (1871) (“And the powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”).

61. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583–84 (1985) (O’Connor, J., dissenting) (“Because virtually every *state* activity, like virtually every activity of a private individual, arguably ‘affects’ interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers.”).

62. See, e.g., *N. Sec. Co. v. United States*, 193 U.S. 197, 402–03 (1904) (Holmes, J., dissenting); cf. *Nelson & Pushaw*, *supra* note 53, at 76 n.345 (observing that Chief Justice Fuller’s dissent in the *Lottery Case*, 188 U.S. 321 (1903), warned that the Court’s opinion transformed non-commercial items into commercial items based only on their transportation from one state to another with potentially large effects on the scope of national power).

63. See *Garcia*, 469 U.S. at 581 (O’Connor, J., dissenting):

Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government but also between the Federal Government and the States In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national one. A conflict has now emerged

64. Some see this as a faithful act of translation. See, e.g., Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 129–31. Absent a constitutional principle limiting the scope of federal power to preempt state laws even in areas of concurrent legislative authority, the impulse to identify areas in which states can preserve their legislative authority is perhaps an arguable inference from the clear constitutional requirement that states have legislatures. Cf. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 798–99 (1996) (suggesting that the scope of the federal power to preempt should not necessarily be as great as the federal power to legislate).

65. Compare *N. Sec. Co.*, 193 U.S. at 397 (White, J., dissenting) (arguing against federal power to prohibit a merger and acquisition because Congress has no power to control ownership of property and suggesting that, if the logic of the majority were upheld, and “[i]f it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that

Second we see the assertion of a purportedly clear founding vision, a vision in which the emphasis is less on the supremacy of federal law and more on maintaining a balance of powers between the states and the national government. Thus, in *Gregory v. Ashcroft*⁶⁶ the Court asserts that it is important to maintain a “proper balance” between federal and state power.⁶⁷ In *Lopez*, Justice Kennedy, joined by Justice O’Connor, insists that “the federal balance” requires that the Court be prepared to “intervene when one or the other level of Government has tipped the scales too far.”⁶⁸ Perhaps most dramatically, the idea of balance is invoked in *Alden*.⁶⁹ In explaining why the Constitution immunizes states from lawsuits in their own courts for damages for violations of federal law, the Court seems to suggest that states themselves must be allowed to balance “competing interests”—including federal obligations—in a process of deliberation within the state.⁷⁰ Not only must there generally be a “balance,” then, but even in the sphere of valid federal legislation, federalism requires further consideration on the “state” side of the balance when it comes to enforcing federal law.

This emphasis on balance rather than supremacy is to a surprising degree a modern innovation, perhaps one safely available only once two developments occurred: first, that the supremacy of federal law is regarded as safely secured, and second, that large areas of concurrent jurisdiction have been accepted not only as a fact of life but also as a fact of law. Yet if the goal is to sustain a new federal balance, this task will be difficult to achieve in specific litigation about particular issues of legislative jurisdiction, since the “balance” in a fed-

subject”), with *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (upholding federal regulations limiting agricultural production). Justice White’s use of the farming example in 1904 presumably was intended to offer an example that would feel “over the line” to his generation; but in 1942 the line had clearly moved, and in their concurrence in *United States v. Lopez*, 514 U.S. 549, 573–74 (1995), Justices Kennedy and O’Connor indicated their intention not to disturb *Wickard*.

66. 501 U.S. 452 (1991).

67. *Id.* at 459 (upholding a state law requiring state judges to retire at age seventy).

68. 514 U.S. at 578 (Kennedy, J., concurring).

69. *Alden v. Maine*, 527 U.S. 706 (1999).

70. *See id.* at 750–51 (1999):

A general federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. . . . If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State not by judicial decree mandated by the Federal Government and invoked by the private citizen.

eral system is the product of an interrelated set of features only one of which is the allocation of legislative authority.⁷¹

A third feature of the recent cases is the Court's display of a self-conscious willingness to assert rules not derived from the Constitution's text to constrain the exercise of national power.⁷² The development and articulation of concrete rules, implied from the Constitution's general structure, rather than its text, as limits on national power have a long history. Perhaps the most striking forbear of today's nontextual "anticommandeering" rule or "Eleventh Amendment" rules that ignore the limited text of the Amendment, would be the intergovernmental tax immunities that at one time, for example, precluded the federal or state governments from imposing taxes on the income of a person employed by the other level of government,⁷³ and which continue in far more limited form today.⁷⁴ The nineteenth-century Court that found an immunity from federal taxation for state officers insisted on the necessity of the rule for the preservation of the states in the federal union with no less force or passion than the current majority evinces in support of the anticommandeering rule. Yet the nineteenth-century holding in *Collector v. Day* was overruled in *Graves v. O'Keefe*,⁷⁵ and *Pollock's* holding on the taxability of interest on public obligations was overruled in *South Carolina v. Baker*,⁷⁶ and the states still stand. This is not to say that nontextual, structural rules are unnecessary or wrong, but it does support some degree of skepticism about claims that states need categorical judge-made rules to

71. See *infra* notes 207–12 and accompanying text.

72. See, e.g., *Alden*, 527 U.S. at 728–29 (recognizing a constitutional immunity for states from suit in their own courts on obligations incurred under a valid federal statute and specifically recognizing that the immunity is not textual but derived from "postulates" understood to be implicit in the Constitution); *Printz v. New York*, 521 U.S. 898, 933–34 (1997) (recognizing a constitutional immunity for state and local executive officers from being "commandeered" by federal law); *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (recognizing an immunity for states from suit in federal court by the state's own citizens on federal claims). For discussion of the Court's willingness to rely on structural reasoning to identify nontextual immunities, see generally Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2001); Jackson, *supra* note 6.

73. See *Collector v. Day*, 78 U.S. (11 Wall.) 113, 128 (1870) (holding a state official immune from federal income tax); *Dobbins v. Comm'rs of Erie County*, 41 U.S. (16 Pet.) 435, 450 (1842) (holding a federal employee immune from county taxes); see also *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 586, *modified*, 158 U.S. 601, 637 (1895) (holding, *inter alia*, that the Constitution precludes federal taxation of interest earned on state-issued bonds).

74. See, e.g., *Jefferson County v. Acker*, 527 U.S. 423, 436 (1999) (holding that intergovernmental tax immunity does not protect federal judges from a county's nondiscriminatory occupational tax).

75. 306 U.S. 466, 486 (1939).

76. 485 U.S. 505, 512 (1988).

protect them from a legislative body in which their constituents also are represented.

Fourth, today's federalism opinions evidence a fairly marked disrespect for congressional action.⁷⁷ In *Florida Prepaid*, the Court impliedly criticized Congress for acting on a record that showed only a small number of infringement suits against states, apparently implying that Congress should have waited for a problem of more national scope to emerge.⁷⁸ The Court also declined to consider whether Congress's abrogation of states' immunity could be sustained on the theory that an uncompensated infringement was a "taking" for purposes of the Fourteenth Amendment, because Congress's failure explicitly to rely on this theory "precludes consideration" of it as a basis to uphold the Act⁷⁹—as if Congress were a plaintiff who failed to plead the right cause of action within the limitations period. In *Lopez*, the Court commented, with thinly veiled sarcasm, that the law in question contained no findings that might illuminate connections to commerce not visible to "the naked eye."⁸⁰

This recent mistrust of Congress may be compared to concerns expressed in earlier cases. In the *Trade-Mark Cases*,⁸¹ for example, the Court invalidated a federal trademark law that was not by its terms limited to transactions in interstate commerce but extended to "all commerce."⁸² Rejecting the argument that the law should be upheld as a useful regulation of items designed for interstate commerce, the Court wrote,

77. For more discussion, see Vicki C. Jackson, *Federalism and the Court: Congress As The Audience?*, 574 ANN. AM. ACAD. POL. & SOC. SCI. 145 (2001); Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 437, 461–62 (2001) (arguing that the Court views Congress as engaged in sloppy and often merely symbolic acts of legislation).

78. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) ("Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases . . . Congress came up with little evidence of infringing conduct on the part of the States."). The Court's language here is reminiscent of litigation, with Congress as the party with the burden of production.

79. *Id.* at 642 n.7. Controversy over whether the Court should search the Constitution for a basis on which to uphold challenged legislation, where Congress did not make clear the powers it sought to invoke, has a long history. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 60 (1882) (Harlan, J., dissenting) (criticizing the majority for invalidating the statute in its entirety even though one of the cases involved passengers on an interstate train and thus might have been upheld under the Commerce Clause and inquiring, "Has it ever been held that the judiciary should overturn a statute because the legislative department did not accurately recite therein the particular provision of the Constitution authorizing its enactment?").

80. *United States v. Lopez*, 514 U.S. 549, 563 (1995).

81. 100 U.S. 82 (1879).

82. *Id.* at 99.

When . . . Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes.⁸³

The statute not being so limited on its face,⁸⁴ with “no hint that the goods are to be transported from one State to another or between the United States and foreign countries,” was invalid.⁸⁵ Consider, as another example, Justice Day’s dissent in *Wilson v. New*.⁸⁶ Objecting to the Court’s upholding of an eight-hour work limit and pay protections for railroad workers, intended as temporary measures pending further study by a commission, Justice Day argued that any presumption of constitutionality must be based on the presupposition of sufficient knowledge to warrant the action taken, but that by the creation of the commission “Congress has in this act itself declared the lack of the requisite information for definite action, and has directed an experiment, . . . the expense of which is to be borne entirely by the carrier.”⁸⁷

As this language suggests, judicial mistrust of Congress may be in part a reflection of the tendency to find what is familiar more acceptable than what is novel. Two recurrent, competing approaches have been deployed in response to novel congressional assertions of power. Justices, both earlier in the last century and within the last ten years, have argued that the previous absence of legislation of a certain character is evidence that such legislation was not within the permissible bounds of the Constitution.⁸⁸ Other Justices, often invoking *McCulloch v. Maryland*,⁸⁹ have argued that the Constitution establishes broad congressional powers to allow the national government to meet

83. *Id.* at 96.

84. *Id.* at 97 (“We find no recognition of this principle in the chapter on trademarks . . .”).

85. *Id.* at 96–97.

86. 243 U.S. 332 (1917).

87. *Id.* at 370 (Day, J., dissenting).

88. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 905–18 (1997) (suggesting that the absence of commandeering statutes in the past supports the claim that they are unconstitutional); *Wilson v. New*, 243 U.S. 332, 378 (1917) (Pitney, J., dissenting) (arguing that the fact that no law fixing railroad workers’ pay had been previously proposed “is the strongest evidence that in the judgment of executives and legislators, state and national measures of this sort were not within the bounds of permissible regulation of commerce”).

89. 17 U.S. (4 Wheat.) 316, 325–26 (1819) (upholding the constitutionality of a federal law creating the national bank).

the changing needs of a growing country.⁹⁰ These “couplets” might be taken to reflect enduring debates between the idea that a written constitution is intended to be rigid and constraining, on the one hand, and that a good constitution is intended to be flexible and empowering, on the other. Yet the current Court’s suspicion of what is novel seems to carry with it a note of disrespect for Congress, as well as for the novel legislation it enacts.⁹¹

Fifth, there is today an apprehensive assertiveness about the Court’s authority. Unlike in the early part of the twentieth century, when members of the Court may be seen as defending a concept of liberty focused on existing distributions of entitlements under assault from state as well as federal legislation, today’s Court seems particularly concerned with Congress as a threat to its own status in the constitutional order. Although the Court was in repeated confrontations over national legislation during the first part of the New Deal, the tone of disagreement was addressed to the legislative product. In *Carter v. Carter Coal Co.*,⁹² for instance, the opinion opens with the following statement:

The purposes of the “Bituminous Coal Conservation Act of 1935” . . . are to stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative mar-

90. See, e.g., *United States v. Lopez*, 514 U.S. 549, 624–25 (1995) (Breyer, J., dissenting) (arguing that upholding the law in question would not expand the Commerce Clause but simply apply it to “changing economic circumstances,” permitting Congress “to act in terms of economic . . . realities” in ways commensurate with the nation’s needs) (citations omitted); *Employers’ Liab. Cases*, 207 U.S. 463, 521–22 (1907) (Moody, J., dissenting) (rejecting the argument that the fact that Congress had never before enacted similar legislation was of controlling significance on the question of its constitutional power to do so in the future). Justice Moody wrote that

[t]he fundamental fallacy of this argument is that it misunderstands the nature of the Constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the infinite variety of the changing conditions of our National life. Surely there is no statute of limitations which bars Congress from the exercise of any of its granted powers

Id. Moody goes on to say that although “the exercise of a power for the first time may be called upon to justify itself,” history shows that “the daily needs of the factory and the household are no longer dependent upon the resources of the locality, but are largely supplied by the products of other States,” and thus Congress has power to regulate safety on instruments in interstate commerce. *Id.* at 522–23.

91. Is it too speculative to wonder, in light of the Court’s assertion of new doctrine in several areas of federalism, whether Congress has become, in the Court’s eyes, like those southern jurisdictions that in the 1960s prosecuted members of the civil rights movement—its motives suspect, its actions subject to close scrutiny and inspiring the Court to innovate in a variety of doctrinal areas to constrain what it sees as overreaching.

92. 298 U.S. 238, 286–317 (1936) (holding that the commerce power does not authorize congressional legislation regulating the production of coal).

keting of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general welfare, and for other purposes. . . . *The constitutional validity of the act is challenged in each of the suits.*⁹³

The Court's focus here is on the Act, not Congress.

By way of contrast, consider the opening paragraph of *United States v. Morrison*, in which Chief Justice Rehnquist described the Fourth Circuit's conclusion "that *Congress lacked constitutional authority* to enact the section's civil remedy"⁹⁴—not "whether the statute's civil remedy is constitutional," but rather a focus on Congress acting without authority. Similarly, Justice Kennedy opened *City of Boerne v. Flores*⁹⁵ with the sentence, "The case *calls into question the authority of Congress* to enact [the Religious Freedom Restoration Act (RFRA)],"⁹⁶—not "the constitutionality of RFRA." Although it might be suggested that this is simply a general change in style that is the product of new contemporary usages, I am skeptical: note the different tone taken when the Court addressed the constitutionality of a state law in *U.S. Term Limits, Inc. v. Thornton*.⁹⁷

Coupled with the subtle use of language to disparage its competitor branch, the Court's self-referential posture suggests insecurity about its position and place in the constitutional scheme, and a consequent attempt to assert itself. Consider the Court's reference in *Alden* to its own "authoritative interpretations" as the basis for invalidating federal legislation.⁹⁸ With whom is the Court arguing about whether its interpretations are authoritative? In *City of Boerne*, the Court finds Congress guilty not only of violating federalism rules, but also of violating separation of powers principles by disagreeing with the implications of the Court's earlier decision in *Employment Divi-*

93. *Id.* at 278 (emphasis added).

94. 529 U.S. 598, 602 (2000) (emphasis added).

95. 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as an impermissible use of congressional power under the Fourteenth Amendment).

96. *Id.* at 511 (emphasis added).

97. 514 U.S. 779, 783, 787 (1995) (framing the issue in terms of the constitutionality of the act, and not in terms of the authority of the voters to enact such a measure).

98. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . .").

sion v. Smith.⁹⁹ The Court invokes *Marbury* to explain that “[w]hen the political branches act against the background of a judicial interpretation of the Constitution already issued, it must be understood that . . . the Court will treat its precedents with the respect due them under settled principles.”¹⁰⁰ Clearly the implication is that the Court is not getting the respect that it deserves and that it plans to insist upon.

The federalism cases thus reveal both striking continuities and marked new notes in the ongoing constitutional dialogue about federalism. There is a new touch of self-awareness, a consciousness of interpretive choices, as well as a disrespect for Congress, immanent in the current Court’s opinions. Interpretive choices are more naked. Rather than contributing to judicial humility about its interpretive choices, however, this postmodern consciousness seems to have made the Court more assertive, as if it does not quite know what to do with its awareness of the necessary ambiguities of the choices upon which its jurisprudence depends.

C. *Dissent, Not Exile, In Constitutional Contests*

The word “exile” not only fails to recognize the continued presence of federalism concerns in the post-1937 period, but the phrase “Constitution in exile” also has an “us against them” quality that I want to resist. Rather than speaking of different constitutions, or of a “Constitution in exile,” one could say that there are multiple interpretive traditions that have vied with each other in different periods of constitutional history, that should be recognized as part of an organic and continuing constitution over which we can and should wrestle.¹⁰¹ In the last one hundred years, the time periods without significant dissents raising competing traditions of federalism have been brief. The principal concerns of the *Lopez* and *Morrison* majorities are reflected in earlier majority and dissenting opinions of the pre-1937 Court. And

99. 494 U.S. 872, 878–89 (1990).

100. *City of Boerne*, 521 U.S. at 537.

101. Cf. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 191–92 (1999) (envisioning constitutional law “as a populist narrative that can be retold,” under which people today are not bound by past decisions but “have an obligation to take those decisions seriously because they were decisions that we ourselves made, in an important—albeit constructed—sense”). While I do not go so far as Professor Tushnet in rejecting the binding nature of judicial decisions (or the value of judicial review), I am in sympathy with his argument that contradictory aspects of the narratives of American constitutional traditions (including the Declaration of Independence) should be taken seriously and engaged meaningfully. For a related view, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578–82 (1993) (arguing that the process of constitutional interpretation is a dynamic national dialogue involving all of society and the three branches of government).

so, too, can the principal critiques of these recent decisions be found in opinions from this earlier time.¹⁰² Different federalism narratives have cycled from majorities to dissents and back over time. While there is certainly a revival of federalism as a substantive limit on national power today, and although I believe that many of the recent decisions are wrongheaded, I do not believe that they are wholly outside the traditions of U.S. constitutional discourse, and I regard the cycling aspects of U.S. federalism as some ground for hope that the adverse impacts of these recent decisions will be short-lived.

It is conventional to envision constitutional decisions as “final,” and in many areas the Court’s decisions do “finally” decide an issue.¹⁰³ But constitutional law also has provided a place of contest over com-

102. Not only were different themes raised in dissents, but the majority opinions were not of one piece on issues relating to the scope of the federal commerce power. For example, the expansive logic of *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895), is significantly disavowed in *Standard Oil Co. v. United States*, 221 U.S. 1, 68–69 (1911). Compare also *Employers’ Liab. Cases*, 207 U.S. 463, 504 (1907) (holding unconstitutional a law regulating employment conditions of employees of carriers because the statute was not limited to employees engaged in interstate commerce), with *Balt. & Ohio R.R. v. ICC*, 221 U.S. 612, 618 (1911) (upholding hours regulations as applied to employees engaged in interstate commerce against the company’s objections that its employees’ activities were so intermingled as to be indistinguishable, and concluding that the power of Congress to regulate entities involved in interstate commerce is not defeated by the fact that the entities regulated may be engaged in intrastate commerce as well), and *Second Employers’ Liab. Cases*, 223 U.S. 1, 51 (1912) (upholding the application of the statute to cases in which an employee not involved in interstate commerce injured another employee who was so involved, holding that it is the effect on interstate commerce, rather than the source of the injury, that serves as the criterion of congressional power). For a review of the historical literature on the case law between the Civil War and the New Deal, and an analysis of the incremental character of the adjudicatory and lawyering processes that led to the 1937 New Deal cases, see CUSHMAN, *supra* note 19, at 141–76 (emphasizing the “current of commerce” cases and the change in the public/private distinction in due process in *Nebbia v. New York*, 291 U.S. 502 (1934)).

103. This is the conventional but by no means uncontroversial understanding. For a sampling of the literature, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 263–64 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Friedman, *supra* note 101, at 653–82; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Geoffrey Miller, *The President’s Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35 (Autumn 1993); Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). For an important response to challenges to judicial finality in constitutional interpretation, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1382–83 (1997). See also Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455 (2000) (describing and responding to several critiques of their first article).

peting narratives of federalism for much of the Court's history.¹⁰⁴ It is a feature of successfully enduring constitutional systems to provide opportunities for peaceful contests over what fundamental commitments will be expressed in law, what fundamental commitments will constrain lawmaking that is subordinate to the constitution. Constitutional adjudication can play that role.¹⁰⁵ To the extent it does not "finally" settle an issue for a polity, constitutional adjudication can provide a meaningful place of contest only if "losers" accept in some sense the legitimacy of their loss.¹⁰⁶ Losers are more likely to accept their loss as legitimate if they have prospects for success in the future on the same or related issues, or on other issues, or both.¹⁰⁷ And judicial dissent implies the possibility of change in the future.

A review of the Court's case law in the roughly fifty years between the 1870s and 1920s demonstrates the force and importance of dissenting views. In many of the cases that came to be regarded as grave constitutional mistakes—for example, *Hammer v. Dagenhart*,¹⁰⁸ *Lochner v. New York*,¹⁰⁹ and the unmitigated ugliness of *Plessy v. Ferguson*¹¹⁰—the dominant view is tempered by the presence of forcefully argued dissents. In the *Slaughter-House Cases*¹¹¹ in 1873 there

104. Cf. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151–64 (1988) (identifying competing narratives of "nationalist" and "federalist" perspectives on allocations of judicial power).

105. Whether it plays that role by allowing more space for legislative (and/or executive) decision or by constraining that space is a matter of serious dispute. For one approach to the role of constitutional adjudication in areas of deep contest, see Cass Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 6, 8 (1996) (suggesting that in areas of "high complexity about which people feel deeply and on which the nation is in flux," decisional minimalism is appropriate to prevent incorrect or ineffective judicial decisions and to allow the democratic process to deliberate on important issues). But even without decisional minimalism, the tradition of judicial dissent can help sustain constitutional adjudication—and, to some extent, political deliberation—as a space for contest.

106. For a theory of constitutional interpretation proceeding from the premise that a just constitution is one under which losers are willing to accept their losses, see generally LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (forthcoming 2001).

107. Cf. HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 7–8 (2000) (arguing that "constitutional indeterminacy plays a pivotal role in integrating competing forces" in the process of state reconstruction, and that "[i]t is law's very indeterminacy, along with its contradictory yet corresponding capacity to set boundaries on the range of viable political options or responses, that characterizes the relationship between law and politics").

108. 247 U.S. 251, 271 (1918) (invalidating a federal prohibition on interstate commerce in goods produced by child labor).

109. 198 U.S. 45, 64 (1905) (invalidating a state law setting maximum hours for bakery workers).

110. 163 U.S. 537 (1896).

111. 83 U.S. 36, 55–56 (1873) (rejecting a Fourteenth Amendment challenge to a state-conferred monopoly).

were strong dissents¹¹² (which continued to be remarked upon within the Court at least through the 1908 *Twining v. New Jersey* decision).¹¹³ In the *Civil Rights Cases*¹¹⁴ in 1883 and in *Plessy* in 1896 there was Justice Harlan¹¹⁵ (who alone is a strong dissent). But not a single sitting Justice issued a strong dissent on the Fourteenth Amendment issue in *Morrison*, and Justice Breyer's brief effort to grapple with that issue was joined by only one other member of the Court.¹¹⁶ For those who believe that the Court's current federalism cases are largely coming down wrongly, in a way inconsistent with better views of U.S. federalism, the absence of a forceful dissent arguing that the Fourteenth Amendment empowered Congress to enact the Violence Against Women Act (VAWA) in *United States v. Morrison* was a troubling disappointment.¹¹⁷ This is particularly so because the equality and liberty norms of the Fifth and Fourteenth Amendments are likely to remain central to the work of the courts in the twenty-first century.

Federalism is and long has been a place of contest in U.S. constitutional law, a place for which "exile" is an inapt metaphor, but a place in which dissent has been, and is likely to remain, central to the Court's ability to develop better answers to new versions of enduring questions about the relationships between the constitutional governments of the United States.

112. *Id.* at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting); *id.* at 124–30 (Swayne, J., dissenting).

113. 211 U.S. 78, 93–96 (1908) (noting the dissenting opinions in the *Slaughter-House Cases* and the continued criticism of that decision). The dissents continue to be of importance in scholarly work on the Privileges and Immunities Clause. *See, e.g.*, Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 656–57, 662–65 (2000).

114. 109 U.S. 3 (1883).

115. *Civil Rights Cases*, 109 U.S. at 35 (Harlan, J., dissenting); *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

116. *United States v. Morrison*, 529 U.S. 598, 664–66 (2000) (Breyer, J., dissenting) (arguing, without "answer[ing] the § 5 question," that older cases do not preclude a remedy against private actors for Fourteenth Amendment violations). Although three other justices joined Part I.A of Breyer's dissent (on the Commerce Clause), only Justice Stevens joined in the Fourteenth Amendment discussion. *See id.* at 655.

117. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 442 (2000) (criticizing the absence of vigorous dissent on the Section 5 holding).

II. COMPARATIVE CONSTITUTIONAL EXPERIENCE AND THE AUTONOMY OF THE COURT'S DISCOURSE

In addition to those distinctive features noted above, another striking aspect of the current federalism cases is the Court's assertion that it develops the law with virtual autonomy from other government actors, supported by invocation of its own "first principles." The message in *City of Boerne v. Flores* plainly is, do not expect the Court to change its views in response to what legislators do—what matters is the Court's own precedent.¹¹⁸ This assertion of judicial autonomy finds echoes in the resistance of some members of the Court to the relevance of comparative constitutional experience for U.S. constitutional decisionmaking.

In his *Printz* dissent, Justice Breyer argued that European versions of federalism were relevant to the question of whether federal law could impose duties on state officers, a question Breyer saw as open under specific constitutional text and past decisions of the Court. Specifically, Breyer argued, the comparative experience of other federal polities—including Switzerland, Germany, and the European Union, which not only permit but generally require that most central government laws be implemented only by officials of the constituent member entities—suggested that requiring state officials to administer federal law was not inconsistent with a healthy federalism.¹¹⁹ Justice Scalia, by contrast, argued that comparative practice

118. See *supra* note 100 and accompanying text (noting the invocation of the Court's precedents in *City of Boerne* and "the respect due them" under stare decisis principles); see also *Printz v. United States*, 521 U.S. 898, 925 (1997) (referring to the Court's prior precedents as "most conclusively" controlling).

119. See *Printz*, 521 U.S. at 976–77 (Breyer, J., dissenting):

[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. . . . They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. . . . Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem. . . . And that experience here offers empirical confirmation [that] . . . there is no need to interpret the Constitution as containing an

was of relevance in making, but not in interpreting, constitutions.¹²⁰ Elsewhere as well, Justice Scalia has sought to develop a constrained view of when, if ever, comparative constitutional practice is relevant to U.S. constitutional interpretation.¹²¹

These two assertions of autonomy—autonomy from Congress’s views of the scope of national power and autonomy from the views and practices of other constitutional systems—are linked.¹²² Together, they help constitute an autonomous narrative of federalism, a narrative that has assumed special prominence in recent years. Recall Justice Kennedy’s invocation of America’s unique contribution to constitutionalism: “Federalism was our Nation’s own discovery.”¹²³ *Lopez*, *Alden*, and *Printz* all issue calls for a return to first principles, either expressly or by implication.¹²⁴ This invocation of first principles suggests that what has occurred in the years since those principles were first laid down, here or elsewhere, is of little or no bearing. The judicial narrative of U.S. federalism’s autonomy is neither new, nor is it the only narrative of federalism on the Court, but it is an important one today.

As I will show below in Section A, members of the Court have episodically referred to other nations’ constitutional experiences in

absolute principle forbidding the assignment of virtually any federal duty to any state official.

120. *Id.* at 921 n.11.

121. See *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 (1988) (Scalia, J., dissenting) (“[W]here there is not first a settled consensus among our own people, 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.”); see also *Stanford v. Kentucky*, 492 U.S. 361, 369–70 & n.1 (1989) (emphasizing “that it is *American* conceptions of decency that are dispositive”).

122. These assertions of independence also may be linked to the Court’s notable failures to interpret U.S. law or treaties in light of international law. See, e.g., *Breard v. Greene*, 523 U.S. 371, 378–79 (1998) (denying habeas relief to a prisoner who asserted a claim under the Vienna Convention); *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (upholding federal jurisdiction over a person abducted from Mexico by U.S. government agents assertedly in violation of a treaty). For a discussion of U.S. courts’ resistance to using international law in domestic adjudication, see Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 218 (1994); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 8–15 (1995). In resisting congressional judgments, comparative constitutional experience, and international law as sources of American constitutional interpretation, the Court resists input from beyond the scope of its own past decisions and asserts institutional control over what counts as authority. For competing arguments that a court can advance its own autonomy through dialogue with and use of foreign court decisions, see *infra* note 158.

123. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

124. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles.”); *Alden v. Maine*, 527 U.S. 706, 713–15 (1999) (describing the basic principles of the federal system); *Printz*, 521 U.S. at 919–20 (describing the principles under which the Articles of Confederation were replaced by the Constitution of 1787).

resolving interpretive questions. Unlike the use of comparative experience in other nations' constitutional courts, however, references to foreign constitutional experience in the U.S. Reports rarely concern the reasoning of other constitutional courts.¹²⁵ It is possible that this will change. Notwithstanding Justice Scalia's disclaimer in *Printz*, several sitting Justices (including Justice Scalia) have referred to the constitutional experience of other nations. In Sections B and C below, I consider some benefits of this practice and then address some concerns about reliance on other nations' constitutional experience. In Sections D and E, I note possible limitations on the use of comparative constitutional experience on federalism issues and briefly consider the possible bearing of comparative constitutional federalism for U.S. doctrine.

A. *Foreign Constitutional Experience in the United States Supreme Court*

Early references to the constitutional practices of other nations reveal a set of recurring polarities between, on the one hand, resort to the practices of other "civilized" nations (especially when they support a governmental practice that is being attacked)¹²⁶ and, on the other hand, assertions of American exceptionalism and uniqueness as a badge of constitutional honor. Both can be found in a case arising from the infamous Chinese exclusion laws, *Fong Yue Ting v. United States*.¹²⁷ The majority asserted that it is the uniform practice of nations to allow the government to decide whether to exclude or expel aliens, while the dissenters argued that the United States "takes nothing" from the experience of other sovereignties and distinguished the American constitutional tradition from the terrible experiences of religious hatred and persecution in Europe and Russia.¹²⁸ This polar-

125. See Lorraine Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *COMPARATIVE CONSTITUTIONAL LAW: DEFINING THE FIELD* (Vicki C. Jackson & Mark Tushnet eds., forthcoming 2002) (manuscript at 2, on file with the *Duke Law Journal*) (noting that "[t]he constitutional jurisprudence of the United States has remained remarkably untouched by the new constitutional comparativism").

126. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 29 (1949) (surveying English-speaking countries and finding that none excluded illegally seized evidence); see also *Twining v. New Jersey*, 211 U.S. 78, 113-14 (1908) (concluding that the privilege against self-incrimination was not "the inalienable possession of every citizen of a free government").

127. 149 U.S. 698 (1893).

128. Compare *id.* at 711 (noting the "inherent and inalienable right of every sovereign and independent nation" to decide whether to permit aliens to enter or remain in the country), with *id.* at 757 (Field, J., dissenting) (arguing that deportations from Europe, for example, the expulsion of the Moors from Spain, the banishment of the Jews from England, and the exile of the

ity is related to the problem of comparability, discussed below, for in each case there is the possibility for disagreement over the comparability, and hence the relevance, of whatever may be identified as the constitutional practice of another system.

More generally, the written Constitution of the United States repeatedly has been distinguished from those of European nations as embodying boundaries that the national government, or some portion thereof, cannot transgress.¹²⁹ As written constitutions have become more widespread, references to the tyrannical practices of other countries still appear, though more in the spirit of explaining what the U.S. Constitution was designed to prevent than in the spirit of explicit American exceptionalism.¹³⁰

Justice Frankfurter, who was probably the twentieth century's foremost U.S. judicial practitioner of explicit comparative analysis as an aid to constitutional interpretation, invoked other nations' practices both to support existing governmental practices and to challenge others, such as the then-common practice of using coerced confessions at trial.¹³¹ Unlike most other Justices who referred to foreign practice, Frankfurter would invoke and rely on the reasoning of foreign tribunals (though his compass of relevant comparison was limited: he looked, as a measure of due process, to the standards of de-

Huguenots from France, are "condemned for their barbarity and cruelty" and that the United States Constitution "takes nothing from the usages or the former action of European governments" with respect to the power to deport resident aliens).

129. See, e.g., *The Lottery Cases*, 188 U.S. 321, 372 (1903) (Fuller, C.J., dissenting) ("The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British parliament . . ."); *Standard Oil Co. v. United States*, 221 U.S. 1, 103 (1911) (Harlan, J., dissenting) (arguing that the Court's interpretations of statutes usurped Congress's role as lawmaker and asserting that when the Constitution was made, it distributed powers "among three separate, equal and coordinate departments," a development that "was at that time a new feature of governmental regulation among the nations of the earth"); *The Pipe Line Cases*, 234 U.S. 548, 564-65 (1914) (McKenna, J., dissenting) (distinguishing written from unwritten constitutions); *Wilson v. New*, 243 U.S. 332, 366-67 (1917) (Day, J., dissenting) (emphasizing that in the United States, the written constitution is deemed essential to constrain legislative power).

130. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217-18 (1953) (Black, J., dissenting) (dissenting from the denial of a hearing for an excluded alien, arguing that dictatorships make one person's liberty dependent on the arbitrary will of another, as in Russia in 1934, and in Germany under Hitler, and asserting that "[o]ur Bill of Rights was written to prevent such oppressive practices"); cf. *Rogers v. Bellei*, 401 U.S. 815, 844-45 (1971) (Black, J., dissenting) ("It is true that England has moved along very well in the world without a written constitution. But with complete familiarity with the English experience, our ancestors determined to draft a written constitution which the members of this Court are sworn to obey.").

131. See, e.g., *Stein v. New York*, 346 U.S. 156, 199 (1953) (Frankfurter, J., dissenting) (urging constitutional interpretation in light of the "standards of decency deeply felt and widely recognized in Anglo-American jurisdictions" and arguing that the confessions at issue would not have been admitted in criminal trials in Canada, Australia, or India).

gency “in a civilized society,”¹³² informed by “notions of justice of English-speaking peoples”).¹³³

Yet with few exceptions,¹³⁴ the Court as a whole has been slow to consider the constitutional practices of other nations, and slower and more reluctant still to consider relying on or distinguishing the constitutional decisions or reasoning of other courts. There is thus a second sense in which we can imagine a “constitution in exile,” a sense that captures something of the isolation of U.S. constitutional decision-making from an increasingly international and transnational discourse of constitutional interpretation.

In recent years, there have been some notable breaches in the Court’s self-imposed exile from transnational constitutional discourse and experiences, but with more emphasis on constitutional practices and less on the reasoning of foreign courts’ decisions. By the phrase, “constitutional experiences,” I mean to include both constitutional “practices” and constitutional “decisions,” which together help constitute in some sense the comparative constitutional law of a nation. A “constitutional practice” is a practice followed in the political governance of a nation and widely understood within that nation to be (in some sense) required by, or consistent with, its constitution even if not the subject of judicial decisions. (An example is the practice in the

132. *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).

133. *Rochin v. California*, 342 U.S. 165, 169 (1952); *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring). Frankfurter, however, was not alone in his knowledge of or reliance on foreign practice as it bore on constitutional interpretation. *See, e.g., Betts v. Brady*, 316 U.S. 455, 465–72 (1942) (Roberts, J.) (citing common law, colonial practice, and current state and English practice in refusing to hold that the Sixth Amendment or Due Process Clause required the appointment of counsel in a state criminal trial). Justice Douglas, for example, utilized his knowledge of other nations’ constitutional treatment of religions to insist on a distinctively “American ideal of religious liberty.” *See McGowan v. Maryland*, 366 U.S. 420, 575–76 (1961) (Douglas, J., dissenting) (distinguishing Nigerian and Indian constitutional approaches from that of the First Amendment).

134. *See supra* notes 126–33 and accompanying text. Although a number of Justices in the Court’s history have made the kind of general references to foreign government or constitutional experience described above, Justice Frankfurter, at least until quite recently, was the Justice most likely to invoke foreign precedent and practice. He did so not only in his efforts to give meaning to the Due Process Clause, *see supra* notes 132–33, but also in federalism cases dealing with intergovernmental tax immunities, *see, e.g., United States v. Allegheny Co.*, 322 U.S. 174, 198 (1944) (Frankfurter, J., dissenting) (asserting that federal constitutional relations in Canada were identical to those in the United States for purposes of the issue and citing a specific decision of the Supreme Court of Canada as pertinent to why the United States Supreme Court should deny the claim of the federal government); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring) (asserting that the intergovernmental tax immunity case raised the “same legal issues” as in Australia and Canada under particular provisions of their constitutions). For a brief description of the uses of foreign constitutional experience by current members of the Court, *see infra* notes 141–52 and accompanying text.

United States of holding elections every two years for the House of Representatives.)¹³⁵ Although a constitutional practice also might be the result of a constitutional court decision, by “constitutional decisions,” I intend to refer to two other subcategories of “constitutional experience”: explicitly constitutional reasoning (typically found in the decisions of constitutional courts) and the bottom line of those judicial decisions (which, if complied with, will constitute a constitutional practice as well). Over the course of its history, the United States Supreme Court has referred to the experiences of other nations in the sense of their constitutional practices (i.e., what is permitted or required by their systems of governance).¹³⁶ It has only occasionally cited the decisions of foreign courts and almost never, in a majority opinion, relied on the constitutional reasoning of other nations’ courts, though individual Justices on occasion have done so.¹³⁷ It is in

135. As I argue elsewhere, constitutional practices comprise an important part of the “invisible constitution” that constitutes American constitutionalism. Many of these practices are drawn less clearly from the Constitution’s text than the biennial elections of representatives but must nonetheless be understood as a part of the Constitution to appreciate the meaning and framework of the constitutional law developed in the courts. See Vicki C. Jackson, *The Invisible Constitution* 8–9 (Mar. 2000) (unpublished manuscript, on file with the *Duke Law Journal*) (describing, inter alia, military self-abnegation in political elections). Constitutional practices may include practices that, if not required by, are consistent with a constitution, or even may be at variance with the formal terms of a constitution. For example, leading scholars report that in Britain, although nominally any peer could sit on the House of Lords acting as a court, the last time this occurred was in 1883, and the lay peer was ignored by the law lords. S.E. FINER ET AL., *COMPARING CONSTITUTIONS* 57 (1995) (reporting also that the monarch still possesses formal authority to veto a bill enacted by Parliament but that such authority has not been used since 1707).

136. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (referring to labor statutes in Great Britain, Switzerland, Austria, Holland, and Germany as bearing on the reasonableness of a state law regulating working conditions for women challenged on due process grounds); see also John Wolff, *The Utility of Foreign Law to the Practicing Lawyer*, 27 A.B.A. J. 253 (1941) (discussing *Muller* as an example of the contributions foreign legal principles can make to the growth of U.S. constitutional law).

137. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 575 n.11 (1961) (Frankfurter, J., joined only by Stewart, J., announcing the judgment of the Court) (quoting, inter alia, from an Irish justice’s dissenting opinion). *Miranda v. Arizona*, 384 U.S. 436 (1966), is a notable exception, in that the opinion of the Court on a constitutional question invoked and relied not only on foreign experience but also on the reasoning in foreign judicial opinions. See *id.* at 488 n.59 (quoting, inter alia, from a 1954 decision by the Lord Justice General of India, a foreign judicial decision also quoted at length in Justice Frankfurter’s *Culombe* opinion, 367 U.S. at 592 n.34). Foreign constitutional materials are discussed as relevant authority in both the majority and dissenting opinions. See *Miranda*, 384 U.S. at 486–90 (invoking and relying on experiences in other countries and quoting the Lord Chancellor of England); *id.* at 521 (Harlan, J., dissenting) (arguing that the cited foreign experiences are not persuasive because in other respects those systems give the prosecution advantages that are denied to prosecutors in the United States). Positing a distinction between constitutional decisionmaking and other forms of legal adjudication, the majority characterized the foreign decisions it invoked as generally motivated by considerations of justice, not by a constitution or interpretation thereof, and argued that the United States

the latter sense that the United States Supreme Court differs markedly from many other constitutional courts, which not only manifest awareness of the constitutional practices of other nations, but also cite and consider the reasoning of foreign constitutional courts' decisions.¹³⁸

To some extent, the relative absence of reliance on the reasoning of other constitutional courts is a function of the relative ages of the constitutions and the depth of the body of domestic precedents with which the Court must grapple.¹³⁹ It is not surprising that courts faced for the first time with difficult constitutional questions would look to established bodies of decisions that address similar issues. Since the United States Supreme Court has been grappling with constitutional questions for a long time, longer than most currently functioning constitutional courts in the world, it may well have been efficient for judges on foreign courts to look to its decisions to see how Justices have framed the issues over time. Since the Supreme Court has its own wide body of precedent available, the relative utility of considering foreign courts' reasoning is diminished. But this argument accounts only for some difference, not for the virtual exclusion of foreign reasoning from the U.S. Reports, since the Court also faces issues that are arguably outside of, or plainly unresolved by, existing doctrine, as was the case both in *Printz* on executive commandeering and on the question of hate speech regulation in *R.A.V. v. City of St. Paul*.¹⁴⁰

should "give at least as much protection to . . . rights grounded in a specific requirement of the Fifth Amendment" as other jurisdictions give based on principles of justice "not so specifically defined." *Id.* at 489–90.

138. See, e.g., *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30, 31–32 (invalidating a Canadian abortion law and extensively discussing U.S. cases); *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 490, 516–19 (dealing with affirmative action in India on behalf of disadvantaged castes and including a discussion of several United States Supreme Court opinions); *State v. Makwanyane*, 1995 (3) SALR 391, 415–24, 451–53 (CC) (holding the death penalty unconstitutional in South Africa and discussing and disagreeing with the United States Supreme Court's more recent cases).

139. See Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 599 (1999). For more general analyses of the factors influencing citation of foreign decisions on constitutional or human rights law by courts around the world, see McCrudden, *supra* note 11, at 516–27; Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 322, 326–29 (1957).

140. 505 U.S. 377, 396 (1992) (holding a bias crime law invalid under the First Amendment). In addition, the style of opinion writing in the United States, a residue of the common-law origins of most judicial systems in the United States, may pose a barrier to thinking about or referring to comparative practice: it is not at all uncommon for a decision of the Supreme Court to begin either with a statement of the facts, or a description of the U.S. precedents and of how the

But the Court's manifest awareness of other constitutional systems is on the rise, a phenomenon I would expect to continue. Chief Justice Rehnquist has cited decisions of the Canadian Supreme Court and the then-West German Constitutional Court in his opinions on abortion and right-to-die issues.¹⁴¹ Justice Breyer has made what appears to be a concerted effort to discuss the decisions of other constitutional courts, not only in his well-known exchange with Justice Scalia in the *Printz* case, but also in his concurring opinion in *Nixon v. Shrink Missouri Government PAC*,¹⁴² and in a dissent from the denial of certiorari in *Knight v. Florida*.¹⁴³ Also of note is Justice Scalia's invocation of the election laws of other democracies, including Australia, Canada, and England, in his dissenting opinion in *McIntyre v. Ohio Elections Commission*¹⁴⁴ to support his argument that the majority was wrong to hold unconstitutional a ban on anonymous pamphleteering in a local election.¹⁴⁵ And Justice O'Connor has publicly endorsed the importance of federal judges in the United States becoming more aware of international and comparative practice.¹⁴⁶

Justice Scalia rejected the relevance of comparative constitutional practice in resolving questions of American federalism in

issue at hand is situated with respect to those precedents. In this mode of reasoning by analogy from one fact pattern to another, a court may find it difficult to "fit" in a consideration of the practices of another system, especially if they involve different starting points.

141. See *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (citing foreign decisions, including those of the Canadian and Colombian Supreme Courts); *Planned Parenthood v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing decisions of the Supreme Court of Canada and the West German Constitutional Court). In *Glucksberg*, Justice Souter also commented on the difficulties of drawing any empirical conclusions from the limited experience of the Netherlands with assisted suicide, see 521 U.S. at 786 (Souter, J., concurring), a phenomenon Professor McCrudden has labeled "empirical" use of foreign experience, as distinct from reliance on foreign decisions as authority. McCrudden, *supra* note 11, at 525-26.

142. 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting that the Court's balancing approach in complex First Amendment cases "is consistent with that of other constitutional courts facing similarly complex constitutional problems" and citing decisions of the European Court of Human Rights and the Supreme Court of Canada).

143. 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting) (citing to decisions of the Privy Council concerning the death penalty in Jamaica and of the Supreme Court of India to demonstrate, inter alia, that a "lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel").

144. 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting).

145. *Id.*

146. Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2; see also Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1117-23 (2000) (describing the participation of U.S. judges, including Justice O'Connor, Chief Justice Rehnquist, and Justices Breyer, Ginsburg, and Kennedy, in processes of global judicial interchanges).

Printz on the rather broad ground that comparative experience is relevant only in making, not interpreting, a constitution.¹⁴⁷ He sought in *Stanford v. Kentucky*¹⁴⁸ to narrowly cabin the relevance of other countries' practices on the question of what constitutes cruel or unusual punishment. But in *McIntyre* Scalia invoked comparative practice in dissent to defend the constitutionality of Ohio's ban on anonymous pamphleteering.¹⁴⁹ His willingness to invoke comparative practice in other democracies on the interpretation of the First Amendment in the context of the Ohio disclosure law is in some tension with his broad rejection of the relevance of comparative constitutional experience in *Printz*. Were the relevant factor for Justice Scalia the difference between using a foreign experience to sustain rather than to strike down a law,¹⁵⁰ it might have been appropriate for him to have considered the practice in other democracies before writing the Court's opinion striking down a local hate speech law in *R.A.V. v.*

147. 521 U.S. 898, 921 n.11 (1997).

148. 492 U.S. 361, 368–69 & n.1 (1989) (rejecting a claim that imposition of the death penalty for individuals under eighteen years of age at the time of the crime violates the Eighth Amendment and stating that practices in other countries cannot establish “the Eighth Amendment prerequisite, that [a] practice is accepted among our people” but can be relevant only to determining “whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place . . . in our Constitution” (citations omitted)); *see supra* note 121.

149. *See McIntyre*, 514 U.S. at 381 (Scalia, J., dissenting):

The third and last question relevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections. In answering this question no, the Justices of the majority set their own views—on a practical matter that bears closely upon the real-life experience of elected politicians and *not* upon that of unelected judges—up against the views of 49 . . . state legislatures and the federal Congress. We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. *See, e.g.*, Commonwealth Electoral Act 1918, § 328 (Australia); Canada Elections Act, R.S.C., ch. E-2, § 261 (1985); Representation of the People Act, 1983, § 110 (England).

150. Compare this possible explanation for Justice Scalia's invocation of foreign experience in *McIntyre* to the limited scope for foreign experience that he would allow in defining the meaning of the Eighth Amendment. *See Stanford v. Kentucky*, 492 U.S. 361, 369–70 n.1 (1989) (noting that American conceptions of decency are controlling in interpreting the Eighth Amendment, with the limited exception that foreign practice can help illuminate whether an American practice is simply a “historical accident” or is implicit in the concept of ordered liberty). Under Justice Scalia's approach in *Stanford*, foreign practice would never be directly relevant to whether a practice followed in a number of American jurisdictions is “cruel and unusual,” but could serve only to confirm that existing practices in the United States (against which the constitutionality of a singular deviation by one or a very small number of states is measured) are no historical accident. In this setting then, although foreign practice could support a decision invalidating a particular state law, they could do so only by lending more weight to the constitutional validity of most states' existing laws. In any event, as noted above, this possible explanation is in tension with Justice Scalia's objection to Justice Breyer's reliance on foreign experience to sustain the federal statute at issue in *Printz*.

*City of St. Paul*¹⁵¹ (hate speech laws having been upheld by some foreign constitutional courts).¹⁵² Although I do not count Justice Scalia as an enthusiast for learning from comparative constitutional experience, he and other members of the Court within the last eight years have referred to the constitutional practices or constitutional court decisions of other nations. What are we to think of this?

B. The Benefits of Comparative Constitutional Knowledge: "Exile" and Legitimacy

Understanding comparative constitutional experiences would benefit constitutional adjudication in the United States. A number of constitutional systems around the world now have judicially enforceable protections of freedom of expression, equality of treatment, human liberty, and freedom from inhumane punishments.¹⁵³ Decisions of foreign courts can inform decisionmaking by U.S. courts, not only by suggesting ways of reasoning about common areas of human experience, but also by providing a basis against which divergent judgments can be tested. Confrontation with and reasoning about the relevance and persuasive value of significant foreign decisions on analogous problems adds to the mechanisms of accountability, through reason-giving, that constrain politically independent constitutional courts.¹⁵⁴ In addition, there may be reputational reasons for U.S. courts to demonstrate greater familiarity with major constitutional developments around the world.

151. 505 U.S. 377, 396 (1992).

152. See, e.g., *The Queen v. Keegstra*, [1990] 3 S.C.R. 697, 699 (Can.) (upholding a conviction under a hate speech law, rejecting a constitutional challenge, and concluding that the law was a proportionate and justified limitation upon freedom of expression). For a detailed discussion of *Keegstra*, see Jackson, *supra* note 139, at 611–17. Both the Eighth Amendment, at issue in *Stanford*, and the First Amendment have been “incorporated” against the states under the Due Process Clause of the Fourteenth Amendment, so that the limited inquiry into foreign decisions Justice Scalia contemplated in *Stanford*, might have been applicable as well in *R.A.V.* See *Stanford*, 492 U.S. at 369–70 & n.1 (referring to the standard of *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), for determining whether particular provisions of the Bill of Rights apply to the states because they are “implicit in the concept of ordered liberty” of the Fourteenth Amendment’s Due Process Clause).

153. See, e.g., Constitution Act, 1982, pt. I, §§ 2, 7, 12, 15 (Can.); Arts. 2, 3, 4, 5, 18, 102 GG, translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (GERMANY) 106–07, 113, 152 (Albert P. Blaustein & Gisbert H. Flonz eds., 1994).

154. On the values of reason-giving in constraining and legitimizing judicial decisions see, for example, Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 349–52, 410–11 (1997); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1482 (2000); cf. Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1753–55 (1995) (noting that reason-giving is properly prized in law to avoid arbitrary decisions).

1. *Arguments for Comparative Constitutional Knowledge from Internal Utility.* There are at least four kinds of arguments for what I would call the “internal utility” of being aware of and considering the constitutional practices and constitutional decisions of other systems.¹⁵⁵ By internal utility I mean the (partly imagined and idealized) process by which a judge reasons about and decides a case for herself.

First, as Professor Donald Kommers and others suggest, understanding what “the law” is, or how roughly comparable bodies have interpreted roughly similar constitutional provisions, can help illuminate constitutional commitments to an idea like freedom of speech.¹⁵⁶

155. For purposes of this Essay, I place less weight on the role of foreign constitutional decisions in what others have called “judicial economy—not having to reinvent the wheel.” McCrudden, *supra* note 11, at 514. Although there are relatively new issues in American constitutional law on which the approaches of other constitutional systems can be quite helpful, *see supra* note 140 and accompanying text (discussing hate speech and executive commandeering), in the view of the Justices it is the rare case in which they will regard other nations as having “invented a wheel” that would be of use to the United States. Moreover, arguments from judicial economy alone are unlikely to be persuasive to a Court that, unlike many others, has almost complete control of the size and scope of its docket and that has dramatically reduced its docket of fully argued cases in the last decade.

I do not consider here the range of arguments for reliance on precedent that derive from considerations of obligations of fairness or of treating like cases alike. For helpful general discussions of this point, *see* McCrudden, *supra* note 11, at 513–15; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1349 (1990). The applicability of such arguments in the transnational setting is complex and, as McCrudden suggests, might be importantly affected by whether the decisionmaker is seen as “responsible” for the decision in both the case at hand and the potential precedent, McCrudden, *supra* note 11, at 513, a condition unlikely to exist where one national court considers the relevance of a decision of a different national court. Moreover, as I discuss below, where federal systems are concerned there is an important sense in which each federal system is built by particularized compromises and thus different, so in this field arguments about fairness or about treating likes alike are peculiarly likely to be inapt.

156. *See* Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 691–95 (1976); *see also* Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from a denial of certiorari) (noting that national courts “that accept or assume the lawfulness of the death penalty” have nonetheless held that lengthy delays in carrying out the death penalty render its application invalid). Justice Breyer’s project is in part the legitimization of resort to comparative constitutional materials, as the following statement illustrates:

[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. In doing so, 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. *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (opinion of Stevens, J.) (considering practices of Anglo-American nations regarding executing juveniles); *Enmund v. Florida*, 458 U.S. 782, 796–97 n.22 (1982) (noting that the doctrine of felony murder has been eliminated or restricted in England, India, Canada, and a “number of other Commonwealth countries”); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (observing that only 3 of 60 nations surveyed in 1965 retained the death penalty for

On this view, even an “originalist” might endorse comparative constitutional reasoning to the extent that a claim of something like universal meaning is plausible.¹⁵⁷ Interestingly, though, this idea of looking to foreign practices to inform our understanding of the law depends in part on the idea that constitutional law is distinctive and to some extent autonomous from culture, historical contingencies, politics, and so forth.¹⁵⁸ Such uses of comparative constitutional law might re-

rape); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (noting that only 2 of 84 countries surveyed imposed denationalization as a penalty for desertion). See also *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8 (1997) (surveying other nations’ laws regarding assisted suicide); *Culombe v. Connecticut*, 367 U.S. 568, 583–84 n.25, 588 (1961) (considering English practice concerning police interrogation of suspects); *Kilbourn v. Thompson*, 103 U.S. 168, 183–89 (1881) (referring to the practices of British Parliament in determining whether the House of Representatives has the power to hold a witness in contempt). . . . In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.

Id. at 997–98.

157. If one believes that the “sovereign” entity creating the constitution—whether it be the drafters or ratifiers—meant a particular phrase or concept in a sense that they understood to be universal, or if the sovereign entity intended that universal or transnational norms be consulted to determine the phrase or concept’s meaning over time or in particular settings, then resort to transnational constitutional experience would be entirely consistent with originalist assumptions. I do not refer here to interpretive methods that look at the practices of the predecessor government in Britain as either positively informing what the Framers intended or as negative examples of what they opposed. *Compare, e.g.*, *The Lottery Case*, 188 U.S. 321, 372 (1903) (Fuller, C.J., dissenting) (distinguishing Congress from the British Parliament), *with Loving v. United States*, 517 U.S. 748, 759–69 (1996) (discussing the British courts-martial practice as bearing on the scope of presidential and congressional powers); *see also, e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1, 38 (1895) (Harlan, J., dissenting) (invoking British and American common law treatment of monopoly power); *Standard Oil Co. v. United States*, 221 U.S. 1, 51–57 (1911) (discussing English and American law on monopolies). My argument is not about the relevance of English law as either a negative or positive precedent, but is rather about the possibility of an “original intent” that some aspects of the Constitution—for example, the meaning of “war” for purposes of Congress’s power to declare war—be understood to have transnational meaning. *Cf.* *The Prize Cases*, 67 U.S. (2 Black) 635, 693, 697–99 (1862) (Nelson, J., dissenting) (suggesting that Congress’s war power must be understood in light of the law of nations and usages of “all civilized countries”).

158. For an argument that constitutional courts deciding human rights questions have an interest in establishing the “relative autonomy of human rights law through the sources of authority and style of judgment” used, see McCrudden, *supra* note 11, at 502. *See also* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 121–23 (1995) (arguing that engagement with foreign court decisions supports a court’s own autonomy). Query whether human rights law is a new/old “brooding omnipresence,” built up through comparative, transnational discourse that implies the existence of some universal “law” apart from the will of particular sovereigns. *Cf.* Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1155–77 (1987) (arguing that the founding generation did not intend their written Constitution to displace prior fundamental law and thus suggesting that some “unwritten” or natural law might survive as a source of fundamental law). Have notions of sovereignty become sufficiently diffuse and complex to make plausible the idea of transnational human rights law as both in some sense positively willed by sovereigns and at the same time auto-

inforce the stature and independence of courts as legal decisionmakers, by reinforcing the idea that law is discoverable uniquely by judges and lawyers. While it is an approach that can relate back to intentionalist, positivist theories of law,¹⁵⁹ it also is an approach with affinities to natural law traditions, with transnational omnipresences a measure of the correctness of a legal rule.

A second reason to look at other constitutional traditions is, as Professor Tushnet suggests, to better understand the nature of one's own constitutional tradition, either with a view to changing and reconstituting that tradition or of preserving and advancing it.¹⁶⁰ To the extent that one regards the expression or reconstruction of a nation's aspirations and commitments as a valid purpose of constitutional interpretation, awareness of other constitutional traditions may be helpful in providing both building blocks and contrasts. Historically, many U.S. references to other constitutional systems seem wrought up in a project of American constitutional exceptionalism that is expressive and self-constituting in nature. Although in the past American constitutional exceptionalism has been invoked to place the United States at the forefront of "progressive" constitutionalism, "ahead" of other countries,¹⁶¹ judges today may worry that resort to the decisions of other constitutional tribunals will suggest that the United States Supreme Court is "behind" in some areas—making resort to comparison less palatable to those convinced, at some level, of the "natural" superiority of their own system. Under this "expressive" view, constitutional law has a somewhat more malleable cast, expressive not only of traditional identities or aspirations, but also available

mously developed by transnational jurists? On changing notions of sovereignty, see generally NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* (1999).

159. *See supra* note 157 (arguing that resort to comparative experience as an aid to interpretation would be legitimate for a positivist originalist if the original sovereign creating the law intended that a phrase be used in some universal or transnational sense, or intended that universal or transnational legal norms be consulted to determine its meaning over time or in particular settings).

160. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1269–85 (1999). This "expressive" possibility of comparative constitutional law, to the extent it focuses on the distinctiveness of particular constitutional approaches or traditions, may be in considerable tension with the first possibility, discussed above, which focuses more on the transnational commonalities of constitutional law.

161. For example, the United States Constitution has been distinguished from the practice of parliamentary sovereignty, or governance without a written constitution, in tones suggesting that the United States's practice is an advance. *See, e.g.*, *Wilson v. New*, 243 U.S. 332, 366–67 (1917) (Day, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 531 (1884)); *The Pipe Line Cases*, 234 U.S. 548, 564 (1914) (McKenna, J., dissenting).

for reconstructive projects. Comparative experience can provide both an illuminating mirror and a set of alternative visions for those who seek to change existing legal cultures.¹⁶²

Third, as both Professor Tushnet and Justice Breyer suggest, the experience of other nations can have significant internal utility for legal interpretation by demonstrating different approaches to similar “functional” questions. To the extent that workability is a criterion for deciding what interpretation of a constitutional provision is best, the approaches of foreign nations can help identify the consequences of different reasonably justifiable interpretations plausibly open to the decisionmaker.¹⁶³ Justice Breyer is plainly willing to consider the functional experience of other nations’ constitutional choices, at least where the text, precedent, and history of the U.S. system do not provide clear answers to constitutional questions. (Depending on one’s theory of constitutional interpretation, even where domestic sources speak to the interpretive question with more clarity, foreign experience still might be thought relevant.)¹⁶⁴ Justice Breyer’s suggestion that comparative experience can illuminate the consequences of different interpretive judgments echoes Professor Kadish’s argument, made in the context of procedural due process issues, about the relevance of comparative procedural practice. Professor Kadish argued that comparative constitutional practice in the procedural area is most relevant “as a basis for predicting the factual consequences of the suggested attenuation of procedures and as evidence of whether those consequences are compatible with the commitments of a free

162. See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 695 (1998) (discussing comparative law as a “unique opportunity to generate critical, subversive self-reflections about American law”).

163. Justice Breyer’s assertion that understanding the consequences of different choices is relevant to constitutional decisionmaking is inconsistent with more formalist approaches to interpretation and thus not uncontroversial. See, e.g., *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429, 644–45 (Harlan, J., dissenting) (questioning the appropriateness of considering the consequences in examining the constitutionality of a federal tax).

164. One may regard legal sources, including the decisions of other constitutional courts, as being *binding*, or as *nonbinding* but relevant authority that *must* be considered, or as of only possible relevance and persuasive value that *may* be considered. See, e.g., McCrudden, *supra* note 11, at 502–03 (citing H.P. Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 264 (1987)); see also S. AFR. CONST. ch. II, pt. 39 §§ (1)(b), (1)(c) (1997) (instructing South African courts that they *must* consider international law and *may* consider foreign law when interpreting the South African Bill of Rights). I make no claim that foreign constitutional decisions are “binding” on questions of United States constitutional law, nor even that, as a matter of United States constitutional law, foreign constitutional law “must” be considered. Rather, it is my claim, both the constitutional practices and the constitutional decisions of other constitutional democracies *may* be relevant and *may* be considered.

society.”¹⁶⁵ Moreover, where constitutional doctrine requires a judicial evaluation of the rationality of a legislative provision, the presence of similar provisions in other polities might support finding minimal rationality or reasonableness.¹⁶⁶ As noted above, Justice Scalia appears to have considered foreign experience in other democracies as a relevant factor in evaluating the constitutionality under the First Amendment of a ban on anonymous pamphleteering.¹⁶⁷

In short, understanding comparative constitutional law can be helpful in discerning the meaning of terms or provisions that have a transnational meaning; can illuminate the particularities of one’s own constitutional experience to better enable constitution interpreters to constitute and reconstitute the constitutional narrative; and can shed light on the functional consequences or rationality of different rules.

Fourth, and more speculatively, participating in transnational constitutional discourse may strengthen both the quality of decisions and the power of reason-giving as a mechanism of accountability for

165. Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 354 (1957). Recognizing the difficulties of comparison, Kadish argued that the problem of comparability was familiar to social scientists, who are unable to conduct controlled experiments. *Id.* As I will argue below, comparability is a major limitation on the kinds of uses that I think can fruitfully be made of comparative constitutional study in the area of federalism.

166. “Minimal rationality” is an aspect of the “proportionality” test, at least as used in Canada. *The Queen v. Oakes*, [1986] 1 S.C.R. 103, 141. “Rationality,” “reasonableness” and kindred concepts have played important roles in U.S. constitutional law. For the majority in *Lochner v. New York*, 198 U.S. 45 (1905), the question was the “reasonableness” of the conditions New York attached to the bakers’ liberty of contract. *Id.* at 53. Similarly, the dissent invoked standards of reasonableness but relied on foreign experience to show that the standard was met. *See id.* at 68, 71–72 (Harlan, J., dissenting) (noting that “civilized peoples” have deliberated on the question of working hours and reciting the average working hours in various nations); *see also* *Romer v. Evans*, 517 U.S. 620, 631, 635 (1996) (finding that a prohibition on the enactment of laws to prohibit discrimination based on sexual orientation fails a “rational relation” test and therefore is unconstitutional); *supra* note 136; *cf.* Tushnet, *supra* note 160, at 1233 n.36 (describing Justice Breyer’s analysis in *Printz* as perhaps resting on “the proposition that legislation is constitutional unless . . . it is arbitrary or irrational [and] [c]omparative analysis might show that the legislation is not arbitrary”).

167. *See supra* note 149 and accompanying text (discussing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting)). After concluding that the Constitution’s original meaning was difficult to discern, but that the practice of U.S. states in prohibiting anonymous electioneering supported the ban, 514 U.S. at 375, Justice Scalia addressed three relevant questions, including “whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections,” *id.* at 381, a question of “common sense” informed by respect “for the practical judgment” of legislators both in the United States and in foreign democracies, *id.* at 378. His reference to other nations’ practices might, then, be taken to reflect both on the functional workability of such a rule in democracies (is it “effective”?) and on the rationality of legislatures (exercising “practical judgment” about elections, a subject with which they had more familiarity than judges) in adopting such a rule. *See supra* note 166 and accompanying text.

politically independent judges. The working mechanisms of judicial accountability in the U.S. constitutional system at present are largely not coercive ones.¹⁶⁸ They are the constraints of reasoned response: how do the Court's decisions and reasons fare among the general public and knowledgeable commentators? As has been said about the benefits of consulting the "constitutional views of our predecessors," "[t]he more varied the participants in the [constitutional] conversation the richer it will be and the more satisfactory will be its results."¹⁶⁹ Confronting the power of others' ideas about common problems or concerns can, in other words, contribute to a better intellectual product and can also impose the discipline of explanation upon the decisionmaker.¹⁷⁰

If a U.S. jurist knows of a significant foreign court (the authority of the decisionmaker contributing to the weight its views would be accorded) that produced a reasoned opinion on a pending issue,¹⁷¹ its reasoning can be considered, whether as logic to adopt as persuasive, to distinguish as inapplicable, or to reject as mistaken.¹⁷² Even if the

168. Although Congress formally has power over appropriations, or to change the term of Court or number of Justices, these powers for the most part have not been used in recent decades to constrain the Court. Although Congress has sought to restrict federal court jurisdiction in habeas cases, the Supreme Court itself has retained appellate jurisdiction over such claims. See *Hohn v. United States*, 524 U.S. 236, 238–39 (1998) (treating a 1996 federal statute designed to restrict review in habeas corpus proceedings as leaving undisturbed the Supreme Court's power to review the lower court's denial of a certificate of appealability); *Felker v. Turpin*, 518 U.S. 651, 661–63 (1996) (recognizing the continued availability of original habeas corpus jurisdiction in the Supreme Court).

169. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 695 (1987).

170. See Michael Kirby, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001). Justice Kirby of the High Court of Australia suggests the benefit of looking to decisions outside one's own nation "to stimulate [the] mind with analogous reasoning." *Id.*

171. It is not uncommon for the Supreme Court to consult the reasoning and decisions of state and lower federal courts, not because their decisions on questions of federal law are authoritative, but because they help the Justices better reach (or, in the case of highly regarded lower court judges, better justify, see *infra* note 172) their own decisions. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (quoting Judge Friendly's Second Circuit decision in 1973); *Bruton v. United States*, 391 U.S. 123, 129–30 (1968) (citing state court decisions and quoting California Chief Justice Traynor). All state and federal courts in the United States can be presumed to be doing their interpretive work under the constraint of the Supremacy Clause and to share a common history or culture in ways that are not true of foreign courts. Decisions of state and lower federal courts are thus at once more likely to consider "comparable" issues, but less likely to offer the outside perspective that can be so illuminating in testing basic assumptions; both kinds of nonbinding decisions can help other decisionmakers reach better-informed decisions.

172. See McCrudden, *supra* note 11, at 516 (distinguishing between uses of foreign judgments based on "authority" and "substantive" reasons). *But cf.* Tripathi, *supra* note 139, at 328 (suggesting that judges will tend to use foreign decisions only to the extent that they support the judges' existing predilections). To the extent this is true, though, it is a problem with many sources of interpretive authority.

reasoning of a foreign court ultimately is rejected, explaining why it is inapplicable or wrong could improve the quality of the Court's reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators, and citizens. The transnational discourse of constitutional decisionmaking provides a broader arena for this kind of constitutional accountability conversation. Considering other constitutional courts' decisions helps locate the Supreme Court in a broader range of opinion and experience through which its constitutional decisions can be constrained in their production by the judges' awareness of competing constitutional traditions—both as a source of approaches to be adopted or distinguished and as a reminder of the transnational context in which their own work will be viewed.¹⁷³ Particularly in a system in which constitutional decisions are not easily changed through amendment, to the extent that awareness of transnational constitutional developments tends to lead to more thoughtful and reasoned decisions, it is surely to be valued.

2. *External Legitimacy, Foreign Law and Audience.* A different but related set of possible benefits has to do with what I will call “external legitimacy” and communicative efficacy to different audiences. As Professor McCrudden observes in his monograph on the uses of comparative constitutional law in human rights decisions around the world, invoking the decisions of other constitutional courts may serve to enhance the legitimacy of a court's reasoning and result before particular audiences.¹⁷⁴ Newly established courts, McCrudden suggests, may rely on the judgments of foreign courts to enhance their own legitimacy with domestic audiences.¹⁷⁵ Additionally, some domestic courts may cite foreign decisions to establish themselves with an international audience as members of the international community, entitled to other benefits of membership.¹⁷⁶

173. See Weinrib, *supra* note 125 (manuscript at 4) (praising comparative constitutional methodology by which judges look at “cognate constitutions” and “benefit by seeing their own systems through the eyes of foreign judges, academics and commentators”).

174. McCrudden, *supra* note 11, at 502; see also Slaughter, *supra* note 158, at 119 (discussing how citing foreign authorities can enhance the persuasiveness, authority, or legitimacy of a decision).

175. McCrudden, *supra* note 11, at 518–19.

176. Cf. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 607 (1999) (noting suggestions that Hungary's Constitutional Court invalidated the death penalty in part to help advance Hungary's membership in the Council of Europe). McCrudden and others suggest a more aspirational set of reasons for the citation to foreign constitutional judgments, including a “need to instill habits of Western democratic participation.” McCrudden, *supra*

In some systems, a court's reliance on, or overt consideration of, the reasoning of foreign or international bodies may strengthen the court's claim to be autonomous and independent in the ascertainment of law, thereby increasing its apparent legitimacy.¹⁷⁷ But if the United States Supreme Court were to identify the reasoning of other court systems faced with similar problems as a basis for its own decision-making, it is a matter of some disagreement whether such overt discussion of foreign constitutional practice would detract, in the eyes of key domestic audiences, from the authority of the Court's decisions.¹⁷⁸ It is to some extent an empirical question whether it is necessary, for law to perform its coercive and legitimating functions, to speak as if it were indigenously autonomous.¹⁷⁹ It seems likely that this question will not have a generalized or universal answer.

Legitimacy, in this empirical sense, depends importantly on the audience. It may well be that Supreme Court Justices, who describe in speeches and at judicial conferences the need for U.S. judges to learn more about international and comparative constitutional developments, are loath to refer to them in their opinions for fear that such citations will undermine the (perhaps already precarious) view that what the Court does is to articulate law in a domain within which the Court alone is supreme.

But it may also be that U.S. isolation from transnational constitutional law could diminish the stature and influence of the Supreme Court over time. As U.S. decisions come under criticism by foreign courts,¹⁸⁰ and to the extent that U.S. influence in constitutional devel-

note 11, at 518 (quoting GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 232 (1993) (discussing the Supreme Court of Israel)).

177. See Anne-Marie Slaughter & Laurence R. Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 282 (1997) (arguing that collective deliberation among international tribunals can "reinforce each other's legitimacy and independence from political interference"); see also HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 146, 162-71 (2000) (describing the use of international and foreign law by South Africa's Constitutional Court not as legal precedent but as sources for specific lines of argument and, more generally, as supporting judicial review).

178. See *infra* notes 191-93 and accompanying text.

179. As others suggest, domestic courts' consultation of international human rights law is sometimes justified on grounds of the law's autonomy, insofar as comparative usage rests implicitly on the premise that law is a technical, specialized area. McCrudden, *supra* note 11, at 502; Slaughter & Helfer, *supra* note 177, at 370-72.

180. For examples of the recent disagreements that foreign constitutional courts have had with U.S. constitutional decisions, see *The Queen v. Keegstra*, [1990] 3 S.C.R. 687, 740-41, 743, 744 (Can.) (disagreeing with the then-trend in First Amendment law to prohibit content-based classifications that would make unconstitutional the prohibition of hate speech); *State v. Makwanyane*, 1995 (3) SALR 391, 415-23, 431-34, 454-55 (CC) (S. Afr.) (disagreeing with current American doctrine on the death penalty). For a Canadian Supreme Court Justice's view, see

opments elsewhere were to be supplanted by such constitutional courts as Canada's, South Africa's,¹⁸¹ or Germany's, Justices may seek to express their awareness of other constitutional approaches in their opinions (if only to sustain the Court's stature against charges of ignorance).¹⁸² And, if Justices' frames of reference or reasoning are influenced by their perceptions of other systems, then candor and transparency values—as well as the legitimating effects of reasoning—would argue in favor of some acknowledgement of foreign decisions. Finally, if Justices refer more to the constitutional decisions of other courts, this practice to some extent will become self-legitimizing, a phenomenon that is already occurring around the world.¹⁸³

C. *Addressing the Arguments Against: Of Positivism, Legitimacy, Competence, and Comparability*

Comparative constitutional knowledge and reliance thereon may improve the quality of judicial reasoning and increase the legitimacy

Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 29–31, 37–39 (1998) (observing a decline in the impact of the United States Supreme Court on other countries and identifying, among the reasons for this decline, the Court's failure to “take part in the international dialogue among the courts of the world”).

181. No doubt I cite South Africa and Canada in part because their decisions are in English and thus accessible to me. English may be becoming the hegemonic language not only for trade and commerce but also for law. Cf. Philippe Van Parijs, *The Ground Floor of the World: On the Socio-Economic Consequences of Linguistic Globalization*, 21 INT'L POL. SCI. REV. 217, 222 (2000) (positing that English will continue to grow as a “world-wide lingua franca” as English-speaking countries attract highly skilled immigrants).

182. As McCrudden notes, Justice Stevens already has publicly expressed concern about how other countries will view particular decisions of the Supreme Court. McCrudden, *supra* note 11, at 520 (discussing Justice Stevens's dissent in *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992)). While Stevens reasoned from the preeminence of the United States Supreme Court and the earlier reliance of other constitutional courts on its precedents, as McCrudden also notes, it is not inconceivable that if the Court is seen as issuing “monstrous” decisions generally on human rights matters, *Alvarez-Machain*, 504 U.S. at 687 (Stevens, J., dissenting), its influence and preeminence will decline correspondingly. McCrudden, *supra* note 11, at 520. The product of the Supreme Court is subject to scrutiny not only by domestic courts' lawyers and scholars but also at the international level. Continuing in (apparent) ignorance and isolation is no way to maintain the relative position of the Court. To the extent that the standing of the legal profession and law professors in the United States is related to the standing of the United States Supreme Court in the global legal order, perhaps lawyers and legal scholars have such reputational interests at stake in the Court's transnational standing as well.

183. See MARY ANNE GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 158 (1991) (noting “brisk international traffic in ideas and rights”); Slaughter, *supra* note 158, at 99 (stating that “[c]ourts are talking to one another all over the world”). See generally McCrudden, *supra* note 11, at 501 (describing as now “commonplace” judicial borrowings from international and other national jurisdictions in interpreting human rights norms).

of decisions before some audiences, but explicitly invoking foreign decisions also may come at some cost to the legitimacy of decisions before other audiences. Objections based on positivist legal theory, legitimacy, competence, and comparability must be considered. These objections are not, in my view, sufficient to defeat the comparative constitutional project, but they suggest that there may be particular limitations on courts' use of comparative constitutional law in the area of federalism. I elaborate on these points below.

The argument from positivism may be closely linked to an interpretive strategy of originalism and to contestable assumptions about original intent on the relevance of comparative constitutional learning.¹⁸⁴ One argument is that U.S. courts interpret the United States Constitution; that U.S. law can mean only what its drafters and/or ratifiers intended or understood the words to mean in the United States; and that foreign decisions can have no bearing on these entirely domestic questions of determining the meaning of law issued from the popular, domestic sovereign.¹⁸⁵ My answer to this critique of comparative constitutional analysis is in part empirical and in part normative. As an empirical matter, it seems doubtful that the generation that framed the Declaration of Independence, which explicitly sought to justify itself in the eyes of a cosmopolitan international audience, would have given no thought to how their words or the governmental structure they established would be regarded abroad.¹⁸⁶

184. While there are constitutions that expressly require or specifically authorize interpreters to consult foreign constitutional law or international law, the United States Constitution does not do so. As Professor Tushnet suggests, a court's authority to consult such materials may be derived from various interpretive theories. See Tushnet, *supra* note 160, at 1230–38. Even if one is committed to originalism understood as original intent, it would be relevant to ask not only what the Framers' intent was with respect to original intent, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985) (arguing that the Framers were not committed to an originalist method of interpretation), but what their intent would have been concerning reliance on comparative understandings for interpretive questions, see *infra* note 186 (describing Justice Breyer's reference to the Declaration of Independence's concern for the "opinions of mankind").

185. See Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996) (arguing that American courts may rely on international law only to the extent that it is already embodied in domestic law and that judges "are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own"). As Justice Scalia's comment suggests, a related form of objection is from democracy—that matters not clearly settled by the Constitution were left open to the people of the states and of the United States to decide. Reconciling democracy with constitutionalism is a complex proposition, whether sources of interpretation are entirely domestic or not. And to the extent that other constitutional systems have considered how to reconcile a fairly rigid constitution with commitments to democracy, understanding those efforts might improve our own.

186. For an implicit suggestion that the Constitution's Framers would have intended resort to the decisions of foreign courts on comparable issues in light of the concern manifest in the

The Framers may well have been more cosmopolitan for their time than today's leading judges and lawyers, and thus may have contemplated that comparative learning would bear on U.S. constitutional interpretation. As a normative matter, I am unpersuaded that such a narrowly focused interpretive methodology as Justice Scalia's is attractive. I am skeptical that it constrains judges' decisions as much as Justice Scalia believes it does, and I believe that it is particularly limited in its workability in the United States in light of other rigidities in the written Constitution.¹⁸⁷ To the extent that a theory of interpretation allows for reliance on sources other than original sources—even if only in some cases, as where original sources leave the matter unclear—there is room for comparative learning.¹⁸⁸

A second objection to the use of comparative constitutional experience is that it might detract from the perceived legitimacy of judicial decisions. This argument from legitimacy, in the empirical sense, might militate against overt reliance on foreign law, given the important communicative role of domestic constitutional courts in establishing their decisions as legitimate in the eyes of parties, lawyers,

Declaration of Independence for the views of other nations, see *Knight v. Florida*, 528 U.S. 990, 996–97 (1999) (Breyer, J., dissenting) (“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 opinions of mankind.’”).

187. Justice Scalia's pithy suggestion in *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), that comparative constitutional experience is relevant in writing a constitution but not in interpreting one, assumes a fundamental difference between “interpreting” law and making law that, in the hardest cases, eludes capture. When the Court interprets the Constitution, it makes constitutional law and can be reversed either through its own subsequent decisions or through constitutional amendment.

188. Some might argue that permitting consideration of foreign sources would increase interpretive methodological problems by increasing the range of what can be considered and thus aggravating the problem of allowing judges to give effect to their personal discretion or value judgments and call it law. It might be argued on these grounds that consulting comparative constitutional law and experience is less legitimate (because of its greater tendency to proliferate discretionary sources) than consulting sources within one's own federal system and because it is not constrained by a theory of precedent within a single defined, hierarchical legal system. I am inclined to think such factors may go to the weight but not to the admissibility of comparative reasoning. On the one hand, multiplying the number and direction of precedents at a theoretical level may increase the range of permissible legal judgment. But it is important to remember that a likely consideration of comparative constitutional material would be bounded by preliminary considerations of comparability: the Court is unlikely to be influenced by decisions from any one country that is not highly comparable (i.e., a sizeable, well-established democracy). Cf. David Fontana, *Refined Comparativism: Towards an American System for the Uses of Comparative Constitutional Law*, 49 UCLA L. REV. (forthcoming 2001) (manuscript at 23, on file with the *Duke Law Journal*) (arguing that comparability is a precondition for the use of comparative constitutional law). To the extent that a number of countries are coming to a similar conclusion on a constitutional problem that has not been considered in the United States, moreover, it would improve the decisional process to be aware of that approach, if only for the purpose of analyzing why it would not be a good approach in this country.

lower court judges, and, most importantly, the people of their own nation. Although the claim that law is a wholly autonomous discipline is one that few legal scholars would seek today to defend,¹⁸⁹ there are complicated questions relating to the legitimacy of judicial decision-making that bear on the degree to which law, in the voice of the Court, should acknowledge its lack of autonomy. Thus, it has been suggested that courts in the United States should perhaps consider and be aware of other systems' approaches but should not acknowledge them in written opinions.¹⁹⁰ To acknowledge consideration of foreign sources of constitutional law would be to delegitimize decisions in U.S. legal discourse—or so the argument goes.

Legitimacy in this external sense—in bolstering the reception of its decisions, the Court's own stature, or the national polity's sense of belonging to an enlightened community of nations—will depend on the efficacy of the authority invoked.¹⁹¹ As an empirical matter, then, the legitimacy of using foreign constitutional law is highly contingent, and changeable. The relationship in the United States between legitimacy and non-citation to foreign sources is suggested by Justice Thomas's rejoinder to Justice Breyer's dissent from the denial of certiorari in *Knight v. Florida*. There was nothing, Justice Thomas asserted, in "U.S. constitutional tradition or U.S. precedents" to support the "neoteric" claim Justice Breyer advanced concerning the Eighth Amendment;¹⁹² if there were anything in the U.S. tradition,

189. See, e.g., Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 778 (1987) (calling for a "return to an older style" of judicial opinion writing "in which formalistic crutches—such as the canons of statutory construction and the pretense of deterministic precedent—that exaggerate the autonomous elements in legal reasoning are replaced by a more candid engagement with the realistic premises of decision"); cf. Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996) (noting that "most scholars agree that law can no longer sustain itself as an autonomous discipline"). But cf. *id.* at 1428–29 (arguing for a new synthesis of legal theory toward exploration of institutional questions including autonomy of law and how it interacts with political institutions).

190. Cf. McCrudden, *supra* note 11, at 515 (generally noting the possibility of courts' relying on but not acknowledging foreign decisions).

191. McCrudden notes, as an empirical matter, a tendency to invoke decisions from constitutional courts of countries with which one's own country is allied, rather than otherwise. *Id.* at 521–23.

192. 528 U.S. 990, 992 (1990) (Thomas, J., concurring in the denial of certiorari). As he elaborated,

I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the ploy of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were 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

Breyer would not need to look to other traditions. Justice Breyer's citations to foreign courts' decisions thus is treated as a symptom of illegitimacy; the invocation of foreign sources could mean only that a claim has no support in domestic law (and hence is illegitimate).¹⁹³

Yet, as suggested in Section A above, foreign constitutional experience has been alluded to, episodically, by members of the Court, past and present.¹⁹⁴ My current sense is that the absence of greater mention is due to some combination of lack of knowledge and a general belief that the U.S. experience is singularly advanced, rather than to any sustained view in the Court that such practice is not relevant or legitimate to consider. Indeed, Justice Scalia's apparent theory for referring to foreign practice in the *McIntyre* case bears a striking resemblance to that advanced by Justice Breyer in *Printz*. Having found the First Amendment issue to be essentially open in terms of original intent, Justice Scalia concluded that understanding the consequences of the challenged rule for democracies would be helpful; it was in this context that his reference to foreign legislative practice appears.¹⁹⁵ Thus, even a Justice who has denied the relevance of comparative constitutional practice in "interpreting" constitutions on occasion has found comparative experience worthy of consideration.

As the United States joins more international treaties and agreements, as communications and information technologies make

Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.

Id. at 990.

193. Professor McCrudden notes that despite efforts by scholars and Justice Frankfurter in the 1950s to encourage cross-national analysis in giving meaning to the Due Process and Equal Protection Clauses, the technique was seldom used after Frankfurter was "marginalized." McCrudden, *supra* note 11, at 508–10, 527. Yet the five-page discussion by the majority in *Miranda v. Arizona*, 384 U.S. 436, 486–90 (1966), of foreign experience with providing warnings to suspects, recapitulates some of Justice Frankfurter's lengthy treatment of the issue in his opinion announcing the Court's judgment in *Culombe v. Connecticut*, 367 U.S. 568, 581–84 (1961). For an extended effort to establish the historic legitimacy of comparative constitutional law in the United States, see Fontana, *supra* note 188 (manuscript at 42–60).

194. See *supra* notes 126–33, 141–49 and accompanying text. For a somewhat stronger claim about the presence of comparative constitutional law in the U.S. tradition, see Fontana, *supra* note 188 (manuscript at 42) (exploring the "long history of American judges using comparative constitutional law in their judicial opinions"). But see McCrudden, *supra* note 11, at 510 ("The USA is now remarkable among precedent-based jurisdictions in citing foreign courts so rarely in the human rights context.").

195. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381–82 (1995) (Scalia, J., dissenting); cf. *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (suggesting that where the Constitution's text and history are inconclusive it is appropriate to look at the experiences of comparable systems in order to understand the consequences of proposed alternative constitutional interpretations).

more of the world's legal decisions more readily available, as lawyers practice more in international settings, and as law students learn more about international and comparative law, the posture of illegitimacy is, I believe, likely to change. Lower court judges, lawyers, scholars, and journalists—who function, in some sense, as the first evaluators of the “legitimacy” of judicial reasoning and as filters through which broader public evaluation proceeds—will themselves be more exposed to international sources of decision, benefiting from international travel and communication with legal and public opinion elites in other countries. Greater knowledge seems inevitable and, with it, greater engagement will seem increasingly legitimate.

A third objection, based on competence, is often raised to the consideration of, much less reliance on, foreign constitutional experience, including judicial decisions. Judges on U.S. courts, so the argument goes, were trained in U.S. law schools in U.S. law. So, too, were their law clerks and most of the lawyers who practice before them. They thus lack the expertise to properly research, understand, and evaluate foreign constitutional court decisions, even if the only competency required was competency in law. To the extent one believes that to evaluate constitutional law one must understand the broader historical, political, and cultural framework within which constitutional governance works, the competency argument assumes larger proportions. Moreover, judges exercise government power and make actual decisions in a real-world time frame; they do not have the luxury of extended time for study that academics (it is thought) have.

I would respond to these concerns with a plea in avoidance: let us assume that it is true that most U.S. judges and lawyers have only minimal, if any, competence in understanding foreign legal systems. That being so, however, does not justify its continuing to be so. It suggests that judges (and lawyers and academics) should approach what they learn about foreign legal sources with humility and skepticism, at the same time that the technical capacity of (at least) the Supreme Court (including its librarians and law clerks) to evaluate the relevance, weight, and soundness of foreign constitutional sources is increased.

The fourth objection to considering comparative constitutional law in interpreting the United States Constitution—the difficulty in determining comparability—is of a different order and of particular relevance to federalism. One of the great benefits of studying comparative constitutional experience is the possibility of illuminating—as choices—those aspects of one's own system that are perceived

from within as necessary. It is, for example, possible to have a vibrant federal system, as in Germany, where it is the responsibility of the “states” to enforce federal law, so *Printz*’s holding should be seen not as a necessity of a federal system, but as a choice. But at the moment of insight, the comparability issue must be confronted. How comparable is the rest of the German federal system? Does “commandeering” pose the same difficulties in a system, such as Germany’s, in which members of the state-level governments sit as the second chamber of the national legislative body, as it poses in the United States, with its popularly elected senators? Does a rule against commandeering have the same meaning in Germany, where federal legislation on some subjects must be in the form of “framework” or general principles, with the state-level governments having the power and duty to fill in the details at their own legislative level?¹⁹⁶ Does the constitutionally mandated “equalization” of the per capita revenues of the state-level governments in Germany affect the compatibility of “commandeering” with effective federalism?¹⁹⁷

196. See Jackson, *supra* note 139, at 597–98 (comparing U.S. and German constitutional federalism principles in the administration of federal law). Note, too, that executive “commandeering” may be subject to different control or influence by affected subnational units in a constitutional system that owes more to the parliamentary model than to the U.S. presidential model of separation of executive and legislative power. For a discussion of some of these, as well as other, factors that bear on the relevance of the German experience to whether the United States should have an anticcommandeering rule, see generally Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (Robert Howse & Kalypso Nicolaidis eds., 2001) (arguing that whether commandeering is viewed as empowering or disempowering the states in a federal system depends on the context, and that “commandeering” of state officials is less threatening where the national government constitutionally must rely on states to carry out federal law). As has been widely noted, constitutional courts sometimes refer to foreign constitutional decisions to distinguish them. See, e.g., McCrudden, *supra* note 11, at 512 (stating that the foreign judicial approach can be “influential in sharpening the understanding of the court’s view of domestic law”). Had Justices Scalia and Breyer engaged in debate on the merits in *Printz*, a sharpening along these lines might have occurred in analyzing how comparable the two federalisms were. See Jackson, *supra* note 139, at 584; Halberstam, *supra*, at 216–17 (“tak[ing] up Justice Breyer’s comparative inquiry” and concluding that Justice Breyer did not consider “countervailing institutional dynamics” in his *Printz* dissent).

197. For an explanation of the German constitutional requirements for transfers of tax revenues to poorer regions from richer regions, see generally Clifford Larsen, *States Federal Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429 (1999) (arguing that equalization is designed to fulfill the positive conception of the independence of each state-level, or Land, government by providing the resources for effective governmental infrastructure); R. St. J. MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 PACE INT’L L. REV. 259 (1996) (describing equalization provisions as the foundation of the German federal system).

More generally, does the history leading to the federalist “deal” or package reflected in the constitution matter? The nation-building impulses behind the United States Constitution of 1787, as supplemented by the universalizing rules of the Fourteenth, Fifteenth, Seventeenth, Nineteenth, and Twenty-Fourth Amendments, might be understood to reflect a very different set of goals and concerns than the German Basic Law, drafted in the wake of the Nazi regime and explicitly designed to empower and protect the governments of the Länder (subnational state-level polities). Even if all else were identical in structure, would the historically different origins of the constitutions suggest that as interpretive issues arose they should be handled differently? Ackerman, Schuck, and others suggest that there are important differences between federal systems that are centralizing, “put together” systems moving toward greater centralization and devolutionary, “taking apart” forms of federalism, in which the constitution is designed to transfer power from the center to the periphery.¹⁹⁸ If so, might not both the workings of the overall federal system and the role of the courts in enforcing that system vary accordingly?

This problem—of determining whether the unit of comparison is “right,” of whether other features bearing on the “rightness” of the comparison or the relevance of the particular rule at issue are embedded in the foreign system—is an inescapable challenge. But lawyers and judges, trained in analogical reasoning both in law schools and in practice, may be well suited to the task of deciding whether “the relevant, known similarities give us good reason to believe that there are further similarities”¹⁹⁹ or whether there are relevant differences that caution against concluding that what works as a rule in one system will work in another. As Professor Sunstein and many others agree, “[r]easoning by analogy is the most familiar form of legal reasoning.”²⁰⁰ Although there are obvious differences between analogical

198. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Peter Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. LAW 195 (2000).

199. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 744 (1993).

200. *Id.* at 741; see also EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949) (“The finding of similarity or difference is the key step in the legal process.”); *id.* at 4 (noting that the judicial process of law development “requires the presentation of competing examples”). For other accounts of the role of analogical reasoning in law, see generally Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Charles L. Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999). Some authors have more skeptical views. See, e.g., Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 72–76 (1996) (questioning the existence of analogical reasoning in law and discussing the views of other critics).

reasoning constrained by precedent and analogical reasoning about concededly nonbinding authorities,²⁰¹ good analogical reasoning's focus on particular contexts and on the task of identifying relevant similarities and differences is likely to be helpful in evaluating whether another nation's constitutional decision has any relevance and hence any persuasive value.²⁰²

The comparability problem is ubiquitous, arguably affecting such individual rights issues as free speech²⁰³ or abortion.²⁰⁴ But the question of comparability appears particularly difficult in determining the bearing of comparative constitutional experience on federalism issues as they arise before courts.

201. Professor Sunstein's article, for example, may assume that the analogies in legal reasoning are generally to other cases with binding value as precedent, so that "judgments about specific cases must be made consistent with one another" to achieve a "principled consistency" in result. Sunstein, *supra* note 199, at 746; *cf. supra* note 155 (noting that the obligation of consistency may apply only where the same responsible decisionmaking court is involved). But even when courts are not obligated to achieve a principled consistency with decisions of another court system (as is usually the case when the courts of one nation consider the constitutional decisions of another), analogical reasoning skills can be deployed to ask whether the foreign practice or decision has a close enough fit to be worth considering.

202. Let me be clear that lawyers' experience with analogical reasoning is by no means a complete answer to the problems of comparability in constitutional law. Nor, in a setting in which the lawyer is not constrained to try to reconcile disparate precedents into some mid-level degree of consistency, is analogical reasoning so readily justified as superior to other forms of reasoning. *Cf.* Sunstein, *supra* note 199, at 770 (assuming that analogical reasoning in law operates within constraints imposed by existing legal holdings and acceptance of *stare decisis*). And, to the extent that analogical reasoning in law depends on intuitions honed by deep familiarity with many cases and contexts, it may be a less acute tool in evaluating foreign material. But my claim here is only that practice in analogical reasoning (within the setting of a domestic system in which many "precedents" are "binding") helps develop skill in discerning arguable similarities and differences that also are necessary in evaluating the degree to which foreign (or other nonbinding) precedents have value in the decisional process.

203. For example, should the constitutionality of hate speech regulations be analyzed the same way in the United States as in Germany, in light of Germany's relatively recent experience with a regime committed to the systematic destruction of large segments of its own citizenry chosen on the basis of religion or ethnicity? *Cf. The Queen v. Keegstra* [1990] 3 S.C.R. 687, 738–43 (arguing first that U.S. free speech principles might permit punishment of hate speech but also that U.S. law was distinguishable because of Canada's distinctive commitments to multiculturalism).

204. For example, should the constitutionality of governmental limitations on women's decisions to terminate pregnancies be affected, at all, by the availability *vel non* of social support for pregnancy and child care by the state? *Cf. MARY ANN GLENDON, ABORTION AND DIVORCE LAW IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 18, 53–58 (1989) (discussing French social and financial support for mothers); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 211–12 (1992) (disagreeing with Glendon's approach but examining the role that social considerations play in abortion decisions).

D. Constitutional Federalism and the Limits of Comparison

Assume for the moment the utility of consulting foreign constitutional experience, including judicial decisions and reasoning, on questions of freedom of speech, freedom from torture, or freedom of religion—questions involving individual rights that widely are viewed as having some degree of universal character.²⁰⁵ The protection of such individual rights is widely seen as benefiting from judicial enforcement, and the vibrancy of the transnational constitutional exchange of ideas on such issues has been well noted.²⁰⁶ The question remains whether the benefits of considering foreign constitutional decisions on questions of individual rights being adjudicated under general commitments to human dignity, liberty, and equality extend to federalism questions. Or is comparative constitutional law less relevant—at least for lawyers and judges—in the adjudication of doctrinal questions of federalism than in the adjudication of individual rights issues?

I will suggest that comparative constitutional law may be of less help in interpreting constitutional terms that allocate power to one or another level of government than in understanding constitutional terms that secure certain individual rights.²⁰⁷ That the Supreme Court

205. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS*, at ix (1990) (describing human rights as “the idea of our time,” a political idea that has received “universal acceptance,” and discussing, *inter alia*, the Universal Declaration of Human Rights).

206. See, e.g., McCrudden, *supra* note 11, at 449.

207. It may be objected that the dividing line I suggest between structural provisions for federalism and individual rights provisions is either illusory or an inadequate basis for distinction as to the relevance of comparative constitutional law. Cf. Steven Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 756–90 (1995) (arguing for the equal importance of structural and rights provisions). While structural provisions may serve individual liberty by, *inter alia*, preventing tyranny, structural provisions do so less directly than rights provisions. And while comparative constitutional law can be helpful across issues of both structure and right in constitutional interpretation, foreign decisions and discussion of particular issues of allocation of government power are likely to be less transferable than, for example, decisions and discussion about the nature of freedom of conscience or freedom of expression. See *infra* note 208 and accompanying text (discussing Canadian “trade and commerce” power). There are reasons why “universal declarations” of human rights contain many specific individual rights, lists that are unmatched in their specificity, or in the consensus with which they are endorsed by the community of nations, by any comparable universal declarations as to federalism, subsidiarity, or other specific forms of governance (beyond commitments to free elections). See generally Universal Declaration of Human Rights, G.A. Res. 217(A)III, U.N. GAOR, 32 Sess., U.N. Doc. A/810 (1948) (delineating the rights of the people of all nations with regard to slavery, torture, equality, fair criminal process, freedom of movement, marriage and family, property ownership, freedom of thought and religion, freedom of opinion and assembly, work, rest, and adequate living standards); *id.* Art. 21 (establishing the right to “take part in the government of his country, directly or through freely chosen representatives” so that the “will of the people shall be the basis of the authority of government”); see also International Covenant on Civil and Political Rights, Mar. 23, 1976, 999

of Canada has construed the Canadian national government's power over "trade or commerce" quite narrowly (for example, not to extend to labeling requirements for products in a single industry) may have little bearing on the proper scope of the United States Congress's power to regulate "interstate and foreign commerce," in part because interpretation of the Canadian "trade and commerce" power has been influenced by the enumerated powers of the Canadian provinces over property and civil rights,²⁰⁸ an enumeration absent from the United States Constitution. If even similarly worded "federalism" provisions call for such different interpretations, the prospects for transnational understandings of particular federalism terms are thus quite limited. Other potential benefits of comparative constitutional study may also be more difficult to glean than in the individual rights context. Why?

First, federalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests. Each federal "bargain" is in important respects unique to the parties' situations, in contrast to constitutional provisions asserted to guarantee universal, or natural, or necessary rights of women and men as persons.²⁰⁹ Similar phrases or provisions concerning federalism may have different historical meanings in a particular polity, tied in different ways to the political compromises that are usually at the foundation of a federal union. Second, not only are federal systems agreed to as a compromise, but the compromise typically constitutes an interrelated "package" of arrangements.²¹⁰ No

U.N.T.S. 171, 173 (further specifying individual rights as well as the right of all peoples to "self-determination"). Although it has been argued that there is an emerging consensus on a "right to democratic governance," e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992), the fact that this proposition is even being debated suggests how far "universal" understandings are from agreement on more particular governmental structures such as those involved in federalism. The reasons for the relatively greater specificity about individual rights than about forms of governance may have to do with the inescapable ubiquity of human beings as a central concern of any system of governance, as compared to the variability of the particular forms of political and social organization addressed by constitutions.

208. PETER HOGG, CANADIAN CONSTITUTIONAL LAW §§ 15.9(b), 20.1, 20.3 (4th ed. 2000).

209. *Compare* Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 130 (D.N.J. 1938) ("[I]n nearly all modern legal systems we find a right (or liberty) of locomotion (movement) of free speech (and press) and of free assembly."), *modified and aff'd*, 101 F.2d 774 (3d Cir. 1939), *modified and aff'd*, 307 U.S. 496 (1939), with L'Heureux-Dubé, *supra* note 180, at 35 ("Decisions on federalism, which are necessarily focused on the particularities of the United States Constitution [have less influence than decisions] on principles that are more universal . . .").

210. This is not to deny that other aspects of constitutional law may be organized as systems of arrangements as well. Cf. THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (examining the legal foundations of the system of free expression in the United States).

one element of the package can be compared to a similar-seeming element in a different federal system without more broadly considering the comparability of the whole “package” and the role of the particular element within that federal package.²¹¹ With the current United States Supreme Court’s doctrinal emphasis on achieving a “balance” between federal and state power to support structural, nontextual rules limiting national power, it would seem both particularly important, and particularly difficult, to consider the entire package in evaluating any particular claim. To compare federalism issues, then, it might be necessary to compare not just decisions on a particular issue but also the entire interrelated structure of a foreign federal system—a task that is even more difficult, especially for judges and lawyers in adjudication.²¹²

Although particular constitutional terms and issues may, then, be too contingently located in a specific nation’s federalism for transnational understandings of those terms to emerge, detailed comparative study may permit identification of principles of governance, or of interpretations, of more general application. And there are ways in which judges’ interpretive understandings of U.S. federalism issues could benefit from looking to the constitutional experiences of other nations—including constitutional practices, judicial decisions on constitutional issues, and judicial reasoning about constitutional law.²¹³

But it is the bargained for, contingently dependent relationship of the elements of federal systems (or possibly of separation of powers arrangements) that seems distinctive from the possible development of systemic sets of principles, as sometimes emerge in the area of speech and associational rights. Cf. Roger Errera, *The Freedom of the Press: The United States, France and Other European Countries*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 63–70, 83–86 (Louis Henkin & Albert J. Rosenthal eds., 1990) (arguing that the United States has a constitutional system of freedom of expression in a way that France does not).

211. Note that the role of courts in enforcing the structures of federalism may be set up quite differently from one system to the next; a judicial review system that extends standing to a minority of subnational unit governments might be thought to invite more aggressive policing, on behalf of the subnational units, of the boundaries of power of the national government. See Art. 93(1)2 GG, translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (GERMANY), *supra* note 153, at 149 (extending the jurisdiction of the German federal constitutional court [*Bundesverfassungsgericht*] to challenges to constitutionality of federal or Land law brought by a Land government). Others may significantly limit governmental standing while incorporating other kinds of strong protections for subnational governments (such as equal suffrage for unequally sized units in the national legislature). While these are aspects of the package nature of federalism issues, they might be seen as particularly relevant to what courts do.

212. A key question is whether the systems are comparable: Have the federalisms formed to serve similar purposes? What is the package of structures that have been designed to secure federal goals?

213. For a discussion of these three categories of constitutional experiences, see *supra* notes 135–37 and accompanying text. Knowledge of other countries’ constitutional practices may be

While Professor Tushnet identifies several possible ways to understand comparative constitutional study,²¹⁴ I want to focus on a more diffuse, but nonetheless helpful category—the “stance” of reviewing courts to federalism-based claims about national power in the United States. Comparative study might have a moderating effect on U.S. federalism discussions. As Part I above has shown, predictions of dire consequences if the Court fails to limit national powers on behalf of the states have, from time to time, reached a fevered pitch.²¹⁵ A calmer, more moderate stance might ensue if judges were more aware of how broad the powers are that states in the United States continue to exercise, especially in the realm of taxation and finance, when compared to those of subnational units in other western federal democracies.²¹⁶ On the other hand, some argue that federalism in the United States is a nonfunctional vestige of the past that should influence neither statutory interpretation nor constitutional decisionmaking.²¹⁷ Such arguments, however, overlook the possible benefits of judicial doctrine that at least holds open the prospect of enforcing federalism-based limits against efforts dangerously to centralize power at the national level (perhaps not to be expected but theoretically possible). A knowledge that in Nazi Germany abolition of the self-governing capacities of the Länder was a prelude to the extermination of large parts of the population and that the German constitution now guarantees as unamendable that Germany will remain a federal state, might well be relevant, for example, should a claim arise

as important as knowledge of the reasoning and result of constitutional court decisions. This knowledge, for one thing, would illustrate the diversity of constitutional practices that have supported vibrant federal systems, and thus help form basic attitudes courts bring to the task of evaluating the constitutionality of their own countries’ legislation even if they are of less value in resolving specific interpretive problems. *But cf.* Fontana, *supra* note 188 (manuscript at 3 n.4) (suggesting that judges should focus on legal texts rather than entire systems).

214. Mark Tushnet, *supra* note 160, at 1269–1306 (discussing “functionalism,” “expressivism,” and “bricolage”). As noted above, Professor Tushnet argues that comparative constitutional law may help identify better ways of addressing common problems, including federalism problems. This “functional” approach, Tushnet explains, entails the assumption that constitutional systems face similar problems and have government entities that must perform similar functions, and that there may be doctrines in other constitutional systems that represent better accommodations. *Id.* at 1238. In an earlier article, I argue along functional lines that the Canadian doctrine of proportionality could play a role in U.S. constitutional law. Jackson, *supra* note 139, at 602–34. Below, in Section E of this Part, I discuss the German concept of *Bundestreue*.

215. See *supra* notes 50–53 and accompanying text.

216. See, e.g., Larsen, *supra* note 197, at 438; Paul Bernd Spahn & Wolfgang Föttinger, *Germany*, in *FISCAL FEDERALISM IN THEORY AND PRACTICE* 228–30 (Teresa Ter-Minassian ed., 1997) (describing the circumscribed authority of Länder governments over taxation).

217. See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 907–09 (1994).

that an emergency requires the national government to replace or take over state governments.²¹⁸ Having a sense of perspective born of greater knowledge of the ways in which federal governments are constituted, preserved, and succeed or fail elsewhere may be important to informing the fundamental attitude that judges bring to federalism problems.²¹⁹

Comparative constitutional study may bear on the Court's stance in reviewing federalism challenges to legislation in another way as well. Understanding foreign constitutional systems would entail knowledge of the procedures used to amend foreign constitutions, thus emphasizing how much more difficult it is to change the U.S. Constitution through formal amendment than to change the constitutions of many other countries, including such strongly federal nations as Germany.²²⁰ While judicial review is quite commonly described in

218. Cf. Gordon Hahn, *Putin's "Federal Revolution": The Administrative and Judicial Reform of Russian Federalism*, 10 E. EUR. CONST. REV. 1, 64 (2001) (describing how, in Russia, President Putin recently procured enactment of a law authorizing the removal from office of a governor of a republic who fails within six months to address constitutional violations in the republic).

219. For an example of how a judicial stance on structural separation of powers issues may be influenced by knowledge of developments elsewhere, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94 (1952) (Frankfurter, J., concurring):

It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

220. The German Basic Law prohibits amendments that “affect[] the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 [human dignity] and 20 [establishing the right to resist any person seeking to abolish the constitutional order].” Art. 79 ¶ 3 GG, *translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (GERMANY)*, *supra* note 153, at 139. Apart from such prohibited amendments, the Basic Law can be amended only by a law expressly modifying its text, which must be passed by two-thirds of the Members of the Bundestag (the popularly elected house) and two-thirds of the votes of the Bundesrat (which represents the Länder governments). Art. 79 ¶ 2 GG, *translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (GERMANY)*, *supra* note 153, at 139. The votes of the Länder in the Bundesrat are not determined on the basis of equality that prevails in the United States Senate, but bear some, though not exact, relation to the population size of the Land. *See* Art. 51 ¶ 2 GG, *translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (GERMANY)*, *supra* note 153, at 126 (each Land has at least three votes; Land with population over two million get four votes; over six million get five votes; and with over seven million get six votes). Altogether there are sixty-nine votes in the Bundesrat. *Stimmenverteilung*, Bundesrat, at <http://www.bundesrat.de/aktuell/Stimmen.html> (last visited Aug. 26, 2001) [hereinafter *Stimmenverteilung*] (on file with the *Duke Law Journal*). Together the seven smallest Länder have twenty-four votes in the Bundesrat, STATISCHES BUNDESAMT (FEDERAL STATISTICAL OFFICE), STATISCHES JAHRBUCH FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 45 tbl. 3.2 (2000) (on file with the *Duke Law Journal*); *Stimmenverteilung*, *supra*, which is the amount needed to block an amendment, *see* § 79 ¶ 2 GG, *translated in 7 CONSTITUTIONS OF*

the United States as “countermajoritarian,” the U.S. amendment process is in a sense also deeply “countermajoritarian” in the degree to which it allows small minorities of persons to prevent formal constitutional amendment.²²¹ Given this difficulty in the formal amendment process, some degree of evolutionary potential allowing for “play in the joints” probably has been necessary to allow this Constitution to continue to provide a framework for governance.²²² Awareness of the greater power of its own decisions to forestall majoritarian decision-making (relative to other constitutional courts) because of the unusual difficulty of formal amendment might lead the Court to re-evaluate the degree to which it defers to national legislative decisions

THE COUNTRIES OF THE WORLD (GERMANY), *supra* note 153, at 139. These seven Länder include 15.7% of the German population. STATISCHES BUNDESRAT, *supra*, at 45 tbl. 3.2.

In the United States, the smallest seventeen states (whose thirty-four votes in the Senate can block passage of a proposed amendment) represent 7.3% of the total U.S. population, while the smallest thirteen states (one more than one-fourth of the states, three-fourths of which must approve an amendment) contain only 4.5% of the total population. *Census 2000 PHC-T2. Ranking Tables for States: 1990 and 2000: Table 1: States Ranked by Population: 2000*, U.S. Census Bureau, at <http://www.census.gov/population/cen2000/phc-ts/tab01.pdf> (last visited Aug. 26, 2001) (on file with the *Duke Law Journal*).

Under Canada’s Constitution Act, 1982, different procedures for amendment apply to different kinds of changes; with respect to some changes particularly affecting the provinces, the consent of an affected province is required. *Compare* Constitution Act, 1982, pt. V, § 43 (Can.) (stating that no amendment that applies to less than all provinces, including alteration of their boundaries or use of English or French languages, can be made without authorization of the legislature of each affected province), *with* U.S. CONST. art. IV, § 3 (formation of a new state from parts of or through joinder of existing states requires the consent of the affected states’ legislatures), *and id.* art. V (“[N]o state, without its consent, shall be deprived of its equal Suffrage in the Senate.”). The default rule in Canada is that amendments require a resolution in the national parliament, approved by at least two-thirds of the provinces with at least one-half the population, Constitution Act, 1982, pt. V, § 38(1) (Can.); HOGG, *supra* note 208, § 4.3(a), a somewhat less rigorous rule than that of the United States, which requires the approval of three-fourths of the states, U.S. CONST. art. V.

221. *See supra* note 220. For an analysis of the disproportionalities in Congress resulting from the allocation of equal voting power to each state in the Senate, and the difficulties of using amendment to redress the problem, see generally Lynn Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923 (1997); Lynn Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997). *Cf.* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 410 (1998) (arguing in favor of popular referenda, repeated at two sequential presidential elections, to approve constitutional amendments). Ackerman presumably favors requiring repeat approvals over time rather than supermajority voting because the latter allows minorities too much power to block change. *Id.* (noting that under his proposed national referenda each citizen’s vote would have the same weight).

222. *See* John Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 272 & n.54 (2000) (noting the importance of the Constitution’s capacity for internal growth and change in constitutional law).

in its constitutional analyses where those decisions are challenged only on federalism grounds.²²³

So ultimately my claim for the benefit of comparative constitutional learning for judges, on federalism issues likely to come before them, is a modest one: more comparative knowledge can provide a broader and deeper perspective on the role of courts in enforcing federalism limits within federal systems. These perspectives in turn may affect the degree of scrutiny or deference judges bring to reviewing actions of the national legislature. But I also would urge that there is some harm from ignorance. It is no longer possible to function in the world, as lawyers or as courts, without some knowledge of how other constitutional systems operate.²²⁴ We have, or think we have, knowledge of how other systems operate. This knowledge influences thinking about our own system in ways that we may not, but should attempt to, recognize.²²⁵ Claims about the distinctiveness of the

223. The countermajoritarian character of the amending process is relevant to the Court's stance on any constitutional question for which its ruling is treated as final (i.e., not dormant Commerce Clause cases), since the difficulty of amending applies to any such decision. But the observation has special force in federalism cases because, although I do not agree that federalism claims should be unreviewable, I do agree with Professor Wechsler's observation that there is less need for judicial policing of Congress's work on federalism grounds given the representative structure of the Congress as including persons elected from geographic districts defined by and within the boundaries of each state. See Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 559 (1954); see also William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 613–16 (1975) (invoking Wechsler's argument in support of *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). For an argument that the Framers assigned no significant role to the courts in enforcing federalism limits on national power and that political parties function across state and federal lines to protect state interests, see generally Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). Professor Baker has powerfully argued, see *supra* note 221, and argues again in this conference with Professor Young, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117–21 (2001), that distortions in representation in the national political process are likely to produce undesirable national legislation because representatives from the overrepresented (smaller) states can and will externalize costs to the underrepresented (larger) states and that overall welfare would be improved by allowing different states to reach different decisions on morally contentious problems. But I am unconvinced either (1) that more aggressive judicial review of national legislation on federalism grounds will effectively target less desirable as opposed to more desirable legislation or (2) that the divisiveness of an issue seen as one of morality correlates in a constitutionally coherent way with a plausible fixed boundary between national and state legislative competence.

224. In contrast to the first 150 years of decisions by the Supreme Court, when there were very few other nations with written constitutions subject to judicial enforcement by courts whose decisions were available in and reported in English, there are now many such systems.

225. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 172–73, 176 (1921) (suggesting that a spirit of self-searching can help judges render judgment free from “unconscious prejudices”); JEROME FRANK, *LAW AND THE MODERN MIND* 114, 362 (6th ed. 1949) (arguing that stimulating judges to attain greater awareness of the factors that influence their judgments will enable “sound intelligence to play a larger part in the process of judging”).

United States's system, moreover, have again become important in the narrative of the Court. Claims of distinctiveness always imply an "other" with which implicit comparison is invited. Given the inevitability of these implicit comparisons, decisionmakers should try to assure themselves that their sense of what makes the United States unique, or of what it shares with other "civilized" governments, is accurate—regardless of whether other systems or other courts' decisions are cited. Incorrectly assuming that there is a single answer to structural problems that instead may have several useable approaches diminishes the quality of decisionmaking.

E. U.S. Federalism, Judicial Review of Federal Laws and Bundestreue

Recent doctrinal ferment over federalism in the United States underscores the importance of understanding divergent approaches to assuring the vibrancy of a federal nation. As I hope briefly to illustrate, revisiting our own constitutional traditions, as well as understanding those of other federal nations, can illuminate alternative approaches that may be better suited to judicial enforcement than much of the Court's current approach.

By way of background, I should say that, in contrast to some other contributors to this symposium,²²⁶ I believe that the continued vibrancy of state governments in U.S. federalism rests primarily on the political structures created or recognized by the Constitution—voting for national office by districts that do not cross state boundaries; regular elections at different intervals for the House, the Senate, and the Presidency, selecting officeholders who exercise federal lawmaking and executive powers; independent state elections of state government officials; and fixed state boundaries. History demonstrates that the national political process can work in two directions—to consolidate national power and to devolve power to the states. The more rapid growth in state and local government employment relative to federal employment in recent decades counsels skepticism of claims that the federal government is squeezing out state and local governments from innovation and ac-

226. See Baker & Young, *supra* note 223, at 106–33 (arguing that political safeguards do not sufficiently protect states' rights); see also Ann Althouse, *Why Talking About "States' Rights" Cannot Avoid the Need for Normative Federalism Analysis: A Response to Professors Baker and Young*, 51 DUKE L.J. 363, 370–73 (2001) (arguing that few "seriously believe" that political checks safeguard federalism, but urging that the question of whether states would use increased autonomy to good ends remains to be answered).

tivism.²²⁷ Political processes grounded in constitutional structure have worked in important respects to balance and give expression to the interests of the states and the people of the states in the national legislature.²²⁸ Moreover, the Court's record of activism on behalf of the states as against national power is neither impressive nor durable. While it is easy to mock "congressional federalism,"²²⁹ it is also easy to forget the untenable positions in which the Court has placed itself in the past when it has resisted reasoned exercises of national power on behalf of the states.²³⁰ Federal systems, moreover, reveal a wide variation in the amount and nature of lawmaking authority reserved to subnational units,²³¹ adding to the difficulty of attempting to define, without a textual anchor (apart from the "tautological" provisions of

227. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 487-88 (1997) (arguing that state governmental powers were expanded by New Deal doctrine at the same time as federal government powers expanded); Vicki C. Jackson, Couer d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENT. 301, 303 n.12 (1998) (detailing a greater absolute and percentage increase in state government employment than in federal government employment between 1972 and the 1990s).

228. State governments sometimes receive treatment under federal statutes that is comparable to the treatment afforded to the federal government by the same statutes. Such statutes may provide exemptions or immunities in ways that suggest that the national political process is attentive to the position of the states as constitutionally guaranteed governments. For example, even before the overtime amendments to the Fair Labor Standards Act (FLSA) that were prompted by responses to *Garcia*, the FLSA contained exemptions for certain positions in state government roughly analogous to exemptions for certain federal employees. *Compare, e.g.*, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 55, 59 (1974) (defining which employees of the federal government are covered so as to exclude certain employees of Congress, and the federal courts [that is, those not in a "unit . . . which has positions in the competitive service"], or in the Office of the President [that is, those not in an "executive agency" as defined by 5 U.S.C. § 105]), *with id.* (defining covered employees of state or local governments to exclude persons not subject to state civil service laws and holding public elective office, or selected by an elected official as a member of his staff or appointed to serve the officeholder on a policymaking level, a definition excluding, for example, most state court judges). *See also* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(5), 11, 86 Stat. 103, 103, 111 (1972) (amending Title VII to extend its application to certain federal and state employees but specifically excluding certain government employees both in state legislatures and the Congress).

229. For an early use of the term "congressional federalism," see *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting).

230. *See, e.g., supra* note 4 (noting *Knight's* distinction between manufacturing and commerce, a distinction since abandoned).

231. *Compare, e.g., United States v. Lopez*, 514 U.S. 549, 564 (implying that family law and crime are for the states and not the federal government to regulate), *with* Constitution Act, 1867, § 91 (Can.) (enumerating criminal law and laws relating to marriage and divorce as powers of the national government in Canada); Art. 74 Nrs. 1, 2, 18, 26 GG, *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (GERMANY), *supra* note 153, at 134-36 & 9 (Supp. 1995) (establishing concurrent jurisdiction in Germany over the registration of births, deaths and marriages, over real property transactions, and over artificial insemination of humans).

the Tenth Amendment), particular substantive areas that are categorically outside federal power in the United States.

Although these and other factors favor a deferential judicial stance toward review of national legislation challenged on federalism grounds, the Court's simply renouncing the field also would pose dangers.²³² First, states are not just like private businesses in the constitutional scheme. They are required to exist; their existence is necessary for each change in the composition of the federal government every two years, and there is thus a constitutional interest in assuring that states are not destroyed, eliminated, or prevented from functioning by, for example, bankruptcy. Second, states not only are assumed to exist, but are assumed to exist in particular form, exercising legislative, executive, and judicial powers. These constitutional guideposts are clear and should be judicially enforceable if national action were to threaten the existence of these functions—which, given the political process, it is unlikely to do. Judicial renunciation of continued review of federalism cases, moreover, is likely to be destabilizing; telling any political body that its power vis-à-vis another political body is legally unchecked is not conducive to responsible action. Additionally, eliminating the possibility of judicial review heightens the stakes for loser states in the national political process.

To what, then, can we look to help better define the judicial role in responding to federalism-based challenges to national power? I offer two suggestions: first, to reconsider what is available within our own constitutional traditions to preserve Congress's legitimate use of national power while affording appropriate protection to the continuing status of the states in the federal union; and second, to understand more about U.S. federalism by learning from the experiences of other federal nations.

For reasons well rehearsed in the literature, there are many political pressures in Congress that can submerge state interests. Clear statement rules, presumptions against intrusion on traditional areas of state authority, and the like, however, can be useful mechanisms to assure that the theory of legislative deliberation of state interests in Congress has some chance to work, without imposing rigid judicial barriers to evolving understandings of what is "truly national."²³³ In

232. For a more extended discussion, see Jackson, *supra* note 9, at 2223–28 (discussing the rule of law and cued deliberation).

233. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."); see LEVI, *supra* note 200, at 41–72 (arguing that constitutional interpretation will have less consistency than statutory or

addition, the anticommandering rule's exception for "generally applicable" laws that can constitutionally apply to the states²³⁴ has the procedural effect of linking states' interest in avoiding burdensome federal legislation with that of private entities, a device that enhances the likelihood that undue burdens on states in federal legislation will be ironed out in the legislative process. I have elsewhere suggested that a law that is "generally applicable" to private entities and states might still make it too difficult for some states to sustain their uniquely governmental constitutional functions, and that further protection of state interests arises where the law in question is extended to the federal, as well as state governments (or there are legitimate reasons Congress considered for different treatment of state and federal governments).²³⁵ A presumption in favor of the constitutionality (as against federalism challenges) of federal statutes that are generally applicable not only to private entities but also to the federal as well as state governments, would be a mechanism to yoke the federal government's self-interest as a government to the preservation of the states as governments.²³⁶

common law development because the meanings of the Constitution's ambiguous words necessarily change in response to what the "community" comes to accept); *see also* Judith Resnik, *Categorical Federalism*, 111 YALE L.J. (forthcoming Dec. 2001) (manuscript at 5, on file with the *Duke Law Journal*) (arguing that the Court's effort categorically to declare family and gender matters solely of state concern is inconsistent with the development of federal law in many areas).

234. *See Reno v. Condon*, 528 U.S. 141, 151 (2000) (rejecting a constitutional challenge to a federal law requiring states to take measures to protect the privacy of driver's license information because the law did not require the state to regulate third parties and was one of general application, and thus outside the scope of the anticommandering rule); *New York v. United States*, 505 U.S. 144, 160 (1992) (distinguishing *Garcia* as involving a law of general applicability).

235. *See Vicki C. Jackson, Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 1006-09 (2000); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 732-38 (2000). Where Congress subjects states to a remedy from which it exempts itself, it might be appropriate for the Court to at least consider whether the reasons for exempting the federal government also might be applicable to the states in evaluating whether the law threatens performance of the states' constitutional functions. The debate between majority and dissent in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), over whether the Patent Act's remedies as against the federal government were or were not similar to those as against the states, *id.* at 648 n.11; *id.* at 663 & n.15 (Stevens, J., dissenting), can be understood in these terms.

236. Such an inquiry also might be one that courts can manage, at least in its initial stages, more readily than evaluating the effects of legislation in particular subject areas on a federal-state "balance" that consists of many elements. *See supra* notes 71, 209-12 and accompanying text. Yet my suggested approach also would raise a number of questions that may not be easy to answer. What counts as comparable treatment (e.g., are administrative penalties against a federal agency similar to judicial penalties against a state)? What is a good reason for different

Consider the bearing, now, of what might be viewed as an indigenously American analogue to the German constitutional doctrine of *Bundestreue*, a notion of “pro-federal” loyalty or comity.²³⁷ In 1870, the United States Supreme Court in *Collector v. Day*²³⁸ held unconstitutional the application of a federal tax to the salaries of state officials, a decision not reversed until well into the twentieth century.²³⁹ In his dissent to *Collector v. Day*, Justice Bradley argued that the federal government “has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers.”²⁴⁰ His reasoning focused on the fact that the federal government acted for all and that officials of the states also were United States citizens. But his linkage of federal power to tax a state’s officers to its power to tax its own officers is of note. It resonates with the Court’s reservation in *McCulloch v. Maryland* of the question whether its decision, prohibiting a state from directing a tax against the National Bank, would “extend to a tax paid by the real property of the bank, in common with the other real property within the state.”²⁴¹

What these statements suggest is the value of judicial focus on whether state or national regulations or taxes discriminate against the other level of government.²⁴² This antidiscrimination principle would require a close look at burdens imposed by the federal government on states but not on the federal government’s own comparable activi-

treatment of federal as opposed to state governments that could mitigate concern over the adverse effects on state governments of laws from which the federal government is exempt? How, in the presence of differential treatment of federal and state governments, should the Court evaluate states’ constitutional objections to federal requirements? These and other questions might in the end prove this proposal too uncertain a tool. For a critique along these lines, see Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1340 n.35 (2001).

237. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 71 (2d ed. 1997) (translating Television I, 12 BverfG 205 (1961)). For helpful general discussions of the concept of *Bundestreue*, see DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 77–80 (1994) (defining *Bundestreue* as “a duty of fidelity to the principle of federalism,” a “constitutional analog of the general civil-law duty of an obligator to act in good faith”); KOMMERS, *supra*, at 69–75 (defining *Bundestreue* as a “principle of federal comity”); see also *infra* notes 244–47 and accompanying text.

238. 78 U.S. (11 Wall.) 113 (1870).

239. *Graves v. New York*, 306 U.S. 466, 486 (1939).

240. 78 U.S. at 128 (Bradley, J., dissenting)

241. 17 U.S. (4 Wheat.) 316, 436 (1819).

242. An antidiscrimination rule is well developed in the case law on state taxation of federal activities or employees. See, e.g., *Jefferson County v. Acker*, 527 U.S. 423, 427 (1999) (upholding the imposition of a county tax on the income of federal judges where, inter alia, the tax also applied to state and county judges); *Davis v. Michigan*, 489 U.S. 803, 817 (1989) (holding unconstitutional a state law distinguishing between federal and state government sources of retirement income in providing exemptions from state income tax).

ties. This principle, however, would accord substantial deference to national legislation that is evenhanded in how it falls on the activities of constitutional sovereigns. An “antidiscrimination” presumption would help prevent the national government from directing laws at the states in a fashion designed to hobble them, competitively, vis-à-vis the federal government, and may be more likely to assure that the political process has given attention to whether the federal rule is compatible with the exercise of state sovereign functions.²⁴³ It also might usefully screen out action by either level of government that is motivated by hostility or indifference to the constitutional position of the other.

Now let us return to the German concept of *Bundestreue*. As Professor Donald Kommers translates *Bundestreue*, it is a “principle of federal comity . . . which obligates federal and state governments to consider each other’s interests in exercising their authority.”²⁴⁴ This concept of “pro-federal comity” imposes obligations that run in three directions—from central government to the subnational governments; from the subnational governments to the central government; and presumably among the subnational governments. *Bundestreue* was treated as requiring a cooperative spirit of consultation in the *Television Cases*, which, Kommers describes, grew out of an effort by the German federal government to create a television station in competition with a television station that was controlled by the governments of the Länder.²⁴⁵ The federal government was found to have “violated the obligation to act profederally” when it failed appropriately to consult with the Länder concerning the plan it had drafted.²⁴⁶ The

243. This principle will not remedy the problem that Baker and Young identify of some states seeking to impose preferences about morally contentious issues on other states through national legislation. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1940 (1995); Baker & Young, *supra* note 223, at 117–24. Query, though, how the Court’s current doctrine of *Lopez* and *Morrison* would distinguish between those national statutes that Baker and Young condemn from those they would permit. And query how the Court would use the Commerce Clause doctrines to determine what issues are “morally contentious” but outside federal power from those that are “morally contentious” but within federal power. Compare *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1917) (holding unconstitutional a prohibition on the interstate shipment of goods made by children), with *United States v. Darby*, 312 U.S. 100, 117 (1941) (overruling *Hammer*).

244. KOMMERS, *supra* note 237, at 69.

245. *Id.* at 69–70.

246. *Id.* at 74–75. It is not entirely clear that *Bundestreue* was necessarily dispositive in this case. The Chancellor promulgated a regulation by decree without consulting fully with all of the Länder. *Id.* at 70, 73. Notwithstanding a specific constitutional grant of power to the federal government over “postal and telecommunication services,” the Court treated the reservation to the Länder of power over “cultural affairs” as a constraint on national power. *Id.* at 70–71. On

Court specifically held that the principle of pro-federal behavior “governs the procedure and style of the negotiations required in constitutional life between the federation and its members.”²⁴⁷

Is the idea of pro-federal loyalty relevant to the United States? First, as Mark Tushnet has also noted, Justice Cardozo’s famous assertion that “the peoples of the several states must sink or swim together” in explanation of the dormant Commerce Clause “resonates with the idea of *Bundestreue*.”²⁴⁸ Moreover, concerns similar to those expressed in the German cases on *Bundestreue* support the “clear statement” rules the United States Supreme Court has developed for interpreting federal legislation particularly affecting state interests.²⁴⁹ Such rules provide notice to states that their interests may be affected and thus afford opportunities for states to articulate concerns or objections in efforts to influence the national political process. In this respect, moreover, clear statement rules generate the possibilities for advance consultations with states that in Canada and Germany are considered an important feature of the constitutional process.²⁵⁰

On the other hand, to require the consultative aspects of *Bundestreue* (or of “executive federalism” as it has been practiced in Canada through regular meetings of ministers of the provinces)²⁵¹ would be less workable in the United States. Not only are there a far greater number of states with which to consult, but the persistence of the “separation of powers” model of organization at the state level means that—in contrast to parliamentary-type systems—state executives

this basis alone the case could seemingly have been decided. In a later case described by Kommers, the German Constitutional Court held that it violated *Bundestreue* for a Land government to allow a locality to conduct referenda on atomic weapons, a subject committed to the central government. *Id.* at 77–78. More recently, in 1995, Kommers reports, the Court upheld European Community regulations to which the federal government had agreed but found a violation of the principle of comity in the failure to consult with the states. *Id.* at 74–75.

247. *Id.* at 72.

248. Mark Tushnet, *What Then Is the American?*, 38 ARIZ. L. REV. 873, 880 (1996) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). For a possibly related suggestion that unanimity of state agreement should be relevant to the constitutionality of federal action, see Justice White’s dissent in *New York v. United States*, 505 U.S. 144, 196 (1992) (White, J., dissenting).

249. See Tushnet, *supra* note 248, at 880.

250. For a thoughtful discussion of the constitutional obligation of the national and provincial governments to negotiate in the event of a referendum vote favoring secession in Quebec, see Reference re the Secession of Quebec, [1998] 2. S.C.R. 217, 265–96.

251. See DANIEL J. ELAZAR, *FEDERAL SYSTEMS OF THE WORLD* 50 (2d ed. 1994); HOGG, *supra* note 208, § 5.8.

with whom consultations might most easily occur cannot necessarily commit their states to particular policies.²⁵²

The concept of *Bundestreue* may be linked to the antidiscrimination principle suggested in *McCulloch* and *Davis v. Michigan* (with respect to state behavior toward the national government) and which Justice Bradley may have been intuiting in his dissent in *Collector v. Day* with respect to federal treatment of the states, as well as to the Court's occasional references to the application (*vel non*) to federal activities of national laws challenged on federalism grounds.²⁵³ States cannot act in a manner hostile to federal interests, though states might be able to extend generally applicable laws to federal interests. Rather than relying on broad, atextual principles of state immunity,²⁵⁴ a presumption that remedial schemes (under otherwise valid, generally applicable federal laws that extend to activities engaged in by states) are permissible, provided that they fall evenhandedly on comparable federal activities, would help assure that federal legislation is not motivated by hostility or indifference to the states' governmental interests and thus would be consistent with the duties owed by the governing parts of a federal system to the whole. Whether this suggestion could contribute to useable doctrine today is a question I continue to think is worth asking.

CONCLUSION

The United States Supreme Court has manifested concern about its own role, its own precedents, and the respect due them. What this bodes for federalism doctrine and for the Court's openness to comparative constitutional learning, however, is no easy matter to predict. For scholars and critics of the Court, comparative constitutional experience reveals the importance of a sense of shared endeavor and the danger of establishing permanent enemies within the polity, as opposed to "opposition" that can hope to triumph in the next election or in the next case.

252. See HOGG, *supra* note 208, § 5.8.

253. See *Florida Prepaid*, 527 U.S. at 648 n.11 ("[C]ontrary to the dissent's intimation, . . . the Patent Remedy Act does not put states in the same position as the United States."); *id.* at 663 (Stevens, J., dissenting) (arguing that the Patent Remedy Act puts states in "in virtually the same posture as the United States"); *South Carolina v. Baker*, 485 U.S. 505, 510, 526–27 (1988) (noting, in rejecting a constitutional challenge to federal conditions on tax-free bond interest as applied to state-issued bonds, that the same requirements extended to "bonds issued by the United States," as well as bonds issued by private corporations).

254. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999).

One function of constitutions is to create space for interpretive contest, in which dissent plays an important role, and which hold open to “losers” of constitutional contests the possibility of a win at some future time. Dissenters should not be regarded as enemies. Federalism in the United States never died, and thus its revival, though important, is not as dramatic a departure as some would have it. Comparative constitutional study, though of limited use in resolving specific federalism issues, may be of substantial value in providing a more balanced framework and perspective for evaluating as well as in suggesting interpretive approaches that may be helpful in resolving constitutional problems in the United States.²⁵⁵

255. For another possible example, see Jackson, *supra* note 6, at 1299–1301 (discussing a Canadian court’s reliance on the gender-equality provisions of the later-enacted Canadian Charter of Rights and Freedoms to explain the need for a generous interpretation of the federal “criminal law power” in resolving a federalism challenge to a national gun registration law).