INTRODUCTION

The objection to citation of foreign law in U.S. Supreme Court decisions is bad history and bad law. First, let me briefly review how the objection has come to prominence recently.

On June 26, 2003, the U.S. Supreme Court decided Lawrence v. Texas, striking down a same-sex sodomy statute. Justice Antonin Scalia, in the course of his dissenting opinion, wrote that the majority’s citation of foreign law was “meaningless dicta,” “[d]angerous dicta.” He added that the majority’s opinion was “the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.”

* Professor of Law, Boston University. This Article is adapted from a talk given on April 22, 2006, for a panel on “The Relevance of International Sources of Law,” at a symposium sponsored by the Boston University School of Law on “The Role of the Judge in the Twenty-First Century.” I thank Carol F. Lee, Daniela Caruso, and Eva Nilsen for suggesting sources for this Article. The Article addresses the judicial pronouncements, public speeches, and proposed legislation and resolutions identified in the opening pages, and is not intended to refute or comment on other symposium contributions.

1 539 U.S. 558 (2003).
2 Id. at 578-79.
3 Id. at 598 (Scalia, J., dissenting). Justice Scalia explained that the dicta were “[d]angerous” because “this Court . . . should not impose foreign moods, fads, or fashions on Americans.” Id. (alteration in original) (quoting Foster v. Florida, 537 U.S. 990, 991 n.* (2002) (Thomas, J., concurring in denial of certiorari)).
4 Id. at 602.
Justice Scalia had previously complained about the citation of foreign law. He described it as “totally inappropriate” and irrelevant in a 1988 dissenting footnote.⁵ “inappropriate” in a 1997 majority opinion,⁶ “feeble” and “irrelevant” in a 2002 dissent.⁷ Dissenting in 2005 from the Court’s decision in *Roper v. Simmons*,⁸ Justice Scalia said that the premise underlying the majority’s citation of foreign law “ought to be rejected out of hand.”⁹ Then again, Justice Scalia himself had mentioned modern foreign law in his own dissenting opinions on matters of constitutional interpretation in 1995¹⁰ and 2004,¹¹ and had joined opinions of others, such as Chief Justice Rehnquist, who cited foreign law.¹² What differed in *Lawrence v. Texas* was Justice Scalia’s charge that citation of foreign law was “dangerous.” This charge did not go unnoticed.

On April 8, 2005, a month after the decision in *Roper v. Simmons*, the Judeo-Christian Council for Constitutional Restoration convened a conference in Washington, D.C. At that conference, Michael Schwartz, Chief of Staff for Senate Judiciary Committee member Tom Coburn (R-Okla.), called for mass impeachments of federal judges.¹³ A week later, Senator Coburn disavowed his chief of staff’s comments.¹⁴ Coburn did add, however, “I am disturbed that

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⁵ Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (arguing that what a majority of foreign nations would do was irrelevant to the issue of capital punishment for fifteen-year-old felons).

⁶ Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (“We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”).

⁷ Atkins v. Virginia, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting) (“[T]he Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.”).

⁸ 543 U.S. 551 (2005) (striking down the death penalty for offenders under the age of eighteen at the time of the offense).

⁹ *Id.* at 624 (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.”).


¹² For example, in the same term as his *Printz* dissent, Scalia joined Chief Justice Rehnquist’s opinion in *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997), which discussed the practice of assisted suicide in the Netherlands.


¹⁴ *Id.*
the Supreme Court is now using foreign law to make decisions on our U.S. Constitution.15

At the same conference, Edwin Vieira, a constitutional lawyer and author of How To Dethrone the Imperial Judiciary,16 said that Justice Anthony Kennedy’s opinion in Lawrence v. Texas “upholds Marxist, Leninist, satanic principles borrowed from foreign law.”17 A reporter at the event wrote that, according to Vieira, “a Politburo of ‘five people on the Supreme Court’ has a ‘revolutionary agenda’ rooted in foreign law and situational ethics.”18 Michael P. Farris, chairman of the Home School Legal Defense Association, said, “[i]f our congressmen lack the courage to impeach Justice Kennedy, they ought to be impeached as well.”19 He also said of the federal judiciary, “[i]f about 40 of them get impeached, suddenly a lot of these guys would be retiring.”20

Tom DeLay, then majority leader of the U.S. House of Representatives, could not attend the Judeo-Christian Council’s conference because he had to go to the Pope’s funeral.21 DeLay told Fox News on April 19, 2005, “We’ve got Justice Kennedy writing decisions based upon international law, not the Constitution of the United States. That’s just outrageous, and not only that, he said in session that he does his own research on the Internet. That is just incredibly outrageous.”22 DeLay said that the House Judiciary Committee was reviewing the activities of Justices on the Supreme Court.23

On September 14, 2005, Senator Coburn asked Judge John Roberts in his confirmation hearings whether judges who cite foreign law should be impeached.24 Roberts answered that he thought citation of foreign law was “not a good approach,” but that he “wouldn’t accuse judges or Justices who

15 See id.
18 Milbank, supra note 17 (quoting Vieira Remarks, supra note 17).
20 Id., quoted in Milbank, supra note 17.
21 Milbank, supra note 17.
23 See id. (“DeLay said the Judiciary Committee will hold hearings on the clause in the Constitution that says ‘judges can serve as long as they serve with good behavior.’”).
disagree with that, though, of violating their oath.”

On January 11, 2006, in response to a question by Senator Coburn, Judge Samuel Alito said in his confirmation hearings, “I don’t think that it’s appropriate or useful to look to foreign law in interpreting the provisions of our Constitution.”

In February 2006, Justice Ruth Bader Ginsburg said that she and former Justice Sandra Day O’Connor had been the targets of death threats posted on an Internet website. Ginsburg said that the web threat had apparently been prompted by legislation introduced in Congress by Republicans that would bar judges from relying on foreign laws or foreign court decisions. She quoted the posting in the website chat room:

Okay commandoes, here is your first patriotic assignment . . . an easy one. Supreme Court Justices Ginsburg and O’Connor have publicly stated that they use (foreign) laws and rulings to decide how to rule on American cases.

This is a huge threat to our Republic and Constitutional freedom. . . . If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.

In early 2005, after the Terry Schiavo controversy, House Majority Leader Tom DeLay (R-Tex.) said that “the time will come for the men responsible for this to answer for their behavior,” and Senator John Cornyn (R-Tex.) mused about how a perception that judges are making political decisions could lead

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25 Id. (statement of John G. Roberts, Jr.). At another point in the hearing, Judge Roberts explained why he opposed the citation of foreign law: “If we’re relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he’s playing a role in shaping a law that binds the people in this country.” Id. at 201 (statement of John G. Roberts, Jr.). For a succinct account of the hearing, see Adam Liptak & Robin Toner, Roberts Parries Queries on Roe and End of Life, N.Y. TIMES, Sept. 15, 2005, at A1.

26 Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 471 (2006) (statement of Samuel A. Alito, Jr.).


28 Id.


people to “engage in violence.”\textsuperscript{31} Conservative commentator Ann Coulter joked in early 2006 that Justice John Paul Stevens should be poisoned.\textsuperscript{32}

If this weren’t so sad, it would be funny. No sitting Justice has yet been assassinated or impeached for citing foreign law. Justice Scalia, who seems to have started all this by some injudicious language in his dissents, has backed off considerably. On February 21, 2006, addressing the American Enterprise Institute, Scalia said that he was not a xenophobe, that he used to teach comparative law, and that he believed comparative law “might well be made a mandatory subject in United States law schools.”\textsuperscript{33} He said that courts should cite foreign law in the interpretation of treaties, that foreign law is sometimes relevant to the meaning of an American statute, and that “foreign law can also profitably be discussed in the opinions of United States courts where it is consulted in response to . . . [p]redictions of disaster [if you rule a certain way].”\textsuperscript{34} He adhered to his view that “foreign legal materials can \textit{never} be relevant to an interpretation of, [or] to the \textit{meaning} of the United States Constitution,” except for “very old English law.”\textsuperscript{35} He said that he feared that the Court’s use of foreign law would continue at an accelerating pace because the “living Constitution” approach leads majorities to want to cite something for the conclusions they pronounce, and because foreign law is an increasingly

\begin{itemize}
  \item \textsuperscript{31} 151 CONG. REC. S3113, 3126 (daily ed. Apr. 4, 2005) (statement of Sen. Cornyn), quoted in Milbank, supra note 17. At the conference of the Judeo-Christian Council for Constitutional Restoration, Phyllis Schlafly of the Eagle Forum said, “The people who have been speaking out on this, like Tom DeLay and Senator Cornyn, need to be backed up.” Phyllis Schlafly, Remarks at the Judeo-Christian Council for Constitutional Restoration Conference: Confronting the Judicial War on Faith (Apr. 7-8, 2005), quoted in Milbank, supra note 17.
  \item \textsuperscript{32} Holland, supra note 27; Coulter Jokes About Poisoning Supreme Court Justice, FOXNEWS.COM, Jan. 27, 2006, http://www.foxnews.com/story/0,2933,183006,00.html (“We need somebody to put rat poisoning in Justice Stevens’ creme brulee,’ Coulter said. ‘That’s just a joke, for you in the media.’”)
  \item \textsuperscript{33} Justice Antonin Scalia, Keynote Address at the American Enterprise Institute Conference: Outsourcing of American Law (Feb. 21, 2006) [hereinafter Scalia Address], available at http://www.aei.org/events/filter.all,eventID.1256/transcript.asp.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Id. (emphasis added). On January 13, 2005, at a panel sponsored by the U.S. Association of Constitutional Law, Justice Scalia said that in constitutional interpretation, foreign law is irrelevant with one exception: Old English law, because phrases like “due process,” the “right of confrontation” and things of that sort were all taken from English law. So the reality is I use foreign law more than anybody on the Court. But it’s all old English law. . . .
  \item \textsuperscript{} . . . I sleep very well at night, because I read old English cases.
\end{itemize}
accessible and attractive tool for Justices to expand their discretion.\textsuperscript{36} Scalia said, in sum, “my belief that use of foreign law in our constitutional decisions is the wave of the future does not at all suggest that I think it’s a good idea.”\textsuperscript{37}

What was for Justice Scalia a rhetorical flourish in a couple of his more bitter dissents, directed at the particular results in a few recent decisions, became the spark for calls for impeachment by congressional staffers, proposed legislation in Congress, Senate hearings on Supreme Court nominees, and death threats against Supreme Court Justices.

The proposed resolutions and legislation introduced in Congress show what these opponents mean by citation of foreign law. Resolutions introduced on November 18 and 21, 2003, instructed the Supreme Court not to “consider” or “look for guidance” to any foreign laws or opinions, new or old, in any of the Court’s decisions on any matter whatsoever.\textsuperscript{38} These resolutions were not confined to constitutional law. They would have condemned evenhandedly the consideration of foreign law in conflict of laws situations, citation of foreign interpretation of U.S. treaties, and execution of foreign judgments.\textsuperscript{39} Compliance with the plain meaning of this language would have left our highest court in violation of some important international treaties. It would also have forbidden Justice Scalia to cite any more of his old English cases.

Bills introduced on February 11, 2004 (the “Constitution Restoration Act of 2004”\textsuperscript{40}) and on April 1, 2004 (the “American Justice for American Citizens

\begin{footnotes}
\item[36] Scalia Address, supra note 33.
\item[37] Id.
\item[39] H.R. Res. 446, introduced on November 18, 2003, by Rep. Jim Ryun (R-Kan.) and co-sponsored by fourteen Republican representatives, expressed the sense of the House that “the Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States.” H.R. Res. 446. The resolution’s preamble cited the \textit{Atkins} and \textit{Lawrence} cases, and stated that “the laws of foreign countries, and international laws and agreements not made under the authority of the United States, have no legal standing under the United States legal system.” \textit{Id.}
\item[40] The Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004), introduced by two Republican congressmen on February 11, 2004, provided that:
\begin{quote}
In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.
\end{quote}
\end{footnotes}
Act”) extended to all federal courts, but only when interpreting or applying the Constitution, and prohibited relying on or employing foreign law, with certain exceptions. The Constitution Restoration Act first permitted reliance on “the constitutional law and English common law,” and then was amended to permit “English constitutional and common law up to the time of the adoption of the Constitution of the United States.” The American Justice for American Citizens Act allowed employing “English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.” Resolutions introduced on March 17, 2004, February 15, 2005, and March 20, 2005, extended to all judicial determinations, federal and state, interpreting the laws of the United States, and made exceptions for “such foreign judgments, laws, or pronouncements

Id. § 201.

A counterpart bill, S. 2082, 108th Cong. (2004), was introduced in the Senate on February 12, 2004, with nearly identical language. Id. § 201. The House bill had gathered thirty-seven co-sponsors by mid-October 2004. In the next Congress, the same bill was reintroduced as H.R. 1070, 109th Cong. (2005), changing the exception to “other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.” Id. § 201. The bill has accumulated fifty co-sponsors to date.

S. 520, 109th Cong. (2005), introduced in the Senate on the same day as H.R. 1070, and S. 2323, 108th Cong. (2004), introduced on April 20, 2004, had slightly different wording of the exception and eleven co-sponsors between them. See S. 520 § 201; S. 2323 § 201. These three bills also stripped the Supreme Court of jurisdiction to review certain establishment clause cases, with an impeachment clause for Justices deciding such cases, but not for relying on foreign law. See S. 520 §§ 101, 302; H.R. 1070 §§ 101, 302; S. 2323 §§ 101, 302.


Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.

Id. § 3.

The bill’s lengthy preamble denounced citation of foreign law as “this new system of ‘transjudicialism,’” which the preamble defined as a “new technique of interpretation” leading to “the reliance by American judges upon foreign judicial and other legal sources outside of American constitutional law,” seen for the very first time in Atkins and in Lawrence. Id. § 2. This bill was reintroduced in the next Congress as H.R. 1658, 109th Cong. (2005), with six new co-sponsors.

42 See supra notes 40-41.

43 H.R. 3799 § 2.

44 H.R. 1070 § 2.

45 H.R. 4118 § 3.
[that] inform an understanding of the original meaning of the Constitution.” Representative Tom Feeney (R-Fla.), lead co-sponsor of one of the resolutions, told an interviewer that failing to comply with the resolution could lead to impeachment:

“This resolution advises the courts that it is improper for them to substitute foreign law for American law or the American Constitution . . . . To the extent they deliberately ignore Congress’ admonishment, they are no longer engaging in ‘good behavior’ in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.”

In all, 133 representatives and thirteen senators, all but six of them Republicans, have signed on to these bills and resolutions. None of these bills or resolutions has passed or has come up for a full vote as of yet.

I would like to offer a legal historian’s reflection on citation to foreign law in the United States and in common law systems generally, in constitutional interpretation and in other matters. I will start with why the objection to this practice is bad history, then go on to why it is bad law.

I. BAD HISTORY

The objection to citation of foreign law is bad history because it is a new complaint (that has been made to appear old) about an old practice (that has been made to appear new). The objection draws on a false history or myth about American and English common law.


H.R. Res. 568.

The two other resolutions had slightly different language. H.R. Res. 97 and S. Res. 92 referred only to “judicial determinations regarding the meaning of the Constitution.” S. Res. 92; H.R. Res. 97. In its preamble, S. Res. 92, introduced by Sen. John Cornyn, stated that “Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations,” and that “inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers, and the President’s and the Senate’s treaty-making authority.” S. Res. 92. H.R. Res. 97 had a hearing on July 19, 2005, and was approved by the House Subcommittee on the Constitution for full Judiciary Committee action.

A. A New Complaint

First, this is a new complaint. Criticism of lawyers as unscrupulous, greedy liars and judges as pompous, arrogant know-it-alls is as old as the law itself. Lawyers and judges hear these criticisms and we remember them.\(^\text{48}\) Nowhere in this vast torrent of vile abuse have I found a hint that citation of foreign law was one of our faults, before Justice Scalia’s opinions from 1988, 1997, 2003, and 2005.\(^\text{49}\) Surely there would be some trace in the long historical record of criticism of lawyers and judges if a vast overwhelming majority or even a tiny fraction of the American people objected to citation of foreign law. Lawyers and judges have not heretofore been condemned for having read too many books, knowing too many languages, or being too well acquainted with the world.

In the first seventy-five years of our independence, many Americans – lawyers included – attacked the common law and advocated strongly for codification of all American law, in part, for the better security of citizens from arbitrary rule by judges. The common law was denounced as a barbaric, feudalistic relic of medieval England that imposed ex post facto, retroactive law on parties whenever judges found a new tort or new common law crime.\(^\text{50}\) Jefferson wrote in a private letter in 1788 that courts in America should be forbidden to cite any English decision since the accession of Lord Mansfield to the bench (in 1756),\(^\text{51}\) and in a private letter in 1812 that it was improper to quote in American courts any English authorities later than the accession of

\(^\text{48}\) See, e.g., Roscoe Pound, The Lay Tradition as to the Lawyer, 12 MICH. L. REV. 627, 632-35 (1914) (discussing negative perceptions of the legal profession in the Middle Ages).

\(^\text{49}\) See supra notes 3-9 and accompanying text.


\(^\text{51}\) Letter from Thomas Jefferson to Mr. Cutting (Oct. 2, 1788), in 2 THE WRITINGS OF THOMAS JEFFERSON 486, 487 (H.A. Washington ed., Philadelphia, J.B. Lippincott & Co. 1871) (“I hold it essential, in America, to forbid that any English decision which has happened since the accession of Lord Mansfield to the bench, should ever be cited in a court; because, though there have come many good ones from him, yet there is so much sly poison instilled into a great part of them, that it is better to proscribe the whole.”); see also Julian S. Waterman, Thomas Jefferson and Blackstone’s Commentaries, 27 ILL. L. REV. 629, 642 & n.82b (1932).
George III (in 1760). During the early codification movement three states – New Jersey in 1799, Kentucky in 1808, and Pennsylvania in 1810 –

52 Letter from Thomas Jefferson to Judge Tyler (June 17, 1812), in 6 THE WRITINGS OF THOMAS JEFFERSON, supra note 51, at 65, 65-66 (stating that refusal to quote any English courts starting with the reign of George III “would add the advantage of getting us rid of all Mansfield’s innovations, or civilizations of the common law”); see also Waterman, supra note 51, at 644 & n.85a; Roscoe Pound, Justice According to Law, 13 COLUM. L. REV. 696, 711 n.49 (1913).

53 In legislation enacted in 1799, the New Jersey General Assembly declared that no decision or report of any British court or any treatise of the common law written or made after July 4, 1776, should be received or read in any New Jersey court “as law or evidence of the law, or elucidation or explanation thereof.” Act of June 13, 1799, ch. 821, § 5, 1799 N.J. Acts 608, 609. In 1800, the section was modified to prohibit the citing of British books of law made and published after June 13, 1799, and also to provide that no British books of law published after July 4, 1776, should have “any binding authority” upon New Jersey courts. Act of Nov. 20, 1800, ch. 12, 1800 N.J. Acts 28, 28. In 1801, New Jersey restored the ban on receiving or reading British (or other foreign) reports and treatises made after July 4, 1776, and also suspended for one year any lawyer who read or offered to read in any New Jersey court any such post-1776 British (or other foreign) report or treatise. Act of Dec. 1, 1801, ch. 58, §§ 1-2, 1801 N.J. Acts 127, 127; see also ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836, at 82-83 (Da Capo Press 1974) (1964); COOK, supra note 50, at 33; Anton-Hermann Chroust, The Dilemma of the American Lawyer in the Post-Revolutionary Era, 35 NOTRE DAME LAW. 48, 67-68 (1959).

54 In 1807, a bill proposed in the Kentucky Senate would have “repealed” the common law and all British statutes, and would have provided that no English cases or decisions, old or new, “ought to form precedents” by which any Kentucky court “ought in any manner to be bound.” S. Res. Dec. 29, 1807 (Ky.), in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF KENTUCKY 6 (1808). Henry Clay secured an amendment so that the statute enacted in Kentucky on February 12, 1808, prohibited reading or considering “as authority” all British reports of cases decided after July 4, 1776, in Kentucky courts. Act of Feb. 12, 1808, ch. 7, § 1, 1808 Ky. Acts 23, 23. By 1873 the statute had been amended to provide only that British decisions since 1776 should not be “binding authority” in Kentucky courts, “but may be read in court and have such weight as the judges may think proper to give them.” K Y. GEN. STAT. ch. 67, § 1, at 610 (Bullock & Johnson eds., 1873); see also BROWN, supra note 53, at 132-33; COOK, supra note 50, at 33; Chroust, supra note 53, at 68.

55 In 1810, the Pennsylvania Assembly made it unlawful to read or quote in any Pennsylvania court any British precedent or adjudication made after July 4, 1776, but allowed the reading of any precedent of maritime law or of the law of nations. Act of Mar. 19, 1810, ch. 98, § 1, 1810 Pa. Acts 136, 136. This statute was repealed in 1836. Act of Mar. 29, 1836, no. 72, § 1, 1836 Pa. Laws 224, 224-25; see also BROWN, supra note 53, at 94 n.62; COOK, supra note 50, at 33; Chroust, supra note 53, at 68. See generally Erwin C. Surrency, When the Common Law Was Unpopular in Pennsylvania, 33 PA. B. ASS’N Q. 291 (1962) (discussing the controversy and motives surrounding the Pennsylvania movement to ban citation of English precedent). Pennsylvania state legislators had demanded that British precedent not be read in any state court opinion as early as 1804, and brought a bill of impeachment against three state supreme court justices for applying principles of English
passed statutes specifically forbidding citation of English cases decided after July 4, 1776. The statutes did not last long in force, and there is some evidence that they were not enforced.56 In New Hampshire, a rule of court was adopted forbidding English citations.57

But all of this was Anglophobia, not xenophobia. Proponents of American codification pointed with admiration and envy to the success of France’s Code Napoléon, parts of which were translated almost immediately in America’s first law journal, and other codes of law.58 Pennsylvania’s statute expressly

common law to their state constitution. See Peter Charles Hoffer & N.E.H. Hull, Impeachment in America, 1635-1805, at 220-21 (1984) (suggesting that the impeachments might also have been related to the politics of the time); Chroust, supra note 53, at 68 (stating that the impeachment prosecution “failed by three votes to obtain a two-thirds majority”).

Cook, supra note 50, at 33 (remarking that the acts banning the use of English law “seem to have made no difference in the legal development of these states”); John Chipman Gray, The Nature and Sources of the Law app. 9 at 323-25 (1909) (explaining that in 1821 courts began to “openly . . . neglect the Statute”); Mary K. Bonsteel Tachau, Federal Courts in the Early Republic: Kentucky 1789-1816, at 77-78 (1978) (observing that Kentucky federal courts after the American Revolution did not distrust English law); Francis R. Aumann, The Influence of English and Civil Law Principles upon the American Legal System During the Critical Post-Revolutionary Period, 12 U. Cin. L. Rev. 289, 294-95 & nn.17-18 (1938) (noting that “the Kentucky court began to show a disposition to evade, if not to disregard, the statute,” and “[g]radually . . . it came to be generally disregarded”). In Ohio in 1806, the state legislature briefly repealed its reception statute, thereby abolishing all English law in the state. Cook, supra note 50, at 32-33.

57 Roscoe Pound, The Lawyer from Antiquity to Modern Times 181 (1953); Aumann, supra note 56, at 295 & n.20 (noting that a New Hampshire court “stopped the reading of an English law-book because the court understood ‘[t]he principles of justice as well as the old wigged justices of the dark ages did’”). Samuel Livermore, Chief Justice of New Hampshire’s Superior Court from 1782 to 1790, “attached no importance to precedents, and to quote any would invite his anger and set loose his sharp and merciless tongue.” Charles R. Corning, The Highest Courts of Law in New Hampshire – Colonial, Provincial, and State, 2 Green Bag 469, 470 (1890).

58 Cook, supra note 50, at 71-74, 96-97, 106, 126; Pound, supra note 57, at 181 (“That large and influential party [Jeffersonian Democrats] not only heartily detested things English, but looked more than favorably upon things French. There was agitation for an American code on French lines and a temporary cult of French law books.”). In the same case in which Henry Clay was expressly prohibited by the Supreme Court of Kentucky from citing an English authority, the court wrote, “There are many books, which are not authority, but which ought to be read and used, for the sound and clear reasoning they contain, as Poethier on Obligations.” Hickman v. Boffman, 3 Ky. (Hard.) 356, 372-73 (1808); see also Chroust, supra note 53, at 68 n.100. Chroust commented that “[t]his would indicate that Kentucky courts, too, at the time displayed a distinct preference for the ‘civilians’ and for French legal authorities in particular.” Id.
approved the citation of post-1776 British precedent about the law of nations. Justice Henry Brockholst Livingston’s dissent in the 1820 case of United States v. Smith was not objecting to Joseph Story’s citation of more than twenty-five sources of foreign law because it was foreign law, but rather was objecting to the open definition of a common law crime of piracy without prior statutory specificity. If Congress had named a statutory offense that could only be defined by reading dozens of relatively inaccessible American books, it seems Livingston would have had the same objection to such a common law crime. This broad-brush complaint about citing to or using foreign law is new.

B. An Old Practice

Second, citation of foreign law is an old practice. In the past few years, however, legislators have proposed bills and resolutions stating that such citation is “new” or “recent.” Many speeches, press releases, and hearings condemning such citation similarly describe it as a new and unprecedented departure by a few current Supreme Court Justices.

59 Act of Mar. 19, 1810, ch. 98, § 1, 1810 Pa. Acts 136, 136 (repealed 1836) (“[N]othing herein shall be construed to prohibit the reading of any precedent of maritime law, or of the law of nations.”).

60 United States v. Smith, 18 U.S. (5 Wheat.) 153, 181-82 (1820) (Livingston, J., dissenting) (lamenting that Congress declared the capital crime of piracy to be defined by “the law of nations,” given how difficult it was for a person who would be charged with such a crime to figure out what “the law of nations” might be).


In fact, of course, the founders of the U.S. Constitution resorted constantly to foreign law and foreign practice for their guidance, the Constitution itself extends federal jurisdiction to offenses against the law of nations, and the Supreme Court has since then considered foreign and international law, probably more often in earlier periods than in recent years. Neither the founders nor early Supreme Court Justices concealed this practice from the public. It is simply bad history to say that the practice is new in 2003 or 2005 and that the opposition to this practice is two hundred or four hundred years old.

The first words that the founders of our nation declared showed “a decent respect to the opinions of mankind.” It would be strange if July 4, 1776, were the last time our founders would respect the opinions of mankind or seek a place “among the powers of the earth” and “in the Course of human events.” If we take the eighty-five Federalist Papers as a guide to what the founders considered relevant to understanding their new Constitution, we find references to England and to Britain, to be sure, but also to Ireland, Scotland, Wales, to Europe in general, France, Germany, Swabia, Bavaria, Westphalia, Hanover, Saxony, Prussia, Austria, Sweden, Poland, Holland, the Netherlands, the Dutch, Zealand, Utrecht, Flanders, the Beligic confederacy, the League of Cambray, Switzerland, Berne, Luzerne, Italy, Savoy, Venice, Greece, Portugal, Spain, Aragon, and twenty-two other place names from the classical world.

(statement of Rep. Steve Chabot) (“Over the last several years, we have witnessed a trend, a dangerous trend.”); 151 Cong. Rec. S3113, 3127 (daily ed. Apr. 4, 2005) (statement of Sen. Cornyn) (“In a series of cases over the past few years our courts have begun to tell us that our criminal laws and our criminal policies are informed not just by our Constitution and by the policy preferences and legislative enactments of the American people through their elected representatives, but also by the rulings of foreign courts.”); Press Release, Rep. Tom Feeney, Feeney/Goodlatte Introduce Legislation Saying That Judicial Decisions Shouldn’t Be Based on Foreign Precedents (Mar. 17, 2004), available at http://www.house.gov/list/press/fl24_feeney/FeeneyGoodlatteResPressConf.shtml (“Recently there has been a deeply disturbing trend in American jurisprudence. The Supreme Court, the highest court in the land, has begun to look abroad . . . .” (quoting Rep. Bob Goodlatte)).


64 U.S. Const. art. I, § 8, cl. 10.

65 See infra notes 86-114 (noting dozens of historical instances where the Supreme Court has cited foreign law).

66 The Declaration of Independence para. 1 (U.S. 1776).

67 Id.

68 See The Federalist Concordance (Thomas S. Engeman, Edward J. Erler & Thomas B. Hofeller eds., Univ. of Chicago Press ed. 1988) (listing in alphabetic order the words used in The Federalist and the frequency of each word’s use). Of 504 instances of foreign places mentioned in The Federalist, 154 were to places in the British Isles. See id.
Beyond Europe, *The Federalist* referred to Canada, the West-Indies, Africa, Egypt, Asia, Tartary, the Ottoman empire, Syria, Persia, India, China, and Japan. These references to foreign places, more than five hundred in all from the Achaean league to Zealand, show the broad range of reference, comparison, and borrowing in *The Federalist* authors’ world. *The Federalist* also referred to ancient lawgivers Draco, Solon, and Lycurgus, and to more modern legal authors such as Montesqueieu and Grotius. Hamilton and Madison made no apology for what they called these “federal precedents” and “foreign precedents.” “Experience,” they wrote, not any divine revelation, “is the oracle of truth; and where its responses, are unequivocal, they ought to be conclusive and sacred.” It was the experience of foreign governments past and present that these founders considered all-important, not America’s absolute separateness.

In another paper presented to this conference panel, much was made of a religious strain of American “exceptionalism,” attributing to the Framers of the Constitution a notion of God’s special mission for America. It is instructive to observe, in this connection, that in the more than 189,000 words of *The Federalist*, there was no mention of Israel or Jerusalem, new or old, no Sodom or Gomorrah, no Jesus or Christ or Lord or Deity, no ark or covenant or tabernacle, no things holy, no commandments, no Moses, no Sinai. There is one reference to nature’s God, one to an ancient Greek god, two to the Almighty. The word “temple” appears three times, but all are pagan. *The Federalist* made a decidedly secular case for the Constitution, with no emphasis on any religious mission. From those who drafted the Constitution and advocated for its ratification, it would be much easier to draw the conclusion that Americans are the new Athenians than the new Israelites.

Faced with such obvious history of the founders’ preoccupation with foreign law and experience, Justice Scalia said in a 1999 footnote that while comparative analysis of foreign developments “was of course quite relevant to

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69 See id.

70 See id.

71 See id.


76 See The Federalist Concordance, supra note 68.

77 See id.

78 See id. The word “Christianity” occurs once, and there are three references to “church.” Id.
the task of writing” the Constitution, it was nevertheless “inappropriate to the task of interpreting” the same Constitution.\textsuperscript{79} Again, the historical record shows that the founders did not practice what Justice Scalia preaches. After the Constitution was written and ratified, James Wilson, a signer of the Declaration and drafter of the Constitution, cited foreign law abundantly in Supreme Court opinions such as \textit{Chisholm v. Georgia} in 1793,\textsuperscript{80} and cited foreign treatises dozens of times in sections of his Law Lectures of 1791 about interpretation of the same Constitution.\textsuperscript{81} David Fontana, in the \textit{UCLA Law Review} in 2001, did an exhaustive investigation of the same founders’ post-ratification interpretations of the Constitution, and showed that the founders, in defiance of Justice Scalia’s prescriptions, continued to look to foreign law.\textsuperscript{82}

My students of American legal history first see Supreme Court Justices citing such foreign legal authors as Vattel, Pufendorf, and Grotius in the 1790s, in opinions considering whether it was constitutional for the federal government to prosecute American citizens for violating the law of nations, which no federal statute had prospectively made a criminal offense.\textsuperscript{83} Federal common law crimes were eventually rejected, but early Federalist justices embraced the law of nations as expounded by foreign jurists as a part of American common law.

David Fontana in 2001,\textsuperscript{84} and Steven Calabresi and Stephanie Zimdahl in the \textit{William and Mary Law Review} in 2005,\textsuperscript{85} surveyed many instances of consideration of foreign law by the U.S. Supreme Court over the last 216 years. A quick sampling of Supreme Court cases that cite foreign law includes some of the most notable decisions in constitutional history, some of them by the most honored Justices: James Wilson in \textit{Chisholm v. Georgia} in 1793 on suits against states;\textsuperscript{86} John Marshall in \textit{Johnson v. M'Intosh} in 1823 on the

\textsuperscript{79} Printz v. United States, 521 U.S. 898, 921 n.11 (1999).
\textsuperscript{80} 2 U.S. (2 Dall.) 419, 457-61 (1793) (referring to foreign states and kingdoms to resolve a sovereign immunity question).
\textsuperscript{81} 1-2 THE WORKS OF JAMES WILSON passim (Robert Green McCloskey ed., 1967) (citing Grotius, Pufendorf, Vattel, and Burlamaqui).
\textsuperscript{83} \textit{E.g.}, United States v. Ravara, 27 F. Cas. 714, 714 (C.C.D. Pa. 1794) (No. 16,122a); Henfield’s Case, 11 F. Cas. 1099, 1117-18 (C.C.D. Pa. 1793) (No. 6360).
\textsuperscript{84} Fontana, \textit{supra} note 82, at 574-91.
\textsuperscript{86} 2 U.S. (2 Dall.) 419, 459-61 (1793) (suggesting that whether a state could be sued hinged in part on “the laws and practice of different States and Kingdoms,” and considering the laws and practice of ancient Greece, Spain, France, and England).
right of discovery, and in The Antelope in 1825 on the international slave trade; Joseph Story in Swift v. Tyson in 1842 on general principles of commercial law, and in United States v. Smith in 1820 on the definition of piracy; Benjamin Robbins Curtis and John McLean, dissenting in the Dred Scott case in 1857 on slavery in federal territories, along with concurring opinions by Samuel Nelson, Peter Daniel, and John Archibald Campbell; Morrison R. Waite in Reynolds v. United States in 1878 on polygamy in federal territories; Thomas Stanley Matthews in Hurtado v. California in 1884 on incorporation of the Bill of Rights; Horace Gray in the Legal Tender Case in 1884; Horace Gray in the majority and Stephen Field dissenting in Fong Yue Ting v. United States in 1893 on deportation; John Marshall Harlan, dissenting in Lochner v. New York in 1905 on maximum hours laws; the Brandeis brief and David Brewer’s opinion in Muller v. Oregon in 1908.

87 21 U.S. (8 Wheat.) 543, 572-84 (1823) (outlining the principles of land discovery observed by the nations of Europe, in particular Spain, France, Holland, and England, and finding that those principles had achieved “universal recognition” in the United States).

88 23 U.S. (10 Wheat.) 66, 115-23 (1825) (describing the practices in Great Britain, Sweden, and France with respect to the international slave trade and piracy).

89 41 U.S. (16 Pet.) 1, 20-22 (1842) (establishing a general principle of commercial law, and bolstering it by pointing out that “[i]n England the same doctrine has been uniformly acted upon”).

90 18 U.S. (5 Wheat.) 153, 163 n.a (1820) (citing Grotius, Bynkershoek, Azuni, Lord Bacon, Martens, Rutherford, Woodeson, and Burlamaqui, among others, “[t]o show that piracy is defined by the law of nations”).

91 60 U.S. (19 How.) 393, 468 (1857) (Nelson, J., concurring) (maintaining that the “current of authority” in England was in accordance with his decision to deny Dred Scott freedom); id. at 473-74 (Daniel, J., concurring) (same); id. at 495-501 (Campbell, J., concurring) (same); id. at 534-35 (McLean, J., dissenting) (arguing that “no nation in Europe” would have denied Scott his freedom); id. at 595 (Curtis, J., dissenting) (arguing that the law of nations provided support for Scott’s case against Sanford).

92 98 U.S. 145, 164-67 (1878) (observing that polygamy had always been considered “odious” in Europe and that a second marriage was void under British common law).

93 110 U.S. 516, 530-31 (1884) (acknowledging that “[t]he Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history”).

94 110 U.S. 421, 447 (1884) (observing that the power to render a note legal tender was “universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution”).

95 149 U.S. 698, 709-11 (1893) (Gray, J.) (referencing the English law of “banishment” in order to determine the constitutionality of deportation); id. at 757 (Field, J., dissenting) (agreeing that English law was relevant but disputing Gray’s interpretation of it).

96 198 U.S. 45, 71-72 (1905) (Harlan, J., dissenting) (citing statistics on average daily working hours in Australia, Great Britain, Denmark, Norway, Sweden, France, Switzerland, Germany, Belgium, Italy, Austria, and Russia in determining the constitutionality of a New York law restricting bakers’ working hours).

\(^97\) 208 U.S. 412, 419 n.1 (1908) (referring to the labor laws of Great Britain, Switzerland, Austria, Holland, Italy, and Germany in determining the constitutionality of an Oregon law limiting women’s working hours).

\(^98\) 245 U.S. 366, 378-80 (1918) (citing Vattel and the laws and practice of England to refute the argument that “compelled military service is repugnant to a free government”).

\(^99\) 256 U.S. 135, 157-58 (1921) (finding a rent regulation constitutional in part because “[t]he preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law”).

\(^100\) 302 U.S. 319, 326 n.3 (1937) (pointing out, in a ruling on the scope of due process, that “[c]ompulsory self-incrimination is part of the established procedure in the law of Continental Europe”).

\(^101\) 307 U.S. 277, 281 & n.6 (1939) (noting, in a ruling on the taxation of judges’ salaries, that the courts of other countries did not consider taxation to be a diminution of income).

\(^102\) 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring) (insisting that judges look to “those canons of decency and fairness which express the notions of justice of English-speaking peoples” when determining what due process requires).

\(^103\) 338 U.S. 25, 28-30, tbl.J at 39 (1949) (listing in a table the “jurisdictions of the United Kingdom and the British Commonwealth of Nations which have held admissible evidence obtained by illegal search and seizure”).

\(^104\) 342 U.S. 165, 169 (1952) (reiterating, in a ruling on whether it violates due process to pump a suspect’s stomach against his will, that “notions of justice of English-speaking peoples” help to define the concept embodied by the Due Process Clause).

\(^105\) 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) (stating that “[j]udicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster”); *id.* at 641 (Jackson, J., concurring) (pointing to the “evils” done by George III and Continental European rulers as evidence that the Framers would have wanted to limit the powers of the executive branch).

\(^106\) 356 U.S. 86, 102-03 (1958) (Warren, J.) (observing that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”); *id.* at 126 (Frankfurter, J., dissenting) (responding that “[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities”).

\(^107\) 367 U.S. 497, 554-55 (1961) (Harlan, J., dissenting) (stating that “no nation . . . has seen fit to effectuate” a contraception policy similar to Connecticut’s).

I mention these historic cases and Justices only to make the point that the citation of foreign law by the Supreme Court was not hidden away from the general public and was not the peculiarity of a few outlier Justices. Probably fewer than five percent of all U.S. Supreme Court cases cite foreign law,\(^\text{115}\) certainly far fewer than other countries’ courts,\(^\text{116}\) but it has always been a

\(^\text{108}\) 384 U.S. 436, 486-90 (1966) (highlighting “[t]he experience in some other countries,” such as England, Scotland, and India, which “suggests that the danger to law enforcement in curbs on interrogation is overplayed”).

\(^\text{109}\) 410 U.S. 113, 130-38 (1973) (detailing attitudes toward abortion in various countries around the world from “the time of the Persian Empire” to present).

\(^\text{110}\) 433 U.S. 584, 596 n.10 (1977) (finding it relevant that “out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”).

\(^\text{111}\) 458 U.S. 782, 796 n.22 (1982) (noting that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”).

\(^\text{112}\) 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (pointing to the laws of ancient Rome and Reformation-period England to support the claim that homosexual sodomy runs against “millennia of moral teaching”).

\(^\text{113}\) 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (buttressing his argument against anonymous campaigning by pointing out that it is prohibited in Australia, Canada, and England).

\(^\text{114}\) 521 U.S. 811, 828 (1997) (referring to a practice of European constitutional courts but stating that the U.S. Constitution contemplates a different approach). Chief Justice Rehnquist once endorsed the use of foreign law in constitutional cases. He said: “[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.” William Rehnquist, *Constitutional Courts – Comparative Remarks, in Germany and Its Basic Law: Past, Present and Future – A German-American Symposium 411, 412* (Paul Kirchhof & Donald P. Kammers eds., 1993) (addressing the October 1989 German-American Conference sponsored by the Dräger Foundation and the American Institute for Contemporary Studies).


practice in some of our most contentious disputes on hot-button social issues like slavery, polygamy, the death penalty, and sexual privacy. It would be curious if all these aforementioned Justices – Wilson, Marshall, Story, Curtis, McLean, Nelson, Daniel, Campbell, Waite, Matthews, Gray, Field, Brewer, Holmes, Brandeis, both Harlans, both Whites, Cardozo, Frankfurter, Jackson, Warren, Blackmun, Burger, Scalia himself, and Rehnquist – should have been impeached or suffered worse consequences for citing foreign law in constitutional cases. There is a principle of law, foreign and domestic, that complaints should be made about a wrongful practice within a reasonable time, or should not be made at all. Surely this complaint about such a public, widespread, and longstanding Supreme Court practice as this should have been made more than two hundred years ago.

I want to single out Joseph Story, a sitting Justice for thirty-three years, and America’s leading treatise writer. Story stood far beyond any other Justice to date in his advocacy for consideration of foreign law. As Daniel Coquillette of Boston College has recently shown, Story wrote and taught that the particular contribution of American federal judges should be to forge a universal private international law, a global commercial code, and that for this purpose American lawyers should train themselves in Roman law and continental legal treatises.\textsuperscript{117} \textit{Swift v. Tyson} (1842)\textsuperscript{118} is just the best remembered example of Story’s enlistment of the Supreme Court in the task of creating not a federal common law but a global commercial law. If citation of foreign law has always been so offensive to the American public, it is Joseph Story’s impeachment we should have expected, not any of the present Supreme Court.

C. The Myth of Insularity Again

I would like to be able to dismiss the present objection to citation of foreign law as simply xenophobia, isolationism, anti-intellectualism, anti-elitism, and political opportunism – a new complaint about a very old practice. If you had asked the founders or early American lawyers where they got the notion that a country’s law and constitution are uniquely adapted to that country’s people, what is now called American exceptionalism, they would have said that that idea came directly from a foreign lawyer – Montesquieu – and his foreign


It would be ironic if we cannot cite foreign laws because a foreign lawyer told us we cannot.

Yet I have to admit that the present objection bears a family resemblance to a myth or false history about the early development of English common law. Beginning in the late nineteenth century, Frederic William Maitland and other English legal historians asserted that English common law had never been influenced by civil (that is, Roman) or canon law, and that English lawyers and judges knew nothing of and cared nothing about these other bodies of law. This was despite the fact that civil law was taught in England’s universities and canon law was practiced in England’s ecclesiastical courts. In an article that I published in 1993, I quoted the principal architects of this myth of English insularity and ascribed their story of absolute ignorance and total isolation to “nineteenth-century nationalism, eighteenth-century Whiggism, and seventeenth-century anti-Catholicism.”

I showed that English lawyers and judges referred to canon law or civil law in over two hundred cases between the years 1300 and 1600, that English judges sometimes brought expert doctors of canon and civil law into their common law courts, and sometimes went out to confer with the canonists and civilians and reported back.

To be sure, English royal courts defended their jurisdiction stoutly against the church courts. English common lawyers never merged or confused canon law or civil law with their own law, but neither were they hostile to it or ignorant of it. English common lawyers and judges knew, compared, and spoke of “their law” (lour ley in the law French of the day) in its similarity to and difference from “our law” (nostre ley), and knew when each was to be applied. After 1600, English law borrowed more frequently and more

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119 Montesquieu, The Spirit of Laws 104-05 (David W. Carrithers ed., Thomas Nugent trans., Univ. of Cal. Press 1977) (1748) (“[T]he political and civil laws of each nation . . . should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another.”).


121 David J. Seipp, The Reception of Canon Law and Civil Law in the Common Law Courts Before 1600, 13 O.J.L.S. 388, 389 & nn.4-10 (1993); see also J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century 89 (reissued ed. 1987) (“The common lawyer [in seventeenth-century England] was confident that the history of English law could be explained entirely by reference to the English past; and the more he developed the myths to which this inevitably gave birth, the greater his repugnance grew to any suggestion that his law might have sprung from an alien stock.”).

122 Seipp, supra note 121, at 392, 406-07.

123 Id. at 394.
heavily from Roman and canon law sources, particularly in the rulings of Chief Justice Holt and Lord Mansfield.\textsuperscript{124}

What Maitland and other English legal historians tried to explain with their myth of insularity was why English common law resisted the kind of “Reception” of Roman law that the local customary legal regimes of France, Germany, and most other parts of Europe went through. Their thinking seemed to be that if English lawyers had any knowledge at all of Roman law, they would have had to receive it as other countries did. This new present objection to citation of foreign law seems motivated by the same sense of insecurity: that if our Supreme Court Justices were to know anything about foreign law, they would surely be seduced and ruled by it. What was so fearfully seductive about Roman law five hundred years ago and what is so alluring about all foreign law today is left to the imagination.

I suppose that a myth that appeals to our insecurity and fear of the unknown will probably need to be refuted again and again until we can finally overcome this insecurity and grow confident that American law and the U.S. Constitution are strong enough to withstand comparison with other countries’ laws. Those Justices who engage in comparison have this confidence in American institutions, a confidence that their critics seem to lack.

Foreign law has been cited on hot-button social issues since slavery days. The only intervening circumstance that separates past uniform Supreme Court practice from the recent instances of that same practice is the fact that Justice Scalia’s injudicious remarks in recent dissents are now taken as marching orders by congressmen and senators calling for legislative prohibitions and impeachment and by others calling for or predicting assassination. Let us be clear about what is new – the intimidation of and attack on the Supreme Court – and what is old: the practice of citing foreign and international law.

\section*{II. \textsc{Bad Law}}

The opposition to citation of foreign law is not only bad history, but if enacted, it would be bad law. Much of the opposition fundamentally misunderstands the distinction between binding precedent and persuasive authority, and is inconsistent with the rule of law.

\subsection*{A. Persuasive Authority, Not Binding Precedent}

First, the fundamental confusion: stare decisis and the rule of precedent are not as old as most lawyers and judges might think. True, English lawyers have kept systematic reports of old case decisions since the thirteenth century.\textsuperscript{125}


and the principle of fairness that like cases should be treated alike is as old as
Aristotle. But while English lawyers often argued by analogy and
sometimes cited previous decisions, and while English judges expected to rule
consistently with what their predecessors had ruled before, English courts had
not settled on a rule of binding precedent before the nineteenth century.

In an influential treatise in 1834, *The Science of Legal Judgment*, James
Ram explained that English courts would be bound by what Ram called a
“fixed doctrine” but would go through a more complicated process in deciding
whether to follow a single decision, or even two or more decisions. England’s
law courts had grown up as coordinate courts rather than in a
hierarchy, so there was no established practice of following “higher” courts
before judicial reorganization in the nineteenth century. When English courts
arrived at a notion of binding precedent, they developed a corresponding idea of
“persuasive precedent,” sometimes called “persuasive authority,” referring
to those sources that a judge might cite and might find persuasive, but would
not be bound to follow. The doctrine of binding precedent reached its
height from 1898 to 1966, during which time the House of Lords made
impossible the overruling of its own precedents, for any reason.

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126 ARISTOTE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935, 1006-07
(Richard McKeon ed., 1941); ARISTOTE, *Politics*, in *THE BASIC WORKS OF ARISTOTLE*,
 supra, at 1127, 1187, 1192-93. For a discussion of the “formal justice” argument that
“respect for precedent is required by the principle that like cases should be treated alike,”
see generally David Lyons, *Formal Justice, Moral Commitment, and Judicial Precedent*, 81

127 See, e.g., RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 24-25 (4th ed.
1991); Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in
PRECEDENT IN LAW 35, 54, 57-61 (Laurence Goldstein ed., 1987); T. Ellis Lewis, *The
History of Judicial Precedent* (pt. 4), 48 LAW Q. REV. 230, 247 (1932) [hereinafter Lewis
(pt. 4)]. T. Ellis Lewis, whose study of the subject is still the most authoritative, found no
evidence of modern theory of judicial precedent in case reports from 1290 to 1765. T. Ellis
(explaining that judges in the early Year Books “were not disposed to be bound by judicial
decisions, even by their own”); T. Ellis Lewis, *The History of Judicial Precedent* (pt. 3), 47
LAW Q. REV. 411, 423 (1931) (concluding that “there was certainly nothing corresponding
to our modern theory of judicial precedent” in the later Year Books); Lewis (pt. 4), supra,
at 239 (explaining that in seventeenth century case reports, “precedents were persuasive and
not absolutely binding”).

128 JAMES RAM, *THE SCIENCE OF LEGAL JUDGMENT* 66-79 (*112-33) (London ed. 1835);
see Evans, supra note 127, at 46-47.

129 See generally Richard Bronaugh, *Persuasive Precedent*, in *PRECEDENT IN LAW*, supra
note 127, at 217.

(H.L.) (appeal taken from Eng.); Practice Statement (Judicial Precedent), (1966) 1 W.L.R.
1234 (Eng.) (stating that “too rigid adherence to precedent may lead to injustice,” so courts
should “depart from a previous decision when it appears right to do so”).
At the time of the American Revolution, lawyers and judges had competing views of the strength of precedent. Lord Mansfield, Chief Justice of England, wrote in 1774 that “[t]he law would be a strange science if it rested solely upon cases,” and that “precedent, though it be evidence of law, is not law in itself; much less the whole of the law.” On the other hand, Sir William Blackstone took a stronger view of precedent in his Commentaries on the Laws of England, writing that it was “an established rule to abide by former precedents, where the same points come again in litigation,” because the judge was “sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.” Yet even Blackstone granted an exception to this rule where “the former decision is manifestly absurd or unjust.” Taking a similarly strong view of precedent, Alexander Hamilton asserted in The Federalist that, to avoid arbitrary discretion in the courts, the judiciary must be “bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”

Early state supreme courts and the U.S. Supreme Court had the same ambivalent attitude toward previously decided cases – even their own recent past decisions. Both a consequence and a cause of this ambivalence about a rule of binding precedent was the fact that in the early years of the Republic, published case reports were scarce. While some state court decisions were published in the 1790s, official reports of the U.S. Supreme Court were not published until 1804, and some of the original thirteen states had no published judicial opinions until the 1830s. In 1854, a state supreme court refused to follow U.S. Supreme Court precedent on the subject of slavery. The first


132 William Blackstone, 1 Commentaries *69.

133 Id. at *70 (stating that if a law “is manifestly absurd or unjust,” then the law is not “bad law,” but “not law”). Lewis asserts that Blackstone “stated the general rule somewhat too widely, for the rigid system he suggests does not appear to have been recognized in his time.” Lewis (pt. 4), supra note 127, at 246-47.


135 It was said of Samuel Livermore, Chief Justice of New Hampshire from 1782 to 1790, that “[e]ven when gross inconsistency marked his decisions, and his attention was called to his former rulings, he was not disturbed, but merely replied that ‘Every tub must stand on its own bottom.’” Corning, supra note 57, at 470.

136 Chroust, supra note 53, at 69-71. Georgia first had published reports in 1824, Delaware in 1837. Id. at 71.

137 In re Booth, 3 Wis. 13, 89 (1854) (refusing to follow precedent because it conflicted with the court’s “obedience to a paramount law; the fundamental law”). Similarly, in England, “[a]s late as 1869 a judge of first instance seems to have had no compunction in delivering a judgment in which he did no more than say that a decision of the Lord
seven or eight decades after independence were a period of great judicial creativity, of instrumentalism. 138 Nevertheless, what was clear was that decisions of other courts, domestic or foreign, were entitled to respect and consideration. As John Marshall said in an 1815 case about thirty hogsheads of sugar, “[t]he decisions of the Courts of every country . . . will be received, not as authority, but with respect.” 139

Every American law student, lawyer, and judge knows this distinction very well, because one state’s judicial decisions are only persuasive authority, not binding precedent, in another state. Indeed, state courts regularly referred to the decisions of other states’ courts as “foreign law,” some of them until quite recently. 140 When Thomas Jefferson catalogued his personal library in Virginia sometime before 1783, he classified the statutes of Massachusetts, Connecticut, and other states alongside those of Bermuda and Barbados under the heading “Foreign Law.” 141

Foreign law in the U.S. Supreme Court, like decisions of other states in a state court, can be at most a “persuasive precedent,” and cannot be “binding” or “authoritative” or “ruling” in the court that cites it. 142 Binding authority controls a court’s decision even if it persuades none of the judges deciding the case, and even if all the judges express their regret about its controlling force. Persuasive authority, even if it persuades all of the judges deciding a case, cannot be said to have controlled the court’s decision. Caleb Cushing, Attorney General of the United States in 1820, described the influence of the civil law on American jurisprudence in a passage that well summarizes the role of foreign law as persuasive precedent:

The common, civil, and customary law of Europe have each precisely the same force with us in this branch; that is, our courts study them all, and

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139 Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (considering whether a British rule concerning the spoils of war should apply in the United States).

140 See, e.g., Robertson v. Estate of McKnight, 609 S.W.2d 534, 537 (Tex. 1980) (referring to a New Mexico law as “foreign law”); Flaiz v. Moore, 359 S.W.2d 872, 875, 876 (Tex. 1962) (referring to a South Dakota law as “foreign law”); King v. Bruce, 201 S.W.2d 803, 809 (Tex. 1947) (referring to a New York law as “foreign law”); Abeel v. Weil, 283 S.W. 769, 776 (Tex. Comm’n App. 1926) (referring to the laws of California as “foreign laws”).

141 BROWN, supra note 53, at 20 n.37; JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK, at xxxv (1944).

142 For these reasons, I refer throughout this paper to “citation” of foreign and international law rather than “reliance on” or “following of” foreign law or “obedience” to its “authority.”
adopt from them whatever is most applicable to our situation, and whatever is on the whole just and expedient, without considering either of course obligatory. If Mansfield, Scott, or Ellenborough, is cited with deference or praise, so likewise are Bynkershoek, Valen, Cleirac, Pothier, and Emerigon. The authority of a decision or opinion, emanating from either of these sources, is rested on exactly the same foundation, viz. its intrinsic excellence.143

I am sure that Justice Scalia understands the distinction between binding precedent and persuasive authority, but he has made it easy for his attacks to be misunderstood by many who don’t understand the distinction, some of whom populate the ideological echo chamber of increasing stridency that repeats, amplifies, and simplifies these attacks. It may be that some of these opponents of foreign law do not make a distinction in their own minds between being persuaded to follow another person’s reasoning and being bound to follow someone else’s opinion by some kind of ideological adherence. The preambles of the proposed Senate and House resolutions declare that “inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States.”144 Senator Cornyn of Texas asserted on the Senate floor, in support of his proposed resolution, that “the American people do not want their courts to follow the precedents of foreign courts. . . . The American people do not want their laws controlled by foreign governments. . . . The American people do not want to see American law and American policy outsourced to foreign governments and foreign courts.”145 No distinction is made between persuasive precedent and binding authority.

Judges certainly do honor this distinction. If a Texas court were to cite and agree with the reasoning of a Massachusetts precedent, I suppose that no one would say that Massachusetts was controlling or ruling over Texas, or that Texas had lost its sovereignty. You may be wondering at this point whether a Texas court ever does cite a Massachusetts case. If American exceptionalism is the source of opposition to citation of foreign law, surely an equally strong case can be made for Texan exceptionalism. Texans have long regarded themselves as unique; many indeed think they are independent of any other political ties. I did a Westlaw search of Texas state court cases citing Massachusetts law since the Goodridge decision on same-sex marriage came

145 151 CONG. REC. S3113, 3128 (daily ed. Apr. 4, 2005) (statement of Sen. Cornyn). Rep. Bob Goodlatte, co-sponsor of the House resolution, stated that “six of the Court’s nine justices have either written or joined opinions that cite foreign authorities. This is an affront to both our national sovereignty and the broader democratic underpinnings of our system of government.” See Press Release, Rep. Tom Feeney, supra note 62.
down in 2003, and I found forty-four cases. In the corresponding period twenty years earlier, there were thirty-two cases.

Texas state courts actually do cite Massachusetts cases because sometimes law is not politics. Sometimes law is simply law. Even an elected judge will sometimes find that a faraway state with very different politics will have judges who give persuasive reasons for an obviously right result to a shared legal problem. When American judges find such a solution to their problem in a foreign opinion, our judges should not think that it is their duty to the law to ignore or reject such a solution out of hand.

B. The Universal Rule of Law

The rule of law is a set of ideas that extend across national boundaries. One element of the rule of law is the idea that aspects of law are universal. Partly because of the appeal of this idea, American law has always resisted an extreme version of the legal philosophy called positivism. Positivism, another foreign legal idea, which we get from the nineteenth century English barrister John Austin, says that law “properly so called” can only originate in a sovereign, and can only bind that sovereign’s territory or jurisdiction. American law, in contrast, has always allowed some core universality, some morality or sense of justice that transcends U.S. boundaries. Chief Justice John Marshall invoked “the legal standard of morality” which, he wrote, “must be found in the law of nations, as fixed and evidenced by . . . the general tenor of the laws and ordinances, and the formal transactions of civilized states.” Owen Roberts invoked the standard of a “universal sense of justice” in 1942 in Betts v. Brady. Seven majority opinions and five dissenting or

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147 I performed the Westlaw searches on April 20-21, 2006. I searched the period from November 18, 2003 to April 21, 2006, and from November 18, 1983 to April 21, 1986. The figures given above are based on multiple searches, including all Texas cases in the relevant time periods using the words “Massachusetts” or “Mass.” (Some cases appeared in one search and not in the other.) Cases citing federal courts sitting in Massachusetts (including district courts and bankruptcy courts) were counted when the case was not exclusively based on federal law. Cases with textual references to the Massachusetts Constitution or to Massachusetts administrative practice or criminal procedure, without a case citation, were also included.
150 316 U.S. 455, 462 (1942).
concurring opinions\textsuperscript{152} have repeated these words, sometimes upholding and sometimes striking down a challenged practice.

The distinction between particular law and universal law dates back to the Romans. Gaius, a Roman law teacher of the mid-second century and not a Christian, wrote an introductory textbook of law, the \textit{Institutes}, that was adopted throughout the Roman Empire, was copied into Justinian's Institutes in the sixth century, and remains the outline of legal education today in much of the world. The opening line of Gaius' \textit{Institutes}, the first speck of law that millennia of beginning law students learned, was that law included both the particular law of one people and a universal law of all people, \textit{ius gentium}, the law of nations.\textsuperscript{153} This idea of a partly universal, partly particular law made its way to an early passage in Justinian's \textit{Institutes}, where a further distinction was made between two kinds of universal law, natural law and the law of nations.\textsuperscript{154} From Justinian's \textit{Institutes}, the introductory text of legal study in Europe for more than a thousand years, this idea made its way into the legal learning of most of the world. Justinian's \textit{Institutes} made plain this distinction, teaching that all are free by the law of nature, but that slavery arose by the law of nations.\textsuperscript{155} Thus, Roman lawyers learned that freedom was universal and slavery was local. English lawyers also were familiar with this bit of Roman


\textsuperscript{153} \textit{The Institutes of Gaius} 18-19 (W.M. Gordon & O.F. Robinson trans., 1988). The first line, in Latin, reads "\textit{Omnes populi, qui legibus et moribus regunt, partim suo proprio, partim communi omnitum hominum iure utuntur... quod uero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur.}" \textit{Id.} at 18. In English: "All peoples who are governed by laws and customs use law which is partly theirs alone and partly shared by all mankind. . . . [T]he law which natural reason makes for all mankind is applied in the same way everywhere. It is called the law of all peoples' because it is common to every nation." \textit{Id.} at 19.

\textsuperscript{154} Justinian's \textit{Institutes} § 1.1.4., at 36-37 (Peter Birks & Grant McLeod trans., 1987). In Latin: "\textit{iure privato, quod est tripertitum: collectum est enim ex naturalibus praeceptis aut gentium aut civilibus.}" \textit{Id.} at 36. In English: "private law. . . has three parts, in that it is derived from the law of nature, of all peoples, or of the state." \textit{Id.} at 37.

\textsuperscript{155} \textit{Id.} § 1.2.2, at 36-37. In Latin: "\textit{ius autem gentium omni humano generi commune est, nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituentur: bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuris naturali contrariae. iure enim naturali ab initio omnes homines liberi nascabantur.}" \textit{Id.} at 36. In English: "The reality of the human condition led the peoples of the world to introduce certain institutions. Wars broke out. People were captured and made slaves, contrary to the law of nature. By the law of nature all men were initially born free." \textit{Id.} at 37.
learning, as were antebellum American lawyers.\footnote{156 See, e.g., ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 10-15, 34 (1975); see also 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 30 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (stating that servitude is “contrary to nature”).} John Marshall and Joseph Story argued in opinions about the legality of the slave trade in these Roman law terms, each invoking the law of nations and the laws of foreign governments.\footnote{157 The Antelope, 23 U.S. (10 Wheat.) 66, 73 (1825) (Marshall, C.J.) (“In some particular and excepted cases, depending upon the local law and usage, they may be the subjects of property and ownership; but by the law of nature all men are free.”); United States v. La Jeune Eugenie, 26 F. Cas. 832, 845-46 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) (arguing that even though some nations permit slavery, the slave trade is not countenanced by the law of nature or the law of nations); see also Prigg v. Pennsylvania, 41 U.S. 539, 611 (1842) (Story, J.) (“By the general law of nations, no nation is bound to recognise the state of slavery . . . . The state of slavery is deemed to be a mere municipal regulation . . . .”).}

Opposition to citation of foreign law in constitutional interpretation would seem closely tied to multicultural relativism, a claim heard nowadays that fundamental human rights in my country are entirely different from and irrelevant to fundamental human rights in your country. What can be law for others cannot be law for us, say the opponents of universal human rights, and of citation of foreign law. There would, I suppose, also have to be no more talk of natural law or natural rights or Christianity in interpreting the Constitution if this opposition were to prevail, because these bodies of principles base their legitimacy on their universal application, and often are explicated by reference to foreign authors and foreign sources.

Finally, the rule of law requires a kind of faith, or at least a fixed “habit of voluntary acceptance and obedience.”\footnote{158 I borrow this phrase from David J. Seipp, Archibald Cox, Teacher, 78 B.U. L. REV. 565, 571 (1998) (reviewing KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997)).} But law in this country is not itself a religion. In England, James I asserted a divine right of kings at the beginning of the seventeenth century. Common lawyers fought against that nonsense and crushed it. The historian Michael Kammen collected and published in 1986 a wide variety of quotations about and examples of a “cult of the Constitution” and worship of the Constitution as an idol or fetish of divine origin.\footnote{159 MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE passim (1986).} Kammen’s sources began in the 1830s, increased in the 1890s, peaked in the 1920s and 1930s, and ended with a 1968 episode of Star Trek about people who worshipped a set of words starting “We the People” that they could not understand.\footnote{160 Id. at 334-35 (citing Gene Roddenberry, The Omega Glory, in STAR TREK 10, at 137-64 (James Blish adaptor, 1974)).} These messages seemed to be aimed primarily at public school
children and recent immigrants.\textsuperscript{161} None of these historical sources ever suggested that the Supreme Court was supposed to join this cult or to worship the Constitution as a divinely inspired text. Instead, experts on the Constitution were rather scornful of the cult of Constitution-worship, particularly Thomas Reed Powell of Harvard Law School, who, in a review of James M. Beck’s worshipful little book, \textit{The Constitution of the United States}, summed up the cult’s approach to the Constitution: “You can read it without thinking.”\textsuperscript{162}

To say that either the law or the Constitution is divinely inspired, to be accepted only with blind, childlike, unquestioning faith; or that it is or has always been far better than any other nation’s law ever was, is, or could be, is to deny our own capacity for rational thought, comparison, criticism, and improvement. This is not a cult whose Kool-Aid I will drink. Nor, I think, will any judge, lawyer, or citizen. It is bad history and bad law.

\textbf{CONCLUSION}

I tell my students of English legal history that law was rational in a pre-rational age, then law was rational in a rational age, and now law is rational in a post-rational age. In a pre-rational age, old forms of proof called ordeals of fire and water, trial by battle, and wager of law all purported to operate on the assumption that God would work a little miracle at every trial to show who was guilty and who was innocent. Law provided the basis for a secular, skeptical, rational critique of that faith in God’s everyday miracles. Law substituted trial by jury, a human method of fact finding, for the ordeal, battle, and wager of law. Then law was rational in a rational age, the age we still call the Enlightenment, when the way law worked among people provided the model for finding “laws” of physics, chemistry, and biology. The mechanistic, check-and-balance structure of our Constitution fits perfectly with the rational, law-saturated age in which it was written. Now law is rational in a post-rational age, blind faith is once more the order of the day, and law is once more the secular, skeptical critique – this time of political ideology.

This is a conference about the role of judges. Judges have a duty to their country, to the Constitution, and to the people, but it is a duty to be a judge, and to be a judge of law, not to follow election returns, opinion polls, or pressure groups. Only then will we follow the words of John Adams, John Marshall, and so many other patriotic Americans, to have a government of laws, not of men.

\textsuperscript{161} \textit{Id.} at 231-45.
POSTSCRIPT

Subsequent to this conference and the preparation of this Article, Justice Scalia stated publicly his disapproval of the proposed congressional resolutions and legislation condemning citation of foreign law.\textsuperscript{163} In a speech to a National Italian American Foundation luncheon attended by several House members, he told Congress that “[i]t’s none of your business. No one is more opposed to the use of foreign law than I am, but I’m darned if I think it’s up to Congress to direct the court how to make its decisions.”\textsuperscript{164} He said that the proposed legislation was “like telling us not to use certain principles of logic,” and added, “[l]et us make our mistakes just as we let you make yours.”\textsuperscript{165} Let us hope that puts an end to all this.


\textsuperscript{164} Justice Antonin Scalia, Adress to the National Italian American Foundation (May 18, 2006), \textit{quoted in} Lane, supra note 163.

\textsuperscript{165} \textit{Id.}, \textit{quoted in} Lane, supra note 163.