



2005

Speech: Citing Foreign Law in U.S. Courts: Is Our Sovereignty Really at Stake?

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Recommended Citation

Messitte, Peter J. (2005) "Speech: Citing Foreign Law in U.S. Courts: Is Our Sovereignty Really at Stake?," *University of Baltimore Law Review*: Vol. 35: Iss. 2, Article 3.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol35/iss2/3>

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EDITOR'S NOTE

CITING FOREIGN LAW IN U.S. COURTS: IS OUR SOVEREIGNTY REALLY AT STAKE?

The Honorable Peter J. Messitte has served on the United States District Court for the District of Maryland since 1993, when President Clinton appointed him to the position. Judge Messitte received his bachelor's degree *cum laude* from Amherst College in 1963 and went on to receive his law degree from the University of Chicago Law School in 1966. Interestingly, Judge Messitte did not enter the practice of law after graduation, but instead joined the Peace Corps as a volunteer in Sao Paulo, Brazil. After returning from Brazil, Judge Messitte worked in private practice for fourteen years. In 1985, he joined the Montgomery County Circuit Court as an Associate Judge. While in this position, Judge Messitte established Maryland's first divorce roundtable, in which lawyers, social workers, and psychiatrists discussed issues concerning the effects of divorce.

Judge Messitte's work also extends to helping developing countries establish independent judicial systems. From 1997 to 2003, Judge Messitte was a member of the International Judicial Relations Committee of the Judicial Conference of the United States. In this Committee, Judge Messitte chaired the Working Group for Latin America and the Caribbean. He has also acted as a consultant for judicial reform projects in Africa and Turkey. The following is a speech Judge Messitte presented on the influence of the U.S. Constitution in other countries and the relevance of foreign law in interpreting the Constitution. This speech was part of the University of Baltimore's Constitution Day celebration on September 20, 2005.

CITING FOREIGN LAW IN U.S. COURTS: IS OUR SOVEREIGNTY REALLY AT STAKE?

The Honorable Peter J. Messitte
Judge, United States District Court for the
District of Maryland
September 20, 2005

Dean Holmes, Professor Higgenbotham, Members of the Faculty and Students of the University of Baltimore Law School, Ladies and Gentlemen:

I'm honored to have been asked to speak to you on Constitution Day. There are so many things one could say about the remarkable document that is our Great Charter. But over the last several years I have had a special opportunity to consider the influence of our Constitution abroad—its internationalization, so to speak—and in the time allotted to me this evening, I'd like to share with you some of my perspectives in that regard. I want to start by telling you a story, probably apocryphal, but one which illustrates rather well the tension in this area.

Some years ago, the aircraft carrier USS Abraham Lincoln was cruising in the North Atlantic when it received a radio signal from the Canadians telling the Americans to divert their course 15 degrees south to avoid a collision. The Americans responded: "We suggest you divert your course 15 degrees north to avoid collision." The Canadians responded: "Repeat. Divert your course 15 degrees south." The Americans replied: "We insist you divert." Another round of this and finally the Americans responded: "We are the USS Abraham Lincoln, the second largest aircraft carrier in the U.S. Navy. We are accompanied by two destroyers and three submarines. We insist you divert your course or we will be required to take appropriate action."

To which the Canadians replied:

"Your call.

We are a lighthouse."

Hold that thought, as they say. I'll come back to it several minutes from now.

Let us return to the Constitution.

Can there be any doubt, as Professor Albert P. Blaustein once wrote, that our Constitution is "[America's] most important export?"¹

1. Albert P. Blaustein, *The United States Constitution: A Model in Nation-Building*, 54 PHI KAPPA PHI FORUM 4, 14 (1984).

Virtually from its beginning more than 200 years ago, our Constitution had influence beyond our borders—in France, then throughout Europe—in Poland, Germany, Austria, Belgium, the Netherlands, Spain, Portugal—and in Latin America. These countries were attracted not only by the idea of constitutionalism, but by the concepts of federalism, separation of powers, judicial review, and the recognition and protection of fundamental rights. We were not even doing much “exporting” in the early days. People came to our shores to observe and analyze what we had accomplished. De Tocqueville’s *Democracy in America*, based on his study and travel here, put in bold relief our constitutional institutions, especially federalism and judicial review.

During the 19th century, countries, such as Argentina, copied our institutions almost down to the letter. Argentina’s Corte Suprema de Justicia de la Nación was fashioned nearly identically after our own Supreme Court, with nine justices, the power of judicial review and a provision for discretionary review akin to our notion of certiorari. Our Constitution was also enormously influential in shaping governmental structures in the wake of the Revolutions of 1848 in Europe.

In time, of course, we did become active exporters of the Constitution. After the Spanish-American War, the U.S. exercised sovereign authority in the Philippines and many of our constitutional concepts were implanted there. By World War I, Woodrow Wilson spoke of making the world “safe for democracy.” And a Justice of the Constitutional Court of the Federal Republic of Germany has written that: “At no time since 1848 was political and legal thought in Germany more intensely preoccupied with American thought than after World War II. This is particularly true with regard to American constitutionalism.”²

In occupied Japan after World War II, the American approach to constitutionalism (especially federalism, judicial review and the protection of fundamental rights) had a similarly decisive influence.

American concepts of rights, more particularly the Bill of Rights, have also had a profound impact upon international organizations. It was largely at the insistence of the United States that the framers of the U.N. Charter in San Francisco in 1945 included references to human rights, and Eleanor Roosevelt, it will be recalled, chaired the Commission that helped draft the Universal Declaration of Human Rights. India looked to American constitutional concepts as it emerged as an independent nation.

In our own time, American assistance to the development of democracies and the drafting of constitutions has been extraordinarily ex-

2. Helmut Steinberger, *American Constitutionalism and German Constitutional Development*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 199, 212 (Louis Henkin & Albert J. Rosenthal eds., 1990).

tensive—in post-communist countries, as well as in countries that have emerged from dictatorships, especially in Latin America and Africa. Many of you have no doubt heard of the American Bar Association's Central and Eastern European Law Initiative (CEELI), sponsored by the U.S. Agency for International Development, through which professors, lawyers, and judges spend considerable time engaged as constitutional consultants in that part of the world. In the last twelve months, I myself have been invited to Argentina and Peru to discuss how the concept of certiorari works in our Supreme Court.

And continuously through all of this—as well might be expected—the high courts of virtually of all these countries and more recently regional tribunals such as the European and Inter-American Courts of Human Rights—have with profound respect, quoted from the decisions of our Supreme Court. This has especially been true as these courts have had to interpret norms derived from our Bill of Rights, principally in four areas: procedural justice and due process of law; equal treatment under the law; freedom of expression; and the right to privacy. One brief example will suffice. In 1993, a Kurdish union leader, Munir Ceylan, was sentenced to prison in Turkey for writing a newspaper article urging political action against the Turkish government's policies concerning the Kurdish people. In 2000, the European Court of Human Rights found Ceylan's punishment to be a violation of human rights, and in so doing, the court quoted the words of someone it called “one of the mightiest constitutional jurists of all time,” Oliver Wendell Holmes. The European court, in fact, cited several U.S. Supreme Court cases, including *Brandenburg v. Ohio*,³ which is so much in our own news today.

All of this is by way of background—ironic background, I should say—to a circumstance that has generated a great deal of heat (and less light) in recent times—the citation of foreign sources by certain members of the Supreme Court as an aid to interpreting our own Constitution—especially when it comes to interpreting questions of fundamental liberties, given, as Jeffrey Toobin noted in a very recent edition of the *New Yorker*, that countries abroad sometimes “tend to be more progressive than those at home.”⁴

You would think that this would be a straightforward, innocent, not particularly complex debate, touching upon such issues as:

- 1) The extent to which foreign law sources should be cited in our constitutional cases.
- 2) What is meant by foreign law? And whose law? England's? The European Court of Human Rights's? Zimbabwe's (Don't laugh)?

3. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

4. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, *NEW YORKER*, Sept. 12, 2005, at 42.

- 3) If foreign law is to be cited, for what purpose? For persuasive effect only? For precedential value, even if limited?

In January of this year, Justices Breyer and Scalia held a debate at Washington College of Law, American University, that was broadcast over C-SPAN. It was a civil debate. Maybe a bit too much laughter by both and a bit too much interrupting by Justice Scalia. But basically a civil debate.

But the debate has not been as straightforward, simple, and innocent as you might expect.

In May of 2004, the Subcommittee on the Constitution of the House Judiciary Committee passed a nonbinding resolution, Number 568, sponsored by Congressmen Feeney and Goodlatte and 59 Republican co-sponsors, which was entitled the "Reaffirmation of American Independence Resolution."⁵ Let me read it to you:

RESOLUTION

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.

Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had "combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws;"

Whereas the Supreme Court has recently relied on the judgments, laws, or pronouncements of foreign institutions to support its interpretations of the laws of the United States, most recently in *Lawrence v. Texas*, 123 S.Ct. 2472, 2474 (2003);

Whereas the Supreme Court has stated previously in *Printz v. United States*, 521 U.S. 898, 921 n. 11 (1997), that "We think such comparative analysis inappropriate to the task of interpreting a constitution . . . ;"

Whereas Americans' ability to live their lives within clear legal boundaries is the foundation of the rule of law, and essential to freedom;

Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through laws enacted

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

by duly elected representatives of the American people and our system of checks and balances;

Whereas 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

Whereas 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: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.⁶

Congressman Feeney offered these remarks at the hearing that led to the resolution:

Increasingly Federal Judges, including six U.S. Supreme Court Justices, have expressed disappointment in the Constitution we inherited from the framers, and disdain for certain laws enacted by democratically elected Representatives. With disturbing frequency, they have simply imported law from foreign jurisdictions, looking for more agreeable laws or judgments in the approximately 191 recognized countries in the world. They champion this practice and fancy themselves players on the international scene of jurisprudential thought. In their recent speeches, several Justices have referred to the "globalization of human rights" and assuming a "comparative analysis" when interpreting our constitution. Is this a proper role for our United States judges?⁷

Congressman Feeney also had this to say on MSNBC: "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's admonishment, they are no longer engaging in good behavior within the meaning of the Constitu-

6. *Id.*

7. *The Courts and International Law: Hearing on Markup of H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004), available at <http://www.house.gov/feeney/downloads/reaffirm/tfstatementmarkup5-13-4> (statement of Rep. Feeney, Member, House Comm. on the Judiciary).

tion and may subject themselves to the ultimate remedy, which would be impeachment.”⁸

A resolution identical to Resolution 568—Resolution 97—was introduced by Congressman Feeney on February 15, 2005, with approximately the same number of co-sponsors, and is currently pending before the House Judiciary Subcommittee on the Constitution.⁹ Congressman Poe of Texas, a former trial judge and instructor in constitutional law and a supporter of the new resolution, had this to say:

Using foreign court decisions across the board would create, of course, judicial chaos, judicial anarchy. But yet the Supreme Court does exactly this. Why should the Supreme Court be left to its own devices? If there is any other standard other than the Constitution, th[e]n what is next?

Mr. Speaker, looking to foreign court decisions is as relevant as using the writings in “Reader’s Digest,” a Sears and Roebuck catalogue, a horoscope, my grandmother’s recipe for the common cold, looking at tea leaves, star gazing, or the local gossip at the barber shop in Cut N’ Shoot, Texas. Mr. Speaker, has the Supreme Court lost its way?¹⁰

And Congressman Sensenbrenner, Chair of the full House Judiciary Committee, in a very recent speech at Stanford University, said this about courts citing foreign sources of authority in their rulings:

As I touched upon in the speech before the Judicial Conference last March, America’s sovereignty and the integrity of our legal process are threatened by a jurisprudence predicated upon laws and judicial decisions alien to our Constitution and foreign to our system of self-government.

Federal courts have increasingly utilized foreign sources of law, as well as international opinion to interpret the United States Constitution. If this trend takes root in our legal culture, Americans might be governed by laws of other nations or international bodies that Congress and the President have expressly rejected. Inappropriate judicial adherence to foreign laws and tribunals threatens American sovereignty, unsettles the separation of powers, presidential and Senate treaty-making authority, and undermines the legitimacy of the judicial process.

* * *

I am pleased to support as an original cosponsor a resolution that will receive Committee consideration in the coming

8. Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, MSNBC, Mar. 11, 2004, available at <http://www.house.gov/feeney/msnbcresolutionarticle.htm>.

9. H.R. Res. 97, 109th Cong. (2005).

10. Representative Ted Poe, *Has the Supreme Court Lost its Way?*, speech from the House Floor (June 13, 2005), available at <http://www.house.gov/poe/remarks/supremecourt61305.htm>.

months. This resolution reasserts the primacy of the United States, reaffirms the principles that informed America's Declaration of Independence, and safeguards the sovereignty for which America's Founding generation and those who have followed have fought and died.¹¹

What are we talking about here? Apart from citing relevant public international law (or private international) in a given case, we're talking about certain justices *citing* foreign law for its persuasive value—never for its binding effect—in a very limited way in a handful of Supreme Court cases, although—to be sure—some controversial ones. We're talking about *Roper v. Simmons*, which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.¹² We're talking about *Lawrence v. Texas*, which overturned state law making it a crime for two persons of the same sex to engage in certain intimate sexual contact;¹³ *Atkins v. Virginia*, that dealt with the execution of mentally retarded offenders;¹⁴ *Grutter v. Bollinger*, that concerned racial and ethnic diversity policies in higher education;¹⁵ and *Knight v. Florida*, regarding excessive delay in execution.¹⁶

Let's look at these cases:

- 4) In *Roper*, Justice Kennedy, writing for a majority of five, spent eighteen pages reviewing Supreme Court precedents and the practices of the various fifty States. In his last four pages, he also noted that since the case of *Trop v. Dulles*,¹⁷ the Court “ha[d] referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’”¹⁸ and observed that the U.S. was “the only country in the world that continue[d] to give official sanction to the juvenile death penalty.”¹⁹ He went on to cite international authorities, including a few conventions that the U.S. either never signed or signed with reservations.²⁰ But, on behalf of the five Justices who signed on to his opinion, Justice Kennedy also said, “the opinion of the world community, while not controlling our

11. Representative F. James Sensenbrenner, Jr., Zale Lecture in Public Policy at Stanford University (May 9, 2005), *available at* <http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf>.

12. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

13. *Lawrence v. Texas*, 539 U.S. 558 (2003).

14. *Atkins v. Virginia*, 536 U.S. 304 (2002).

15. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

16. *Knight v. Florida*, 528 U.S. 990 (1999).

17. 356 U.S. 86 (1958).

18. *Roper*, 125 S. Ct. at 1198 (2005).

19. *Id.*

20. *Id.* at 1199.

outcome, does provide respected and significant confirmation of our own conclusions."²¹

Even Justice O'Connor, in dissent, said,

[T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values in other countries. . . . At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.²²

On the other hand, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, said "the 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."²³

5) In *Lawrence*, Justice Kennedy, for the majority, in two short paragraphs out of a thirty page opinion, referred to the repeal of laws punishing homosexual conduct in Great Britain and the case of *Dudgeon v. U.K.*, from the European Court of Human Rights, which held such laws invalid under the European Convention on Human Rights.²⁴

Justice Scalia, in contrast, characterized this reference to foreign law as "meaningless dicta, dangerous dicta however," and spoke of the impropriety of imposing "foreign moods, fads or fashions on Americans" —quoting Justice Thomas from an earlier case.²⁵

But it should be noted that the majority in *Lawrence* was writing primarily to refute Chief Justice Burger who had said in *Bowers v. Hardwick*²⁶ that bans on gay sex were "firmly rooted in Judeo-Christian moral and ethical standards."²⁷ *Lawrence* also suggested that European conceptions of "human freedom" could help shed light on our understanding of the concept in our own country.²⁸

6) In *Atkins*, in a footnote, along with references to organizations with germane expertise such as the American Psychological Association, and to widely diverse religious communities in the U.S.—Christian, Jewish, Muslim, and Buddhist—and to polls among Americans, Justice Stevens for a majority of six, stated that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is

21. *Id.* at 1200.

22. *Id.* at 1215-16 (O'Connor, J., dissenting).

23. *Id.* at 1226 (Scalia, J., dissenting).

24. *Lawrence*, 539 U.S. at 576.

25. *Id.* at 598 (Scalia, J., dissenting).

26. 478 U.S. 186 (1986).

27. *Id.* at 196.

28. *Lawrence*, 539 U.S. at 576-78.

overwhelmingly disapproved.”²⁹ There was also reference to an amicus brief that had been filed by the European Union.³⁰

Chief Justice Rehnquist found little support in precedent and the antithesis of federalism “to place weight on foreign laws. . . .”³¹ Justice Scalia took issue with the majority’s reference to the “so-called world community” and other non-domestic legal sources saying it took the “Prize for the Court’s Most Feeble Effort to fabricate a ‘national consensus. . . .’”³²

But what had the majority done? Had it imported “foreign law?” Had it said anything like, “We’re bound to follow it?”

- 7) In *Grutter*, the only reference to foreign law was in a concurring opinion by Justice Ginsburg who, in a single paragraph, referred to the International Convention on the Elimination of All Forms of Racial Discrimination, which had been ratified by the U.S. in 1994, which she cited because it endorsed the principle that certain measures might be in favor of certain racial groups for the purpose of guaranteeing their rights.³³ True, she also cited as in accord the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by 170 nations,³⁴ but not by the U.S.³⁵

But why did she cite it? Simply to agree with the majority opinion that “race-conscious programs ‘must have a logical endpoint.’”³⁶

- 8) *Knight v. Florida* was not a merits opinion. It was Justice Breyer dissenting from the denial of certiorari in a case raising the issue of excessive delay in executing an individual. He cited opinions from the Privy Council in England, from India, Canada, and from—in what he later called “a tactical error”—a case from Zimbabwe, which as he later conceded, is “not the human rights capital of the world.” But all he said was that the opinions of these courts might be “useful.”

There have been other causes of concern to some Congressmen.

They have cited speeches by such “transnationalist” justices as Justice O’Connor, who in Atlanta in October, 2003, said:

29. *Atkins*, 536 U.S. at 316 n.21.

30. *Id.*

31. *Id.* at 322 (Rehnquist, C.J., dissenting).

32. *Id.* at 347 (Scalia, J., dissenting).

33. *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

34. United Nations Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited March 10, 2006) (listing the states that have signed and ratified the Convention). As of March 2, 2006, 182 countries are party to the Convention and the United States has still not ratified it. *Id.*

35. *Id.*

36. *Id.*

I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts.³⁷

Of course Justice O'Connor also said (in a caveat not as frequently quoted) that: "[C]onclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts"³⁸

Justice Ginsburg has spoken to similar effect.

Let's consider why some Congressmen, law professors, and commentators object to when Justices cite foreign law.

- It violates the doctrine of separation of powers, they say. Judges are supposed to interpret U.S. law and foreign law only insofar as the Constitution or statutory law allow. Congress, in contrast, may look to foreign law for whatever models it chooses.
- Citing foreign law undermines our distinctive Constitution, they argue. Foreign laws emerge from different historical, social, and cultural settings.
- They believe that citing foreign law is selective, i.e., Justices look almost always to Europe, sometimes Canada, and only as to rights the Justices favor (e.g., gay rights or abortion). There is no principled way to distinguish what law to cite for what purpose.
- Citing foreign law, they suggest, encourages judicial activism. Judges will find pretexts for abandoning existing precedents and launching in new directions.
- Finally, citing foreign law undermines respect for law. The Constitution is "our" law. "[O]ver time . . . [there's] a danger of dissolving the affections that Americans have for their own Constitution."³⁹ (This is a thesis of Professor John McGinnis of Northwestern University Law School.)

There are responses to these concerns, of course:

37. Honorable Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, Remarks at the Southern Center for International Studies (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf.

38. *Id.*

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. (2004), available at http://commdocs.house.gov/committees/judiciary/hju92673.000/hju92673_0.HTM (testimony of Professor John McGinnis).

- Leave aside concepts of international law relative to “war” or “treaties” or “conventions,” which everyone agrees are relevant.
- Leave aside cases interpreting Article I, Section 8, of the Constitution, which authorizes Congress to define and punish offenses against the law of nations (e.g., piracy).
- There are no other instances where Supreme Court Justices ever cited foreign law as *binding* upon them.
- Citing foreign law for persuasive effect is no different from citing other persuasive authority, (e.g., lower federal court cases, state court cases, law review articles, even literary sources).
- The fact that foreign sources could be abused is not an argument that they should not be used at all, only that they must be used with integrity.
- Reliance on foreign law is consistent with our earliest traditions. The Declaration of Independence, for example, says that “a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation,”⁴⁰ and goes on to speak of “truths to be self-evident, that all men are created equal”⁴¹ Chief Justice John Marshall, in *Thirty Hogsheads of Sugar v. Boyle*,⁴² wrote that “the decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.”⁴³
- And there have been several other cases of similar tenor.
- Foreign law can also be cited for its negative effect, as Justice Jackson, concurring, did in *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁴ President Truman had ordered the Secretary of Commerce to seize and operate steel mills.⁴⁵ Justice Jackson cited the Weimar Constitution after World War I, which gave Germany’s President the right to suspend any and all rights when public safety and order might be endangered.⁴⁶ When Hitler persuaded President Von Hindenberg to suspend all such rights, they were never restored.⁴⁷
- Telling judges how to interpret law also strikes “at the core of the judicial process.” It isn’t judges citing foreign law that violates the doctrine of separation of powers. It’s telling judges they *can’t* cite foreign law that violates the doctrine.
- And one might add another argument: Resistance to citing foreign law is yet one more manifestation of the clash between

40. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

41. *Id.* at para. 2.

42. 13 U.S. (1 Cranch) 191 (1815).

43. *Id.* at 198.

44. 343 U.S. 579 (1952).

45. *Id.* at 582.

46. *Id.* at 651 (Jackson, J., concurring).

47. *Id.*

strict constructionists, i.e., originalists (e.g., Justice Scalia and Justice Thomas, on the one hand, plus the some sixty House Republicans) and the non-originalists who see the Constitution as a living, constantly evolving document. If you look closely at the Resolution 568 and Resolution 97, you will see that they don't refer to citation of foreign law by the Supreme Court alone, but by judges in general; that the resolutions are not limited to constitutional interpretation but to "judicial interpretations regarding the laws of the United States;" and that they single out original intent as the only legitimate method of judicial interpretation.

Opposition to citing foreign law, I submit, is not just wrong-headed. It looks very much like an effort at mind-control. It is simply one more shot across the bow at the Judiciary by Congress seeking to intrude on judicial independence.

- Recall the Feeney Amendment (the same fellow behind Resolution 97 and Resolution 568) that required federal judges to justify departures from the sentencing guidelines. That amendment passed with absolutely zero input (i.e., no testimony) from the Judiciary.
- Remember the subpoenaing of the sentencing records of a federal judge called to testify before Congress who had been critical of the sentencing guidelines.
- Recall the recurring threats to strip federal judges of authority to hear certain cases, (e.g., challenges to the phrase "Under God" in the Pledge of Allegiance; or to the display of the Ten Commandments on government property; and/or to the Defense of Marriage Act).
- Recall the threats by Congress to withhold funds to enforce certain court decisions.
- And consider the ominous reference by Congressman Sensenbrenner of the House Judiciary Committee, in his recent Stanford speech, to the possibility of Congress establishing an Inspector General for the federal courts.

Opposition to citing foreign law, particularly insofar as it is a one-way street (i.e., foreign courts can cite our Supreme Court, but ours cannot cite theirs), brings to mind other instances of America's arrogance and latter day rejection of multi-lateralism. Some might say it's of a piece with the attitude of our current Government with respect to:

- The Kyoto Accords (global warming);
- The new Anti-Ballistic Missile Treaty;
- The International Criminal Court;
- And, yes, Iraq (where we're said to be engaged in an effort to democratize that country).

So what, then, is the moral?

It is, I would suggest, that judges, lawyers, professors, and students of the law have to be vigilant. We must work to correct this shortsightedness. We need to keep searching for truth wherever we can find it. We cannot, to paraphrase John Stuart Mill, rob the human race by ignoring whatever information and wisdom foreign law sources might hold. Of course we will never be bound by foreign law sources and no one has ever said we should be. But if reference to foreign sources is prohibited, posterity and the existing generation stand to lose, including those who don't want to consider those sources. If the foreign sources are enlightening, opponents will be deprived of the opportunity to learn. If foreign sources are not enlightening, opponents will be losing as great a benefit—"the clearer and livelier impression of truth, produced by its collision with error."⁴⁸

Let me return to my—what shall I call it? Parable? Of the USS Abraham Lincoln and the radio signal from the Canadians. If reason prevails, we can look forward to the day that most, if not all, of our fellow citizens understand that when our Supreme Court occasionally cites foreign law sources—that in fact it's a lighthouse out there—it's not a menacing vessel that's trying to interfere with our progress. And that lighthouse—containing all that foreign law—only exists to help illuminate us along our way.

I'll close by quoting a statement made some years ago by someone who may surprise you:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly ground in so many countries, it is time that the United States courts begin looking to the decision of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the future.⁴⁹

48. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (citation omitted).

49. 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. Kommers eds., 1993).

Who was the speaker? Our late Chief Justice William H. Rehnquist. He tried to pull back slightly in his later years. But he was clearly torn. So you see, there is reason to hope.