THE ANTI-AUTOCRACY CANON & FOREIGN LAW

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David Driesen's book[1] is both a familiar and a novel work of scholarship. Familiar, because it follows in the tradition of a robust body of legal scholarship that strives to explain America's recent experience with democratic decline.[2] Novel, because of many reasons. Perhaps most importantly, the book is explicit in its recognition that democratic decline is first and foremost a *political* phenomenon,[3] which in turn requires a focus on political prescriptions,[4] and then legal prescriptions to the extent that they have the potential to shape politics.[5]

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1. DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER (2021) [hereinafter DRIESEN, THE SPECTER OF DICTATORSHIP].

2. *See, e.g.*, Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) [hereinafter Scheppele, *Autocratic Legalism*].

3. *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 2 ("Political factors and political parties, for example, play critical roles."); *id.* at 9 (observing that "political science suggests that political parties play a more important role in preserving democracy than courts"); *id.* at 140 (observing that "broad studies of the rise and fall of democracies across time and space identify politics and political parties as the primary factors causing democratic decline"). Similarly, and referring to the Republican Party, Michael Klarman has characterized the Trump presidency as "a symptom of a diseased political party." Klarman, *supra* note 2, at 45. *See also* Scheppele, *Autocratic Legalism*, *supra* note 2, at 580 (arguing that dysfunctions in the party system can result in the capture of a mainstream political party).

4. *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 146 (concurring with political scientists who have described "political actors as the primary potential checks on autocracy"); *see also* Scheppele, *Autocratic Legalism*, *supra* note 2, at 583 (emphasizing the importance of civic education to counter democratic decline).

5. *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, s*upra* note 1, at 9–10 (recognizing the primacy of political prescriptions, but also asserting that "the courts have something to contribute both in laying a foundation for preserving democracy during relatively untroubled times and in pushing back as an elected leader takes steps toward establishing autocracy"); *id.* at 171 (noting that "[j]udicial decisions perform an important political role that can help check autocracy"). *See generally* MARK TUSHNET, WHY THE CONSTITUTION MATTERS (2010) (providing a general

Equally innovatively, Driesen is implicitly in conversation with the scholarship on the judicial use of foreign law and experiences. To be sure, the democratic decline literature in the United States has long recognized the relevance of other countries to American constitutional law and practice, but to my knowledge, Driesen is the first to make a *legal* argument that would constitutionally license American judges to refer to the constitutional law and practices of nations experiencing democratic decline.[6] Driesen not only recognizes that judges ought to learn from the experiences of others, but also finds a *constitutional* basis in support of that learning exercise, which I term the "anti-autocracy canon"—a bundle of arguments that Driesen articulates based on familiar and conventional methods of American constitutional interpretation,[7] including originalism, structuralism, and precedents—that permits judges to refer to the laws and practices of *certain* nations, those that have either undergone or are undergoing democratic decline, for a *certain* purpose, to effectuate the constitutional principle of avoiding autocracy.

A caveat is in order at the outset: while it is clear that Driesen urges judges to learn from other countries' experiences with democratic decline,[8] it is not entirely clear whether he thinks it important that judges be constitutionally licensed to do so. Much scholarly attention has already been paid to the question of whether it is constitutionally permissible for judges to use foreign law and practices for purposes of domestic constitutional interpretation and adjudication,[9] but it is important to note that the question was

statement that law (and particularly, constitutional law) matters to the extent that it has the capacity to influence the operation of ordinary politics).

6. Many arguments have been made, of course, for and against judicial uses of foreign law more generally. However, Driesen's work refines the discussion by making a specific case for the judicial use of laws and practices of countries that are experiencing—or have experienced—democratic decline. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 121–23.

7. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (examining the basis for the legitimacy of judicial review); Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987).

8. *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at ix (urging "judges to learn from other countries"); *id.* at 95 ("To defend democracy, the judges (and citizens) must understand how countries have lost democracies.").

9. *Cf.* Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 149 (2013) (noting that "[d]ebates over the effects of globalization on constitutional law have thus far tended to focus on questions of the permissibility of domestic courts considering foreign or international law in domestic interpretation").

occasioned by *judicial citations* to foreign law and practices.[10] In other words, *non-judicial* uses of foreign law and practices by judges, including in their extrajudicial statements, have seldom been a constitutional issue. If, by "learning," Driesen is referring to a more informal and extrajudicial form of judges educating themselves, where they understand the laws and practices of countries experiencing democratic decline, but do not refer to what they have learned in their judicial opinions,[11] then the question of permissibility, that is, whether the constitution would condone such a learning experience, arguably becomes moot or at least less relevant.[12] Yet, there are strong indications that Driesen finds merit not only in informal learning, but also in *judicial citations* to comparative examples of democratic decline, evidenced by his search for a legal justification that would permit such citations. In his own words, "a case for our judges to learn from other countries requires a justification rooted in our own experience."[13]

With that caveat, and assuming that by judges' learning from other countries, Driesen is referring to judicial considerations, within judicial opinions, of the experiences of countries that have either undergone or are undergoing democratic decline, it becomes all the more important to examine whether the Constitution licenses such learning exercises. According to Driesen, it does, due to an integral part of American constitutional law—"the anti-autocracy canon," as I

10. The controversy over the use of foreign law by judges was exacerbated, if not also occasioned, by foreign judicial citations in a number of politically sensitive Supreme Court cases, which included Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it was unconstitutional for the states to impose the death penalty on juvenile offenders); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that it was unconstitutional for the states to criminalize consensual same-sex activity); and Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that it was unconstitutional for the states to impose the death penalty on persons with mental disabilities).

11. Driesen's other writings suggest that, by learning from comparative examples, he does not rule out the possibility of *judicial* citations to the laws and practices of democratically-declining countries. *See, e.g.*, David M. Driesen, *SCOTUS Aids Trump's Drive to Autocracy*, VERFASSUNGSBLOG (July 1, 2020), https://verfassungsblog.de/scotus-aids-trumps-drive-to-autocracy/ [https://perma.cc/U2SR-SRJM] [hereinafter Driesen, *SCOTUS Aids*] ("In *Seila Law*, the Supreme Court used an activist approach to create an important new rule amplifying already dangerous presidential power. In doing so, nobody on the Court, not even the dissenters, displayed any awareness of the lessons one might glean from countries that have seen their democracies seriously undermined through abuse of executive power in recent years. That's a shame, and quite dangerous.").

12. I say arguably because even informal learning can influence, consciously or unconsciously, how a judge crafts her judicial opinion.

13. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at ix; *see* Driesen, *SCOTUS Aids*, *supra* note 11.

call it, which permits judges to look to comparative examples of democratic decline.

The first strand of argument in the anti-autocracy canon that Driesen articulates is decidedly originalist. Driesen recognizes that the founding generation was far "less parochial than we are."[14] "[S]ome of our predecessors," he observes, "look[ed] at foreign models available to them."[15] Additionally, as a whole, and taken in context as a document framed deliberately to disavow and repudiate British monarchical rule,[16] the Constitution is infused with "the original intent to guard against 'tyranny.'"[17] Elsewhere, Driesen refers to this as the Founders' "original intent to avoid autocracy."[18] His conclusion is clear: "the Founders—the Ratifiers and Framers—established the American Republic in part to avoid autocracy. This goal therefore must influence interpretation of the Constitution."[19] To Driesen, then, the existence of an original intent to avoid autocracy can be understood as permission for interpreters of the Constitution, judges included, to consider the laws and practices of autocratic constitutional systems and of those countries that are headed in that direction, to avoid the same from happening in the United States. Admittedly, the originalist defense of judicial references to foreign law and practices, and in this case, references to those of democratically declined or declining nations, is not entirely persuasive. Three objections readily come to mind.

The first objection is an argument from within, an originalist argument. Adding to the evidence Driesen marshals to demonstrate the Founders' interest in other parts of the world, one can invoke specific passages from the *Federalist Papers*, including a passage

14. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at vii.

15. *Id*. at ix.

16. *Id*. at 14 ("The Founders therefore crafted a constitution that would substitute a rule of law for the rule of arbitrary executive authority many Americans saw in King George."); *see* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 310 (2003) [hereinafter Scheppele, *Aspirational and Aversive Constitutionalism*] (observing that the British constitutional structure "served as the leading negative model in drafting state constitutions and the Articles [of Confederation]," while also recognizing that it served as a positive model, in some respects, at the Philadelphia Convention).

17. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 6.

18. *Id*. at 25.

19. *Id*. at 12 (first citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); and then citing Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L. J. 1 (2018)).

urging "attention to the judgment of other nations."[20] Yet all of this points, at best, to the fact that the Founders, and perhaps *just them*, were intent on consulting foreign sources. In other words, while the evidence Driesen presents could satisfy an original intent originalist,[21] it does not have the same effect on the public meaning originalist—a growing, if not predominant,[22] faction within originalism—for whom the broader public's perception, at the time of ratification, of what the Constitution meant and required is controlling. This critique is not lost on Driesen, who responds by observing that original intent can inform original public meaning, as "[t]he Framers' intent constitutes some evidence of what the people who adopted it—the Ratifiers—might have thought it meant,"[23] and possibly what the general public at the time thought the ratified text meant.[24]

The second objection is that the originalist case for considering the laws and practices of other nations, including those of then-autocratic Britain, whether it is justified based on original intent or original public meaning or another variant of originalism, is limited to a specific purpose: *making* constitutions, not *interpreting* them. In other words, it may indeed be true that the Framers consulted and advocated consultation of foreign laws and practices, and the broader public at the time may have concurred with this position, yet perhaps such consultation was perceived as a desirable part of adopting, not interpreting, a constitution. If so, there is indeed an originalist principle to use foreign law, and particularly aversive foreign law, that is, foreign law that ought not to be emulated or foreign law that ought

20. THE FEDERALIST NO. 63 (James Madison). Driesen, too, places an important emphasis on the Federalist Papers to discern original intent. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 12 (asserting that the Framers' intent is "expressed in the Federalist Papers").

21. Driesen is aware of this. *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 12 (noting that judges usually "refer to the intentions of the Framers").

22. *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2021) (asserting that "Public Meaning Originalism is the predominant form of originalist constitutional theory"); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380 (2013) ("Originalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry.").

23. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 12.

24. *See generally* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019) (providing a scholarly attempt to harmonize original intent originalism and original public meaning originalism).

to be taken as a negative example,[25] for purposes of adopting a constitution, not interpreting it.[26] Simply put, Driesen may be correct to infer an originalist principle to consult foreign material to avoid autocracy, but he may have gone too far in inferring that that principle also applies to constitutional interpretation.

The third objection historicizes the founding generation's consultation of foreign law and practices. Yes, they consulted foreign materials, but perhaps they did so out of necessity. The United States was a fledgling nation, and either because the Framers thought it useful to mimic (or reject, as the case may have been) the laws and practices of other nations to gain acceptance from the world community or because not enough legal knowledge (in the form of lived practical experience, precedents, and so forth) had accumulated, they consulted foreign sources.[27] Even Driesen seems to find some merit in this view: "Our founding fathers were less parochial than we are. *They had no choice*."[28] If that is so, perhaps we, including judges, *now* have the choice to be "parochial," and to look inward rather than outward.[29]

25. *See* Scheppele, *Aspirational and Aversive Constitutionalism*, *supra* note 16, at 298 (defining aversive foreign laws and practices as "the ones that are so forcefully rejected that they cast their influence over the whole constitution-building effort").

26. Justice Scalia, one of the leading opponents of consulting foreign sources for purposes of domestic constitutional interpretation, made a similar argument. He said: "Alexander Hamilton, sir, was writing a Constitution, not interpreting one. . . . And in writing one, of course you consult foreign sources, see how it has worked, see what they've done, use their examples and so forth. But that has nothing to do with interpreting it." Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 538–39 (2005).

27. *Cf.* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 108 (2006) ("Indeed, compliance with international law was critical to help protect the fledgling nation from retaliation by powerful foreign states."); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 85 (2004) ("For new constitutions in fledgling democracies, anchoring constitutional rights in the jurisprudence of more established systems supplies a body of precedent and decreases the likelihood of repressive interpretations.").

28. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at vii (emphasis added).

29. On the other hand, the view that looking outward, that is, at other nations, comes at the expense of looking inward—heralded by conservative scholars in particular—understates the self-reflective benefits of looking at other legal systems. On the self-reflective benefits of comparative constitutional law, see Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 117 (2005) (arguing that "comparisons can shed light on the distinctive functioning of one's own system"); Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L

The anti-autocracy canon is also structuralist; it relies on the notion that, at its core, the structure of the Constitution is tilted in favor of avoiding "systemic risk."[30] In other words, the Constitution is infused with an instinct for self-survival. "Avoidance of systemic risks constitutes the primary duty of all government officials, because collapses of systems produce catastrophic and often irreversible consequences,"[31] as Driesen notes. This harkens back to the idea that the Constitution "is not a suicide pact."[32] This means, among other things, that judges ought to do anything in their capacity, including looking at foreign cases of democratic decline, to counter executive aggrandizement.

It is no coincidence that Driesen repeatedly[33] draws inspiration from *McCulloch v. Maryland*,[34] "the foundational stone of what we all know now as 'structural' argument."[35] In *McCulloch*, Chief Justice Marshall famously reasoned that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[36] If the ages that have come since *McCulloch* was decided have witnessed a presidency that "use[s] authoritarian tactics associated with Hungary's and Poland's autocratic leaders,"[37] that "emulate[s] the autocracies in tilting the electoral playing field,"[38] and a president who "openly admires"[39] autocrats, judges should not be standing by idly and should instead judicially consider and critically examine those sources of autocratic inspiration. This licenses judges to look at the experiences of other nations with democratic decline.

L. J. ONLINE 1, 9 (2010) (observing that judicial engagement with comparative materials can "help American judges clarify what is *not* consistent with the text and traditions of the United States") (emphasis in original); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1285 (1999) (arguing that "seeing how things are done in other constitutional systems may raise the question of the Constitution's connection to American national character more dramatically than reflection on domestic constitutional issues could.").

30. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 9.

31. *Id*. at 141.

32. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

33. *See, e.g*., DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 26, 142.

34. 17 U.S. 316, 316 (1819).

35. Sanford Levinson, *McCulloch II: The Oft-Ignored Twin and Inherent Limits on "Sovereign" Power*, 19 GEO. J. L. & PUB. POL'Y 1, 10 (2021).

36. *McCulloch*, 17 U.S. at 415 (emphasis in original).

37. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 9.

38. *Id*. at 122.

39. *Id*. at 168; *see also id*. at 4 ("President Trump openly admires the rules of these [autocratic] countries and emulated some of their tactics while in office.").

Finally, the anti-autocracy canon has roots in precedent. To be sure, there is already a strong case to be made that the Supreme Court's jurisprudence over the centuries demonstrates robust and consistent engagement with foreign laws and practices.[40] Driesen refines the point: there is also a case to be made that the Supreme Court has historically been willing to look at foreign examples of democratic decline to prevent the same from happening in America. An early case in point that Driesen alludes to is *Ex parte Milligan*,[41] which held that trials of civilians by military courts created by the president are unconstitutional. Writing for the Court in the politically tense atmosphere of the Civil War, Justice Davis reasoned that the "history of the world," known and understood by the Founders, counseled against such encroachments upon personal liberty.[42] *Milligan* thus signified the Court's willingness to consider law and practices abroad to counter democratic decline at home.

The watershed moment arguably came in *Youngstown*,[43] when the majority of the Court ruled, amidst the Korean War, that President Truman did not have the constitutional authority to issue an executive order to seize and operate most of the nation's steel mills. In his concurring opinion, famous for the tripartite distinction he made of executive power, based on whether executive power has congressional backing, Justice Jackson took notice of the experiences of other countries. He reasoned that the executive power envisaged by the founding generation was markedly different than that of George III or that of other rulers in Continental Europe.[44] Further, he likened the executive power asserted by the Truman administration to "the

40. *See, e.g.*, VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 103 (2010) (observing that "the U.S. Court and its justices have been involved in deliberative engagements with foreign and international law episodically over the course of our constitutional history"); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 907 (2005) ("References to foreign sources of law have not been aberrational over the past 216 years. Instead, they have been somewhat commonplace."); Minow, *supra* note 29, at 2 ("Here is the puzzle: no one disagrees that United States judges have long consulted and referred to materials from other countries as well as international sources; yet for the past nine or so years, citing foreign and international sources has provoked intense controversy."). Critics may still plausibly argue, of course, that the longevity of a practice does not automatically confer on it the status of being constitutional.

41. 71 U.S. 2 (1866).

42. *Id*. at 120; *see* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 38.

43. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

44. *Id*. at 641 (Jackson, J., concurring).

executive powers in those governments we disparagingly describe as totalitarian."[45] Justice Jackson's concurrence was robust in its references to examples of European democratic decline, no doubt partially because "he had lived through Hitler's destruction of the Weimar Republic"[46] and also because he "had served as the Nuremberg prosecutor of Nazi war crimes."[47] Justice Frankfurter, too, was cognizant in his concurrence of the perils of concentrated power, as he drew attention to "[t]he experience through which the world has passed in our own day," by which he was primarily referring to the horrors of the Nazi regime.[48] Both justices "linked then recent events in Europe"[49] to domestic concerns about executive power and its aggrandizement. There is therefore precedent for judges to do the same in this day and age, that is, to link America's own experience with democratic decline to its contemporaneous counterparts, including the recent experiences of Hungary, Poland, and Turkey.

There are at least two objections to the precedent-based argument that the Court's jurisprudence contains examples of learning from comparative democratic decline. The first one is obvious: perhaps not a sufficient number of precedents have accumulated for us to speak of an established judicial practice of referring to foreign experiences with democratic decline; all we have are scattered references in a handful of cases.[50] The second objection is more substantive: even assuming that enough precedents have accumulated, indicating a willingness on the Court's part to look overseas when questions about domestic democratic decline are triggered, how does one ascertain that that judicial practice is constitutionally sound? Put differently, why should mere practice, even when repeated over a sustained period of time, which is doubtful, be regarded as constitutionally licensed?[51]

45. *Id*.

46. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 48.

47. *Id*.; *see id*. at 79 ("Jackson's concerns about the tendency of the head-of-state's emergency powers to erode democracy in light of then recent events in Europe contributed to his application of this framework to limit presidential power.").

48. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring); *see* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 49.

49. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 49.

50. This point triggers larger concerns about how to quantify the emergence and consolidation of any judicial practice. Additionally, Driesen does not purport to have exhaustively reviewed the Court's entire jurisprudence to definitively conclude that it has consistently engaged with foreign examples of democratic decline.

51. An interesting parallel to this point can be found in discussions of what constitutes customary international law—one of the main sources of international law. Scholars recognize that to speak of an international custom that attains the status

Even assuming that there are robust originalist, structural, and precedential reasons to consider foreign experiences of democratic decline in domestic constitutional interpretation and adjudication—and the strength of Driesen's assertion that there are such reasons stems partly from his eclectic approach—other concerns persist.

First, who decides which countries have undergone or are presently undergoing democratic decline to allow for comparison? Driesen's book focuses, in the main, on Hungary, Poland, and Turkey,[52] but is that an exhaustive list? Should judges rely on political science literature to make such determinations, which would open up a whole series of questions around judges' proficiency (or the lack thereof) regarding effectively understanding and utilizing non-legal sources?[53] Do judges rely on determinations made by the political branches of government, which not only raises significant separation of powers questions, but also gives rise to accuracy concerns, given that the executive may choose to label certain countries as being democratic or undemocratic based on political motivations.[54] The question of selection bias[55] or the problem of "cherry-picking"[56] is real: skeptically put, what prevents the judge from focusing on a

of a binding rule, an act (or omission) must be repeated over the course of time (*usus*), with the conviction that such act (or omission) is required by international law (*opinio juris*). *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6–10 (7th ed. 2008). Similarly, that the Court has referred to comparative democratic decline in its caselaw should not mean, in and of itself, that such references have been made with the conviction that those references are required or even permitted by the Constitution.

52. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 95 (explaining that the book, in relevant part, is "analyz[ing] democratic decline in Hungary, Poland, and Turkey").

53. *Cf.* Ken Shear, *Why Justices of the Supreme Court Make Bad Historians*, HISTORY NEWS NETWORK (Nov. 10, 2009), https://historynewsnetwork.org/article/117999 [https://perma.cc/X2KS-TRLF].

54. To give but one example, "The Summit for Democracy," an international summit convened by President Biden in December 2021, included some countries that political scientists would consider "less free" than some of the countries that were excluded. Whether or not it is understandable and even desirable for the political branches to make such political determinations is a separate question I do not address.

55. Chief Justice John Roberts, when asked during his confirmation hearings about his stance on using foreign law to interpret the U.S. Constitution, famously replied that "looking at foreign law for support is like looking out over a crowd and picking out your friends." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005) (statement of Judge John G. Roberts, Jr.).

56. *See* RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 144 (2014).

particular subset of countries experiencing democratic decline and using their experience while sidelining the experience of other countries to (intentionally or unintentionally) distort the outcome of the constitutional controversy at hand?

Second, there are questions associated with capability. Do judges have the resources, and courts the institutional capacity, to adequately engage with the laws and practices of democratically-declining nations, especially given the high probability that these nations are typically non-English-speaking jurisdictions?[57] Assuming resources are in place and courts are capable of researching and accurately identifying comparative examples, should the attention of courts be placed on other, presumably more high-priority matters, such as ensuring that the domestic caselaw relevant to the constitutional question at issue is accurately identified in its entirety and properly understood?

A third concern is that urging American judges to consider comparative examples of democratic decline may prove to be counterproductive in that it may strengthen (mis)conceptions that America is "doing fine," and that its experience with democratic decline, if any, is nothing comparable to the foreign countries being judicially examined. This is not an unlikely possibility since many justices of the Supreme Court who have traditionally been eager to cite to foreign law have supported their position by invoking America's exceptional status in the world, by characterizing references to other countries' laws as an act of grace, and by speculating how openness to foreign law would serve the interests of America and specifically enhance the status of the Supreme Court as a leading source of jurisprudence in the world. In this context, consider Justice O'Connor's statement in defense of using foreign law: "When U.S. courts are seen to be cognizant of other judicial systems, our ability to

57. For similar capacity concerns associated with accurate engagement with foreign law, see Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 65 (2004) (observing that "the Court fundamentally lacks the institutional capacity to engage in proper comparativism"); Ran Hirschl, *Judicial Review and the Politics of Comparative Citations: Theory, Evidence and Methodological Challenges*, *in* COMPARATIVE JUDICIAL REVIEW 403, 410 (Erin F. Delaney & Rosalind Dixon eds., 2018) (listing "institutional capacity" as one of the factors to explain references to foreign law, explaining that institutional capacity includes, for example, "the existence of comparative law research units or special law clerks charged with the task of foreign references.").

act as a rule-of-law model for other nations will be enhanced."[58] Consider too Justice Breyer's extrajudicial assertion that "for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up."[59] Justice Scalia's concerns about "[t]he Imperial Judiciary,"[60] although he used that descriptor about the Court in a very different context, come to mind. In a legal tradition, at least at the Supreme Court level, where citations to comparative cases have partly hinged on the notion of American exceptionalism, it is not entirely clear whether judges would be willing to cite to comparative examples of democratic decline to demonstrate that the same could happen here. More likely, citations to democratically declining countries run the risk of triggering a sense of judicial *schadenfreude* on the Court's part, a sense of gratitude that America is not like those countries, and worse yet, a false sense of confidence that it will never become one.

There are two additional concerns associated with judicial uses of comparative examples of democratic decline that Driesen readily recognizes. These have to do with the wholistic and gradual nature of democratic decline, respectively. Democratic decline is wholistic because it is typically the product of a combination of worst practices and laws.[61] To borrow Kim Lane Scheppele's creative formulation, modern autocracies, which she calls "Frankenstates," are "created by combining the bits and pieces of perfectly reasonable democratic institutions in monstrous ways, much as Frankenstein's monster was created from bits and pieces of other living things."[62] This means that American judges will have a difficult time understanding how a single practice, seemingly ordinary and innocuous, causes or contributes to democratic decline, since judges will not be able to fully appreciate

58. Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17,2008), https://www.nytimes.com/2008/09/18/us/18legal.html [https://perma.cc/X8AD-B4SD].

59. *Supreme Court Justices Hold Rare Public Debate on Law*, VOA NEWS (Oct. 28, 2009, 3:11 AM), https://www.voanews.com/a/a-13-2005-01-18-voa55-66901662/262341.html [https://perma.cc/QVK8-6PRZ].

60. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

61. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 97 (observing that autocracies "combin[e] worst practices, [tweak] them slightly, and [employ] discretionary authority creatively.").

62. Kim Lane Scheppele, *Not Your Father's Authoritarianism: The Creation of the "Frankenstate,"* EUR. POL. & SOC'Y NEWSL. 5, 5 (2013).

how that practice interacts with other practices, resulting in democratic erosion.[63] Democratic decline is also gradual; easily identifiable moments of democratic rupture, such as bloody coups, have become a rarity. Modern-day cases of democratic decline resemble the tale of the frog thrust into a pot with tepid water: as long as the water is heated in a gradual manner, the frog never feels the urge to escape the pot and eventually boils to death. As Driesen observes, "[t]his adds to the difficulty of detecting serious threats to democracy in a timely manner."[64]

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As it becomes clear upon close examination, then, there are serious issues one needs to grapple with before arriving at the conclusion that the anti-autocracy canon permits American judges to consider the experiences of democratically declining nations for purposes of domestic constitutional interpretation and adjudication. To recapitulate, the anti-autocracy canon's grant of permission to judges to cite to the laws and practices of democratically declining nations rests on shaky originalist, structural, and precedential grounds. The lack of objective criteria with which judges can identify democratically declining countries from others compounds the problem, as does the problem of selectivity, that is, the concern that judges may selectively engage with the experiences of certain democratically-declining nations at the expense of others, to arrive at predetermined constitutional outcomes. Add to that the possibility that such comparative inquiries into autocracies may generate counterproductive results if American judges cannot disabuse themselves of the (mis)conception that America is comparatively better off and therefore there is no reason to be alarmed. Driesen himself administers the *coup de grâce* to the case for judicial citations to examples of comparative democratic decline: as examples across the Atlantic suggest, democratic decline is the product of a collective set of worst practices, each of which, when singled out, might appear to the judge as being innocuous. Further, democratic decline occurs gradually, rendering it difficult to identify its presence at any given point in time.

63. Driesen is acutely aware of this. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 97–98 ("The ordinariness of many measures establishing autocracy matters, because observers looking at a single measure with little understanding of how all the measures fit together and operate in practice can easily underestimate democratic erosion.").

64. *Id*. at 98.

Some of these concerns are not specific to the judicial use of foreign law, let alone the judicial use of cases of comparative democratic decline. The problem of selectivity, for example, is a problem associated with constitutional interpretation generally.[65] Some of these concerns, such as the gradual nature of democratic decline and the resulting difficulty in identifying it in a timely manner, on the other hand, are endemic to the judicial use of comparative democratic decline.

There is yet a final, disheartening critique to be made, captured by this question: is the entire discussion of whether the anti-autocracy canon permits judges to use and draw on examples of comparative democratic decline merely "a tempest in a teapot,"[66] given the current foreign-law-averse composition of the Supreme Court?[67] The retirement of Justice Kennedy, a prominent proponent of looking across the Atlantic,[68] coupled with the death and replacement of Justice Ginsburg,[69] and the recent retirement of Justice Breyer[70] (who was replaced by Justice Jackson, who might be less receptive to

65. *Cf.* Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1281 (2006) ("So too, perhaps, in this context: the selectivity concern, like the originalist one, may be parasitic on a contested interpretive theory.").

66. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 248 (2003); *see also* Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299, 299 (2006). Similarly, another scholar has described the controversy surrounding the Court's use of foreign law as a "storm in a teacup." *See* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, U. ILL. L. REV. 637, 637–38 (2007).

67. Following Justice Kennedy's announcement that he was going to retire, a book talk held at the Harvard Law School, entitled "Comparative Capital Punishment," had predicted that the new composition of the Court would be less receptive to foreign law. For a recording of the event, see Harvard Law School, *HLS Library Book Talk | Comparative Capital Punishment*, YOUTUBE (Feb. 24, 2020), https://www.youtube.com/watch?v=G84fCwS3gD4[https://perma.cc/E7DS-8P6K].

68. *See generally* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER (Sept. 12, 2005), https://www.newyorker.com/magazine/2005/09/12/swing-shift [https://perma.cc/9HEL-M36N] (detailing how Justice Anthony Kennedy's interest in and reference to foreign law influenced his Supreme Court decisions).

69. *See generally* Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), https://www.nytimes.com/2009/04/12/us/12ginsburg.html [https://perma.cc/T4BB-R69M] (explaining Justice Ruth Bader Ginsburg's defense of the use of foreign law by American judges).

70. *See generally* Dorsen, *supra* note 26 (containing Justice Breyer's statements defending the Supreme Court's use of foreign law).

foreign law than her predecessor[71]) are discouraging realities to those who believe in the merits of learning from the experiences of other countries.

In the end, whether judges are constitutionally licensed to make judicial use of examples of comparative democratic decline is not certain, as is the question of whether they should do so, even if so licensed, given all of the attendant problems briefly discussed above. That, however, does not detract from the importance, timeliness, and novelty of Driesen's book, which not only broaches the subject of judicial reliance on comparative democratic decline, but makes a case for such reliance. Another contribution Driesen makes to the literature on judicial references to foreign law is that his argument is particularist: he urges us to consider the possibility that American constitutional law and practice perhaps permits judges to make use of examples of comparative democratic decline. The scholarship on judicial references to foreign law has long entertained the question of permissibility of such references as a blanket question—the Constitution either permits or rejects references to foreign law in their entirety. But Driesen offers a more targeted and refined approach to that question, and therein lies yet another contribution of his scholarship: there may be a possibility that the Constitution, as evidenced by its origins, structure, and Supreme Court precedents expounding it, *specifically* licenses references to the laws and

71. This, of course, is a tentative suggestion, pending how the opinions Justice Jackson will author during her tenure will (or will not) draw, even if partly, on foreign law. During her confirmation process, however, then-Judge Jackson made oral and written statements that evince a degree of skepticism regarding the relevance of foreign law to domestic constitutional interpretation and adjudication. In response to one question on whether it is "proper for judges to rely on foreign law in determining the meaning of the Constitution," for example, she submitted: "It is not proper for judges to rely on foreign law in determining the meaning of the Constitution." JUDGE KETANJI BROWN JACKSON WRITTEN RESPONSES TO QUESTIONS FOR THE RECORD 79 (2022) (responding to a question from Sen. Ted Cruz). She did acknowledge elsewhere, however, that "foreign law can be consulted in certain circumstances, just as law review articles or treatises can be consulted." *Id*. at 214 (responding to a question from Sen. Thomas Bryant Cotton). *See also* Adam Liptak, *By Turns Cautious and Confident, Judge Jackson Takes the Stage*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/us/ketanji-brown-jackson-judicial-philosophy.html [https://perma.cc/AMJ7-W4CY] ("Justice Breyer, for whom Judge Jackson served as a law clerk, has written and spoken approvingly about the role foreign and international law can play in the work of American courts. Judge Jackson declined to endorse that position.").

practices of democratically-declining countries for the purpose of effectuating the original intent to avoid autocracy.[72]

To conclude, while I believe Driesen's arguments in support of judicial reliance on comparative examples of democratic decline are novel, stimulating, and engaging, his ultimate agenda is, of course, domestic: to ensure that the Supreme Court engages in what he terms "prodemocracy doctrinal moves for future jurisprudence."[73] This involves curbing, or better yet, repudiating the unitary executive theory, strengthening the president's legal accountability, and less judicial reliance on doctrines of justiciability that have the practical consequence of shielding the executive from meaningful judicial scrutiny.[74] I wholeheartedly concur with Driesen that a court receptive to understanding the experiences of countries that have undergone or are undergoing democratic decline would more readily and easily make those "prodemocracy doctrinal moves."[75] Yet, I am less optimistic that the Supreme Court, as a matter of constitutional law could, and as a practical matter would, be more receptive to reaching across the Atlantic. Perhaps the notion of openness to, and learning from, other jurisdictions will "in time again command the support of a majority of [the] Court."[76] Until then, Professor Driesen is to be congratulated for his masterfully written book that brings the issue of comparative democratic decline, and how the Court can learn from it, to our collective attention.

72. This is not to say that Driesen is necessarily for or against judicial uses of foreign laws and practices more generally.

73. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 140.

74. *See id.*

75. *Id.*

76. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).