Why do I defend the resistance theory?

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Abstract

Unlike engagement and convergence postures, the resistance theory has full constitutional legitimacy. American courts (especially the U.S. Supreme Court) should never use and cite the foreign law or foreign judicial decisions to interpret the meaning of the Constitution of the United States. The main reason to defend this assertion is logical: these foreign materials do not have democratic legitimacy. American people have not elected either those lawmakers or judges from other countries. Therefore, their legislation or judgments are irrelevant.

Keywords: resistance theory, constitutional legitimacy, checks and balances, democratic theory, originalist interpretive theory

Resumen

A diferencia de las posturas del compromiso y convergencia, la teoría de la resistencia tiene plena legitimidad constitucional. Los tribunales americanos (especialmente el Tribunal Supremo de los Estados Unidos) nunca debería utilizar ni citar el derecho extranjero o las resoluciones judiciales extranjeras para interpretar el significado de la Constitución de los Estados Unidos. La razón principal para defender esta afirmación es lógica: estos materiales extranjeros no tienen legitimidad democrática. El pueblo americano no ha elegido a los legisladores ni a los jueces de otros países. Por lo tanto, su legislación o jurisprudencia son irrelevantes.

Palabras clave: teoría de la resistencia, legitimidad constitucional, frenos y contrapesos, teoría democrática, teoría interpretativa originalista.

[239] I want to dedicate this essay to Ms Sonia Hermosilla Díaz, Ms Marta García Gravi, and Ms Aida Ferrer Mitjavila. Thanks to these incredible women, the group ELSA-Universitat Pompeu Fabra (Barcelona) has been possible. In addition, I also want to inscribe this essay to my parents —Mr Manuel Atserias Gracia and Mrs Marta Beatriz Luque Llaosa—, doctors —Ms Blanca Bueno Julià-Capmany and Ms Maria del Pino Alonso Ortega—, and my best friend, Mr. Tomás Gabriel Garcia i Micó. All of them are helping me to fight against my disease: Obsessive Compulsive Disorder (OCD).

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1. Introduction

One of the most important and exciting questions in the field of comparative constitutional law is whether domestic constitutional courts or supreme courts with judicial review should use and cite the foreign law or foreign court decisions to interpret national constitutions.

This debate has taken place in both US Supreme Court and US Congress, although it is not exclusive to this country. Nonetheless, this essay focuses on analysing this legal question in the context of US legal system, considering that I have studied this topic as from US Supreme Court opinions, legal scholarship, bills, confirmation hearings, and other materials.[240]

The first section consists of two parts, namely: firstly, it briefly analyses current postures on this topic —resistance, engagement, and convergence— so that the reader can better understand this academic and legal discussion. Secondly, it refers to some important events as of *Roper v. Simmons* opinion in the US.

The second section shows my view about this topic. Unlike professors Victor Ferreres Comella and Vicki C. Jackson, who support engagement posture,[241] I am a supporter of resistance theory. For this reason, this paper does not intend to be neutral and focuses on exposing the legal (and more precisely, constitutional) foundations of this posture. In particular, I will take into account the democratic theory and originalist interpretation of the US Constitution.

2. The General Framework of this Academic and Legal Discussion in the US

2.1. Brief Mention to the Three Current Postures concerning the Use of Foreign Legal Materials

In accordance with Vicki C. Jackson's book,[242] there are three current postures concerning the use of foreign legal materials: resistance, engagement, and convergence.

According to the **resistance theory**, domestic courts interpreting their Constitution must reject foreign legal materials when dealing with constitutional issues. US Supreme Court

[240] Bearing in mind that I am very critical with interpretative tools used by the European Court of Human Rights, I consider appropriate to analyse this legal discussion in another context.
[241] Víctor F. Comella, *Comparative Modesty. A Review of Constitutional Engagement in a Transnational Era*, by Vicki Jackson, *European Constitutional Law Review*, Volume 7, Issue 3 (2011), pp. 517-528. Professor Comella asserts that he is "deeply sympathetic with the engagement model that Jackson has articulated in this book."
[242] Vicki C. Jackson, *Constitutional Engagement in a Transnational* Era, 2010.

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Chief Justice John G. Roberts and Associate Justice Samuel Alito are supporters of this posture.[243]

As per the **engagement posture**, domestic courts may use and cite the transnational law to interpret their Constitution. There is a 'light version', known as **deliberative**, which promotes that judges may consider both foreign law and international law as a permissive source when deciding constitutional issues. There is also a 'hard version', known as **relational**,[244] which considers that judges must consider the transnational law materials. In both categories, judges are not required to follow foreign legal precedent. Justices Stephen Breyer and Anthony M. Kennedy defend this posture.

Lastly, the **convergence model** suggests that judges must interpret the national constitution in the light of the transnational law.

2.2. Resistance movement: first reactions after Roper v. Simmons opinion

2.1.1. Roper v. Simmons

Roper v. Simmons opinion,[245] which was delivered by Justice Kennedy and decided on 1 March 2005, generated much controversy in American society. Before explaining its first reactions, it is necessary to summarise this case to understand its constitutional importance.

Simmons planned and committed a capital murder when he was 17. He was tried and sentenced to death. After *Atkins v. Virginia* opinion,[246] on which US Supreme Court held that the Constitution prohibits the execution of a mentally retarded person under Eighth[247] and Fourteenth[248] Amendments, Simmons filed a new petition[249] for state postconviction relief before the Missouri Supreme Court. This court held that since *Stanford v. Kentucky*[250] "a

[243] The late Associate Justice Antonin Gregory Scalia, who died in February 2016, was also an ardent supporter of this theory.

[244] American judges do not follow this posture. Nonetheless, other countries have expressly recognised it in their constitutions. For instance, according to Article 39.1 of the Constitution of the Republic of South Africa (1996), "When interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law, and (c) may consider foreign law.

[245] Roper v. Simmons (03-633) 543 U.S. 551 (2005)

[246] Atkins v. Virginia (00-8452) 536 U.S. 304 (2002): "Our independent evaluation of the issue reveals no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency', we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."

[247] US Constitution Amendment VIII provides that "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[248] Through the Fourteenth Amendment, the Amendment VIII is applicable to the States. The US Supreme Court cited *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (*per curiam*); *Robinson v. California*, 370 U.S. 660, 666—667 (1962) and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion) to justify this interpretation.

[249] Simmons firstly filed a motion for postconviction relief based on ineffective assistance at trial. This motion was rejected.

[250] *Stanford* v. Kentucky (No. 87-5765)

national consensus has developed against the execution of juvenile offenders" and accordingly it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor."

The key question, in this case, was to determine whether it was constitutional under the Eighth and Fourteenth Amendments to the US Constitution to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime.

After analysing whether there was a change of the national consensus in US, bearing in mind American precedents and legislatures on this legal question, US Supreme Court used and cited foreign law to interpret the Eighth Amendment.[251,252] It held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed" and it upheld the judgment of the Missouri Supreme Court.

Justice Scalia, with the support of Chief Justice John G. Roberts and Justice Clarence Thomas, formulated a dissenting opinion. He did not agree with Kennedy on the use of foreign law to determine the meaning of Eighth Amendment.[253]

2.1.2. Scalia (resistance) v. Breyer (deliberative engagement)

It is very illustrative to read the informal discussion between US Supreme Court Justices Scalia and Breyer on the validity of using the foreign material on constitutional issues,[254] which took place at the American University Washington College of Law on 13 January 2005.

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[251] *Roper v. Simmons*: "Yet at least from the time of the Court's decision in Trop [v. Dulles], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments." Moreover, US Supreme Court added that "Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49—50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."

[252] *Trop v. Dulles* (No. 70) 356 U.S. 86: "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"; *Atkins v. Virginia*: "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"; *Thompson v. Oklahoma* (No. 86-6169) 487 U.S. 815: "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"; *Enmund v. Florida* (No. 81-5321) 458 U.S. 782: "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."; *Coker v. Georgia* (No. 75-5444) 433 U.S. 584: "It is (…) not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."

[253] Scalia's dissenting opinion (*Roper v. Simmons*): "The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent."

[254] Norman Dorsen, *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*; Oxford University Press and New York University School of Law 2005, International Journal of Constitutional Law, Volume 3, Number 4, 2005, pp. 519-541.

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In this conversation, the reader can clearly identify two of three existing postures concerning above mentioned legal question: while Scalia defends resistance theory, Breyer is a supporter of deliberative engagement position.

This conversation was not merely an academic discussion. Behind this, there was a legal debate between US Supreme Court Justices,[255] which can be seen in *Roper v. Simmons* opinion.

After Dorsen's first questions,[256] Justice Scalia answered with an amusing comment, which clearly symbolized his position on that subject.[257] His speech analysed several positive ingredients of resistance theory that I want to emphasize. Firstly, he stressed that American people have its own moral and legal framework.[258] He referred to the Federalist Papers to determine the differences between US and European countries.[259] Secondly, Scalia highlighted the selective use of foreign law when some American judges decide constitutional issues,[260] citing *Lawrence v. Texas*.[261] Lastly, he asserted that there is a difference between writing and interpreting a Constitution. While the former is appropriate to use foreign law, the latter is not.[262]

Breyer also began his speech with a funny comment, which refuted Scalia's first assertion.[263] He explained a personal anecdote that reflected this academic and legal discussion between resistance and engagement supporters.[264] He repeated *ad nauseam* that decisions of foreign

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255 Marc C. Rahdert, *Comparative constitutional advocacy*, The American University Law Review, 56 Am. U.L. Rev. 553 (2007), pp. 554-665: "As the nation soon learned, Justices Breyer and Scalia's […] conversation was not purely academic exchange. Behind this discussion (known to them though not yet to us) was the Supreme Court's pending decision in Roper v. Simmons."

256 Ibid. at 16. Among all formulated questions from the beginning, maybe the clearest and straightforward question was as follows: "(…) is appropriate for our [American] judges to use and cite to foreign materials in the course of deciding constitutional cases?"

257 Ibid. at 16. "Well, most of those questions should be addressed to Justice Breyer because I do not use foreign law in the interpretation of the United States Constitution."

258 Ibid. at 16. "But we don't have the same moral and legal framework as the rest of the world, and never have."

259 Ibid. at 16. "If you read the Federalist Papers, they are full of statements that make very clear the framers didn't have a whole lot of respect for many of the rules in European countries. Madison, for example, speaks contemptuously of the countries of continental Europe, 'who are afraid to let their people bear arms."

260 Ibid. at 16. "When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it."

261 *Lawrence et al. v. Texas* (02-102) 539 U.S. 558 (2003)

262 Ibid. at 16. "Why is it that foreign law would be relevant to what an American judge does when he interprets —interprets, not writes— the Constitution? Of course the founders used a lot of foreign law. If you read the Federalist Papers, it's full of discussions of the Swiss system, the German system, etc. It's full of that because comparison with the practices of other countries is very useful in devising a constitution. But why is it useful in interpreting one?"

263 Ibid. at 16. "I think my law clerk found a case where Justice Scalia referred to foreign law."

264 Ibid. at 16. "The best example arose at a seminar where several professors, a member of Congress, a senator, and another judge and I were discussing the relations among the branches of government. The congressman began to criticize the Supreme Court's use of foreign law in its decisions (…) I said to the congressman, 'If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something. The congressman replied, 'Fine, you are right. Read it. Just don't cite it in your opinion'."

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courts do not bind American courts and there was no problem to take into account this foreign material.

2.1.3. Legislative reaction: "Constitution Restoration Act" and "American Justice for American Citizens Act"

Roper v. Simmons was decided on 1 March 2005. Two days after, US Senator Richard C. Shelby and Representative Robert B. Aderholt, among others who support them, introduced a Bill each one to limit the jurisdiction of Federal courts in certain cases and promote federalism, known also as "Constitution Restoration Act of 2005" (henceforth, CRA), in the US Senate[265] and the US House of the Representatives.[266] In accordance with Section 201 CRA, American courts "may not rely upon" foreign law or foreign court decisions to interpret and apply the US Constitution.[267] The purpose of these bills, which were not finally enacted, was "[to protect and preserve] the Constitution of the United States by restricting federal courts from recognizing the laws of foreign jurisdictions and international law as the supreme law of our land."[268]

Moreover, in order to dissuade American judges from using and citing foreign legal material, CRA stated that they could be removed upon impeachment and conviction.[269]

Later, Representative Ronald Ernest "Ron" Paul introduced a Bill to ensure that the courts interpret the Constitution in the manner that the Framers intended, also known as "American Justice for American Citizens Act" (henceforth, AJACA),[270] in the US House of

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[265] S.520 — 109th Congress (2005-2006) U.S. Senate: https://www.congress.gov/bill/109th-congress/senate-bill/520/all-info(last visited on 27 February 2017).

[266] H.R.1070 — 109th Congress (2005-2006) the House of the Representatives of the United States: https://www.congress.gov/bill/109th-congress/house-bill/1070/all-info (last visited on 27 February 2017).

[267] Section 201 CRA, called "The interpretation of the Constitution", stated that "In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States."

[268] Judge Rooy More's statement in an interview: http://www.waff.com/Global/story.asp?S=1644862 (last visited on December 14, 2015). Although CRA was originally introduced in 2004, the purpose of these bills were the same in 2005.

[269] Section 302 CRA, called "Impeachment, conviction, and removal of judges for certain extrajurisdictional activities", provided that "To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act, engaging in that activity shall be deemed to constitute the commission of (1) an offense for which the judge may be removed upon impeachment and conviction; and (2) a breach of the standard of good behaviour required by article III, section 1 of the Constitution."

[270] H.R.1658 — 109th Congress (2005-2006): https://www.congress.gov/bill/109th-congress/house-bill/1658/text?q=%7B"search"%3A%5B"American+Justice+for+Americans+Citizens+Act"%5D%7D&resultIndex=6 (last visited on 27 February 2017). In accordance with Section 3 AJACA Bill, "Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States".

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Representatives on 14 April 2005. The Section 3 AJACA also prohibited American judges from using and applying foreign law and foreign court decisions to interpret the US Constitution. This bill was not either enacted.

2.1.4. Confirmation hearings: Roberts and Alito before the U.S. Senate

In the hearing on the nomination of John G. Roberts JR. to be Chief Justice of the United States,[271] before the Committee on the Judiciary United States Senate, which took place between 12-15 September 2005, Senator Kyl Jon asked him about the role of foreign law in US Supreme Court decisions.[272] Kyl, who defends the democratic theory,[273] referred to two cases (*Roper v. Simmons* and *Knight v. Florida*) to show his concern on this judicial practice.

Roberts used democratic theory to answer Senator Kyl's question.[274] Moreover, he showed his concern on using foreign precedent because it enlarges the discretional power of judges.[275]

In the hearing on the nomination of Samuel A. Alito, JR. to be an Associate Justice of the Supreme Court of the United States,[276] which took place between 9-13 January 2006, Senator Kyl asked the same. Alito said that foreign law is not helpful to interpret the U.S. Constitution.[277]

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[271] Confirmation hearing on the nomination of John G. Roberts, JR. to be Chief Justice of the United States before the Committee on the Judiciary United States Senate (available in https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf).

[272] Ibid. at 33. "What, if anything, is the proper role of foreign law in U.S. Supreme Court decisions? Of course we are not talking about interpreting treaties or foreign contracts, but cases such as those that would involve interpretations of the U.S. Constitution?"

[273] Ibid. at 33. "Our Constitution was drafted by the Nation's Founders, ratified by the States, and amended repeatedly through our constitutional processes that involve both Federal and State legislators. It is an American Constitution, not a European or an African or an Asian one, and its meaning, it seems to me, by definition, cannot be determined by reference to foreign law."

[274] Ibid. at 33. "Judicial decisions in this country —judges of course are not accountable to the people, but we are appointed through a process that allows for participation of the electorate, the President who nominates judges is obviously accountable to the people. The Senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country."

[275] Ibid. at 33. "The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges. In foreign law you can find anything you want. (…) And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent."

[276] Confirmation hearing on the nomination of Samuel A. Alito, JR. to be an Associate Justice of the Supreme Court of the United States before the Committee on the Judiciary United States Senate (available in https://www.gpo.gov/fdsys/pkg/CHRG-109shrg25429/pdf/CHRG-109shrg25429.pdf).

[277] Ibid. at 38. "I don't think that foreign law is helpful in interpreting the Constitution. (…) As for the protection of individual rights, I think that we should look to our own Constitution and our own precedents. (…) We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution.

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3. The constitutional legitimacy of the resistance theory: Scalia's originalism and textualism

Unlike engagement and convergence postures, the resistance theory has full constitutional legitimacy. American courts (especially the U.S. Supreme Court) should never use and cite the foreign law or foreign judicial decisions to interpret the meaning of the Constitution of the United States. The main reason to defend this assertion is logical: these foreign materials do not have democratic legitimacy. American people have not elected either those lawmakers or judges from other countries. Therefore, their legislation or judgments are irrelevant.

Although these foreign materials are not binding on American courts (deliberative and relational engagement), the mere fact of citing and using them on judicial decisions violates clearly the principle of separation of powers[278] and democratic government.

When some American judge cites and uses the foreign law or foreign court decisions to interpret the US Constitution, it is necessary to ask him or her the following questions: who has voted this foreign law? Who is accountable to the American citizens? Why has he or she cited and used only this specific foreign material (for example, French case-law) and not another when interpreting US Constitution?

Judges should take into account that citing and using foreign material is irrelevant to decide American constitutional issues.[279] Furthermore, this judicial practice increases the discretional power of American judges, which is initially limited by American precedent. This scenario undermines legal certainty, so long as citizens will not be able to know how an American court resolves a specific case. We are probably before the most perverse and sophisticated judicial practice which main purpose is to replace American people's will with the judge view, and this is very dangerous in a democracy.

I agree with Justice Scalia on the distinction between writing and interpreting a Constitution. In order to determine the original meaning of any Constitution, it is necessary to take into account when this legal document was adopted by its framers. As a result of this theory, it is not appropriate to use foreign legal material when American judges decide constitutional issues. It is not only irrelevant, but it can be harmful to American people. If an American judge cites and uses the foreign material, it seems that the Supreme law of this country does not have sufficient "force" or "personality" to offer a legal answer before American legal disputes.

[278] I represent checks and balances system with a 'perfect triangle', which reflects that each power controls and is controlled by each other for the purposes of avoiding the abuse of power. In the case of Judicial Branch, US Supreme Court can declare unconstitutional both laws of US Congress and presidential acts. In compensation for this power, judges are nominated by the President and confirmed by the Senate. Moreover, judges can be impeached by US Congress, as well as removing them from office whether impeachment is passed.

[279] If they are interested in using and citing foreign materials, he can write books that illustrate comparative constitutional law analysis. I will be delighted to buy them and study them because I also like it.

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However, it is important to distinguish between constitutional issues (for example, fundamental or constitutional rights) and other topics, such as foreign investment, which may be regulated by treaties. In this case, taking into account that the American people, through US Congress, have consented to join this international agreement, American judges are authorised to pay attention how parties' courts have decided one particular case under a treaty.

Lastly, I would like to add as follows: Firstly, although some assert that support the resistance theory is provincial and narrow-minded (I am sorry but I cannot share this opinion), it is perfectly compatible to defend this theory and at the same time to be interested in analysing the field of comparative constitutional law. For example, an American judge can study a specific foreign law to participate in an academic debate with other judges or publish a paper establishing the differences between foreign constitutional law and his or her own. But when this judge must decide one case in accordance with his or her Constitution, he or she should never use foreign law or foreign court decisions to interpret it.

Secondly, although conspiracy theories are very entertaining, I do not think they are good enough reasons to support the resistance theory. The Western dominance or international elite, whose purpose is to impose its decisions on other countries (in this case, U.S.), are ridiculous. If someone wants to defend this theory through these reasons, it is better that he or she immediately leaves this academic and legal discussion.

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