

FOREIGN LAW AND AMERICAN CONSTITUTIONAL INTERPRETATION: A LONG AND VENERABLE TRADITION

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I. INTRODUCTION

In his dissent in *Lawrence v. Texas*, Justice Antonin Scalia called the majority's use of foreign law "[d]angerous dicta."¹ Foreign law, he implied, had no place in the interpretation of the United States Constitution. Citing a concurrence by Justice Clarence Thomas, Scalia noted: "this Court . . . should not impose foreign moods, fads, or fashions on Americans."² In his concurrence in *Sosa v. Alvarez-Machain*,³ Justice Scalia, quoting an earlier opinion by Justice Clarence Thomas, asserted that "[t]he Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners."⁴ In *Roper v. Simmons*,⁵ Justice Scalia squared off with Justice Anthony Kennedy on the appropriateness of citing foreign law to interpret the U.S. Constitution, and by extension, U.S. law in general. Kennedy asserted that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile

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1. 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

2. *Id.* (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

3. 542 U.S. 692 (2004).

4. *Id.* at 750 (Scalia, J., concurring in part and concurring in the judgment) (internal citations omitted).

5. 543 U.S. 551 (2005).

death penalty”⁶ Citing an amicus brief from the Human Rights Committee of the Bar of England and Wales, Kennedy noted “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁷

Justice Scalia, on the other hand, in a rather cramped view of law and legal principles, flatly rejects the idea that foreign “sources” of law should be used to interpret American law. He denounced Kennedy’s opinion, noting that “[a]cknowledgement’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.”⁸ This opinion dovetailed with the position he took in a public panel with Justice Breyer held at American University Law School in January 2005.⁹ There, Justice Scalia declared categorically, “I do not use foreign law in the interpretation of the United States Constitution.”¹⁰ He conceded that he would use foreign law to interpret a treaty, but only because “the object of a treaty [is] . . . to come up with a text that is the same for all the countries”¹¹ Therefore, he acknowledged that “we should defer to the views of other signatories, much as we defer to the views of agencies” if the interpretation of the other signatories is “within ball park.”¹² Turning to his favorite hobby horse—originalism—Justice Scalia declared that “the [F]ramers of the Constitution . . . would have been appalled” if they were told that the Supreme Court was “after . . . something that will be just like Europe.”¹³ To bolster this claim, Justice Scalia argued that the Federalist Papers were “full of . . . statements that make very clear” that the Framers “didn’t have a whole lot of respect for many of the rules in European countries.”¹⁴

6. *Id.* at 578.

7. *Id.*

8. *Id.* at 628 (Scalia, J., dissenting) (emphasis in original).

9. Free Republic, Full Written Transcript of Scalia-Breyer Debate on Foreign Law: American University, Jan. 13, 2005, <http://www.freerepublic.com/focus/f-news/1352357/posts> (last visited April 12, 2007).

10. *Id.*

11. *Id.*

12. *Id.* Justice Scalia declared he was willing to defer to foreign understanding of a treaty if that understanding was “a reasonable interpretation” of the treaty, even if the interpretation was “not necessarily the very best.” *Id.*

13. *Id.*

14. *Id.* To prove this point, Scalia noted that Madison “speaks contemptuously of the countries on continental Europe, ‘who are afraid to let their people bear arms.’” *Id.* This quotation came from *Federalist 46*, where Madison explains why the state militias will be a proper counter-balance to a standing army. This

It is odd that Justice Scalia would be so dismissive of the use of foreign law, given his persistent support for an originalist interpretation of the Constitution. In this article, I sketch out the ways in which foreign law has, in fact, been an integral part of our legal culture from the beginning of the nation. In doing this, I hope to make clear that American lawyers and judges—especially Supreme Court justices—used foreign law and foreign legal principles at the founding and for many years afterwards. Moreover, the use of foreign law by American courts was not considered controversial until Justices Scalia and Thomas¹⁵ began to question it.

I have three main concerns in this article. First, this article offers a correction to the arguments of Justices Scalia and Thomas that the Supreme Court should not use foreign law (except perhaps in interpreting treaties), because it would violate the original intent of the Framers. As this article demonstrates, such a contention is simply wrong. Correcting this inaccurate history is important because the modern Supreme Court often turns to history to explain its interpretation of the Constitution. A number of justices, includ-

section of the *Federalist Papers* has virtually nothing to do with the use of foreign law. There, Madison wrote: “Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.” THE FEDERALIST No. 46, at 267 (James Madison) (Clinton Rossiter ed., 1999). Madison’s point was that the nation’s liberty would be protected by state militias, and he believed that if European nations had local militias led by “officers appointed out of the militia . . . that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.” *Id.* at 268. Justice Scalia seems to have pulled this quotation totally out of its context to make a point that the document will not support. Yet, even if this quotation does somehow support Scalia’s point about Madison and the Framers, it would also support the use of foreign law today. Madison’s comments about the governments in Europe referred to monarchies, which Madison condemned because they were non-democratic. Thus, even if Scalia’s interpretation of Madison’s statement is correct on the inapplicability of foreign law to the United States, Madison’s statement would be applicable only to non-democratic foreign nations. By contrast, Madison would in theory be willing to accept as having some legal value the laws of democracies in Europe and other places. Justice Scalia’s argument is not supported, however, since Madison is not discussing the private ownership of firearms, but rather the idea that the states will be able to maintain their own regulated militias under the Federal Constitution. On this issue, see Paul Finkelman, ‘A Well Regulated Militia’: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 213-14 (2000); see also Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, in THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 117, 146 (Carl T. Bogus ed., 2000).

15. Justice Thomas also takes this position. As I note above, Justice Scalia cites Justice Thomas’s concurrence in *Foster v. Florida* in his dissent in *Lawrence v. Texas*.

ing Scalia and Thomas, claim to believe in a jurisprudence of original intent. If the Court is going to rely on history, then surely historians must push the Court to offer the best history it can. It serves no good purpose when a justice claims adherence to history and then ignores vast amounts of historical evidence that do not fit with his preferred outcome.

My second point is tied to the first, but goes beyond the “Framers” intent.’ The history of the Court in the eighteenth, nineteenth, and early twentieth centuries demonstrates that the Court often used foreign law to help it decide cases that did not involve treaties. Some of this early use of foreign law was certainly connected to the founding generation and the Framers. Chief Justice John Jay was a key founder of the republic and a co-author of *The Federalist Papers*, although not technically a framer of the Constitution. Chief Justice John Marshall was not a framer at the Philadelphia convention but was a delegate to the Virginia ratifying convention. After the Founding generation, great jurists, such as Joseph Story, used foreign law. The appeal to history, implicit in the jurisprudence of Justice Scalia, ought to take into account the long history of the Court’s use of foreign law. Indeed, such use of foreign law might constitute a jurisprudential tool equivalent to *stare decisis*—it has been legitimized because it has been used for so long and so often by so many different justices.

Third, I argue that because of the nature of the Court’s historic use of foreign law, it is particularly appropriate for the modern Court to use foreign law to expand the rights of minorities and those with the least power in our society. As I demonstrate in this article, early in our history the Court often used foreign law to suppress liberties. Given this fact, it would be jurisprudential hypocrisy for the Court to turn against the use of foreign law now, when it might be used to protect or enhance liberty and fundamental rights. As the United States continues to grapple with the problems of international terrorism and wars without clear enemies or national boundaries, it is increasingly important for the nation to take into account the standards of treatment and theories of due process and justice found in other nations. Foreign law, international law, and international concepts of justice are particularly appropriate for shoring up or expanding civil liberties in the current age of terrorism.

A. *Correcting Historically Inaccurate Statements*

From the very beginning of the nation, the Framers of the Constitution, the early Congress, the Supreme Court, and state

courts used foreign precedents, the law of nations, European legal and political theories, and the works of European treatise writers to support their decisions. The Court continued this practice throughout the nineteenth century and well into the twentieth century. In its early years the Court sometimes used English precedents because of the legal traditions the United States inherited from Britain. Since most American states adopted the common law as it existed before or at the time of the Revolution, the use of pre-Revolutionary English law was surely appropriate in the early years of the nation. But American courts continued to use new English case law and doctrine—developed after the Revolution—to support American jurisprudence. Surely, if eighteenth and nineteenth century American courts could legitimately apply post-Revolutionary English law (and law from other jurisdictions), it cannot be inappropriate to apply it today.

One important example of this phenomenon is the fellow servant rule. This rule, which dramatically harmed industrial workers, originated in England, but was quickly adopted by American courts.¹⁶ Under this rule, courts held that large employers, such as railroads and factories, were not liable to their employees for workplace accidents caused by the negligence of other employees. Rather, the injured worker had to sue his negligent ‘fellow servant,’ who in most cases would be judgment proof. This rule had the effect of shifting one cost of industrialization—the care of injured workers—from investors and capitalists to the workers themselves and their families. By the end of the nineteenth century, almost every state had adopted this rule, which began in Great Britain in the 1830s.¹⁷

In developing an American jurisprudence of slavery, the U.S. Supreme Court actually rejected *pre*-Revolutionary English doctrine

16. The fellow servant rule was first adopted by English courts in *Priestly v. Fowler*, 150 Eng. Rep. 1030 (1837). South Carolina accepted the doctrine in *Murray v. S.C. R.R. Co.*, 26 S.C.L. (1 McMul.) 385 (1841). More importantly, the great Massachusetts Chief Justice, Lemuel Shaw, adopted the rule in *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49 (1842). For a discussion of the early American application of this case see LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 166-82 (1957).

17. Jerrilyn G. Marston, Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579, 579 (1984) (“By 1880 the [fellow servant] rule . . . was . . . firmly entrenched in nearly every American jurisdiction . . .”). Southern courts did not generally apply this rule to slave workers rented by railroads, steamboats, and other industries. See Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEG. HIS. 269, 281-304 (1987).

that was presumably part of American law at the founding, in favor of *post*-Revolutionary English doctrine. Thus in *Strader v. Graham*¹⁸ and *Dred Scott v. Sandford*,¹⁹ the U.S. Supreme Court rejected the doctrine of the great English case, *Somerset v. Stewart*,²⁰ which held that slaves who lived in free jurisdictions became free. That case, decided before the American Revolution, in 1772, was presumably part of the common law of the nation at the time of the Founding. Instead of accepting this precedent, the Court accepted the *post*-Revolutionary English doctrine set out in *The Slave, Grace*,²¹ which held that a slave who returned to a slave jurisdiction was not free, even if that person had a right to be free while living in a free state or territory under *Somerset*.²² The use of new (*post*-Revolutionary) foreign law by the Supreme Court of the United States in 1857 was not a result of either our colonial heritage or a lack of a well-developed American jurisprudence. From the 1820s though the early twentieth century, the U.S. Supreme Court and many state courts cited and followed English cases decided *after* the American Revolution. They did this because virtually every Supreme Court Justice *before* Scalia and Thomas has understood the legitimacy of using foreign law in American decisions.

The claim that U.S. judges had only English law to rely on has even less force when one considers that American courts cited continental treatise writers, whose works often had the force of law in non-common law countries. When nineteenth century American jurists cited Grotius or Puffendorf, as well as more recent English cases and commentators, they did so not because of an inherited tradition, but because they believed that these scholars and cases were legitimate interpreters or sources of law. The courts were simply acknowledging that they could learn from and accept ideas that were developed outside the United States. Furthermore, by accepting ideas, theories, and doctrines developed in other nations, the courts took advantage of the fact that foreign jurists and scholars have invested time and energy in developing a jurisprudence or legal theory that works for a particular problem. Such a jurispru-

18. 51 U.S. (10 How.) 82 (1850).

19. 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. CONST. amend. XIV (1868).

20. (1772) 98 Eng. Rep. 499 (K.B.).

21. 166 Eng. Rep. 179 (1827). For a discussion of this case and its adoption by American courts, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 182-235 (Lawbook Exchange 2000) (1981).

22. See *Strader*, 51 U.S. (10 How.) at 94; *Dred Scott*, 60 U.S. (19 How.) at 467-68.

dence of “efficiency” should be attractive to advocates of law and economics, such as Justice Scalia.²³

An important example of this efficient use of the work of other countries and other courts is found in *Muller v. Oregon*.²⁴ In that case, the future Supreme Court justice Louis D. Brandeis, who was counsel for the State of Oregon, used foreign statistics and empirical evidence to demonstrate the deleterious effects of overwork on women. Brandeis also used the examples of labor regulations in foreign nations to convince the Court that Oregon’s statute ought to be sustained.²⁵ In his opinion for a unanimous Court, Justice David Brewer provided an extensive footnote praising and summarizing Brandeis’s brief.²⁶ In this note, Brewer specifically pointed out Brandeis’ citations to statutes from Great Britain, France, Switzerland, Austria, Holland, and Italy.²⁷ In the same footnote, Brewer explained that Brandeis also provided “extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization.”²⁸ In effect, the *Muller* Court—one of the most jurisprudentially conservative Courts in our history—made efficient use of the work of jurists, legislators, and scholars from other countries. This is no different from what Justice Kennedy did when he took note of the empirical findings and legal arguments developed in Britain with regard to

23. Proponents of law and economics argue the law should support “efficiency” in economic transactions. This same “efficiency” should also apply to the work of judges and courts. Thus, if a foreign court has investigated a problem and reached a jurisprudential or empirical conclusion based on expert evidence or solid legal analysis, it is reasonable and *efficient* for an American Court to take advantage of this. For example, in *Roper v. Simmons*, Justice Kennedy accepted the findings of foreign courts and cited the work of the Human Rights Committee of the Bar of England and Wales, which argued that the juvenile death penalty violates notions of due process. Kennedy cited findings in Britain that “the instability and emotional imbalance of young people may often be a factor in the crime[s]” they commit. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Kennedy—and the lawyers who argued the case—efficiently used these findings, rather than spending new resources to find what scholars in Britain had already demonstrated.

24. 208 U.S. 412 (1908).

25. Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1907) (No. 107) reprinted in *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63, 77-80* (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Brandeis Brief].

26. *Muller*, 208 U.S. at 419-20 & n.1.

27. *Id.*

28. *Id.* at 420 n.1. Brandeis cited reports from Germany, Britain, France, Switzerland, Italy, Canada, and Belgium. Brandeis Brief, *supra* note 25, at 63, 77-88.

juvenile crime in his decision striking down the juvenile death penalty in *Roper v. Simmons*.²⁹

B. The Use of Foreign Law and Minority Rights

In the nineteenth century, the Court often used foreign law to undermine the rights of the most vulnerable members of American society. The Court used foreign law or theories of international law to bolster decisions adversely affecting slaves, Indians, and Chinese immigrants.³⁰ If foreign law was available to enslave Africans or dispossess Indians of their lands, then surely it ought to be available to protect those with the least power in modern society. For the Court to deny the legitimacy of references to foreign law today, when such sources help the weakest member of society, seems deeply hypocritical.

C. Respect of Foreign Law is Consistent with Traditional American Practice

At the very birth of the nation, Americans expressed a deep respect for world opinion and foreign ideas. The Continental Congress produced the Declaration of Independence because revolutionaries meeting in Philadelphia believed that “a decent respect to the opinions of mankind”³¹ required that Americans explain to the world why they were revolting against Great Britain. Since that time the Supreme Court has often cited foreign law and foreign legal theorists to support its opinions. Significantly, it is only in the last few years that any Justice has ever argued that the use of non-American sources was in any way illegitimate. Conservative members of the Court—including John Marshall, Joseph Story, Roger B. Taney, and Felix Frankfurter—turned to foreign law to bolster their arguments, to explain their decisions, to illuminate the direction of their opinions, and because they believed American law should also reflect “a decent respect to the opinions of mankind.”³² Shortly after World War II, for example, Justice Frankfurter cited recent

29. 543 U.S. 551, 578 (2005).

30. See discussion *infra* Part III.

31. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) [hereinafter DECLARATION]. See also Mark Tushnet, “A Decent Respect to the Opinion of Mankind”: Referring to Foreign Law to Express American Nationhood, 69 ALB. L. REV. 809, 811-12, 814-15 (2006).

32. See DECLARATION, *supra* note 31. For an elaborate discussion of Marshall’s use of foreign and international law, see James Thuo Gathii, *The American Origins of Liberal and Illiberal Regimes of International Economic Governance in the Marshall Court*, 54 BUFF. L. REV. 765 (2006).

British cases to support his concurring opinion in a case interpreting the First Amendment.³³ He apparently had no intellectual or ideological problem with using British law and legal theory to support freedom of the press in the United States, even though he was interpreting the First Amendment to the Constitution, which had no equivalent in British law.³⁴ No one at the time questioned this use of foreign law. Frankfurter's modern use of foreign law was consistent with the long tradition, dating from 1776, of showing a "decent respect for the opinions of mankind." This tradition is no less important—and maybe more important—today, as the nation uses its vast influence and military power to shape world history.

II. FOREIGN LAW AND THE FOUNDING

While the Americans had good reason to dislike Parliament and the King, they nevertheless praised Britain's government, law, and institutions throughout their early debates over the founding of the nation. James Wilson expressed what a number of delegates felt, when he declared, "I revere the theory of the Brit[ish] Gov[ernment]."³⁵ In developing the roles of the three branches, the language of the constitutional text itself, and their arguments on contentious issues, the Framers all naturally drew on foreign law sources to further their claims at the Constitutional Convention.

A. *Foreign Law and the Constitutional Convention*

At the Constitutional Convention the delegates made numerous references to foreign law and foreign governmental systems. They frequently used English law and precedent to support their arguments and as a basis for their views on how the Constitution should be written. They praised Lord Mansfield and "the celebrated Judge Blackstone."³⁶ They talked about the "admirable . . . English Constitution."³⁷ Indeed, the support for English law was

33. *Pennkamp v. Florida*, 328 U.S. 331, 358-64 (1946) (Frankfurter, J., concurring).

34. *Id.* at 359. ("It will hardly be claimed that the press is less free in England than in the United States.")

35. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 159 (Max Farrand ed., Yale Univ. Press rev. ed., 1966) (1911) (noting, however, that the theory should not be adopted) [hereinafter 1 Farrand].

36. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103 (Max Farrand ed., Yale Univ. Press rev. ed., 1966) (1911) [hereinafter 2 Farrand]; 1 Farrand, *supra* note 35, at 472.

37. 2 Farrand, *supra* note 36, at 278.

too great for some of the delegates. At one point John Rutledge of South Carolina argued against “a blind adherence to the British model,”³⁸ while George Mason of Virginia complained, “[w]e all feel too strongly the remains of an[c]ient prejudices, and view things too much through a British [m]edium.”³⁹ Whether or not Mason’s complaint was wholly justified, it does reflect the persistent use of English law by the delegates. Indeed, Mason himself argued that the new nation should follow Britain’s policy on accumulating debt because “[h]e considered the caution observed in Great Britain on this point as the paladium of the public liberty.”⁴⁰

As the Framers approached the task of designing the role of the executive, they drew on European sources for ideas, despite their wish to avoid the model of the European monarch. In his speech opposing compensation for the executive, Benjamin Franklin used the examples of the High Sheriff in England and the French “office of Counsellor or Member of their Judiciary Parliaments”⁴¹ In debating whether there should be a unitary or a divided executive, Roger Sherman noted that “[e]ven the king of Great Britain has his privy council.”⁴²

James Wilson argued against term limits for presidents by appealing to all sorts of foreign precedents, including “a Doge of Venice who was elected after he was 80 years of age.”⁴³ More remarkably, Wilson noted that “popes have generally been elected at very advanced periods, and yet in no case had a more steady or a better concerted policy been pursued than in the Court of Rome.”⁴⁴ This was a truly unusual, indeed remarkable position for the Founders, who were almost universally Protestant and while not necessarily prejudiced against individual Catholics, were culturally and politically hostile to the Catholic Church.⁴⁵ Wilson assumed that term limits would force people out of office at a relatively young age and deprive the nation of mature and experienced leadership. In addition to using the examples of aged Popes, Wilson

38. *Id.* at 279.

39. *Id.* at 203.

40. *Id.* at 327.

41. 1 Farrand, *supra* note 35, at 84.

42. *Id.* at 105.

43. 2 Farrand, *supra* note 36, at 102.

44. *Id.*

45. The New York Constitution, for example, established full religious freedom in the state—the only state constitution to do so—but still required that immigrants seeking naturalization foreswear allegiance to any foreign “potentate,” which was a slap at the papacy. N. Y. CONST. of 1777, arts. XXXVIII (establishing freedom of worship), XLII (setting rules for naturalization).

offered the example of Lord Chief Justice Mansfield of the Court of King's Bench. Wilson pointed out "[w]hat an irreparable loss would the British Jurisprudence have sustained, had the age of 50[] been fix[ed] there as the ultimate limit of capacity or readiness to serve the public. The great luminary (Ld. Mansfield) held his seat for thirty years after his arrival at that age."⁴⁶ The Framers could hardly have intended to reject foreign law while simultaneously citing it for so many fundamental propositions.

In designing the representative bodies of the legislature, the Framers again drew on European models for inspiration. In debating the make-up of the Senate, John Dickinson of Delaware asserted that "[i]n the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England."⁴⁷ He then "repeated his warm eulogiums on the British Constitution."⁴⁸ Franklin used the example of the English parliament to support the idea that members of Congress could both represent their own districts and represent the interests of the nation as a whole.⁴⁹ In objecting to the New Jersey plan, which would have given all the states equal power in Congress, James Wilson of Pennsylvania used the examples of Turkey, Russia, and Persia to support the idea that the states had to continue to exist, even as they had to be subordinate to the national government.⁵⁰ In doing so he praised "Alfred the great, that wise legislator."⁵¹ In arguing that the national legislature should meet frequently, Roger Sherman asserted that "frequent meetings of Parliament were required at the Revolution in England as an essential safeguard of liberty."⁵²

As with the other two branches, the Framers' design of the American judiciary was influenced by foreign models. Nathaniel Gorham used the example of English judges in arguing that judges should not be involved in the law-making process.⁵³ Gouverneur

46. 2 Farrand, *supra* note 36, at 103.

47. 1 Farrand, *supra* note 35, at 136.

48. *Id.*

49. *Id.* at 197-98. Franklin noted that despite Scotland's numerical inferiority in Parliament,

to this day I do not recollect that any thing has been done in the Parliament of Great Britain to the prejudice of Scotland; and whoever looks over the lists of public officers, Civil & military of that nation will find I believe that the North Britons enjoy at least their full proportion of emolument. *Id.* at 198.

50. *Id.* at 328.

51. *Id.*

52. 2 Farrand, *supra* note 36, at 199.

53. *Id.* at 73.

Morris, on the other hand, argued that judges ought to be involved in the law-making process, and turned to English practice to support this position:

The truth was that the [j]udges in England had a great share in [the] Legislation. They are consulted in difficult [and] doubtful cases. They may be [and] some of them are members of the Legislature. They are or may be members of the [P]rivy Council, and can there advise the Executive as they will do with us if the motion succeeds.⁵⁴

Faced with the delicate task of wording the Constitution, the Framers looked to parallel provisions in European sources. Americans had particularly good reasons to dislike British regulations of political expression, including British use of treason statutes; had they lost the Revolution a number of the Framers might have been tried and hanged for treason. Nevertheless, in debating the language of the treason clause in the Constitution, James Madison, Edmund Randolph, and George Mason all cited English law—specifically the treason statute of Edward III. Randolph successfully demanded that the exact language of that British law be put into the Constitution, so that the definition of treason would include “giving [enemies of the United States] aid (and) comfort.”⁵⁵ Similarly, John Dickinson turned to *Blackstone’s Commentaries* for guidance on the use of the term “ex post facto” in the Constitution.⁵⁶ Roger Sherman believed the language that limited judicial appointments to “good behavior” was appropriate because “[h]e observed that a like provision was contained in the British Statutes.”⁵⁷ James Wilson declared that “In G[reat] Britain . . . the security of private rights is owing entirely to the purity of her tribunals of Justice”⁵⁸

Other delegates praised the entire British Constitution. Charles Pinckney of South Carolina believed that “the Constitution of G[reat] Britain” was “the best constitution in existence,” and lamented that it could not be “introduced into this Country, for many centuries.”⁵⁹ Delegates praised the liberties of England—the essence of their law—and saw them protected by the Constitution. Delaware delegate Gunning Bedford even argued that the English

54. *Id.* at 75.

55. *Id.* at 345.

56. *Id.* at 448-49.

57. *Id.* at 428.

58. 1 Farrand, *supra* note 35, at 253-54.

59. *Id.* at 398.

system of “rotten boroughs” did not threaten fundamental liberty.⁶⁰ Noting the complaints over the rotten boroughs, he rhetorically asked, “[h]ave not the boroughs however held fast their constitutional rights?”⁶¹ Bedford implied that the United States could also have districts that were markedly different in their population but still had equal representation in Congress. Self-serving as this argument was for tiny Delaware, Bedford’s point illustrates how the Framers were willing to turn to foreign law to support their own positions in the convention debates.

In addition to praising English liberties and the English Constitution, some of the Framers admired English restrictions on liberty or rules that militated against democracy. Pierce Butler argued for lengthy residence requirements for immigrants holding public office, and mentioned “the great strictness observed in Great Britain on this subject.”⁶² Similarly, John Francis Mercer of Virginia argued that the Constitution should not set a quorum for Congress; rather “[h]e was for leaving it to the Legislature to fix the Quorum, as in Great Britain, where the requisite number is small [and] no inconveniency has been experienced.”⁶³ George Mason, who had expressed his belief that the delegates were too enamored of the British system, nevertheless argued that the Congress should have expanded powers of impeachment because “bills of attainder which have saved the British Constitution are forbidden” by the new Constitution.⁶⁴

In the fiercest debates that the Framers engaged in while writing the Constitution, they further drew on foreign law to support their arguments. The debate over the African slave trade illustrated the importance of foreign law to the Framers. Charles Pinckney justified continuing the African slave trade by asserting that “[i]f slavery be wrong, it is justified by the example of all the world.”⁶⁵ He cited “the case of Greece Rome [and] other an[c]ient States; the sanction given by France England, Holland [and] other modern States.”⁶⁶ John Dickinson, alluding to the English case of *Somerset v. Stewart*⁶⁷ and similar cases in France,⁶⁸ responded with his own

60. *Id.* at 491. These were very old parliamentary voting districts that no longer had a substantial population. Thus the districts, or “rotten boroughs,” actually represented very few people.

61. *Id.*

62. 2 Farrand, *supra* note 36, at 236.

63. *Id.* at 251.

64. *Id.* at 550.

65. *Id.* at 371.

66. *Id.*

67. (1772) 98 Eng. Rep. 499 (K.B.).

reference to foreign law, noting that “[i]f Eng[land] [and] France permit slavery, slaves are at the same time excluded from both those Kingdoms.”⁶⁹ Dickinson, trained as a lawyer in England, wanted to use foreign precedents from both England and France to set the rules under the new Constitution.

The debates in the Philadelphia Convention show, over and over again, how the Framers accepted the importance of foreign law and admired foreign jurists. The American Framers were not total revolutionaries, trying to separate themselves from centuries and millennia of western legal thought and European precedents. On the contrary, they wanted to incorporate many of these traditions into their new constitution. In part, they likely understood the efficiency of borrowing ideas, legal theories, and precedents from other jurisdictions. Thus, it is striking that jurists who profess to use history to guide their jurisprudence would conclude that the Framers did not think that foreign statutes and cases were legitimate sources of law.

B. *Foreign Law in the New Nation*

As the Constitution was sent to the states for ratification, proponents of the new national structure looked to foreign sources to help support their arguments. In spite of the fact that Justice Scalia took Madison’s words in the *Federalist Papers* out of context, we know that the authors of *The Federalist* did not reject foreign law and foreign legal concepts. Hamilton, in *Federalist 84*, quotes “the judicious Blackstone”⁷⁰ for his praise of the Habeas Corpus Act, which, Hamilton notes, Blackstone calls “the BULWARK of the British Constitution.”⁷¹ In the same essay, Hamilton praised the Magna Charta, the Petition of Right, and the English Bill of Rights—three major sources of English law.⁷² Far from rejecting foreign law, Hamilton endorsed it. In *Federalist 63*, the author used examples from Rome, Carthage, Sparta, and Greece to justify the existence of the Senate under the new Constitution.⁷³

68. For further discussion of the French cases, see generally SUE PEABODY, “THERE ARE NO SLAVES IN FRANCE”: THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIEN RÉGIME (1996).

69. 2 Farrand, *supra* note 36, at 372.

70. THE FEDERALIST NO. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

71. *Id.* (citation omitted).

72. *Id.* at 481.

73. It is not clear if Madison or Hamilton wrote this essay. Compare THE FEDERALIST NO. 63, at 350, 353 (“Probably Madison”) (Clinton Rossiter ed., 1961) with

Immediately after the Revolution began, most of the states wrote constitutions that explicitly acknowledged the continuing force of English common law.⁷⁴ Despite their recent revolution *against* Britain, these states did not authorize a wholesale rewriting of their law to reject their ‘foreign’ legal heritage. Similarly, despite Blackstone’s support for the monarchy and the empire, American lawyers and judges continued to rely on his work to explain their own law. Blackstone’s *Commentaries* continued to be both an im-

THE FEDERALIST NO. 63, at 345, 348-49 (“Alexander Hamilton”) (E.H. Scott, ed., 1898).

74. For example, see the following provisions:

The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention.

DEL. CONST. of 1776, art. 25;

And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same.

N.Y. CONST. of 1777, art. XXXV;

That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity; and also to acts of Assembly, in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been or may be altered by acts of Convention, or this Declaration of Rights—subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State: and the inhabitants of Maryland are also entitled to all property, derived to them, from or under the Charter, granted by his Majesty Charles I. to Caecilius Calvert, Baron of Baltimore.

MD. CONST. of 1776, art. III;

That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.

N.J. CONST. of 1776, art. XXII. The Constitutions are also available at the Avalon Project, www.yale.edu/lawweb/avalon.

portant source of law and a tool for educating new lawyers in the new republic.

After the Revolution, the states continued to cite English precedent, and more importantly, English legal principles. For example, in 1781, a distinguished Pennsylvania jurist, Thomas McKean, declared that “[i]t is the opinion of the court, however, that the common law of England has always been in force in Pennsylvania”⁷⁵ In 1784, after the Revolution was over, the same jurist declared, in “a case of the first impression in the United States,”⁷⁶ that “the principles of the laws of nations . . . form a part of the municipal law of Pennsylvania.”⁷⁷ In *Hayburn’s Case*,⁷⁸ one of the first ever decided by the U.S. Supreme Court, Chief Justice John Jay declared that “the court considers the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.”⁷⁹ A year later, in a decision involving promissory notes and the Bank of North America, the Supreme Court of Pennsylvania began by noting that “[t]he law in *England* is very strict upon this subject.”⁸⁰

Significantly, Justice Scalia quoted the *Federalist Papers* to show the Framers had contempt for foreign law. However, as previously noted, two of the authors of *The Federalist*, Hamilton and Madison, favorably cited foreign law and foreign sources. The early cases of the Supreme Court show that the third author of the papers—who became our first Chief Justice—believed that foreign law mattered in the interpretation of American law. Chief Justice Jay’s use of foreign law further supports the notion that the Founders were not contemptuous of foreign law, as Justice Scalia claims.

It would take a lengthier study than this article to detail all the uses the court made of English law and foreign law sources. However, database searches of United States Supreme Court opinions

75. *Morris’s Lessee v. Vanderen*, 1 U.S. (1 Dall.) 64, 67 (Pa. 1782) (emphasis omitted).

76. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (Pa. 1784).

77. *Id.*

78. 2 U.S. (2 Dall.) 409 (1792).

79. *Id.* at 413-14 (emphasis omitted). Of course, John Jay was not a Framers, because he was not at the Philadelphia Convention. But as the first Chief Justice and an author of the *Federalist Papers*, he offers key insights into the prevailing views of the founding generation.

80. *Bank of N. Am. v. Pettit*, 4 U.S. (4 Dall.) 127, 129 (Pa. 1793).

reveal that the Court cited foreign legal sources extensively.⁸¹ The U.S. Supreme Court cited the law of England about 750 times before 1865. The Court cited Lord Chief Justice Mansfield about 170 times, the Court of King's Bench about 125 times, Sir Edward Coke about 100 times, the German legal scholar Baron Samuel von Puffendorf more than a dozen times, the Dutch scholar Hugo Grotius about fifty times, and the Dutch scholar Ulrich Huber and the French philosopher Montesquieu at least ten times each. The great Swiss legal scholar Emmerich de Vattel was a central figure for American jurisprudence, because he wrote extensively on federalism in his treatise, *Law of Nations*.⁸² This book was "[t]ranslated immediately into English" and "was unrivaled among such treatises in its influence on the American founders."⁸³ Before 1865, the Court cited him at least thirty times while attorneys cited him in their arguments about seventy times. From 1865 to 1910, the Court cited Vattel thirty-three more times, while lawyers cited him in nearly thirty other cases.⁸⁴

Sometimes the Court would cite many foreign sources in the same case. Consider *Brown v. United States*,⁸⁵ a case involving the embargo during the War of 1812, and the seizure of goods aboard a ship. Here, Chief Justice John Marshall cited the French theorist Montesquieu, the Dutch legal scholar Cornelius van Bynkershoek, the Swiss legal scholar Emmerich de Vattel, and the English scholar Joseph D. Chitty.⁸⁶ In dissent, Justice Joseph Story cited a long list of English cases, as well as the German legal scholar Puffendorf,

81. The material in this section is based on searches in Lexis and Westlaw databases. These searches probably undercount the use of foreign law because the searches will not pick up names that are not spelled correctly or citations to books without authors. For example, I searched for the use of "Vattel," the great Swiss legal scholar, but that search would have missed a reference to "Vatel," or to his book, *The Law of Nations*, or a reference that described Vattel, such as a reference to "a great European expert on the law of nations."

82. See MONSIEUR DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND OF SOVEREIGNS* (Joseph Chitty ed. & trans., 1852) (1785).

83. PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776-1814*, at 11 (1993).

84. These statistics are based on Westlaw and Lexis searches of the databases for U.S. Reports. As noted above, *see supra* note 81, such searches seriously undercount the use of foreign sources in legal arguments and briefs because most briefs and arguments were not published in U.S. Reports. These searches may undercount the Court's use of these sources, as well, because the searches do not find cases where the Court cited a book, but not the author, or incorrectly spelled the author's name.

85. 12 U.S. (8 Cranch) 110 (1814).

86. *Id.* at 124-25.

Vattel, Hugo Grotius, Bynkershoek, Lord Chief Justice Mansfield, and other foreign sources.⁸⁷

After the deaths of Chief Justice Marshall and Justice Story, the Court continued to cite foreign law. In *Alabama v. Georgia*,⁸⁸ which was decided on the eve of the Civil War, the Court had to determine the location of the boundary between those two states. Nothing, it would seem, could have been more of a distinctly American legal and constitutional question than the border of these two states along the Chattahoochee River. Yet, in sorting out the confusion of the boundary, Justice James Wayne (who was from Georgia) turned to Grotius, Vattel, and England's Lord Hale.⁸⁹ Wayne was taking advantage, as the U.S. Supreme Court has often done, of the hard work of judges and legal theorists from other countries who had faced similar legal issues.

In explaining the meaning of *ex post facto* laws before the Civil War, Justice Campbell not only cited foreign law, but noted that the Framers had as well. He wrote: "The debates in the federal convention upon the constitution show that the terms 'ex post facto laws' were understood in a restricted sense, relating to criminal cases only, and that the description of BLACKSTONE of such laws was referred to for their meaning."⁹⁰ As if writing with the subject of this article in mind, Campbell went on to assert: "This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time."⁹¹ In the last opinion he ever wrote, which was posthumously published, Chief Justice Roger B. Taney explained the powers of the Courts and their limitations. Taney turned not to the Constitutional Convention, or the *Federalist Papers*, but to English law: "The judicial power is carefully and effectually separated from the executive and legislative departments. The language of BLACKSTONE upon this subject is plain and unequivocal."⁹²

The Civil War itself created a new set of legal problems that were also truly and uniquely "American." Other nations had suffered through civil wars and internal revolutions, but those had always been about control of the nation. The American Civil War was

87. *Id.* at 129-50 (Story, J., dissenting).

88. 64 U.S. 505 (1859).

89. *Id.* at 513.

90. *Carpenter v. Pennsylvania*, 58 U.S. 456, 463 (1854) (internal citation omitted).

91. *Id.* (internal citations omitted).

92. *Gordon v. United States*, 117 U.S. 697, 706 (1864) (internal citation omitted). This 1864 opinion was published years after Taney had died.

different in that the seceding southern states did not want to control the nation. Rather, they wanted to create their own nation. Thus, the United States government had to cope with the legally complex issue of the status of the Confederacy and the states that made up the Confederacy. Was it a “nation,” in which case the law of war would apply, or was it part of the United States, in which case the traditional laws of war might not apply? The American Civil War was also uniquely “American” because it involved the question of how the U.S. Constitution might apply to states that had made war against the nation as the seceding states had done.

The Supreme Court dealt with these issues in a series of cases involving the blockage of southern ports collectively known as *The Prize Cases*.⁹³ In these uniquely American cases, the court relied heavily on foreign law. In arguing for the United States, Richard Henry Dana, Jr. cited a number of British cases as well as works by Grotius and other international law theorists.⁹⁴ In his opinion upholding President Lincoln’s power to impose a blockade, and thus enabling the President to prosecute the war effort, Justice Robert Grier quoted Vattel: “it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war.”⁹⁵ He also cited Lord Stowell of the British High Court of Admiralty,⁹⁶ a proclamation by Queen Victoria of England,⁹⁷ and the “law of nations” as a general body of law.⁹⁸ Justice Samuel Nelson of New York dissented, joined by Chief Justice Taney and two other justices.⁹⁹ These four members of the court were ready to prevent President Lincoln from successfully fighting the war. Notably, while making a few passing comments on British history, the dissent avoided foreign sources.¹⁰⁰

Thus, in the *Prize Cases* the Court majority, relying in large part on foreign law, gave the Lincoln administration a green light to take those steps necessary to save the Union and the Constitution. The dissenting justices were hostile to Lincoln, emancipation, and the war in general. At least one, Chief Justice Taney, was also sympathetic to secession. These justices ignored foreign law while argu-

93. 67 U.S. (2 Black) 635 (1862).

94. Brief for Libellants, *The Prize Cases*, 67 U.S. (2 Black) 635, 650, 654.

95. *The Prize Cases*, 67 U.S. (2 Black) at 667.

96. *Id.* at 668.

97. *Id.* at 669.

98. *Id.* at 670.

99. *Id.* at 682, 699 (Nelson, J., dissenting).

100. *See id.* at 682-99.

ing that the President of the United States lacked the constitutional power to hold the nation together. The majority found foreign law helpful in saving the American nation; the dissenters rejected foreign law because they were willing to see the nation be destroyed.

Later in the war, Chief Justice Salmon P. Chase referenced the rule of the British Court of Admiralty in a case involving the disputed ownership of various bales of cotton.¹⁰¹ As it had in the *Prize Cases*, the Court once again used foreign law to uphold the power of the Lincoln administration to preserve the Union.

In the aftermath of the Civil War, lawyers and judges turned to foreign law to help determine whether the United States could try civilians by military tribunals or military commissions. In *Ex parte Milligan*,¹⁰² a case that has implications for the United States in the modern War on Terror, the great lawyer David Dudley Field and other lawyers for the petitioner cited English and French law, Blackstone, Lord Hale, Sir James Mackintosh, Montesquieu and the French scholar and student of American society, Alexis de Tocqueville for the principle that the military could not try civilians.¹⁰³ Stressing the importance of foreign law to the United States, attorney Jeremiah S. Black declared “England owes more of her freedom, her grandeur, and her prosperity to [the jury trial], than to all other causes put together.”¹⁰⁴

Black continued by noting that French scholars like “Montesquieu and De Tocqueville speak of [the jury trial] with an admiration as rapturous as Coke and Blackstone.”¹⁰⁵ Citing recent European history, he noted that “the most enlightened states of continental Europe have transplanted it into their countries” and “[i]t was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the Revolution of the Barricades gave the right of trial by jury to every Frenchman.”¹⁰⁶ In his opinion for the Court, Justice David Davis similarly cited old English law, the theories of Lord Brougham and Sir James Mackintosh, and a famous nineteenth century English case involving the

101. See *In re Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404, 421 (1864).

102. 71 U.S. (4 Wall.) 2 (1866).

103. See Briefs for Petitioners, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 31, 35-39, 47-49, 53-56, 65 (1866).

104. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 65.

105. *Id.*

106. *Id.*

trial of a civilian by a military court in the colony of Demerara.¹⁰⁷ Justice Davis noted that Brougham and Mackintosh had “participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that ‘when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime.’”¹⁰⁸ This was almost exactly the situation in Milligan’s case. Thus, the Court found that foreign precedent was useful and directly on point for civilian trials after America’s civil war.¹⁰⁹

In overturning Milligan’s conviction, the Supreme Court recognized that the charges against him were serious. Milligan, a leading copperhead in Indiana,¹¹⁰ had been convicted of organizing a pro-Confederate army in Indiana in an attempt to subvert the government of the United States during the Civil War. His case was not about speech or sedition, but about overt acts to accomplish rebellion, treason, and in modern language, terrorism. While Milligan’s trial was illegal, Davis had little sympathy for Milligan, noting that “if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment.”¹¹¹ He believed that “[c]onspiracies like [the one Milligan participated in] should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct.”¹¹² Yet, in part by turning to foreign law and foreign legal theories—what Justice Scalia might call “foreign moods, fads, or fashions”—the Supreme Court, in the aftermath of the nation’s greatest crisis and most bloody war, concluded that trials in the United States must be by jury, and that military commissions were not legitimate vehicles for punishing civilians as long as the regular courts of the states and the nation were operating.¹¹³

107. *Id.* at 128. The Demerara case, *The King v. Rev. John Smith*, is discussed in PAUL FINKELMAN, *SLAVERY IN THE COURTROOM* 272-77 (1985).

108. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 128.

109. Both cases are of course relevant to the United States in a post-9-11 World.

110. JENNIFER L. WEBER, *COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH* 149 (2006).

111. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 130.

112. *Id.*

113. *See id.* at 125-31.

III. FOREIGN LAW AND HUMAN RIGHTS IN HISTORICAL PERSPECTIVE

The Court's use of foreign law that seems to so upset Justice Scalia has involved the status of underrepresented people and human rights. Foreign law has already come up in cases involving gay rights¹¹⁴ and the execution of people who were children when they committed capital crimes.¹¹⁵ References to foreign law will likely come up in important future cases, such as those involving treatment of prisoners of war and captured enemy combatants and the legal rights of aliens and immigrants.

Justice Scalia says we cannot look to foreign law for guidance or precedent. He argues that doing so is new to our jurisprudence. Yet, as we have seen, the eighteenth and nineteenth century Court used foreign law to settle mundane issues like boundary disputes between the states, as well as larger political issues involving the embargo, blockades during the Civil War, and military trials of civilians. The Court also turned to foreign law when adjudicating the great human rights questions of the nineteenth century. Cases involving Indians, free blacks and slaves, religious freedom, and Chinese laborers illustrate how the nineteenth century Court was willing to use foreign law to adjudicate the status of the most vulnerable people in the United States.

A. *Indian Lands*

The first important Indian law case to come before the Supreme Court was *Johnson v. M'Intosh*.¹¹⁶ Here, Chief Justice Marshall, speaking for a unanimous Court, turned to European notions of conquest, land use, and property ownership when considering the nature of Indian land ownership. The Court used these foreign law concepts to proclaim that Indians, neither as individuals nor as nations, had any permanent title to their land. Counsel in the case cited Vattel, Puffendorf, Grotius, Locke, and Montesquieu.¹¹⁷ These theories helped bolster the result in the case. In his opinion, Marshall embraced the doctrine of discovery,¹¹⁸ which Americans

114. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

115. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

116. 21 U.S. (8 Wheat.) 543 (1823). See generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005).

117. Briefs for Defendants, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 569-70 (1823).

118. *M'Intosh*, 21 U.S. (8 Wheat.) at 572.

derived from European law. This doctrine allowed the United States to take land from the Indians at will. Marshall asserted throughout the opinion that the doctrine of discovery was accepted by all European nations,¹¹⁹ and that Americans had inherited and adopted the doctrine. The Chief Justice endorsed “the theory of the British constitution, [that] all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative.”¹²⁰ Marshall acknowledged that “this principle was as fully recognised in America as in the island of Great Britain.”¹²¹ This doctrine, which became fundamental to American land law, was entirely based on foreign law.¹²² Marshall asserted that the United States might take land by treaty or purchase, but would do so only to avoid conflict and accomplish the land grab smoothly. Using foreign law, Marshall justified the United States taking the land in any way it chose.

The importance of the use of foreign law in *Johnson v. M'Intosh* cannot be overestimated. The case involved land that was first claimed by whites in the colonial period, and thus one might argue that Marshall was following European doctrine and British law because the case originated when the land was under the authority of the Crown. Yet, the doctrine of discovery was understood to extend to all Indian land that the United States then possessed or might ever possess. Decided on the eve of the great movement into the lands west of the Mississippi, most of which were then wholly occupied by Indians, Marshall's opinion, rooted entirely in foreign law, set the stage for the settlement of the west, manifest destiny, and the destruction of Indian nations across the continent. Few Court decisions had such a long reach, affected so much land and so many people. And few decisions of the Court were so thoroughly rooted in foreign law.

Marshall might have reached the result in *M'Intosh*—that the U.S. government had the ultimate power to regulate ownership and title to Indian lands—without relying on foreign law and deeply racist language about the nature of Indian society. Marshall might

119. *Id.* at 572-579.

120. *Id.* at 595.

121. *Id.*

122. *Id.* at 592 (“[T]he principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”).

have offered a purely American analysis—that the Indian Commerce Clause gave Congress complete and plenary power over all land transactions with Indians.¹²³ Thus Marshall might have concluded that Johnson's claims to Indian lands were invalid because whites could acquire land only through congressional action. This would have avoided the use of foreign law and racist attacks on Indian culture while preserving what the Court clearly intended to preserve—the right of white Americans to dispossess Indians of their lands. Such an analysis might not have changed the ultimate result—the removal of most Indians from their lands—but it might have changed the way Indians were dispossessed of their lands. Marshall's use of the doctrine of discovery led him to assert that Indians were "savages," who did not own their land because

the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.¹²⁴

If Marshall had asserted federal power over Indian lands through the Indian Commerce Clause, he would never have had to reduce Indians to "savages" within his opinion. That Marshall chose to ignore the obvious *American* theory on which to rest his decision, and instead chose to use a European theory of law and conquest, shows how important foreign law was to the founding generation.

B. Slavery and Foreign Law

American Framers, politicians, and jurists also used European notions of slavery and slave law to justify the enslavement of Africans.¹²⁵ At the Constitutional Convention, as noted above, Charles Pinckney of South Carolina cited foreign law to justify slavery in his state and to demand—successfully—that the Constitution protect slavery and prevent Congress from interfering with the African slave trade.¹²⁶ In 1807, the United States banned the importation of new

123. See U.S. CONST. art. I, § 8, cl. 3.

124. *McIntosh*, 21 U.S. (8 Wheat.) at 590.

125. Some northern state judges also used European precedents to attack slavery. The most important example of this was the application of *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.), by northern courts to free slaves in transit. See, e.g., *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 198 (1836).

126. 2 Farrand, *supra* note 36, at 371.

slaves from Africa,¹²⁷ and subsequent laws declared that participation in the African slave trade was a form of piracy.¹²⁸ But, when the issue came before the Supreme Court, America's greatest Chief Justice, John Marshall, found international law helpful in protecting the interests of slave traders. In *The Antelope*,¹²⁹ a complex case involving the African slave trade, Chief Justice Marshall began by noting

[t]hat the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage, and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.¹³⁰

He later noted that “[p]ublic sentiment has, in both countries [Britain and the United States], kept pace with the measures of government; and the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed.”¹³¹

Citing four British cases, and quoting extensively from the Chief Justice of the High Court of Admiralty, Sir William Scott, Marshall then investigated the status of the slave trade.¹³² He noted that it “will scarcely be denied” that “it is contrary to the law of nature.”¹³³ Marshall, himself a slaveowner,¹³⁴ nevertheless agreed that it was “generally admitted” that “every man has a natural right to the fruits of his own labour . . . and that no other person can

127. State Trade Prohibition Act, ch. 22, 2 Stat. 406 (1807).

128. See e.g., Act of May 15, 1820, ch. 113, 2 Stat. 600; see also Act of April 20, 1818, ch. 91, 3 Stat. 450; Act of Mar. 3, 1819, ch. 101, 3 Stat. 532.

129. 23 U.S. 66 (1825).

130. *Id.* at 114-15.

131. *Id.* at 116.

132. *Id.* at 116-20.

133. *Id.* at 120.

134. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 11, 714-15 (1974). When he married, at age twenty-seven, his father gave him a slave as a wedding present. *Id.* at 715. He would later accumulate and inherit more slaves. In 1791, he owned ten adult slaves. *Id.* at 184.

rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.”¹³⁵ These arguments did not, however, lead to a liberation of the slaves in this case. Being contrary to natural law did not make the slave trade contrary to international law. Turning again to foreign law, Marshall discussed the British case of *Le Louis*,¹³⁶ in which the High Court of Admiralty dealt with the slave trade. Quoting—and praising—an opinion of Sir William Scott, Chief Justice Marshall found that despite American law, slave trading was not piracy under international law. “The act of trading in slaves, however detestable, was not, he said, ‘the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country, in its coasts and vessels, indiscriminately.’ It was not piracy.”¹³⁷

Although American statutes held that slaves taken from Africa had to be returned to Africa,¹³⁸ Marshall was not ready to apply American law, in an American court, to slaves coming into an American port. Similarly, while American law declared participation in the African slave trade to be piracy, punishable by death,¹³⁹ Chief Justice Marshall refused to apply the American law of piracy in an American court. Instead, he asserted that “[i]f [the African slave trade] is consistent with the law of nations, it cannot in itself be piracy[.] It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.”¹⁴⁰

Here then was an opportunity to apply American law in an American court to an issue of great humanitarian interest. Marshall might have concluded that the law of the United States required that all the slaves aboard the *Antelope* be returned to Africa. He could even have done this without pushing the issue of capital punishment for the slave traders.¹⁴¹ This was an opportunity to use the liberating aspects of American law to overcome the older, repressive law of nations that allowed slavery and the continuation of the African slave trade.

That Marshall chose not to apply American law, and instead applied foreign law, is not surprising. Foreign law, foreign prece-

135. *The Antelope*, 23 U.S. at 120.

136. (1817) 165 Eng. Rep. 1464 (High Ct. of Adm.).

137. *The Antelope*, 23 U.S. at 118 (quoting *Le Louis*, 165 Eng. Rep. at 1476).

138. See Act of Mar. 3, 1819, ch. 101, 2 Stat. 532.

139. Act of May 15, 1820, ch. 113, §§ 4-5, 2 Stat. 600, 601.

140. *The Antelope*, 23 U.S. at 122.

141. The case involved a libel action against the ship and its contents, and not a criminal prosecution of the traders.

dents, and concepts of international law mattered a great deal to Marshall. He was unwilling to take the nation in a new direction in the face of entrenched European notions of law and justice. To use Justice Scalia's language in his *Sosa* concurrence, in this case "the American peoples' democratic adoption of the death penalty" for slave traders was "judicially nullified because of the disapproving view of foreigners."¹⁴²

Most famously, of course, Chief Justice Taney made extensive use of foreign law and concepts of international law in his opinion in *Dred Scott v. Sandford*.¹⁴³ Here, Taney overturned a major act of Congress—the Missouri Compromise—and created without any statutory authority a new rule of civil procedure—that blacks, even if free, could never be citizens of the United States and could never sue as plaintiffs in diversity cases.¹⁴⁴ Taney argued that blacks could not be citizens of the United States because at the founding "the state of public opinion . . . which prevailed in the civilized and enlightened portions of the world" held that blacks were "an inferior order" that "had no rights which the white man was bound to respect."¹⁴⁵ Taney argued this view of blacks was "fixed and universal in the civilized portion of the white race"¹⁴⁶ and that "the public history of every European nation displays it in a manner too plain to be mistaken."¹⁴⁷ Taney asserted that the Declaration of Independence could not have been meant to embrace blacks because in no "part of the civilized world" would the language of the Declaration "be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery."¹⁴⁸ Taney thus could easily conclude that blacks "were not intended to be included, under the word 'citizens' in the Constitution."¹⁴⁹

There are strong arguments to be made against Taney's history and his use of international law, but this is not the place to debate the merits of Taney's logic. The point here is simply that the two most important Chief Justices in our nation's first century both

142. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment).

143. 60 U.S. (19 How.) 393, 407-09 (1857), *superseded by* U.S. CONST. amend. XIV (1868).

144. For a short history of this case, see PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (1997).

145. *Dred Scott*, 60 U.S. (19 How.) at 408.

146. *Id.* at 407.

147. *Id.*

148. *Id.* at 410.

149. *Id.* at 404.

used international law to either negate federal statutes, as Marshall did in *The Antelope*, or to overturn a federal law, as Taney did in *Dred Scott*. As we have also seen, they and their fellow justices regularly used the law of nations, international law, foreign law, and the theories of foreign legal scholars, to justify, explain, and support their decisions. Of equally significance, the Framers used similar sources to justify and explain parts of the Constitution they wrote and supported.

C. *Religious Liberty and Religious Minorities: The Mormon Cases*

Most whites in nineteenth century America enjoyed substantial civil liberties. The greatest exception to the general availability of civil liberties for white Americans was the treatment of members of the Church of Jesus Christ of Latter-Day Saints, better known as the Mormons. Their practice of polygamy offended most other Americans and led to a series of federal laws designed to suppress the Mormons in federal territories.¹⁵⁰ This led to the first examination of the Free Exercise Clause of the First Amendment by the Supreme Court. In *Reynolds v. United States*, the Court upheld laws that allowed for the persecution of Mormons, and set the stage for forcing Mormons to alter their religious practice.¹⁵¹ The case raised questions about fair trials, spousal immunity in testimony, and the meaning of the words “free exercise” of religion. This was a case that solely involved American issues, with a religion that had begun in the United States and claimed protection under the Constitution from statutes passed by the U.S. Congress. In upholding the prosecution—and persecution—of Mormons, the Court relied on foreign law to interpret the Constitution in a way that allowed for the suppression of an authentically American religious faith.

Chief Justice Morrison Waite cited such English scholars as Lord Coke and Matthew Bacon, as well as various English cases, in support of the conviction of the Mormon leader.¹⁵² In explaining why the statute banning polygamy did not violate the First Amendment, Chief Justice Waite cited acts from the reign of King James I, who was hardly a model for religious toleration,¹⁵³ the English case

150. Anti-Polygamy Act, ch. 126, 12 Stat. 501 (1862); Edmunds Act, ch. 47, 22 Stat. 30 (1882); Anti-Polygamy (Edmunds-Tucker) Act, ch. 397, 24 Stat. 635 (1887). See generally EDWIN BROWN FIRMAJE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900 (1988).

151. 98 U.S. 145, 145 (1878).

152. *Id.* at 154-55.

153. *Id.* at 165.

of *Regina v. Wagstaff*,¹⁵⁴ and more generally, the history of “northern and western nations of Europe,” English common law, and “the earliest history of England.”¹⁵⁵ The ironies here are obvious; the Mormon Church was a uniquely *American* institution and the claim was based on the U.S. Constitution. But that claim was shattered, in part, by a reliance on foreign law.

D. Chinese Immigrants

In 1882, Congress passed the first significant limitation on foreign immigration in the nation’s history, the Chinese Exclusion Act.¹⁵⁶ The goal of the Act was to eliminate Chinese immigration into the country, but the need for cheap labor and various loopholes in the law led to some continued immigration. Congress responded with various other acts including the Chinese Deportation Act of 1892,¹⁵⁷ which allowed for the expulsion of any Chinese laborers found in the nation who could not prove they were legally entitled to be in the United States.¹⁵⁸ One aspect of establishing their right to be in the United States required the testimony of “at least one credible white witness.”¹⁵⁹

In *Fong Yue Ting v. United States*,¹⁶⁰ the Court upheld this law. This statute regulated American law and American immigration; presumably the rest of the world (besides China perhaps) should have cared little about how the United States treated Chinese immi-

154. *Id.* at 167 (internal citation omitted).

155. *Id.* at 164-65.

156. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

157. Act of May 5, 1892, ch. 60, 27 Stat. 25.

158. The statute allowed for the deportation of “any Chinese person or person of Chinese descent . . . [who] shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.” *Id.* § 3. The law required that “all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States” apply for a “certificate of residence” to remain in the United States. *Id.* § 6. The statute provided that “any Chinese laborer” in the United States

without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested [and] . . . be deported from the United States . . . unless he shall establish clearly to the satisfaction of said judge, . . . by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. *Id.*

159. *Id.* § 6.

160. 149 U.S. 698 (1893).

grants. Furthermore, the Constitution seemed to give Congress plenary power to regulate naturalization and immigration.¹⁶¹ However, the Court was unwilling to rely solely on American law or American constitutional interpretation to uphold this blatantly racist statute. Perhaps the Justices were uncomfortable with the unfairness of the law, given its harsh racism and the result that people who struggled to come to the United States could be so easily expelled. Decided just seven years after the dedication of the Statue of Liberty, Justice Gray and his brethren looked to foreign sources to justify the expulsion from the United States of the “tired,” the “poor,” and the “huddled masses yearning to breathe free,”¹⁶² just because they happened to be from China.

In upholding the law, Justice Horace Gray made numerous references to foreign and international law. He first asserted that “the statements of leading commentators on the law of nations” supported the idea that every nation had a right to determine who could live within its jurisdiction.¹⁶³ He then quoted Vattel’s argument:

Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right, and, in

161. U.S. CONST., art. I, § 8, cls. 3-4 (“Congress shall have the power . . . [3] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; [4] to establish a uniform rule of naturalization . . .”).

162. The following poem was read at the opening of an art and culture exhibit organized to raise money for the installation of the Statue of Liberty. In 1903 it was placed on the pedestal of the statue.

Emma Lazarus, “The New Colossus” (1883)

Not like the brazen giant of Greek fame
 With conquering limbs astride from land to land;
 Here at our sea-washed, sunset gates shall stand
 A mighty woman with a torch, whose flame
 Is the imprisoned lightning, and her name
 Mother of Exiles. From her beacon-hand
 Glows world-wide welcome; her mild eyes command
 The air-bridged harbor that twin cities frame.
 “Keep, ancient lands, your storied pomp!” cries she
 With silent lips. “Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tost to me,
 I lift my lamp beside the golden door!”

EMMA LAZARUS, THE POEMS OF EMMA LAZARUS 202-03 (1889).

163. *Fong Yue Ting*, 149 U.S. at 707.

virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.¹⁶⁴

He then cited and quoted the French jurist Joseph Louis Elzear Ortolan, and his work, *Diplomatie de la Mer*, and the English scholar and judge, Sir Robert Joseph Phillimore.¹⁶⁵ He noted that

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848.¹⁶⁶

In support of this proposition he cited Coke's *Institutes*, Blackstone, Chitty, various debates in Parliament, and other English sources.¹⁶⁷ Citing decisions by various contemporary English judges, including "Lord Lyndhurst, Lord Brougham, and Justices Bosanquet and Erskine,"¹⁶⁸ Gray declared, "[e]minent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein."¹⁶⁹ He then cited a more recent English case, involving Chinese immigrants in the British colonies.¹⁷⁰ For this court, foreign law was a vital source for upholding the constitutionality of the nation's new repressive and racist immigration law.

IV. CONCLUSION

The use of foreign law to justify the outcomes in *Johnson v. McIntosh*, *The Antelope*, *Dred Scott*, *Reynolds*, *Fong* and other cases illustrates how foreign law was an integral part of the American constitutional process from the earliest history of the Court. There are scores of other examples of the use of foreign law in the early years of the Court.¹⁷¹

164. *Id.* (internal citation omitted).

165. *Id.* at 708.

166. *Id.* at 709.

167. *Id.*

168. *Id.* at 709-10.

169. *Id.* at 709.

170. *Id.* at 710-11 (citing *Musgrove v. Chun Teeong Toy*, (1891) A.C. 272, 282-83).

171. An even earlier example is Justice Samuel Chase's use of Blackstone in his important opinion in *Calder v. Bull*, 3 U.S. 386, 391 (1798).

Some might argue that foreign law should not be relied upon in American courts because in the past, the Court used foreign law to justify decisions that harmed Indians, blacks, Asians, and religious minorities. In fact, this historic use of foreign law to justify discrimination against minorities arguably illustrates exactly why foreign law should have no place in our jurisprudence. However, it seems more reasonable to conclude that since we have always used foreign law in our Constitutional jurisprudence, we should not abandon it now, when it can be applied to help guarantee rights for the most underrepresented members of society. Similarly, foreign law was sometimes used to bolster the legal rights of Americans in times of crisis. In the Civil War era, the Court appealed to foreign law to preserve the right to a jury trial for civilians accused of terrorism.¹⁷² If foreign law was applicable during America's greatest military and constitutional crisis—when the fate of the nation was clearly in the balance—then surely foreign law ought to be applicable in the current era.

One reason American Supreme Court justices used foreign law, and one reason why it should be used today, is that its use is efficient. If other nations have worked out theories of law that are not inconsistent with our own Constitution, it certainly makes sense to borrow and use those theories, even as we adapt them to American circumstances. Many courts throughout the world use the law of the United States as a model for their decisions for just this reason. It is efficient to borrow and use what others have developed. Marshall and Taney understood this. So too did Chief Justices Salmon P. Chase and Morrison Waite in the years after the Civil War.

In reading the multiple citations to continental and English jurists and the decisions in *Fong*, *Dred Scott*, *The Antelope*, *Johnson v. McIntosh*, and *Reynolds*, one must recall Justice Scalia's petulant complaint in *Roper v. Simmons* that an "[a]cknowledgement' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today."¹⁷³ One is similarly reminded of his screed in *Lawrence v. Texas*, "this Court . . . should not impose foreign moods, fads, or fashions on Americans."¹⁷⁴ Can it be that Justice Scalia has a monopoly on what sources of law are appropriate for American

172. See *supra* notes 93-101 and accompanying text.

173. 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

174. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

courts, and that Chief Jay, Marshall, Taney, Chase, and Waite, as well as various Associate Justices and other American jurists of the eighteenth, nineteenth, and twentieth centuries, were jurisprudentially ‘un-American?’¹⁷⁵ Moreover, if it was appropriate to use foreign law to contract liberty in the nineteenth century, why is it inappropriate to use foreign law to expand liberty in the twenty-first century? Equally important, if the court could use foreign law to protect the rights of the accused during the nation’s greatest crisis—as the Court did in *Milligan*—is it inappropriate to use similar sources of law to protect the rights of the accused in our current age of terrorism?

In declaring independence, the new American leaders felt they had to frame their claim with a “decent respect” for world opinion.¹⁷⁶ This appeal to world opinion and the use of foreign law permeated the age of the Founders and beyond. Once the Constitution was in place, the Supreme Court regularly made such appeals for more than a century. In the nineteenth century, foreign law was used to protect bondage, to justify taking land from the Indians, to suppress the “wrong” kind of religious practices, and to expel the “wrong” kind of immigrants. Conservatives at the time thought there was nothing wrong with this use of foreign law. Today, ironically, conservatives like Justice Scalia, are appalled because we use foreign law to expand liberty and human rights. Justice Scalia argues, with little regard for actual history, that the Founders would be shocked and appalled at the use of foreign law. This is simply wrong. Despite his claims to originalism, he ignores the long history of using foreign law to interpret our Constitution. Perhaps it is time he took a CLE in legal history.

175. Significantly, in his controversial opinion in *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), Justice Scalia relied heavily on *Reynolds*. See *id.* at 879-83.

176. DECLARATION, *supra* note 31.

