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# JUDGES, LEGISLATORS, AND EUROPE'S LAW: COMMON-LAW CONSTITUTIONALISM AND FOREIGN PRECEDENTS

NOGA MORAG-LEVINE\*

## I. INTRODUCTION

The global emergence of powerful, politically assertive courts has redefined the process and meaning of legal transplantation. With the rise of powerful judiciaries outside the United States, court opinions have emerged as a novel avenue for cross-national importation of law. In this environment, newly created or emboldened courts can draw inspiration from statutes of other countries and the opinions of foreign judges. Courts were encouraged in this direction over the past two decades by a growing sense of community among members of the judiciary worldwide.<sup>1</sup> A distinctive result has been a marked increase in the prevalence of citation to foreign court opinions on the part of a growing number of national supreme courts and international adjudicative bodies.<sup>2</sup> The U.S. Supreme Court has been comparatively slow to follow this trend.<sup>3</sup> Nonetheless, it is in the United States that the practice of citing foreign precedents seems to have met with the greatest controversy. The role of foreign law in Supreme Court jurisprudence is currently the topic of extensive discussion on the Internet, in the press, in academic journals, and in Congress. A number of Supreme Court Justices have addressed the issue directly in their opinions,<sup>4</sup> and, more unusually, in off the bench writings and speeches.<sup>5</sup>

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\* Associate Professor, Michigan State University College of Law. Andrew Barnes, Barbara Bean, and Jennifer Logan Tilden provided excellent assistance in researching this Essay. Thanks to participants in the *Maryland/Georgetown Constitutional Law Schmooze* for helpful comments.

1. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192-94 (2003).

2. See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 820-21 (1999) (noting the growing use of comparative jurisprudence in constitutional interpretation in courts outside of the United States); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 99-100 (1994) (enumerating examples of citations to foreign courts by national courts and international adjudicative bodies).

3. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 410 (2003); Rebecca Lefler, Note, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165, 166 (2001).

4. See *infra* Part IV.

5. In January 2005, Justices Breyer and Scalia participated in a televised public forum on "The Relevance of Foreign Law for American Constitutional Adjudication." For tran-

The controversy is perplexing in part because it appears to be restricted to the United States. There is little evidence to suggest parallel mobilization in opposition to foreign citations by courts abroad.<sup>6</sup> Moreover, even when viewed strictly within the parameters of American law and politics, the foreign citation controversy seems to deviate from the prevailing pattern. The Court tends to draw political fire in response to controversial results rather than contested modes of reasoning. The usual line of criticism, familiar from responses to the Court's decisions on abortion or flag burning, works back from a hot-button decision to the absence of a legal basis sufficient to justify interference with the decisions of the democratically elected legislative branch. By contrast, opposition to the citing of foreign cases puts front and center the Court's reasoning as such. Even if we take the view that opposition to foreign references serves as a proxy for substantive disagreement with the rulings, the benefits of such a strategy are not self-evident. If the goal was defense of criminal prohibitions on sodomy or the juvenile death penalty (to take two prominent areas where references to foreign cases have recently appeared), why deflect from these politically potent issues by framing the question at hand in reference to the citation of foreign law? Alternatively, if we opt to view opposition to the Court's comparative jurisprudence in principled terms, the principle at stake is not simple to pinpoint. Supreme Court opinions are replete with references to extra-legal sources such as philosophical treatises and social science research.<sup>7</sup> Why single out foreign case law as deserving of special condemnation?

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script and video of the event, see Antonin Scalia & Stephen Breyer, U.S. Supreme Court Justices, A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication at American University Washington College of Law (Jan. 13, 2005), available at <http://www.wcl.american.edu/seclc/founders/2005/050113.cfm> (follow "Video Archive from C-Span" hyperlink or "Press Release and full transcript" hyperlink). For the flavor of the political side of the debate, see Rick Santorum, *The Internationalist Threat to America's Constitution*, CRISIS, Dec. 2003, available at <http://www.crisismagazine.com/december2003/hill.htm>.

6. See Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 16, available at <http://www.thepublicinterest.com/archives/2004winter/article1.html>. Kersch writes: "The process of integrating international legal standards at the domestic level has proceeded pretty much unquestioned abroad: Most foreign judges are enthusiastic about integrating their law and their constitutions into an emergent and evolving world system." *Id.* Kersch argues that American judges ought not to follow in their path. *Id.* at 18.

7. See generally Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108, 1110 app. (1997) (identifying a large increase in the Supreme Court's use of nonlegal sources); Neomi Rao, Comment, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1372-81 (1998) (noting a substantial increase in philosophical references by the Supreme Court in the past thirty years).

This Essay seeks the answer in American legal history. Throughout the nineteenth century, American elites divided over the question of whether political and legislative principles inspired by the continental civil-law tradition were compatible with American constitutionalism. Legal treatises, political pamphlets, and newspaper articles attest to the depth of disagreements regarding codification initiatives, social legislation, and other European-inspired reform agendas.<sup>8</sup> Opponents of such reforms offered a dual line of response based in political theory and constitutional law: the first cast the civil-law tradition as an absolutist instrument of authoritarian origin, and the second equated constitutional due process with a closed set of common-law procedures and principles.<sup>9</sup> Defined in this fashion, due process served to bar civil-law-based legislative reforms.

Today's controversy bears a striking similarity to the nineteenth-century dispute. Contemporary opponents of judicial citations to foreign law stress the importance of securing the boundary between American and European constitutionalism.<sup>10</sup> The timing of the current controversy is instructive in this regard. Citations to foreign judicial opinions are hardly a novel development in American jurisprudence. Supreme Court Justices across the nineteenth and the twentieth centuries repeatedly referenced the views of their overseas English-speaking colleagues regarding the constitutional disputes of the day.<sup>11</sup> Opposition to the practice, however, materialized only once the Justices began to look beyond the common-law world for comparative insights. Critical attention to foreign citations in the United States closely tracks growth in the global influence of European courts, most importantly the European Court of Human Rights (ECHR). Entrusted with enforcing the European Convention on Human Rights, the ECHR "has become a source of authoritative pronouncements on human rights law" for adjudicative bodies well beyond Europe, including the courts of South Africa and Zimbabwe, writes Anne-Marie Slaughter.<sup>12</sup> This ascendancy has been matched by

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8. See *infra* Part II.

9. See *infra* notes 19-30 and accompanying text.

10. See *infra* notes 33-36 and accompanying text (noting that the conflict between European legal principles and American constitutional law was present in *Hurtado v. California*, 110 U.S. 516 (1884), and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

11. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 n.14 (2004) (listing cases where the Supreme Court recognized that the concept of "ordered liberty" is a concept recognized in other English-speaking peoples' legal systems, as well as the United States).

12. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1109-10 (2000).

a decline in the American Supreme Court's influence on the jurisprudence of foreign courts.<sup>13</sup>

Unresolved disagreements on the legitimacy of learning from European public law underpin the transplantation controversies of both the nineteenth and twenty-first centuries. In the nineteenth- and early-twentieth-century story, legislation was the primary mechanism for the transplantation of continentally modeled law into the United States.<sup>14</sup> Opponents invoked an inherent antagonism between American constitutionalism and continental political systems in an effort to dissuade legislators from enacting continental-inspired legal reforms and to encourage judges to invalidate them, once passed.<sup>15</sup> Today, the roles have reversed with some judges serving as agents of transplantation and some legislators guarding the gates. In this fashion, the current controversy offers a mirror image of nineteenth-century legal transplantation crises. Yet the underlying controversy over the fit between American and continental political values has remained the same.

This thesis finds support in the prominence of references to core differences between Europe and America within the current debate. Here I offer two such examples: The first consists of arguments advanced on behalf of a congressional resolution condemning citations to foreign law during hearings that the Subcommittee on the Constitution devoted to this topic,<sup>16</sup> and the second is Justice Scalia's response in *Printz v. United States*<sup>17</sup> to Justice Breyer's comments on the structure of federalist institutions on the continent.<sup>18</sup> Before turning to these contemporary examples, the following section highlights a few of the instances where nineteenth-century jurisprudential debates addressed the status of European legal and constitutional principles in America.

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13. Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597, 607.

14. Codification initiatives galvanized political debate across the nineteenth century. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960*, at 117-121 (1992); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 8 (1992) ("Inspired by European precedents, proposals for need-based old-age pensions, for health and unemployment insurance covering wage earners, and for labor regulations to protect all adult male workers received considerable intellectual justification and political support in the early-twentieth-century United States.")

15. See *infra* Part II.

16. See *infra* Part III.

17. 521 U.S. 898 (1997).

18. See *infra* Part IV.

## II. NINETEENTH-CENTURY ANTECEDENTS: CONTINENTAL LEGAL PRINCIPLES AND AMERICAN LIBERTY

The theme of the civil law's alleged incompatibility with American liberty recurs through the writings of some of the nineteenth century's most prominent legal scholars. Early in the century, the status of the civil law tied to a larger debate on the nature of the American legal system following its separation from England. A particularly influential voice in this connection was that of James Kent whose *Commentaries on American Law* addressed the proper role of Roman civil law in American jurisprudence at significant length.<sup>19</sup> Learned in continental law, Kent found much to admire in that system's treatment of "subjects relating to private rights and personal contracts."<sup>20</sup> As a judge, he expressed willingness to be guided by "foreign jurists" in the absence of governing English law.<sup>21</sup> But he drew a sharp line against such borrowing where the civil law's treatment of "the connexion between the government and the people" was at stake.<sup>22</sup> "In every thing which concerns civil and political liberty," Kent wrote of the civil law, "it cannot be compared with the free spirit of the English and American common law."<sup>23</sup>

In mid-century, the political theorist Francis Lieber described the common law as a cornerstone of what he termed "Anglican liberty," to be distinguished from its continental ("Gallican liberty") counterpart.<sup>24</sup> The differences between these two political constructs—and the superior protection accorded to civil liberty under Anglican principles—is the theme of a treatise, *On Civil Liberty and Self-Government*, that Lieber published in 1853. The animating force behind his 1853 treatise was a defense of the common-law tradition against the threat of continental-modeled agendas for political reform.<sup>25</sup>

19. JAMES KENT, *Of the Civil Law*, in 1 COMMENTARIES ON AMERICAN LAW 481 (Da Capo Press 1971) (1826).

20. *Id.* at 507.

21. JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM 1763-1847, at 272 (1939).

22. KENT, *supra* note 19, at 506.

23. *Id.* at 507.

24. See FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 51 & n.1-53 (Theodore D. Woolsey ed., Da Capo Press 1972) (3d ed. 1877) (enumerating the ideas, principles, and institutions that must be observed to understand "Anglican liberty").

25. See *id.* at 203-14 (arguing that the common law is superior to civil law in areas such as personal rights and self government). Against this backdrop, Lieber offered the following insight on the significance of the common law: "[A]nd though we should have brought from England all else, our liberty, had we adopted the civil law, would have had a very precarious existence." *Id.* at 211.

By the end of the century, the question of codification inspired an extensive literature on the relative merits of the civil- and common-law traditions. Among the better-known writings is a pamphlet that James C. Carter, who headed the American Bar Association's anti-codification campaign, published in 1884.<sup>26</sup> Codes, Carter wrote, are characteristic of states "which have a despotic origin, or in which despotic power, absolute or qualified, is, or has been, predominant."<sup>27</sup> This, he argued, was not a coincidence but an intrinsic aspect of the political character of code-governed states.<sup>28</sup> "In free, popular States, the law springs from, and is made by, the people," whereas codes are the instrument of a "sovereign [who] must be permitted at every step to say what shall be *the law*."<sup>29</sup> In keeping with this theme, John Dillon used the Storrs Lectures in 1892 as a forum for "protest against the *Continentalization* of our law," a goal he sought to accomplish by exhibiting "the excellences of our legal system as it now exists, with a view to show that for the people subject to its rule it is, with all its faults, better than the Roman or any other alien system."<sup>30</sup>

In 1884, the Supreme Court addressed the constitutionality of state legislation modeled after civil-law instruments of criminal procedure in *Hurtado v. California*.<sup>31</sup> At issue was the use in a capital trial for murder of an indictment by information, in lieu of grand jury. The constitutional question was whether information—a practice with roots in continental civil law—complied with due process under the Fourteenth Amendment. Writing for the majority, Justice Matthews framed the decision before him in the following manner:

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments,

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26. JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* (1884), *microformed on Nineteenth-Century Legal Treatises*, No. 1183 (Research Publications 1994).

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 6-7.

30. JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA*, at viii (Fred B. Rothman & Co. 1994) (1894).

31. 110 U.S. 516 (1884).

is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.<sup>32</sup>

In highlighting the compatibility of continental systems of government with due process of law, Justice Matthews implicitly acknowledged the influence of a competing view limiting due process to the institutions of common law.

In *Hurtado*, the question was whether constitutional due process invalidated legislation implementing civil-law-inspired practices of criminal procedure.<sup>33</sup> Similarly, the relationship between due process and European legal principles was again at issue in *Lawrence v. Texas*,<sup>34</sup> the first instance where a reference to an ECHR judgment appeared in the text of a majority opinion in the U.S. Supreme Court. In *Hurtado*, the controversy focused on the compatibility of European-inspired legislation with constitutional due process.<sup>35</sup> In *Lawrence*, the tables turned and the issue became whether domestic law would survive constitutional scrutiny in the face of European-inspired conceptions of constitutional due process.<sup>36</sup>

### III. THE SUBCOMMITTEE HEARINGS AND THE CASE AGAINST LEARNING FROM FOREIGN PRECEDENTS

Within months after *Lawrence*, the first of a series of proposed resolutions against the citing of foreign precedents came before the House of Representatives.<sup>37</sup> In March of the following year, Reps.

32. *Id.* at 530-31.

33. *Id.* at 519-20.

34. 539 U.S. 558 (2003).

35. *Hurtado*, 110 U.S. at 538.

36. See *Lawrence*, 539 U.S. at 573, 576-77 (citing to ECHR decisions upholding the right of individuals to engage in homosexual activities as persuasive authority to overrule precedent).

37. H.R. Res. 446, 108th Cong. (2003). Representative Jim Ryun together with eight co-sponsors introduced the resolution on November 18, 2003. *Id.*



Tom Feeney and Bob Goodlatte introduced a similar resolution<sup>38</sup> which they titled "The Reaffirmation of American Independence Resolution."<sup>39</sup> Over seventy co-sponsors ultimately signed on to the "Reaffirmation Resolution" during the 108th Congress, including House Majority Leader Tom DeLay, Majority Whip Roy Blunt, and House Judiciary Committee Chairman Jim Sensenbrenner.<sup>40</sup> The Christian Coalition of America is one of a number of conservative political organizations to have endorsed the Resolution.<sup>41</sup> To underscore the serious political intent behind the initiative, Rep. Feeney stated in an interview to MSNBC that, notwithstanding the Resolution's nonbinding status, Justices who "deliberately ignore Congress' admonishment . . . may subject themselves to the ultimate remedy, which would be impeachment."<sup>42</sup> In February 2005, Rep. Feeney introduced a revised version of the Resolution to the 109th Congress.<sup>43</sup> The next month, Sen. John Cornyn brought an essentially identical document before the Senate.<sup>44</sup> Senator Cornyn's action came shortly after Justice Kennedy specifically commented on the relevance of foreign jurisprudence to the Court's constitutional inquiry in *Roper v. Simmons*.<sup>45</sup> The House Judiciary Committee responded by including Justice Kennedy in a list of judges whose activities the Committee has

38. H.R. Res. 568, 108th Cong. (2004).

39. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 57 app. (2004) [hereinafter *Hearings*] (statement of Rep. J. Randy Forbes). The Resolution's introductory section reads as follows:

Expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.

H.R. Res. 568.

40. [Transfer Binder 2003-2004] Cong. Index (CCH) 30,188 (Apr. 2, 2004).

41. Christian Coalition of Am., Christian Coalition Endorses Congressman Feeney's/Goodlatte's "Reaffirmation of American Independence Resolution" (May 14, 2004), <http://www.cc.org/content.cfm?id=142>. For additional groups and individuals who have expressed support for the Reaffirmation Resolution, see Rep. Tom Feeney, Should Americans Be Governed by the Laws of Jamaica, India, Zimbabwe, or the European Union?, <http://www.house.gov/feeney/reaffirmation.htm> (last visited Jan. 21, 2006).

42. Tom Curry, *A Flap over Foreign Matter at the Supreme Court*, MSNBC, Mar. 11, 2004, <http://msnbc.msn.com/id/4506232>.

43. H.R. Res. 97, 109th Cong. (2005). As of August 2005, it had sixty-five co-sponsors. Library of Congress, Bill Summary & Status for the 109th Congress, H.R. Res. 97, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.res.00097>: (last visited Jan. 21, 2006).

44. S. Res. 92, 109th Cong. (2005).

45. 125 S. Ct. 1183, 1198-1200 (2005) (finding foreign and international law to be persuasive authority in holding juvenile death penalty unconstitutional).

targeted for investigation.<sup>46</sup> House Majority Leader, Tom DeLay, explained the reasons in an interview to FOX News Radio: "We've got Justice Kennedy writing decisions based upon international law, not the Constitution of the United States. That's just outrageous . . ." <sup>47</sup>

Foreign citations are hardly the only source of strain at the moment between the Republican leadership in Congress and the federal judiciary. The 108th Congress saw the introduction of multiple jurisdiction-stripping bills, some of which passed the House (though not the Senate).<sup>48</sup> Additional attempts at court curbing included bills directed at limiting the discretion of federal judges as well as the launching of investigations against two judges by the House Judiciary Committee.<sup>49</sup> Against this backdrop, the introduction of congressional resolutions on the inappropriateness of judicial citations to foreign judgments may look like "politics as usual." Nonetheless, these resolutions stand out in their focus on reasoning rather than result.

The "Reaffirmation Resolution" prompted the Subcommittee on the Constitution to convene special hearings in March 2004 on the "Appropriate Role of Foreign Judgments in the Interpretation of American Law."<sup>50</sup> The Subcommittee invited four experts on constitutional and international law to address the topic. Three of them (Jeremy Rabkin of Cornell University, John Oldham McGinnis of Northwestern University School of Law, and Michael Ramsey of the University of San Diego Law School) spoke in favor of the Resolution. The fourth, Vicki Jackson of Georgetown Law Center, was the only one to defend the appropriateness of the Court's foreign citations. Two parallel lines of argument are evident in statements made by the Congress members and professors who spoke during the hearings against the legitimacy of citing foreign case law. The first invoked a familiar set of complaints against judicial activism, i.e., separation of powers, countermajoritarianism, and original intent. But in addition, the hearings reveal a separate, substantive ground, for opposing the practice under review. Rather than the alleged conflict between for-

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46. *DeLay Rips Justice Kennedy*, FOXNEWS, Apr. 20, 2005, <http://www.foxnews.com/story/0,2933,154009,00.html>.

47. *Id.*

48. *See, e.g.*, Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) (attempting to strip all federal courts of jurisdiction over certain provisions of the Defense of Marriage Act); [Transfer Binder 2003-2004] Cong. Index (CCH) 34,517 (Dec. 30, 2004); *see also* Am. Bar Ass'n, Independence of the Judiciary: Court Stripping and Erosion of Judicial Discretion (May 10, 2005), <http://www.abanet.org/poladv/priorities/erode.html> (describing legislation presented to the 108th Congress that was intended to limit court jurisdiction).

49. Am. Bar Ass'n, *supra* note 48.

50. *Hearings*, *supra* note 39.

eign citations and proper judicial roles, the focus here was on a deeper tension between the underlying commitments of American and European law.

The argument from judicial activism recurs throughout the hearings' transcripts, in various garbs. A prominent example comes from the opening statement by Rep. Steve Chabot (who chaired the Subcommittee):

Americans' ability to live their lives within clear constitutional boundaries is the foundation of the rule of law and essential to freedom. There is no substitute for the unadulterated expression of the popular will through legislation enacted by duly elected representatives of the American people. The foundation of liberty turns to sand, however, when American [sic] must look for guidance not only to duly enacted statutes by elected legislatures and to decisions of American courts faithfully interpreting those statutes, but also to the often contradictory decisions of hundreds of other organizations worldwide.<sup>51</sup>

Representative Steve King sounded a similar warning against going down "the path of activism, judicial activism, that sees the future of America in a fashion that's not accountable to the voice of the people."<sup>52</sup> Other Subcommittee members repeated this charge in various ways, never specifying why the act of citing the decisions of foreign courts is necessarily a form of judicial activism—or why it is inherently any more deplorable than other such forms.<sup>53</sup> Thus, at the start of the hearings, Rep. Chabot offered the following description of the problem at hand, apparently confident in the proposition's self-evident nature: "[T]oday an alarming new trend is becoming clear: Judges, in interpreting the law, are reaching beyond even their own imaginations to the decisions of foreign institutions to justify their decisions."<sup>54</sup>

The task of articulating the actual mechanism by which foreign citations exacerbated judicial activism fell to the three professors who

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51. *Id.* at 3 (statement of Rep. Steve Chabot, Chairman, H. Subcomm. on the Constitution).

52. *Id.* at 8 (statement of Rep. Steve King, Member, H. Subcomm. on the Constitution).

53. For example, Rep. Jim Ryun stated that "[t]he Court's usage of international law and opinions in decisions is completely incompatible with our democratic values and the proper role of the courts in our constitutional system." *Id.* at 7 (statement of Rep. Jim Ryun).

54. *Id.* at 1 (statement of Rep. Steve Chabot, Chairman, H. Subcomm. on the Constitution).

testified in favor of the Resolution. All three focused in this connection on the capacity of judges to pick and choose among available foreign precedents as the primary culprit. "Judges," as McGinnis argued, "are likely to use their own discretion in choosing what foreign law to apply and what foreign law to reject. Judges will use foreign law as a cover for their discretionary judgments."<sup>55</sup> Ramsey offered a similar claim,<sup>56</sup> as did Rabkin who stated:

One of the main reasons why judges cite precedents is to demonstrate that their decisions are not simply based on their own personal preferences but follow, in some way, from recognized legal standards. If foreign rulings are relevant guides to the law, then judges have a much larger range of precedents to choose from—or to hide behind.<sup>57</sup>

As Rabkin's statement makes evident, the alleged connection between foreign precedents and judicial activism begins with skepticism regarding the sincerity of judicial reasoning as such. To the extent that judicial opinions are seen as post hoc rationalizations for preconceived results, foreign precedents increase the quantity of available sources on which judges are able to draw. They do not, however, alter what is already understood to be an instrumentalist mode of judicial reasoning. If judicial citations to domestic precedents are not to be taken seriously, the urgency of attending to the practice of foreign citations becomes difficult to see.

This challenge carries over to efforts to ground opposition to foreign precedents in the Framers' original intent. The participant who put the most emphasis on this argument during the hearings was McGinnis. His written statement<sup>58</sup> offered in brief an account of why originalism was the correct interpretive approach as a matter of democratic theory. Once this proposition is accepted, the inappropriateness of citing foreign precedents follows by definition. Contemporary foreign precedents, after all, can shed little light on the Framers' orig-

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55. *Id.* at 32 (statement of John Oldham McGinnis, Professor, Northwestern University School of Law).

56. *See id.* at 20 (statement of Michael D. Ramsey, Professor of Law, University of San Diego Law School) ("It seems clear that the justices and the academic commentators who support them want to use foreign materials not on the basis of any principle appropriate, but merely when they happen to coincide with the justice's own moral and social preferences.").

57. *Id.* at 12-13 (statement of Jeremy Rabkin, Professor of Government, Cornell University).

58. *Id.* at 30-33 (statement of John Oldham McGinnis, Professor, Northwestern University School of Law).

inal intent.<sup>59</sup> The argument is of limited value, however, in grounding the campaign against foreign precedents. This is so because it does not offer a clear reason for distinguishing between foreign citations and the Justices' various other violations of originalist interpretive principles.

Elsewhere in his testimony, McGinnis hinted at a different and highly instructive variation on the argument from original intent. Assuming *arguendo* that the Framers intended "that the cruel and unusual clause should be tied to evolving standards in general," McGinnis argued that "[i]t does not follow that the Framers would have wanted to tie these evolving standards to the standards of other nations around the world rather than focus only on domestic evolution."<sup>60</sup> The reason, as he explained, derives from the "self-conscious exceptionalism of the United States" at its inception.<sup>61</sup> "At the time the Constitution was framed the United States was one of the few republican nations in the world and the Framers often distinguished its practices from the world's *ancien regimes*."<sup>62</sup> This outlook, McGinnis concludes, would have made the Framers very unlikely to pin the future development of the Bill of Rights on the practices of other nations because "[t]hey would have no confidence that those standards would not represent retrogression rather than progress."<sup>63</sup> To the extent that the protection of American exceptionalism is understood to be part of the original American constitutional project, all manner of legal borrowing from Europe becomes constitutionally suspect. Viewed through this lens, it is in the very act of introducing European legal norms into American law that foreign precedents violate original constitutional intent.

Moving from eighteenth-century Europe to that of the twenty-first century, the Resolution's supporters highlighted a range of ways that Americans and Europeans differ to this day. For Rabkin, the most outspoken on this issue among the three, fundamental differences in American and European conceptions of the "importance of self-defense" provided the cause for alarm.<sup>64</sup> "American courts," Rabkin testified, "have generally been very deferential to the President and Congress when it comes to basic questions about military opera-

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59. *Id.* at 31.

60. *Id.* at 33.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 13-14 (statement of Jeremy Rabkin, Professor of Government, Cornell University).

tions.”<sup>65</sup> By contrast, European courts have tended to exercise less such deference.<sup>66</sup> Once we begin to look to European law on matters such as capital punishment or homosexual rights, “[i]t is only a short step . . . to the notion that European opinion must be considered when our courts decide on the legality or constitutionality of American responses to the challenge of terrorism.”<sup>67</sup>

Conversely, Ramsey warned against the possibility that Europe’s legal influence would weaken the protection of some rights. His argument in this connection proceeded in two steps. The first posited that “[i]f U.S. courts adopt a practice of relying on foreign materials, we would expect that foreign materials be treated as authoritative guides *as a general matter*.”<sup>68</sup> In other words, they may not pick and choose and must adopt an all-or-nothing approach. This would entail, he argued, retreat from domestically established rights that other systems of law have failed to recognize. The list of such rights included freedom of speech, freedom of religion, the right to own property, and the right to bear arms.<sup>69</sup> The two place-specific examples offered in illustration pertained to Europe, “where many countries have an established church or explicitly ‘Christian’ parties,” and frequently offer “lesser protections for the free exercise of religion (as the controversy in France over headscarves and other religious headgear suggests).”<sup>70</sup> Presumably, consistent borrowing of European law would require adoption of these and similar limitations on established American rights. The alternative (and, to Ramsey’s mind, more likely) outcome would be a more selective approach to borrowing.<sup>71</sup> This approach would avoid the pitfall of wholesale importation of foreign law but by definition would inappropriately limit citations to those that happen to support a particular result.<sup>72</sup>

Finally, McGinnis argued that “the problem with using foreign decisions” is that they cannot be viewed in isolation of “a whole set of norms and governmental structures” from which they emerged.<sup>73</sup> Offering *Lawrence* as an example, McGinnis noted in his written state-

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65. *Id.* at 14.

66. *Id.*

67. *Id.*

68. *Id.* at 26 (statement of Michael D. Ramsey, Professor of Law, University of San Diego Law School).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 32 (statement of John Oldham McGinnis, Professor, Northwestern University School of Law).

ment to the Subcommittee that "European traditions are more favorable than American traditions to the imposition of elite moral views. Indeed, the European notion of human rights in constitutionalism is fundamentally different from ours: human rights in Europe are the product of a search for eternal normative truths to be imposed against democracy."<sup>74</sup> To this, he added in oral testimony: "And, therefore, it can be quite misleading to try to transplant the European decision into the American context, because we have a whole set of different institutions for creating norms."<sup>75</sup>

Jackson, the only invited guest to oppose the Resolution, posited at the start of her statement a very different picture of the Founders' attitude towards the foreign political systems of their time: "Far from being hostile to considering foreign countries' views or laws, the Founding generation of our Nation had what the signers of the Declaration of Independence described as a 'decent Respect to the Opinions of Mankind.'"<sup>76</sup> In this connection, Jackson quoted from *Federalist No. 63* on the importance of "attention to the judgment of other nations."<sup>77</sup> But ultimately, her opposition to the Resolution rested not on history but on its interference with the independence of the judiciary:

Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system. It could be seen both here and elsewhere as an attack on the independence of the courts in performing their core adjudicatory activities.<sup>78</sup>

Those who spoke in favor of the Resolution were ultimately unable to provide a countervailing separation-of-powers argument adequate to justify congressional intervention in processes of judicial reasoning. None of the arguments put forth were sufficient to distinguish foreign precedents from other modes of non-originalist constitutional reasoning. Instead, what seemed to make this mode of judicial reasoning so egregious was its capacity to transplant prohibited European constitutional principles into the United States. The

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74. *Id.*

75. *Id.* at 29.

76. *Id.* at 16 (statement of Vicki C. Jackson, Professor of Law, Georgetown Law Center).

77. *Id.* (quoting *THE FEDERALIST* No. 63, at 382 (James Madison) (Clinton Rossiter ed., 1961)).

78. *Id.* at 18.

following section points to parallel lines of argument in the opinion of Justice Scalia in *Printz v. United States*.<sup>79</sup>

#### IV. SCALIA ON EUROPEAN FEDERALISM AND THE FRAMERS' INTENT

*Printz* marked the opening of an ongoing exchange between Justices Scalia and Breyer on the constitutional relevance of foreign law. The case addressed the constitutionality of a provision of the Brady Handgun Violence Prevention Act<sup>80</sup> that required state law enforcement officials to inquire into the criminal record of prospective gun purchasers.<sup>81</sup> Justice Scalia's majority opinion invalidated the rule as unconstitutional federal "commandeering" of the authority of state officials.<sup>82</sup> In dissent, Justice Breyer argued that a commitment to federalism is not inconsistent with the enforcement of federal laws through constituent units and offered the federal systems of Switzerland, Germany, and the European Union as examples. "[T]heir experience," Justice Breyer noted, "may . . . cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity."<sup>83</sup> Justice Scalia responded by labeling Justice Breyer's mode of "comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."<sup>84</sup> The Framers paid considerable attention to existing models of European federalism, but they did so only to reject them as "subversive of the order and ends of civil polity."<sup>85</sup> The lesson to be taken from the Framers' rejection of the available models is that "our federalism is not Europe's," Justice Scalia wrote, and as such contemporary models of European federalism are irrelevant to American constitutional interpretation today.<sup>86</sup>

Sanford Levinson questioned the logic of this argument by noting that rejection of available models during the eighteenth century says nothing regarding the relevance of contemporary European ex-

79. 521 U.S. 898 (1997).

80. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

81. *Printz*, 521 U.S. at 902.

82. *See id.* at 935 (holding that Congress cannot circumvent the prohibition on compelling states to enact or enforce a federal regulatory program by conscripting state officer directly).

83. *Id.* at 977 (Breyer, J., dissenting).

84. *Id.* at 921 n.11 (majority opinion).

85. *Id.* (quoting THE FEDERALIST NO. 20 (James Madison and Alexander Hamilton), *supra* note 77, at 138).

86. *Id.*



amples to American constitutional inquiry.<sup>87</sup> If anything, the historical lesson to be taken from the Framers' examination of foreign models (notwithstanding their subsequent rejection) is of the significance they accorded to cross-national comparison. "One obviously might find the specifics of foreign experience repellant, as Justice Scalia argues was the actual case, but this scarcely seems to entail a permanent closing off from the potential of future enlightenment."<sup>88</sup>

The difference between Justice Scalia's and Levinson's reading of the pertinent *Federalist Papers* cuts to the crux of the controversy. Levinson highlights the Founders' interest in the political experience of other nations. Justice Scalia, by contrast, sees their negation of these models as key. At least where the structure of American federalism is concerned, Europe stands in Justice Scalia's account as the rejected alternative against which American constitutionalism emerged. Opposition to contemporary learning from Europe is consistent with this world view.

## V. TRADING PLACES

The contemporary controversy surrounding foreign citations in judicial decisions shares a common jurisprudential question with that which occupied the nineteenth-century Court in *Hurtado* and other cases: the relationship between constitutional due process and continental law. In both eras, opponents of governance approaches with roots in civil law asserted the unconstitutionality of these models. Where the controversies of the two eras manifestly differ is in the respective roles accorded to judges and legislators. During the nineteenth century, opponents of continental-inspired legislation looked to the courts to invalidate such laws on due-process grounds. This argument was built on the long-standing notion that ever since the Magna Charta, the twin terms "due process" and "law of the land" have encoded a closed and permanent list of common-law-based substantive guarantees that ought to trump legislative provisions to the contrary.<sup>89</sup> By contrast, the contemporary *Lawrence* citation turns this issue on its head. Rather than European-modeled legislation, the controversy surrounds the ostensible role of European constitutional principles in undercutting domestic legislation. In the process, judges, rather than legislators, have emerged as the controversial agents of transnational transplantation. The notion of a fundamental

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87. Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 357 (2004).

88. *Id.* (emphasis omitted).

89. RODNEY L. MOTT, *DUE PROCESS OF LAW* 241-42 (Da Capo Press 1973) (1926).

tension between the offerings of European law and politics and American constitutional democracy has, however, remained constant.

Kim Scheppele has argued for the importance of “negative models” or “aversive constitutionalism” in shaping the course of transnational constitutional borrowing.<sup>90</sup> As she explains, “the *aversive* alternatives, the ones that are so forcefully rejected that they cast their influence over the whole constitution-building effort,” may matter more to constitutional construction than the choice to emulate available positive models.<sup>91</sup> This insight may be useful not only to the understanding of the workings of comparative influences in processes of constitutional formation but also within subsequent interpretive debates. In some instances, a broad consensus may exist regarding the aversive commitments of a particular system. In others, the legitimacy of another legal system’s inroads may be a matter for controversy and the source of deep political divisions. The instrument behind these contested transplants may be legislation, as was the case during the nineteenth century, or it may take the form of court-to-court fertilization as is the situation today.

To identify this historical continuity is not to argue that the principles at issue have remained one and the same. There are cogent arguments to be made in favor of the position that “[i]f the views of foreign legislatures are relevant, they would surely be relevant to debates in American legislatures, not to judicial interpretations of the Constitution.”<sup>92</sup> In other words, one might support legislative transplantation and oppose court-to-court borrowing without being inconsistent. Nonetheless, the parallels between nineteenth-century transplantation controversies and those of today can help us understand why the practice of foreign citations has struck such a raw nerve in the United States. Notwithstanding much of the rhetoric to that effect, judicial activism and separation of powers appear to be tangential to this debate. The core division is between aversive and inclusive constructions of the relationship between Europe’s and America’s constitutional law.

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90. Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 296-301 (2003).

91. *Id.* at 298.

92. ROBERT H. BORK, COERCING VIRTUE 23 (2003).