

*Out of Bounds: Judges, Legislators, and
Europe's Law*

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Legal reform has long taken place through the movement of ideas about the law across national borders—sometimes by decree, at other times by choice.¹ The spread of American-inspired judicial review to numerous countries over the past few decades is one of the most important contemporary manifestations of the workings of such legal transplantation.² This phenomenon has had an important structural effect beyond sheer transnational legal exchange. The global emergence of powerful, politically assertive courts has redefined the instruments through which legal transplantation has historically taken place. Prior to the globalization of judicial review, domestic legal systems acquired outside influences through one of two means: military conquest or, more commonly, legislation patterned after foreign models.³ With the rise of powerful judiciaries outside the United States, court opinions have emerged as a novel venue for cross-national importation of law. Newly created or emboldened courts can now draw inspiration from statutes of other countries and the opinions of foreign judges. They were encouraged in this direction by a growing sense of community among segments of the judiciary and legal academy world-wide.⁴ A distinctive result has been a marked increase in the prevalence of citation to foreign court opinions on the part of European Union (EU) adjudicative bodies and a number of national supreme courts.⁵

The United States Supreme Court has been comparatively slow to follow this trend. Only a small number of citations to foreign laws and opinion have made their way into Supreme Court opinions in recent years, and these were largely limited to dissents, concurrences, or footnotes. Nonetheless, they sufficed to spark a heated political and legal debate on the legitimacy of “constitutional borrowing” that appears to have bypassed other countries. The issue came to a head in the wake of Justice Kennedy’s reference in *Lawrence v. Texas* (2003) to a decision by the European Court of Human Rights.⁶

Opponents responded with a call for congressional intervention. In March 2003 the House Subcommittee on the Constitution took the unusual step of holding hearings on the “appropriate role of foreign judgments in the interpretation of American law.”⁷ In May of that year the Subcommittee passed what it called the “Reaffirmation of American Independence Resolution.” Its core message was that “U.S. judicial decisions should not be based on any foreign laws, court decisions, or pronouncements of foreign

¹ Alan Watson, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 22-24 (2nd Ed. 1993).

² See Henkin, “Introduction,” in Louis Henkin & Albert J. Rosenthal (eds.), *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 1, 13-14 (1990)

³ Owen, *The Foreign Imposition of Domestic Institutions*, 56 *Int’l Org.* 375, 376-77, 379 (2002).

⁴ Anne-Marie Slaughter, *A Global Community of Court*, 44 *Harv. Int’l L.J.* 191, (2003).

⁵ C.L Ostberg et al., *Attitudes, Precedents and Cultural Change: Explaining the Citations of Foreign Precedents by the Supreme Court of Canada* 34 *Canadian J. Pol. Sci.* 377 (2001); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *Ind. L.J.* 819 (1999). See discussion in Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 *Tex. Int’l L.J.* 353.

⁶ *Lawrence v. Texas* 123 S. Ct. 2472, 2481 (2003) (discussing the holding in *Dudgeon v. United Kingdom*, 4 *Eur. H.R. Rep.* 149, 164-65 (1981)).

⁷ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. R. 568 Before the House Judiciary Subcomm. on the Constitution*, 108th Cong. 2nd Session (2004) [hereinafter *Hearings*].

governments.”⁸ Fifty-nine members of Congress gave their names to this initiative. Three of the four professors invited to testify before the Subcommittee offered their support.⁹ In a media interview, Rep. Tom Feeney (the Resolution’s chief sponsor) suggested that justices who continue to cite foreign law, notwithstanding this warning, may be duly impeached.¹⁰ That, objected Rep. Jerrold Nadler (the ranking Democrat on the Subcommittee) was “the definition of intimidation.”¹¹ He, and Rep. Adam Schiff, another Democrat, were the only members of the Subcommittee to take issue with the initiative during the hearing.

For the time being, the momentum for further congressional action in this regard, appears to have slowed down, and the future impact of the resolution on the pattern of foreign citations remains to be seen. Failure to heed the Subcommittee warning may well spark more concerted congressional action. In the meantime a vigorous debate on the issue among academics, judges, and media, shows no sign of abating.

The political salience of the foreign cites matter is not simple to make sense of, because it is an exception to the usual pattern of criticism of judges. The Court tends to draw political fire in response to specific judicial outcomes, not modes of reasoning. Even if we take the view that opposition to foreign references serves as a proxy for substantive disagreement with the rulings, the chosen framing calls for explanation. The normal line of attack on judicial decisions has tended to employ some variant of the counter-majoritarian argument. It is an argument backed by powerful democratic logic, and proven political appeal. By contrast, the link between majoritarian democracy and opposition to foreign citations is much more tenuous. It depends on both subtle and complex arguments. Why then opt for this mode of framing over straight-forward complaints about judicial activism? It may be because the principles of majoritarian democracy, or separation of powers are in fact secondary within this debate to a very different concern.

The primary dispute, this paper argues, pertains to the fit between American political and constitutional values and those of continental Europe, from whose law the Court’s foreign citations were predominantly drawn. American elites divided throughout the 19th century over the legitimacy of continental-modeled legal and social reforms. Recurrent codification and legislative initiatives patterned after European labor law were the trigger behind this political and jurisprudential debate. The constitutional argument against such transplantation equated the meaning of due process with common law

⁸ H.R. Res. 568, 108th Cong. (2004).

⁹ The three professors who testified in favor of the resolution were Jeremy Rabkin, from Cornell University; Michael Ramsey, from University of San Diego Law School and John Oldham McGinnis, from Northwestern University School of Law (in order of appearance). Professor Vicki Jackson, from the Georgetown University Law Center, testified in opposition.

¹⁰ “To the extent they deliberately ignore Congress admonishment, they are no longer engaging in good behavior within the meaning of the constitution and may subject themselves to the ultimate remedy, which would be impeachment.” *Hearings, supra* note 7, at 46 (citing Rep. Tom Feeney).

¹¹ *Hearings, supra* note 7, at 43.

guarantees. It built in turn on an understanding of due process as a synonym for what the Magna Charta first termed, “the law of the land.”¹²

The current controversy over foreign citations offers a mirror image of 19th-century legal transplantation crises. In the 19th century story, legislation was the medium through which law was transplanted. And some judges of the era saw their role as defending against this foreign-inspired law. Today the roles have reversed, with some judges serving as agents of transplantation, and some legislators guarding the gate. But both the meaning and salience of the contemporary controversy follow from its 19th century incarnation, I hope to show here. The first step in building this claim relies on analysis of the arguments put forth during the Subcommittee on the Constitution hearings. In this connection I point to the place that the speakers accorded to substantive differences between American and European political culture, and the view of American constitutionalism as inherently exceptionalist. Next the paper explores the parallels between the argument developed in the course of these hearings and those advanced by 19th-century opponents of legislative initiatives modeled after continental examples.

I. The Case Against Learning from Foreign Precedents: Judicial Activism, American Exceptionalism, and Original Intent.

The task of justifying the “Reaffirmation of American Independence” resolution required direct articulation of the threat that foreign citations pose. Because of this, the text of the Subcommittee on the Constitution hearings offers an excellent window into the construction of the relevant harm by opponents of foreign citations. In this regard, two parallel lines of argument are evident in statements made by the seven Congress members who spoke at the hearings (or contributed written statements) and the three professors who testified in support. The first built on familiar arguments against judicial activism to make the case against foreign citations, casting them as an especially egregious form of such activism. The second, invoked a distinct set of substantive, rather than institutional, concerns. The emphasis here was not on an alleged conflict between foreign citations and proper judicial roles, but on a deeper tension between the underlying commitments of American and European law. This line of argument incorporated, in turn, both a contemporary and a historical component. Current differences between European and American political values, according to this position, argue against judicial borrowing from the decisions of European courts. The argument for maintaining these differences into the future, links in turn to an originalist conceptions of American constitutionalism as a distinctly American project.

¹² On the overlap between “due process” and “the law of the land” see A.E. Dick Howard, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (1964).

Foreign Precedents and Judicial Activism

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

Americans' ability to live their lives within clear constitutional boundaries is the foundation of the rule of law and essential to freedom. There is no substitute for the unadulterated expression of the popular will through legislation enacted by duly elected representatives of the American people. The foundation of liberty turns to sand, however, when Americans must look for guidance not only to duly enacted statutes by elected legislatures and to decisions of American courts faithfully interpreting those statutes, but also to the often contradictory decisions of hundreds of other organizations worldwide.¹³

Congressman Steve King sounded a similar warning against going down “the path of activism, judicial activism, that sees the future of America in a fashion that’s not accountable to the voice of the people.”¹⁴ Other Subcommittee members repeated this charge, in various ways, never specifying why the act of citing the decisions of foreign courts is necessarily a form of judicial activism—or why it is inherently any more deplorable than other forms.¹⁵ Thus, at the start of the hearings, Rep. Chabot offered the following description of the problem at hand, apparently confident in the proposition’s self-evident nature: “[T]oday an alarming new trend is becoming clear: Judges, in interpreting the law, are reaching beyond even their own imaginations to the decisions of foreign institutions to justify their decisions.”¹⁶

The task of articulating the actual mechanism by which foreign citations exacerbated judicial activism fell to the three professors who testified in favor of the resolution. All three focused in this connection on the capacity of judges to pick and choose among available foreign precedents as the primary culprit. “Judges” as John McGinnis argued, “are likely to use their own discretion in choosing what foreign law to apply and what foreign law to reject. Judges will use foreign law as a cover for their discretionary judgments.”¹⁷ Michael Ramsey offered a similar claim, as did Jeremy Rabkin who stated: “One of the main reasons why judges cite precedents is to demonstrate that their decisions are not simply based on their own personal preferences, but follow, in some way, from recognized legal standards. If foreign rulings are relevant

¹³ *Hearings, supra* note 7, at 3.

¹⁴ *Id.* at 8.

¹⁵ See e.g. statement of Congressman Jim Ryun “The Court’s usage of international law and opinions in decisions is completely incompatible with our democratic values and the proper role of the courts in our constitutional system.” *Hearings, supra* note 7, at 7.

¹⁶ *Hearings, supra* note 7, at 1.

¹⁷ *Id.* at 32.

guides to the law, then judges have a much larger range of precedents to choose from---or to hide behind.”¹⁸

As Rabkin’s statement best makes clear, the alleged connection between foreign precedents and judicial activism begins with realist premises on rule-skepticism. This framework offers a cogent argument against the borrowing of precedents from foreign law, but does so at the cost of “throwing the baby with the bathwater.” If judicial reasoning and cites to domestic precedents are not to be taken seriously, the grave harm posed by foreign citations becomes difficult to see. In addition to the available precedent pool, foreign decisions might make the activist judge’s task somewhat easier. They do not, however, alter what is already understood to be an instrumentalist mode of judicial reasoning in a qualitative way. This suggests that the urgency behind the foreign cites issue stems from a different source.

How Europe Differs

Each of the three supporting witnesses addressed contemporary differences between European and American legal and political values. The testimonies varied both in the degree of emphasis they accorded these differences, and in their definition of the substantive values at stake. For Rabkin, the most out-spoken on this issue among the three, fundamental differences in American and European conceptions of the “importance of self defense” provided the cause for alarm.¹⁹ “American courts” Rabkin testified, “have generally been very deferential to the President and Congress when it comes to basic questions about military operations.” By contrast, European courts have tended to exercise less such deference. Once we begin to look to European law on matters such as capital punishment, or homosexual rights, “[i]t is only a short step ...to the notion that European opinion must be considered when our courts decide on the legality or constitutionality of American responses to the challenge of terrorism.”²⁰

By contrast, Michael Ramsey raised the potential of European influences to weaken protections for some rights. His argument in this connection proceeded in two steps. The first posited that “[I]f courts adopt a practice of relying on foreign materials” they must do so, as a matter of principle, across the board. In other words, they may not pick and choose and must adopt an all-or-nothing approach. This would entail, he argued, retreat from domestically established rights that other systems of law have failed to recognize. The list of such rights included freedom of speech, religion, the right to own property and the right to bear arms. The two place-specific examples offered in illustration pertained to Europe, “where many countries have an established church or explicitly ‘Christian’ parties,” and frequently offer “lesser protections for the free exercise of religion as the controversy in France over headscarves and other religious scarves suggests).”²¹ Presumably, consistent borrowing of European law would require adoption of these and similar limitations on established American rights. The alternative

¹⁸ *Hearings, supra* note 7, at 12-13 (testimony of Professor Jeremy Rabkin).

¹⁹ *Id.* at 14.

²⁰ *Id.*

²¹ *Id.* at 26.

(and to Ramsey’s mind more likely) outcome would be a more selective approach to borrowing. This approach would avoid the pitfall of wholesale importation of foreign law, but by definition would inappropriately limit citations to those that happen to support a particular result.

Finally, John McGinnis argued that “the problem with using foreign decisions” is that they cannot be viewed in isolation of “a whole set of norms and governmental structures” from which they emerged. Offering *Lawrence* as an example, McGinnis noted in his written statement that “European traditions are more favorable than American traditions to the imposition of elite moral views.”²² To this he added in oral testimony “And, therefore, it can be quite misleading to try to transplant the European decision into the American context, because we have a whole set of different institutions for creating norms.”²³

That Americans and Europeans currently differ on any number of issues is not per se an argument against the citing of European precedents. Dissatisfaction with the status quo—and a desire to move policy and legal outcomes closer to those seen elsewhere—is the reason for embarking on legal transplantation projects to begin with. Opponents therefore are pressed to offer a normative argument in favor of resistance to legal influences coming from abroad. In the course of the hearings, the primary effort in this direction hinted at the presence of a commitment to “American exceptionalism” in the framers original constitutional intent.

Original Intent and the Law of the Land

“Original intent” carries two meanings within the context of the foreign-precedent debate. The first is the original intent of the framers that underlay the constitutional provisions (e.g. due process, cruel and unusual punishment) at issue in particular cases. The second is the framers’ larger intent on the appropriateness of citing foreign precedents as such. The first meaning concerns original intent on the substance of particular constitutional provisions, and the second pertains to proper interpretive methodology. Both sides of this argument made their way into the Subcommittee’s hearings, but only the latter cut to the heart of this controversy.

The participant who most thoroughly addressed the argument from original intent during the hearings was John McGinnis. His written statement offered in brief an account of why originalism was the correct interpretive approach as a matter of democratic theory. Once this proposition is accepted, he correctly pointed out, the inappropriateness of citing foreign precedents follows by definition. Contemporary foreign precedents, after all, can shed little light on to the founders’ original intent.²⁴ This argument rests on acceptance of the originalist premise; without acceptance of the proposition, there is no logical bar to citation of foreign precedents. But the limits of this argument in building the normative case against foreign citation extend beyond its

²² *Hearings, supra* note 7, at 32 (testimony of Professor John McGinnis).

²³ *Id.* at 29.

²⁴ *Id.* at 30.

premise. Even working from that premise, the particular objection to foreign precedents is not clear. By the logic of the same argument every domestic precedent lacking an originalist base would be subject to the same critique. McGinnis does not address this difficulty. But elsewhere in his testimony he points in the direction of an alternative originalist rationale, based on the founders' view of Europe and the lessons its legal system might provide.

McGinnis turned to this question in response to the argument that the framers envisioned an evolving rather than static meaning to the bill of rights, and that they allowed for the possibility of transnational influences on the course of this evolution. Rejecting this possibility, McGinnis concludes that the framers would not "have wanted to tie these evolving standards to the standards of other nations around the world." The reason, as he explains, derives from the "self-conscious exceptionalism of the United States" at its inception. "At the time the Constitution was framed the United States was one of the few republican nations in the world and the Framers often distinguished its practices from the world's ancient regimes." This outlook, McGinnis concludes, would have made the framers very unlikely to pin the future development of the Bill of Rights on the practices of other nations, since "[t]hey would have no confidence that those standards would not represent retrogression rather than progress."²⁵

This characterization of the early American republic as self-consciously exceptionalist may be fairly debated, as ample historical evidence on both sides of this issue can be found. What matters for the purpose of this paper are the implications of this thesis for the foreign-precedent controversy. To the extent that the protection of American exceptionalism is understood to be part of the original American constitutional project, all manner of legal borrowing from Europe becomes constitutionally suspect. Viewed through this lens, it is in the very act of introducing European legal norms into American law that foreign precedents violate original constitutional intent.

Originalist understandings of American exceptionalism as an independent constitutional principle are hindered, however, by the absence of supportive language within the constitutional text. The appropriateness of learning from foreign law finds no mention in the constitution, with one possible exception: the incorporation of the phrase "law of the land" into Article VI's supremacy clause. The phrase originated in the Magna Charta, and came to denote a defined set of legal guarantees that could not be altered over time, entrenching in the process a particular common-law-based status quo. The difficulty in reading this meaning into the constitution's use of the phrase comes from its placement within the supremacy clause. The concern of the supremacy clause is with the relationship between federal and state law, not foreign and domestic law. Nonetheless, various speakers during the Subcommittee's hearing--from the opening statement onward--highlighted an alleged contradiction between the practice of foreign citations and the constitution's status as the "supreme law of the land."²⁶ In the process

²⁵ *Id.* at 33.

²⁶ *Hearings, supra* note 7, at 1, 8, 57 (testimony of Rep. Steve Chabot, Rep. Steve King, and Rep. J. Randy Forbes, respectively).

they bridged the controversy at hand with its 19th century parallel—perhaps intentionally, perhaps not.

II. Between “due process of law” and the “absolutism of continental governments”

Presaging the current controversy on citing foreign precedents, Justice Matthew wrote in 1884:

“The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*sum cuique tribuere*. There is nothing in the Magna Charta, rightly construed as a broad charger of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.”²⁷

The case from which this passage is taken, *Hurtado v. California* (1884), addressed the constitutionality of indictment by information (rather than before a grand jury) in a capital case. The constitutional question was whether indictment by information—a practice originally borrowed from continental civil law—complied with due process under the Fourteenth Amendment. The Court answered in the affirmative, upholding *Hurtado*’s death sentence. But, as the above-quoted passage suggests, the Court used the occasion to address a larger debate on the legitimacy of legislative provisions patterned after continental civil law. The substance of this debate can be partially reconstructed through the arguments Justice Mathew sought to rebut. The central disagreement was whether due process implied exclusive and permanent adherence to common law. Those who answered in the positive, one gathers from the above quote, invoked both the Magna Charta and the alleged absolutism of continental law. The influence of this position during that time is evident from the attention it received from the *Hurtado* Court. Furthermore, two important decisions would later quote the same passage from *Hurtado* almost verbatim. The first was *Holden v. Hardy* (1898), which upheld a law limiting the hours of employment in smelters and mines.²⁸

²⁷ *Hurtado v. California* 101 U.S. 516, at (1884).

²⁸ *Holden v. Hardy*, 169 U.S. 366, 386 (1898).

And the second was Chief Justice Parker's opinion in the 1904 New York Court of Appeals decision upholding work hour limits in bakeries²⁹ (to be overturned a later in *Lochner v. New York* (1905)).³⁰

Hurtado was issued in 1884 in the midst of a fierce political battle over the fate of codification in the state of New York. In 1879 and 1882 the state governor vetoed codes that were enacted by the assembly and the senate. In 1884 the code was before the state legislature, and the New York Bar Association attacked it in an all-out, and ultimately successful campaign. Justice Matthew's comment on the civil law in *Hurtado* suggests that he may well have been on the side of the codifiers. In reproducing the same passage from *Hurtado*, Justice Henry Brown, who authored the Court's opinion in *Holden*, likewise defined the issue before him in reference to legal transplantation. The issue cutting across both cases was whether due process entailed common-law-based substantive limitations on legislation. The Court answered in the negative in both *Hurtado* and *Holden*, but ultimately shifted course in *Lochner*. But the origins of this controversy date to several centuries before.

The idea that the civil law tradition was incompatible with the protection of liberty did not originate in the United States. It dates back to medieval England where at least since the 1300s, opponents of civil-law modeled reform initiatives branded them with authoritarianism. "In the early seventeenth century," the historian Norman Cantor wrote, "for an English royal official or churchman to have a degree in Roman law was sufficient for him to be branded a lover of foreign-type tyranny by the common lawyers and the oppositional gentry in the House of Commons."³¹ American legal commentators built on this foundation throughout the 19th century.

Early in the century the status of the civil law was addressed as part of a larger debate on the nature of the American legal system following its separation from England. A particularly influential voice in this connection was that of Chancellor Kent whose *Commentaries* addressed the proper role of Roman-civil law in American jurisprudence at significant length. Learned in continental law, Kent found much to admire in that system's treatment of "subjects relating to private rights and personal contracts." As a judge, he expressed willingness to be guided by "foreign jurists" in the absence of governing English law. But he drew a sharp line against such borrowing where the civil law's treatment of "the connection between the government and the people" was concerned. "In everything which concerns civil and political liberty," Kent wrote of the civil law, "it cannot be compared with the free spirit of the English and American common law."³²

29 *People v. Lochner*, 177 N.Y. 145, 150-51 (N.Y. 1904).

30 *Lochner v. New York*, 198 U.S. 45, 56 (1905)

31 Norman F. Cantor, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM*, 42 (1997).

32 James Kent, *COMMENTARIES ON AMERICAN LAW* (1826-1830) at 548.

In mid-century the political theorist Francis Lieber described the common law as the corner-stone of what he termed “Anglican liberty.” This term captured for him the bundle of attributes that he ascribed to Anglo-American political culture, in contradistinction from its continental (“Gallic liberty”) counterpart. The contrast between these two political constructs—and the superior protection accorded to civil liberty under Anglican principles—is the theme of a treatise *On Civil Liberty and Self-Governance*, that Lieber published in 1853. An immigrant who arrived in the United States from Germany during the 1830s, Lieber embraced the Anglo-American political tradition totally and completely. The animating force behind his 1853 treatise was a defense of that tradition against the threat of continental-modeled agendas for political reform. The task was lent urgency following the arrival of thousands of German immigrants in the wake of the failed 1848-9 revolutions.³³ The new arrivals included activists with a distinct radical bent and far-reaching ambitions for legislative and constitutional reforms (with some advocating the abolition of the presidency and the senate and a move towards parliamentary democracy).³⁴ Against this backdrop, Lieber offered the following insight on the significance of the common law: “[A]nd though we should have brought from England all else, our liberty, had we adopted the civil law, would have had a very precarious existence.”³⁵

By the end of the century the codification debate inspired an extensive literature on the relative merits of civil and common law. Among the better-known writings is a pamphlet that James C. Carter, who headed the American Bar Association’s anti-codification campaign, published in 1884. In sharp juxtaposition with Justice Mathew’s statement above, Carter highlighted in his opening paragraphs the ostensible inherent despotism of the civil law. Codes, Carter wrote, are characteristic of states “which have a despotic origin, or in which despotic power, absolute or qualified, is, or has been, predominant.” This, he argued was not a coincidence, but an intrinsic aspect of the political character of code-governed states. “In free, popular States, the law springs from, and is made by, the people” whereas codes are the instrument of a “sovereign [who] must be permitted at every step to say what shall be *the law*.”³⁶

Kent, Lieber and Carter are but some of the 19th century legal theorists who put such weight on the divergence between the political values underpinning common and civil law. The prominent attorney John F. Dillon explained the purpose unifying the Storrs Lectures that he delivered at Yale University in 1892 in the following way:³⁷

[T]hat purpose is to delineate the characteristics and exhibit the excellences of our legal system as it now exists, with a view to show that for the people subject to its rule it is, with all its faults, better than the Roman or any other alien system. It is

33 On the influence of the 1848 revolutions on Lieber’s writing see Theodore D. Woolsey, “Introduction to the Third Edition” p. 9. (This is the introduction to the third edition of Lieber’s treatise ON CIVIL LIBERTY AND SELF-GOVERNMENT, which was published in 1877.)

34 Carl Wittke, *REFUGEES OF REVOLUTION: THE GERMAN FORTY-EIGHTERS IN AMERICA*, (1952).

35 *ON CIVIL LIBERTY AND SELF-GOVERNANCE*, 1853 at 210.

36 Carter, *THE PROPOSED CODIFICATION OF THE COMMON LAW* (1884) at 6.

37 John F. Dillon, *THE LAWS AND JURISPRUDENCE IN ENGLAND AND AMERICA*, vii (Da Capo Press ed. 1970) (1895).

an argument intended to be so earnestly and strongly put as to amount to a protest against the *Continentalization* of our law. I have a profound conviction of the superiority of our system of law, at least for our people; but I know that this estimate is not so fully and firmly held by the body of lawyers and law teachers as I think it ought to be.

Dillon's primary concern here was not with codification, which he did not oppose.³⁸ Instead, the continental threat he feared most was labor legislation inspired by socialist winds abroad. For help in deflecting this danger he appealed to the judiciary:

Among the peoples of our race the era of the despotism of the monarch or of an oligarchy has passed away. If we are not struck with judicial blindness, we cannot fail to see that what is now to be feared and guarded is the despotism of the many,--of the majority.³⁹

A decade and some later, the Court took on this exact challenge in *Lochner*, leaving *Hurtado* and *Holden* behind.

III. Trading Places

The contemporary controversy surrounding foreign citations in judicial decisions shares a common jurisprudential question with that which occupied the 19th-century Court in *Hurtado* and other cases: the relationship between constitutional due process and continental law. In both eras opponents of governance approaches with roots in civil law asserted their unconstitutionality. Where the controversies of the two eras manifestly differ is in the respective roles accorded to judges and legislators. During the 19th century, opponents of continental-inspired legislation looked to the courts to invalidate such laws on due-process grounds. The argument built on the long-standing notion that ever since the Magna Charta the twin terms "due process" and "law of the land" have encoded a closed and permanent list of common-law based substantive guarantees that ought to trump legislative provisions to the contrary. By contrast, the contemporary *Lawrence*-citation turns this issue on its head. Rather than European-modeled legislation, controversy has focused on the ostensible role of European constitutional principles in undercutting domestic legislation. In the process, judges, rather than legislators, have emerged as the controversial agents of transnational transplantation. The notion of a fundamental tension between the offerings of European law and politics and American constitutional democracy has, however, remained constant.

To identify these continuities is not to argue that the principles at issue have remained the same. There are cogent arguments to be made on both sides of the belief that "[i]f the views of foreign nations are relevant they should be relevant to legislative debates, not in judicial interpretations of the Constitution."⁴⁰ In other words, one might

³⁸ Benjamin R. Twiss, *LAWYERS AND THE CONSTITUTION*, 160 (Russell & Russell Ed. 1962) (1942).

³⁹ *The Laws and Jurisprudence of England and America*, at 204-205.

⁴⁰ *Hearings*, *supra* note 7, (Prepared Statement of Rep. Jim Ryun, quoting judge Bork).

support legislative transplantation and oppose court-to-court borrowing without being inconsistent. Nonetheless, the parallels between 19th-century transplantation controversies and those of today can help understand why the practice of foreign citations has struck such a raw nerve in the United States. Notwithstanding much of the rhetoric to that effect, judicial activism and separation of powers appear to be tangential to this debate. Rather, what seems to be at stake is the degree of overlap between American constitutionalism and the tenets of the Anglo-American common law tradition.