

Lessons from the Anticanon (and Some Comparative Questions)

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American constitutional interpretive discourse is fixated on an “anticanon” of cases that has remained stable over the last four decades or so: *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Lochner v. New York*, and (arguably) *Korematsu v. United States*.¹ American constitutional interpretive discourse also includes references to a set of episodes not captured in domestic case law that qualify as what Kim Lane Scheppele has called “aversive” models.² We craft and develop constitutional norms in opposition to expressive immoral or dysfunctional legal and political history with cultural salience: the colonial experience under the Crown and the subsequent experience under confederation; the controversy over the Alien and Sedition Acts; the Red Scare and 1950s McCarthyism; Watergate; and so forth. For a time, Reconstruction was also on this unfortunate list. Some, though not many, of these aversive episodes are in no sense a part of the domestic political history of the United States: the practices of Nazi Germany, Soviet Russia, and apartheid-era South Africa.³

Anticanonical cases serve much the same function as anticanonical episodes, and the same basic features of such episodes also serve to recommend cases for anticanonical treatment. Thus, American constitutional interpretive discourse, no less than ordinary political discourse or indeed Internet blogging, features what Leo Strauss called the *reductio ad Hitlerum*, whereby “[a] view is . . . refuted by the fact that it happens to have been shared by Hitler.”⁴ Nazi Germany so frequently appears in these discourses not because it stands for any particular proposition but because its moral valence and the pluripotency of its message permits it to stand for *every* particular proposition. In extremis, democracy and totalitarianism, moral relativism and moral certainty all lead to Hitler. Likewise, constitutional interpretivism and noninterpretivism both lead to *Dred Scott*; formalism and contextualization both lead to *Plessy*; judicial curtailment of the regulatory state and judicial invocation of substantive due process both lead to *Lochner*.

I note the peculiar use of anticanonical cases and their affinity with aversive constitutionalism more generally in order to gesture, schmooze-like, at an important distinction in the ways in which judicial precedent is used in

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¹ See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 380 (2011).

² Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 I•CON 296 (2003).

³ See *id.* at 312–24; David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 n.59 (2001).

⁴ LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 42–43 (1953).

constitutional argument. The distinction has implications for the debate, such as it is, over the uses of transnational comparative materials in constitutional law. Constitutional theory increasingly adopts a distinction, first developed by Keith Whittington, between constitutional interpretation and constitutional construction.⁵ Constitutional interpretation might be understood in one of two ways (depending on the scholar), either as exegesis of constitutional text or as the process by which one arrives at the semantic content of the law. Thus, Bruce Ackerman’s multi-generational synthesis of constitutional moments might well be understood, on his terms, as an exercise in interpretation even if it is unconcerned with constitutional text. The important point is that interpretation is directed at constitutional *meaning* rather than constitutional *adjudication*.⁶ By contrast, constitutional construction involves the building out of constitutional reality over time as underspecified constitutional standards and principles are made flesh through lived experience. Theorists will disagree on the degree to which constitutional construction is in fact or should ideally be constrained by constitutional interpretation, but construction is, in any event, not limited to the materials that speak to constitutional meaning. Constitutional construction brings constitutional meaning, narrowly understood, together with other sources of adjudicative wisdom to arrive at an appropriate resolution to concrete cases. Adopting this distinction for present purposes (without committing to it for all time), constitutional interpretation is primarily a dialectic process whereas constitutional construction is primarily a rhetorical process. In Aristotelian terms, rhetoric involves not just *logos* but also *pathos* and *ethos*; it involves the creative use of narrative and it involves appeals to the basic and particularistic character of a political community.

Let us return, then, to the use of judicial precedent in constitutional cases. We can understand relying on such precedent in the service of either interpretation or construction. We might believe that the meaning of a particular constitutional provision in some sense *includes* the authoritative applications and qualifications developed over time through case law. Thus, constitutional interpretation will involve deciphering the semantic intentions underlying judicial opinions as “constitutional” texts. The debate over whether a particular part of a Supreme Court opinion is holding or dicta is intelligible in the context of understanding the body of decisional law articulated in such opinions as, in effect, a dictionary that explains the meanings of words in the Constitution. We might alternatively view judicial opinions externally, as part of the cultural and historical mosaic that “constitutes” a people over time and therefore is an important source of wisdom in any political decisional process. Constitutional

⁵ KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5–14 (1999).

⁶ I use “adjudication” broadly to refer to the application of the Constitution to a concrete legal controversy, whether the applicant is a judge or some other actor.

construction might entail reference to such opinions as part of an appeal not to legal meaning as such but to *pathos* or to *ethos*, as an argument from ethical authority for why some proposition, perhaps itself arrived at through interpretation, should or should not govern present legal and political affairs. Resort to judicial precedent, like appeals to history, might in this sense be termed a form of ethical argument.⁷

Anticanonical cases are used primarily in this second way; we misunderstand them if we believe they are used only or primarily in the first way. These cases are cited in proportion to their repudiation within the political culture not because they are necessary to rebut some statement of what “the law” is or requires but because use of precedent as *pathos* or *ethos* is much more likely to rely upon an efficient and expressive jargon than is use of precedent as a statement of legal meaning. We cite *Lochner* rather than *Allgeyer v. Louisiana*, *Coppage v. Kansas*, or *Adkins v. Children’s Hospital* (the case the switch-in-time *actually* repudiated) for the same reason we cite Nazi Germany rather than the Khmer Rouge or the Partition of India: not just (or even, I think, primarily) because of the scale of atrocity, and certainly not because more modern phenomena approximate the Holocaust than other genocides, but rather because the domains in which we discuss such matters neither require nor invite nuance. The point is to assimilate ones opponent to a shared negative reference; the effectiveness of this style of argument increases in proportion to the notoriety and expressive capacity of the reference and diminishes in proportion to its obscurity.

Which brings us to comparative constitutional law. Consider the sources of American resistance to reference to foreign precedent within domestic constitutional discourse.⁸ There are two broad categories of criticism. First, it is argued that drawing on foreign law exacerbates the countermajoritarian difficulty by permitting American constitutional law to take direction from legal norms that do not reflect our demos. Second, the universe of sources of foreign law is so vast that it is difficult or impossible, even in good faith, to select references intelligently and, *a fortiori*, to reign in bad-faith selective citation. Both categories of criticism generally assume, however, that a judge is using foreign precedents as an aid to constitutional interpretation rather than constitutional construction. In constitutional construction, the purpose of the reference is often precisely to identify the domestic ethos. If it is a negative reference, the fact that it emerges from a different jurisdiction or culture is therefore an argument *in favor* of its use. And the second category of criticism, based on problems of selectivity, assumes a dialectic rather than a rhetorical mode of argumentation. As discussed, selectivity

⁷ See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); see also Richard Primus, *The Functions of Ethical Originalism*, 88 *TEX. L. REV.* 79 (2010).

⁸ My enumeration of such sources relies on VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 17–38 (2010).

is a feature of rhetoric, not a flaw. Scholars have noted that using foreign precedents as negative models mitigates many of the criticisms associated with the use of such precedent more generally.⁹ Indeed, even critics of foreign citation themselves use foreign precedent in this way. Studying the domestic anticanon underscores the fact that we often use domestic precedent, including case law, in much the same way.

This observation raises a number of questions, however, that require both more thinking and more substantive knowledge (on my part) even to begin to answer. First, we might wish to explore what rhetorical use of negative case law within the domestic setting tells us about similar use of positive case law, and therefore whether the interpretation-construction distinction (as I have framed it) can offer an answer to critics of foreign citation even outside the context of *negative* citation. Exploring the ways in which we use anticanonical cases in the domestic context makes it obvious that we often use canonical cases in much the same way. The rhetorical use of canonical cases can be obscured by the fact that such cases are also good law, and are therefore essential to the practice of interpretation. For example, deciphering the “meaning” of *Brown* in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁰ was both an exercise in interpretation, because everyone understood the legal meaning of *Brown* in part to control the case, and in construction, because *Brown* is a cultural icon whose authority is a significant resource in constitutional argument quite apart from whether the decision is formally controlling.

I can identify no reason, in principle, why a foreign decisional precedent that also happens to be good law cannot aid in construction even if it is irrelevant or barely relevant to interpretation. Indeed, I believe this is precisely how such precedents are often used, but (as with *Brown*) it can be difficult to disaggregate the distinct uses. Consider the use of *Dudgeon v. United Kingdom* and other foreign case law in *Lawrence v. Texas*.¹¹ Justice Kennedy wrote:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual

⁹ See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 1 I•CON 296 (2004) [hereinafter Choudhry, *Lochner*]; Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Scheppelle, *supra* note 2.

¹⁰ 551 U.S. 701 (2007).

¹¹ 539 U.S. 558 (2003).

conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.¹²

Dudgeon is good law, and its example is meant to support, not to attack the proposition for which it is cited. It is easy, then, to characterize the citation as evidence of the evolving meaning of the term “liberty” in the Fourteenth Amendment. That is certainly how Justice Scalia read the reference:

Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on “values we share with a wider civilization”, but rather rejected the claimed right to sodomy on the ground that such a right was not “‘deeply rooted in *this Nation’s* history and tradition’”. *Bowers’* rational-basis holding is likewise devoid of any reliance on the views of a “wider civilization”. The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”¹³

Consider, however, the possibility that reference to “wider civilization” and “human freedom” is not directed at the meaning of liberty, *per se*, but with the independent question of why a meaning of liberty arrived at through other means and leading to a valid constitutional claim in this case should be deemed controlling notwithstanding precedent, Burkean prudence, or other sources of adjudicative guidance. To say that a contrary holding is uncivilized is an appeal to *pathos*. To say that “in this country” the government has no more urgent interest in curtailing personal choice is an appeal to *ethos*.

Consider, in this regard, the Court’s erstwhile practice, memorably mocked by John Hart Ely, of referring to “the traditions of the English-speaking people.”¹⁴ This practice makes much more sense in the context of construction than interpretation. As Will Kymlicka writes, democratic political traditions

¹² *Id.* at 576 (internal citations omitted).

¹³ 539 U.S. at 598 (Scalia, J., dissenting) (internal citations omitted).

¹⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 60 (1980).

emerge from “politics in the vernacular,”¹⁵ based on the fact that “political communication has a large ritualistic component, and these ritualized forms of communication are typically language-specific.”¹⁶ It might be quite difficult in a case involving positive citation to distinguish exercises in interpretation from exercises in construction, but this problem is not special to the use of foreign precedent. The point, rather, is that the assumption that all such references speak to interpretation alone is no more warranted in this context than it would be with respect to domestic precedent.

Thus understood, the two overarching criticisms of foreign citation in U.S. courts—reliance on non-autochthonous sources of legal norms and the problems of identification and citation—again fade away as persuasive criticisms. Citation to foreign precedent as an element of construction is itself part of an argumentative practice directed at resolving the degree to which a particular proposition forms part of our traditions. To criticize it on the basis of its reference to foreign precedent as not distinctively American assumes the answer to the question presented. From this perspective, the cherry-picking criticism seems especially perverse, since it is manifestly not the case, nor would anyone argue, that any and every foreign precedent that is *legally* on point also coheres with American values. We do not use Iranian law as positive precedent because the practices of Iran do not wield authority in constitutional argument, and choosing among competing sources of authority is precisely the ballgame.

A second major question arises from this discussion, and this one is far more difficult to answer. I have sought guidance from the use of anticanonical cases to derive both a justification for citation to foreign precedent and, in broad terms, a set of criteria that might guide the practice of citation to such precedents. The discussion has been limited, however, to U.S. courts. The anticanon serves a particular set of functions within American constitutional discourse. One of its most significant functions is to mitigate severe dissonance between the Constitution’s drafting and ratification and our current time. Abrupt ethical shifts that in retrospect are either morally or practically requisite are explained in terms of wrongheaded judicial decisions rather than constitutional error or disjunction. Thus, protection of slavery is rendered a consequence rather than a cause of *Dred Scott*; a political and constitutional commitment to (or tolerance of) Jim Crow is rendered a consequence rather than a cause of *Plessy*; and hindrance of the regulatory state is rendered a consequence of *Lochner* rather than integral to the free labor ideology of Reconstruction and the politics of the *Lochner* era. The U.S. Constitution is both famously old and famously difficult to amend, and so some means of mitigating the dissonance between the eighteenth century and

¹⁵ WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* (2001).

¹⁶ *Id.* at 213.

today is necessary in order to make the original Constitution feel, in any palpable sense, ours.¹⁷ The anticanon is an instrument of cognitive dissonance.

A polity with a more modern constitution and with an easier amendment process might have less need to treat judicial opinions interpreting their constitution in the way in which we treat our anticanon. If other nations do not have anticanons, or do not include case law within them, or do not in any event use anticanonical cases or episodes in the same way, any lessons for foreign citation derived from the way in which Americans use the anticanon might be only imperfectly applied to other jurisdictions. We will want to know, then, how anticanons are identified and used in other countries. It makes sense to ask those questions, moreover, about two different species of anticanon: the domestic anticanon and the transnational anticanon. The domestic anticanon is the set of intrajudicial cases or episodes treated as irredeemably wrong across the political spectrum within a given polity; the transnational anticanon is the set of cases or episodes that are treated as irredeemably wrong across a range of different jurisdictions.

It is clear that some countries besides the United States have their own set of intrajudicial episodes and cases that are cited aversively. Scheppele's article sought to identify and describe just this phenomenon across several different jurisdictions, but her study focused primarily on aversive citation in constitutional design rather than constitutional interpretation. If one of the primary functions of anticanonical argument in U.S. discourse is to mitigate the effects of time on constitutional interpretation, then use of such argument in constitutional design obviously serves a different purpose. It is, likewise, less likely that an aversive model in constitutional design will take the form of a judicial decision rather than a comprehensive political regime, and so it is difficult to perceive lessons in the practice for citation to foreign judicial precedent.

Determining the transnational prevalence of aversive citation to judicial opinions in aid of constitutional interpretation requires far more expertise than I can claim. The foreign jurisdictions with which I am most familiar—Canada and Australia—do not, it seems to me, have cases within their respective domestic canons that approximate the role *Dred Scott* or *Lochner* plays in the United States. I am also not aware of any such cases within French or German jurisprudence, though I concede significant ignorance of the case law of the Conseil Constitutionnel and the German Constitutional Court. This is hardly an exhaustive survey, and my level of confidence is low even as to these few jurisdictions, but if my impression is correct, it does suggest that the United States—where anticanonical discourse is vibrant—might have some unique features that lend themselves peculiarly to this form of argument. The absence of any significant

¹⁷ Cf. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993).

strain of originalism in most of these other jurisdictions—with Australia as a qualified exception—might, in part, be either cause or effect of the American fixation on anticanonical cases. Further study is needed to say more.

One apparent and significant example of an anticanonical case within a foreign jurisdiction is *Jabalpur v. Shukla* in India. The case involved the suspension of habeas corpus during a state of emergency declared by Prime Minister Indira Gandhi in 1975. The unavailability of habeas was in apparent contravention of Article 21 of the Indian Constitution, which provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law.” Nonetheless, the Court held that Article 21 had no effect during a state of emergency. Pratap Bhanu Mehta has said that the decision “is now unanimously regarded as one of the worst in Indian judicial history.”¹⁸ As with *Dred Scott*, *Jabalpur v. Shukla* was quickly overturned by constitutional amendment, but only after Indira Gandhi and her Congress Party allies were forced from power. The rights-activism of the Supreme Court of India is often tied to *Maneka Gadhi v. Union of India*, the court decision that decisively repudiated the legalism evident in the *Shukla* decision. Like the United States, India is a common law jurisdiction but it has a comparatively young constitution that is unusually easy to amend. It might be that constitutional age and rigidity do not in themselves give rise to anticanons but only make it more likely that a constitutional crisis will ensue which nominally is resolved within the existing constitutional framework. The anticanonical case then underwrites a narrative of constitutional continuity.

The second species of anticanon, the “transnational” anticanon, has not been the subject of much study, at least as to cases, and it is not obvious that such a phenomenon is especially prevalent. Reference to negative examples from foreign jurisdictions is of course a significant part of constitutional discourse both in the United States and abroad.¹⁹ But we might distinguish between mere negative examples and, to cite Scheppele again, “aversive” examples, which connote models “that are so forcefully rejected that they cast their influence over the whole constitution-building effort.”²⁰ Scheppele says that such episodes can be foreign,²¹ but again, her focus is on constitution drafting rather than constitutional interpretation, and her focus is on historical episodes or tropes rather than cases. In order for a judicial precedent to serve as a transnational aversive model, the precedent itself must have an unambiguous moral or ethical valence across a range of jurisdictions, it must be sufficiently well-known that it may serve a rhetorical purpose, facilitating efficient discourse about constitutional

¹⁸ Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 19 J. DEMOCRACY 70, 73 (2007).

¹⁹ See Fontana, *supra* note 3, at 551; Scheppele, *supra* note 2.

²⁰ See Scheppele, *supra* note 2, at 298.

²¹ *Id.* at 300.

commitments, and the judiciary must figure prominently in large-scale constitutional change within the referring jurisdiction.

Sujit Choudhry has suggested that *Lochner* has served this function within a number of jurisdictions, including Canada, South Africa, and Israel.²² In Canada, *Lochner* was invoked during the Charter drafting process to explain the wording of section 7 of the Charter, which provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Avoiding the words “property” and “due process of law,” which appear in the Fifth and Fourteenth Amendments to the U.S. Constitution, was defended by reference to the unfortunate consequences of the *Lochner* era. *Lochner* has also figured prominently in subsequent interpretation of section 7, both by litigants and judges seeking to limit its reach. It is not surprising that *Lochner* would be anticanonical within Canada. Not only was *Lochner* specifically cited during the Charter’s drafting, but the Supreme Court of Canada refers liberally to foreign precedent; U.S. jurisprudence in particular looms large over its neighbor (much of whose elite bar received some legal training in the United States); and Canada had its own New Deal crisis contemporaneous with the crisis that led to *Lochner*’s formal repudiation in the United States. Choudhry cites but does not elaborate on references to *Lochner* in South African and Israeli opinions.

Further study is necessary to flesh out how transnational anticanonical cases are actually used in other jurisdictions. Questions for a possible research agenda in this direction include not only whether the phenomenon exists and what its content might be but how and through whose agency cases make their way into the anticanon, whether and to what degree the narrative accompanying such cases varies across jurisdictions with distinct cultures and distinct legal and political histories, and indeed whether the use of cases in foreign jurisdictions can meaningfully be described in terms of the interpretation-construction distinction as I have described it. Contrary to the standard criticism of foreign law citation, greater variation in the narratives that attach to aversively cited foreign precedent may signal not misunderstanding or pernicious manipulation of such sources but rather domestication of a global resource to suit local legal and political dynamics. Indeed, the greater fear is that such cases are treated as if they have only a single message or some particularized legal significance, which would be inconsistent with their use within their native jurisdictions and which would impoverish their potential as rhetorical points of reference.

²² See Choudhry, *Lochner*, *supra* note 9.