

## BOOK REVIEW

### THE DISINTEGRATING CONSTITUTION: THE PROGRESSIVE CREDO OF A SITTING JUSTICE OF THE U.S. SUPREME COURT

THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW  
GLOBAL REALITIES. By Justice Stephen Breyer.  
New York: Alfred A. Knopf. 2015. Pp. 361.

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Justice Stephen Breyer's latest book, like his previous literary efforts, falls within the mainstream of progressive statutory and constitutional interpretation. He furthers this agenda while at the same time assuring his readers that he is merely giving a neutral survey<sup>1</sup> of the problems courts face when dealing with an ever smaller and interdependent world. Interdependence with the rest of the world is one of the primary themes of the book, and Breyer wants to "explain just what that abstract term means concretely for the work of one American institution, the Supreme Court."<sup>2</sup>

In order to understand the full implications of Breyer's argument in *The Court and the World*, one must first understand the argument in his earlier book, *Active Liberty: Interpreting Our Democratic Constitution*<sup>3</sup>. In *Active Liberty*, Breyer argues that the liberty that the Founders were protecting was an ancient one—not just the concept of being left alone by the government, but a system in which all citizens have the right to active participation.<sup>4</sup> The idea of a citizen being left alone by his government is a modern theory that included freedom from government,<sup>5</sup> but it means much more. It was the "freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation's public acts."<sup>6</sup> Breyer's emphasis is the former—

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<sup>1</sup> STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 281 (2015) [hereinafter *THE COURT AND THE WORLD*].

<sup>2</sup> *Id.* at 4.

<sup>3</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) [hereinafter *ACTIVE LIBERTY*].

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 4–5.

<sup>6</sup> *Id.* at 3.

ancient liberty—active democratic participation by citizens. Breyer states: “My thesis is that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.”<sup>7</sup> Breyer makes this sound like a positive interpretive perspective—power to the people, but his explanation takes this power back from the people and deposits it in the Court. He writes: “[T]he Constitution’s democratic objective [is] not simply restraint on judicial power . . . , but also a source of *judicial authority and an interpretive aid* to more effective protection of ancient and modern liberty alike.”<sup>8</sup>

Breyer is asserting that in order to protect liberty rights, the Court has the authority to define the Constitution with democratic objectivity, (i.e., what best protects democracy, even if it goes beyond the natural boundaries of the text). For Breyer, the boundaries that inhibit the Court are not textual, but the Court’s authority to protect democracy, which as it regularly turns out, is limitless. This Breyer calls the “democratic objective”<sup>9</sup> of the Constitution. In fact, the entire thesis of *Active Liberty* is the “Constitution’s democratic objective.”<sup>10</sup> He supports this thesis in the main body of the book by “examples [that] suggest that increased emphasis upon that [democratic] objective by judges when they interpret a legal text will yield better law—law that helps a community of individuals democratically find practical solutions to important social problems.”<sup>11</sup> Sounds positive, but what does this mean and what should the Court’s methodology be to reach that objective? Breyer’s answer—a judge must consider “practical consequences, that is, consequences valued in terms of constitutional purposes, when the interpretation of constitutional language is at issue.”<sup>12</sup> It’s the consequences, not the text, that should be primary in a judge’s consideration. The text must bend to the desired outcome.<sup>13</sup> This is active liberty. A more appropriate title for this book would be “Active Judiciary.”

The thesis of *Active Liberty* must be considered when evaluating *The Court and the World*. Using Breyer’s thesis, the Court has no obligation to apply a hermeneutic that accurately interprets the texts, but must

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<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 6 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> ACTIVE LIBERTY, *supra* note 3, at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See James M Boland, *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of a Shifting Supreme Court Majority*, 36 CUMB. L. REV. 245, 259 (2005–2006) (quoting Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609–10 (1908). “The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the *adjustment of principles and doctrines to the human conditions* they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.” *Id.* (emphasis added).

actively search for practical outcomes that further the Court's understanding of active liberty, which according to Breyer, is the democratic objective of the Constitution. This is not accurate. Facially, it sounds like a principle that Americans would support. "Democratic" sounds so American. It evinces the same feelings as one gets when thinking about the brilliance of the Founders, but the Constitution they wrote is not democratic. It is republican. Dan Himmelfarb writes in the *Yale Law Journal*:

[T]he Framers of the Constitution had to choose a *form* of government. *The Federalist* explains why republican government is the preferred form. "Republics"—that is, governments "in which the scheme of representation takes place"—are superior to "pure democracies," because the latter are susceptible to the dangers of faction, and thus "have ever been found incompatible with personal security." A "pure democracy" is rejected because of its deficiencies regarding the protection of rights.<sup>14</sup>

Thus the Framers did not have the same goal as Breyer implies, but in fact were attempting to write a Constitution that was not democratic because they feared the tyranny of the majority. Breyer uses "democratic objective" as the foundational principle on which Constitutional hermeneutics are built. But this premise presumes an evolving constitutional hermeneutic in which the Justices must always be informed of the latest societal legal trend, and bring the Constitution in line to support it. This active liberty method lays waste the goal of democratic liberty by taking power from the people and instilling it in the Court. There is no role for Congress within the active liberty principle or in the democratic objective for which Breyer argues. *Active Liberty* does not add anything new to American jurisprudence. Rather it appears to be Breyer's inchoate attempts to lay, *ex post facto*, a philosophical foundation for the "evolving" Constitution interpretive method. He then gives this a global context in *The Court and the World*. One can only make sense of the argument in *The Court and the World* if the deeply buried premise first found in *Active Liberty* is understood by the reader. This evolving Constitution interpretive method based on ends not means is controversial even when interpreting American law by an American court. But here Breyer enters into the even more controversial global arena of finding a "practical" outcome (rather than a legal one), by applying foreign legal principles to American jurisprudence. Breyer presents himself as a neutral abitur who is merely educating us to new aids and principles for

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<sup>14</sup> Dan Himmelfarb, Note, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 *Yale L. J.* 169, 179–80 (1990).

use in American courts as they interpret the Constitution and statutes. He asserts that, “[t]his book merely surveys what is for many an unfamiliar and still-changing legal landscape, in the hope of raising awareness and stimulating further discussion.”<sup>15</sup> But his further assertion that, “[this] discussion, in turn, will help us to revise concepts, practices, and institutions as necessary”<sup>16</sup> seems to preclude a conclusion that his “democratic objective” methodology is flawed, and assumes that the Constitution needs only to be revised, not merely interpreted by the Court.

In simple terms, Breyer is arguing a hidden premise (i.e., that the Founders’ Constitution is not up to the task of protecting liberty rights in the modern world and the Court must make up for its deficiencies). Breyer assumes that this is a legitimate Constitutional interpretive method and apparently does not even feel the need to address what ought to be a conundrum for his argument—revision, if necessary, was provided for in Article V of the Constitution.<sup>17</sup> In fact his claim that the basic constitutional values are active liberty and that a democratic objective is its goal, is the *sina qua non* of the argument for the legitimacy of infusing global values into American jurisprudence. He writes: “By engaging the world and the borderless challenges it presents, we can promote adherence to and the adoption of those basic constitutional and legal values for which the Court and Constitution stand . . . . Cross-referencing [of American with foreign law] is more likely to advance those values than to undermine them.”<sup>18</sup> This is a conclusion without a foundation. John Dewey, an academic philosopher, educational reformer and head of the philosophy department at the University of Chicago from 1894–1904,<sup>19</sup> admitted that Sociological Jurisprudence (a consequence based hermeneutic) is inconsistent with the classical syllogistic methodology—major premise, minor premise, and conclusion. Dewey openly stated: “As a matter of actual fact, we generally begin with some vague anticipation of a conclusion . . . and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions.”<sup>20</sup> This is Breyer’s method—desire a conclusion and work the syllogism backwards with principles to reach the already-decided upon conclusion. Breyer now wants to add foreign law and principles to fill this backward syllogism.

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<sup>15</sup> THE COURT AND THE WORLD, *supra* note 1, at 281.

<sup>16</sup> *Id.*

<sup>17</sup> U.S. CONST. art. V.

<sup>18</sup> THE COURT AND THE WORLD, *supra* note 1, at 246.

<sup>19</sup> *John Dewey Biography*, BIO., <http://www.biography.com/people/john-dewey-9273497> (last visited April 21, 2016).

<sup>20</sup> John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23 (1924) (emphasis added).

Having examined the context in which Breyers constitutional world functions, the substance of the book must be addressed, even though the substance is not the main point. In fact, most of the book is non-controversial. Part I exams the constitutional breadth of the President's power in the context of national security.<sup>21</sup> Part II discusses the foreign reach of American statutory law.<sup>22</sup> Again, this is non-controversial. Breyer uses the example of regulating international commerce.<sup>23</sup> If American law and foreign law conflict over an international commerce law, it would be foolish not to examine foreign law to harmonize the two and attempt to keep the flow of international commerce smooth. Not examining foreign law when there is a conflict would be analogous to neighboring landowners solving a property line dispute without examining both deeds. Does anyone argue that considering foreign law when there is a conflict with U.S. law is controversial? No.

Part III is mostly non-controversial—the interpretation of treaties to which the United States is a signatory, and harmonizing a U.S. statute that reaches beyond our borders.<sup>24</sup> These, by their very nature, involve interaction with foreign treaties and laws that must be considered in order to determine correctly the manner in which to apply a U.S. text in light of the foreign law. Thus Court involvement in this situation is quite logical.

The controversial aspects of this book begin in chapter 10, the last section of Part III.<sup>25</sup> The chapter is entitled, “*Postscript: Home Alone, A Political Discussion,*” and in it, Breyer finally gets to the point. He has just presented relatively non-controversial examples in chapters 1–9 and then uses them as a context to discuss the issue on which he knows he will get resistance. He writes:

These cases seem to me the right context in which to consider an argument frequently made when the very idea of foreign law as an influence on American courts raises its head. It is an argument I have deferred considering until now, since it is too often made without much context in our political discourse and even in Court opinions. It concerns the practice of “cross-referencing” foreign cases—that is, referring in opinions to the decisions of foreign courts.<sup>26</sup>

Breyer has set up this argument with a false comparison, and he as much as admits it. He states that, “[a]lthough this argument [against cross-referencing] has seemed to occupy the foreground in political

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<sup>21</sup> See THE COURT AND THE WORLD, *supra* note 1, at 9–45.

<sup>22</sup> See *id.* at 89–134.

<sup>23</sup> *Id.* at 91.

<sup>24</sup> See *id.* at 165–246.

<sup>25</sup> See *id.* at 236.

<sup>26</sup> *Id.*

discussions . . . it turns out to prove relevant to only a small part of that role, and one that cannot but recede set against the examples discussed elsewhere in this book.”<sup>27</sup> However, the examples in chapters 1-9 are not analogous to the arguments for “cross-referencing foreign law” that he makes in chapter 10. Yet Breyer asserts that the former examples legitimize the latter when in fact the cross-referencing foreign law argument is a fallacious leap in logic to which he has given no foundation, his protestation notwithstanding.

Breyer continues his argument with a statement that upon first reading appears to support an anti-cross-referencing hermeneutic. Breyer states: “To understand the controversy, one must keep in mind the fact that the *Supreme Court of the United States is a domestic court, not an international court*. Its job is to interpret and apply the Constitution, federal statutes and sometimes treaties.”<sup>28</sup> So far so good. Breyer reminds us that the job of U.S. courts is to apply U.S. law. This should be the end of the story, but for Breyer, it’s an intellectual set-up. He repeats the basic arguments of chapters 1-9. The world has shrunk since the founding, and this “has made it necessary for the Court ever more frequently to consider matters of international law and the laws of other nations.”<sup>29</sup> This statement is absolutely on point when applying U.S. laws that are in conflict with foreign or international laws. In these cases, U.S. judges must know the relevant foreign law. But this does not make Breyer’s point. He is arguing that foreign laws and even foreign societal practices, should be considered when interpreting U.S. laws that have nothing to do with foreign laws or traditions. That leap in logic simply cannot be made no matter how many non-analogous examples Breyer cites.

Breyer’s principle argument for resorting to foreign law seems to be, “why not, I might learn something from it.”<sup>30</sup> Breyer writes:

[I]f someone with a job roughly like my own, facing a legal problem roughly like the one confronting me, interpreting a document that resembles the one I look to, has written a legal opinion about a similar matter, why not read what that judge has said? I might learn from it, whether or not I end up agreeing with it.<sup>31</sup>

Then Breyer supports this comparative exercise with situations in which the Court learned something from U.S. lower court judges.<sup>32</sup> The simple refutation of this analogy is that the lower court judges are

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.* at 237.

<sup>30</sup> *Id.* at 240.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

operating within the same system as the Supreme Court Justices, and thus are grappling with the same issue in the same legal context. “Other” sources may be, and probably are, working within a system that does not look to the principles of the U.S. founding. The difference is a deal-breaker for Breyer’s cross-referencing hermeneutic and places it in the illegitimate category. Breyer waves off critics of the cross-referencing methodology by stating that “those who hold a negative view of cross-referencing at best overstate their concerns.”<sup>33</sup> Then he states: “There is little reason to think that [cross-referencing] will, for better or worse, lead to the emergence of a Kantian universal law—a single rule of law for the whole world.”<sup>34</sup> Who is making that argument? Breyer doesn’t say; however, the most salient objection to cross-referencing is not the fear of the emergence of a Kantian universal law, but the undermining of the principles embodied in the Declaration of Independence and protected by the Constitution. If Constitutional interpretation is opened to whatever foreign principles a judge thinks will insure the outcome that the judge subjectively is looking for, then the Constitution loses its position as protector of the liberty principles embodied in the Declaration.

Breyer in the postscript raises other objections that critics might raise to cross-referencing U.S. legal issues with foreign law principles. Among those objections is nose-counting. He writes: “It is possible that the critics of cross-referencing worry that the practice of citing foreign decisions will lead American judges to decide cases not through legal analysis but through ‘nose-counting’—that is, tallying up the number of countries on each side.”<sup>35</sup> This objection is not without a reasonable expectation that it will happen. Breyer himself, in *Glossip v. Gross*,<sup>36</sup> supports his dissent in a death penalty case by counting foreign noses. He writes:

I rely primarily upon domestic, not foreign events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is “unusual.” Those circumstances are sufficient to warrant our reconsideration of the death penalty’s constitutionality. *I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. . . .* In 2013, only 22 countries in the

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<sup>33</sup> *Id.* at 245.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 239; see also Earnest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 150–51 (2005) (discussing how citation of foreign law could turn into “counting noses, with little regard to the reasons that led to the adoption or rejection of a practice in any particular jurisdiction”).

<sup>36</sup> *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting).

world carried out an execution. No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia. (This figure does not include China, which has a large population, but where precise data cannot be obtained.)<sup>37</sup>

The above argument is classic Breyer. He flatly states that his dissent could have been (and was) based on purely domestic principles, but then continues to make a nose-counting argument of foreign countries. One wonders why the introduction of foreign nose-counting was needed in the analysis if it was not needed for the decision—Breyer himself can't resist nose-counting in the same year that his book warns against it. This dissent by Breyer is actually the foreign camel's nose under the U.S. constitutional interpretive tent. Breyer chooses a case that supports the decision that he would have made notwithstanding the introduction of foreign societal outcomes regarding the issue. To be fair, he admits that was not his primary argument, but to reach a legitimate result based on U.S. law and tradition, cross-referencing/nose-counting should not be used at all. If it's possible to have *dicta* in a dissent, this is it. However, if the decision had gone the other way, and Breyer had written the opinion for the Court, foreign nose-counting would now have precedential authority in U.S. law.

Justice Scalia, dissenting in *Thompson v. Oklahoma*,<sup>38</sup> sums up the textual interpretive hermeneutic that completely forecloses an appeal to foreign law. Dissenting in a capital punishment case of a 16-year-old he writes:

The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries, is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to

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<sup>37</sup> *Id.* at 2775-76 (citations omitted) (emphasis added).

<sup>38</sup> *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Scalia, J., dissenting).

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 not merely in our mores but, text permitting, in our Constitution as well. But where 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. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.<sup>39</sup>

Part V of *The Court and the World* is entitled, “The Judge as Diplomat.”<sup>40</sup> Yes, you read that correctly – the judge as diplomat. Article III of the Constitution does not mention “diplomat” as a function of the Supreme Court. But again to be fair, Breyer is not referring to “diplomat” in the sense of being an ambassador or some other form of a real diplomat. He is actually referring to going to international conferences and chatting up foreign judges, from whom he says we have much to learn.<sup>41</sup> However, Breyer states, such “[discussions] don’t challenge any sacred American legal principle; they simply inquire about the relative strengths of alternative arrangements for the administration of the law . . . . [Rather, the] discussions we’ve had can affect the way we understand our own solutions to legal problems *entirely* within our own system.”<sup>42</sup> Then he suggests that the legal concept of “proportionality” or “balancing” is a useful product of European jurisprudence, and one that U.S. courts should consider.<sup>43</sup> He states that Europeans practice balancing of interests when a legislative enactment comes in conflict with a basic right. When this occurs, Breyer suggests that most courts, including American, use a three part test to determine the outcome.<sup>44</sup> If the case is not resolved by the three-part test, European judges will ask a fourth question: “Does the

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<sup>39</sup> *Id.* at 868–69, n.4 (citations omitted).

<sup>40</sup> THE COURT AND THE WORLD, *supra* note 1, at 247.

<sup>41</sup> *Id.* at 249–51.

<sup>42</sup> *Id.* at 253–254 (emphasis added).

<sup>43</sup> *Id.* at 254.

<sup>44</sup> *Id.* at 256 (citing Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 75 (2008)). The test asks three questions: “(1) What kind of interest does the government’s limitation seek to protect or to advance? How important is the interest? How legitimate? (2) What is the rational connection between the restriction and that objective? (3) Is there a less restrictive way . . . .?” If the issue passes the three-part test, then the European judge will apply a proportionality test. *Id.*

limitation impose a restriction that is *disproportionate* to the legitimate interest the government seeks to achieve.”<sup>45</sup> In other words a balancing test or what Breyer states is the Europeans “principle of proportionality.”<sup>46</sup> Breyer further suggests that American courts are stuck with applying the first three principles, which he calls a type of categorization, but would be freed up to achieve a more nuanced outcome if a balancing test or proportionality test were applied.<sup>47</sup> However, Breyer uses the European term “proportionality” synonymously with the “balancing test” term of art that is already imbedded in American constitutional jurisprudence.<sup>48</sup> Professors Cohen-Eliya and Porat argue that there is an important difference between the two doctrines and the distinct differences are missed by Breyer and “by tossing the term proportionality into the American constitutional lexicon he might have been seeking to create a framework for bringing the operation and thinking of American constitutional law closer to European constitutional law.”<sup>49</sup>

For instance, in *District of Columbia v. Heller*,<sup>50</sup> Breyer in his dissent “came close to introducing the significant European doctrine of proportionality into American constitutional jurisprudence”<sup>51</sup> He writes in dissent: “Contrary to the majorities unsupported suggestion that this sort of ‘proportionality’ . . . is unprecedented . . . the Court has applied it in various constitutional contexts, including election-law cases, speech cases and the due processes cases.”<sup>52</sup> Professors Cohen-Eliya and Porat suggest that Breyer actually knows the difference and is implicitly introducing a European interpretation of proportionality, and claiming that it has the same meaning as balancing in the tradition of American constitutional law. They write:

Justice Breyer has used the word proportionality before, but always in the same sense that it bears in common spoken language—proportionate versus disproportionate, or the proportionality of a restriction. *Heller* appears to be the first case in which Breyer explicitly used proportionality as a term of art, by using the phrase “proportionality approach.” Arguably, at least two messages are implicit in Breyer's deliberate use of this

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<sup>45</sup> THE COURT AND THE WORLD, *supra* note 1, at 256.

<sup>46</sup> *See id.* at 257.

<sup>47</sup> *See id.*

<sup>48</sup> *See* Moshe Cohen-Eliya & Ido Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 372 (2009).

<sup>49</sup> *Id.*

<sup>50</sup> *District of Columbia v. Heller*, 544 U.S. 570 (2008) (Breyer, J., dissenting).

<sup>51</sup> Cohen and Porat, *supra* note 47, at 368.

<sup>52</sup> *Heller*, 544 U.S. at 690 (citation omitted).

term: (1) that the doctrine of proportionality is analogous to the American concept of balancing interests; and (2) that proportionality is part of American constitutional law. Given the centrality of proportionality analysis in so many other legal systems, the ramifications of these messages are great. The inherent implication is that American constitutional law is not as different from European constitutional law as some commentators and Justices would suggest. Breyer's dissent in *Heller* thus marks an important stage in the Court's ongoing debate over the relationship of U.S. constitutional law with foreign constitutional law.

This last step in the foreign law debate is interesting and important in at least two respects. First, the allusion to foreign constitutional law in *Heller* is implicit rather than explicit. Despite his reference to proportionality, not a sole foreign legal authority was cited by Justice Breyer. Rather, he based his entire argument for proportionality on decisions from American case law that, in his view, manifest the doctrine. This could represent a shift in strategy regarding the use of foreign law.<sup>53</sup>

Breyer references proportionality without a single citation to a European source, but bases his argument solely on references to American cases, thus implicitly leaving the impression that it is within the American constitutional tradition.<sup>54</sup> Professors Cohen-Eliya and Porat justifiably assert that, “[t]his tactic gives foreign law doctrines American credentials and prevents any criticism of the infiltration of foreign materials into American law.”<sup>55</sup> Further, they call this “a covert move in the foreign law debate.”<sup>56</sup> Other commentators flatly state that, “judges who adopt proportionality position themselves to exercise dominance over policymaking and constitutional development.”<sup>57</sup> This is in nascent form one of the fears of cross-referencing that Breyer blithely dismisses in *The Court and the World* as an overreaction.<sup>58</sup>

Take note that this book was written after *Heller* in which Breyer has already covertly introduced the foreign law of proportionality under the guise of a continuation of the American constitutional tradition. Yet he denies that the fear of what he has done in *Heller* will ever happen—when in fact he has already done it.

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<sup>53</sup> Cohen and Porat, *supra* note 47, at 370.

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 371.

<sup>56</sup> *Id.* at 372.

<sup>57</sup> Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 72 (2008).

<sup>58</sup> *See* THE COURT AND THE WORLD, *supra* note 1, at 245.

Read *The Court and the World* with much skepticism. All is not as Breyer would have it appear to be.