The Lost European Aspirations of U.S. Constitutional Law

By Charles F. Abernathy[1]

Most European and American attorneys and judges think the U.S.A. has its legal roots in English common law,[2] and that is probably true for the many areas of U.S. law that are still controlled by the traditional common-law process of simultaneously making and applying law.[3] Yet, with respect to constitutional law – America's greatest legal contribution to modern respect for the rule of law, the

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[2] Professor Langdell's famous first casebook on U.S. contract law, for example, contained only cases, without explanatory commentary, and these cases were explicitly chosen because they revealed "doctrines [that had] arrived at [their] present state by slow degrees," by a process of "growth, in many cases extending through centuries." Charles C. Langdell, Law of Contracts vi (1871). Today German Universities continue the identification of foreign or comparative law with the study "Anglo-Saxon" or American common law, see, e.g., Muenster University, Study of Common Law, at http://www.uni-muenster.de/Jura.cl/ (Muenster's website on study of common law), and universities in the United States similarly equate U.S. domestic law with common law and comparative law with what they often call the "civil-law" system. See, e.g., Harvard Law School Catalogue:

> "As the twentieth century nears its close, almost every contemporary legal order has felt the influence of either the common law system or the civil law system of continental Europe. A general introduction to the civil law through, for example, a study of basic institutions and solutions of contemporary French and German law provides common law students with the background needed for more specialized work in foreign law, or in jurisprudential or historical courses that deal with material not drawn from the common law. (For students trained in the civil law, a general background in the common law is, of course, of like importance.)" *See* HARVARD LAW SCHOOL CATALOGUE (2002), at http://www.law.harvard.edu/students/catalog/cgroups/foreign.php#b.

[3] Even in areas that are ostensibly statutory or controlled by codes, the U.S. codes are often dominated by common-law concepts or reflect a desire to have the codified law continue to evolve, within parameters set by the open-ended terms of the relevant code. *See, e.g.*, Richard Danzig, *A Commentary on the Jurisprudence of the Uniform Commercial Code*, 26 Stan. L.REV. 621 (1975).

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roots of the U.S. legal system are firmly planted in Europe, not England. The U.S. Constitution was inspired by French revolutionary ideas of rationalism in law; it was intended as an integrated document just like codes; and it has been interpreted by American judges to be not just a political document but binding law – law that is binding on all three branches of government, legislative, executive, and judiciary. In fact that was the holding in *Marbury v. Madison*,[4] the case decided exactly two hundred years ago.

Despite its European origins, this legal constitutional tree has grown into a very strange hybrid, a tree with continental European roots but an increasingly common-law superstructure of branches, trunks, and leaves. Despite repeated attempts by some Supreme Court justices, the continental code-law tradition has been unable to win a majority at the Supreme Court for many decades. From the European perspective, one may ask the question, "What has gone wrong?" From a less-interested perspective, what has caused the mutation from French-German roots to an English trunk, branches, and leaves? This is the topic of my presentation today.

I. THE EUROPEAN, CODE-BASED ORIGINS OF THE U.S. CONSTITUTION

A. The Two Legal Systems and the Original American Choice of Rationalism

1. The Rationalism of Codes

When most Americans speak of the "civil law system," they speak of two separate but inter-related ideas – the rediscovery in Europe of the substantive precepts of the Roman law and the transformation of these rules into updated codes that simulated the codes of the late Roman period.[5] "Civil law," therefore, describes not just a set of rules, but also a method for knowing the rules, for making and ascertaining the rules. If we can identify these separate strains, then we can see that it is the methodology of the European legal system, what I will call the "code-based system," that is most important in influencing U.S. constitutional law. In

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4 5 U.S. (1 Cranch) 137 (1803).

5 The code-based system is typically called the "civil law system" in the United States. See Arthur von Mehren & James Gordley, THE CIVIL LAW SYSTEM 3 (1977) (leading early university casebook on "civil law"): "[I]n the civil law, large areas of private law are codified" and "influenced by Roman law," neither being significant features of the "common-law system developed in England." In order to avoid confusion with the term "civil law" insofar as it indicates non-penal law, this essay uses the terms "code law" and "code-based law," thus emphasizing not the Roman source of law but the codification methodology.

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origin and essential quality the code system desired to give more specificity to law so that it can be known by the people to whom it applies. This greater certainty was intended not only to make law more rational and fair, by giving notice of what constitutes a violation of law;[6] it was also designed to take power away from the powerful men who, sitting as judges or local parlements, could create law, and numerous variations from town to town, under the guise of merely applying law.[7] The Code systems were, in this sense, an inherent part of the rationalization of democratic power and themselves powerfully democratic and transparent.

Of course, it is well-known that the drafters of the initial Code in France found it more difficult to create certainty than was first thought. Over many years several efforts failed,[8] and the final group that drafted the Code worked very quickly, found it difficult to develop precise rules of law, and ultimately resorted to a code that it thought was more general and aspirational than precise and scientific.[9] But these developments, to which I shall return later, came considerably after the drafting of the 1789 U.S. Constitution. The Americans were more strongly influenced by what the French hoped to accomplish than what the French would actually create, more than ten years later. The original American Constitution of 1789 was the first flower of Eighteenth Century Rationalism,[10] the philosophical movement so much related to the rationalizing of European law in European codes.

2. The Rationalist Constitution of 1789 – Structure and Details

The 1789 Constitution reflected this Rationalism in two ways. First, in grand scheme it adopted completely Montesquieu's idea for the separation of powers.[11] Article I created a Legislature,[12] Article II an Executive,[13] and Article III a judiciary,[14] each with its own source of authority. In fact, the French ideas were so

6 *See* von Mehren & Gordley, *supra* note 5, at 14 (describing France).

7 *Id.* at 48 (describing France).

8 *Id.* at 48-51.

9 *Id.* at 54-56.

10 *See* Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 273-80 (1967).

11 *See* Montesquieu, THE SPIRIT OF THE LAWS 156-57 and Chapter 5 passim (A. Cohler, et al. eds., 1989).

12 U.S. CONST. art. I, § 1.

13 U.S. CONST. art. II, § 1.

14 U.S. CONST. art. III, § 1.

strongly imbedded in the Americans' minds at that time that the Americans did not even bother to define the powers that were separated -- the U.S. Constitution merely states that "[a]ll legislative Powers" shall be vested in Congress,[15] "[t]he executive Power" in the Presdident,[16] and "[t]he judicial Power" in federal courts.[17] The Federalist Papers, the clearest explanation of the goals of the 1789 Constitution, sold the document to a leery public based primarily on French ideals of separation of powers in order to prevent tyranny.[18]

This adoption of Montesquieu's ideas was all the more remarkable because it triumphed in such a short period. From the time of the first Constitution in 1781, called the Articles of Confederation, to our current Constitution, written in 1787 and ratified in 1789, less than a decade had elapsed. But the constitutional change was profound. The original Articles of Confederation had provided for no separation of powers – the Congress acted as legislature,[19] one of its committees acted as de facto executive when the Congress was not in session,[20] and the full Congress acted as a judicial body to settle disputes between the states.[21] Between 1781 and 1789, therefore, the United States converted itself from a nation ruled by one omnipotent Congress exercising parliamentary sovereignty to a tripartite government of divided powers as suggested by Montesquieu.

It was not only the grand design that reflected a taste for rationalism and certainty, for both within the first three articles and in the supplementary articles IV-VII, the 1789 Constitution showed surprising specificity as compared to the Articles of Confederation of the immediate post-revolutionary period. The earlier document contained a total of thirteen articles, but many of them were extremely short and general. Its Article I, for example, simply gave the name of the new government – "The Stile of this Confederacy shall be 'The United States of America'"[22] – and at least seven of the Articles consisted of a single sentence,

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15 U.S. CONST. art I, § 1 (further subdivided into a Senate representing the states and a House of Representatives based on population).

16 U.S. CONST. art I, § 1 (who serves with a vice-president but exercises such executive power alone).

17 U.S. CONST. art. III, § 1, cl. 1.

18 *See* THE FEDERALIST No. 10, 28.

19 ART. OF CONFED., arts. V and IX, ¶1.

20 ART. OF CONFED., art. IX, ¶5 and X.

21 ART. OF CONFED., art. IX, ¶¶2-3.

22 ART. OF CONFED., art. I.

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usually of the most general description.[23] The 1789 Constitution, on the other hand, specified in detail the qualifications of important officeholders,[24] the duties of officers,[25] the mechanics of legislation,[26] the terms of service in government,[27] and limitations on federal and state legislative power[28] – and all of that only in the first three articles creating the three branches of government. Four shorter final articles provided the detail for interstate relations, expansion, security, amendment, federal supremacy, and more.[29] Moreover, even on those issues where it did not provide a rule, the 1789 document often noted the issue and provided a mechanism for finding the future rule of law.[30] Of course, the Articles of Confederation had created only a confederal government of limited powers, whereas the 1789 Constitution created a more centralized government, but my point is that the drafters of the 1789 Constitution actually took very seriously the code-based ideal of specifying in as much detail as possible the actual structure of the three branches of the federal government, the complex interactions between the branches, and the even more complex interactions with the existing state governments.

The 1789 Constitution, therefore, not only adopted the prevailing rationalistic view of a tripartite government, it also "legislated" in detail the rules for conducting that government. Both of these aspects of the U.S. Constitution were grounded in the nascent European code-law concept of the desirability of knowing, specifying, and observing legal rules by written documentation of the law.[31] Indeed, the primary support for the new American Constitution came from

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23 ART. OF CONFED., arts. I, II, III, VII, X, XI, and XII.

24 U.S. CONST. art. I, § 2, cl. 1 (House of Representatives); art. I, § 3, cl. 3 (Senators); art. II, § 1, cl. 5 (President). Members of the third branch, the judiciary, are merely described as "judges," without further qualification. *See* U.S. CONST., art. III, § 1.

25 U.S. CONST. art. I, § 4-5, 8 (Congress); art. II, § 2-3 (President); art. III, § 2 (Supreme Court and inferior federal judges).

26 U.S. CONST., art. I, § 7 (bicameral adoption, signature by President or veto, override of veto).

27 *See, e.g.*, U.S. CONST. art. I, § 7 (privileges and compensation of members of Congress, limitations on other service); art. II, § 4 (removal of President); art. III, § 1 (compensation and removal of judges).

28 *See* U.S. CONST. art. I, § 9-10 (federal and state limitations, respectively).

29 See U.S. CONST. art. IV-VII.

30 *See, e.g.*, U.S. CONST. art I, § 4, ¶1 (method of congressional election and time for future meetings); art. III, § 1 (creation of inferior federal courts).

31 Similar themes can be seen in the German codification movement of the nineteenth century. *See* von Mehren & Gordley, *supra* note 5, at 72-75 (discussing the triumph of positivism in German private law).

supporters who saw its institutions as desirable precisely because they were based on a rationalized democratic government. [32]

B. *Marbury v. Madison*: The Constitution Is *Law*

The most famous decision in American constitutional law -- the decision that created constitutional *law* -- also relied completely on the code-law tradition adopted from continental Europe. This is, of course, the case we celebrate today, *Marbury v. Madison*.[33]

1. Essence of the Civil Law Tradition of Code-Based Law

Before I discuss *Marbury*'s role in espousing European legal ideas in America, I need to provide some more detail about the code-law tradition. Although we may admit that the European, code-law system cannot be absolutely defined as scientific and deductive,[34] its tendencies in this direction can be contrasted easily with opposite tendencies in the common-law system.[35] The attributes of each legal system or legal culture can be usefully compared with the following list. (The emphasis here is not on what the legal rules are in the two systems, which may or may not be the same,[36] but on how the law is made or found in each system.)

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32 *See, e.g.*, THE FEDERALIST No. 46 (Madison) (federal government is not the enemy of the states, for the people control both), No. 78 (Hamilton) (judiciary will enforce constitutional law without power of force or political judgment and only by persuasive peans).

33 5 U.S. (1 Cranch) 137 (1803).

34 Few scholars seriously believe today that the civil-law system is a computer that automatically replicates uniform and predictable results under all circumstances; the dispute is largely over the degree to which the continental systems remain committed to these ideals. *Compare* Mitchell Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995) (arguing for indeterminancy and discretion in reality of French judicial rulings), *with* von Mehren & Gordley, supra note 5, at 54-59 (1977) (arguing that original desire for predictability could not be attained in drafting but that later educational schools tended to enforce such ideas). In any event, it is enough for present purposes that the civil-law and common-law systems vary by some significant degree on these issues, even though they may not lie at extremes on such issues. *Cf.* G. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AMER. J. COMP. L. 683 (1998).

35 *See, e.g.*, R. David & J. Brierly, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 17-24, 90-93 (1978).

36 *See id.* at 15-43 (contract law).

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LEGAL SYSTEMS COMPARED[37]

Code-Based Law	*Common Law*
Legislature creates law	Courts create law
Law changes as legislature declares	Law evolves over time
Courts find law scientifically	Courts make law organically
Logic, structure, or doctrines guide judicial interpretation	Experience, practicality, and precedent guide judicial interpretation
Law is integrated into written code	Law is diffuse and incomplete
Law is pervasive	Law is interstitial
Law is a collection of doctrines	Law is a collection of results
Law is known (from written code)	Law is known by the "good" person or declared by the "good" judge
Security resides in certainty	Security may reside in uncertainty
Government makes law through the code	Law reflects citizens' or elites' values
The code speaks	Precedent signals what the law may be
Law professors know law best	Law professors affect law little

I have previously identified how the text of the U.S. Constitution adopted the developing ideals of the code-based law of Europe. Now I want to add a second point – the decision in *Marbury v. Madison*, which enforced the constitution

37 *See* Charles F. Abernathy, LAW IN THE UNITED STATES 18 (1996) (adapted).

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as a superior form of law, also adopted and affirmed these European ideals. Indeed, the rationale of the decision in *Marbury* is even more explicitly European than was the 1789 constitutional text.

2. *Marbury*'s Idealization of Constitutional Law as European Code-Based Law

In reviewing Chief Justice Marshall's opinion in *Marbury*, one can see that the Court justifies its role in interpreting the Constitution by pointing to four basic arguments for deeming the Constitution to be superior to ordinary legislation. All four arguments come directly from the code-law tradition.[38]

(1) The Constitution is "permanent"[39] ["The code speaks," not courts, and law does not evolve with judicial action];
(2) The Constitution is "written"[40] ["Law is written," and people know it because it is written];
(3) The Constitution's text explicitly recognizes the Constitution as supreme law, in at least five different explicit respects[41] ["Law is known from written code"];
(4) It is the duty of judges to obey the Constitution because it is "law" and it is "fundamental"[42] ["Legislature (constitutional convention) creates law" and it is fundamental].

In fact, the entire persuasiveness of the *Marbury* opinion is built on the concept that the Court is not taking power from the legislature,[43] but is merely reading and applying the law as it has already been declared by the authors of the more fundamental applicable law, the Constitution.[44] This is, of course, a

38 *See* Abernathy, *supra* note 37, at 143-46 (summarized from a longer list). The quoted material in brackets is taken from the list in the text accompanying note 37.

39 5 U.S. at 176.

40 5 U.S. at 176-78.

41 5 U.S. at 178-80.

42 5 U.S. at 177.

43 Recall that the statute held unconstitutional in *Marbury* sought to give the Supreme Court original jurisdiction over cases which the Constitution limited to its appellate jurisdiction, or so the Court construed the statute. *See* Abernathy, *supra* note 37, at 149-50.

44 5 U.S. at 179-80: "From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature."

fundamental tenet of the code-law tradition.[45] Finally, the Court's methodology in *Marbury* is as compelling as its explicit arguments – the *Marbury* opinion does not cite a single case or precedent throughout and instead proves its argument based on text and doctrines.[46]

II. The Decline of Civil Law Influence, the Rise of the Common Law Influence, and the Current Battle for American Constitutional Law

A. The Early Return of Common Law and the Unwritten Constitution

Harold Berman, the great American scholar of the law of the U.S.S.R., often argued that Soviet law was more "Russian" than "Soviet" because the dominant legal culture continued to control law even after the revolution,[47] and so it was also in the United States after *Marbury*. Despite some early enchantment with European codes for topics in private law,[48] as early as 1819, Chief Justice Marshall, the author of *Marbury*, began his opinion for the Court in *McCulloch v. Maryland*[49] by noting that history and experience made the best argument for upholding the power of the federal government to create federal banks, despite the absence of any textual power to do so.[50] In the same opinion, he justified his expansive interpretation of federal power by noting that he was not interpreting a "legal code"[51] but a more aspirational document: he wrote, "we must never forget that it is a constitution we are expounding."[52]

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45 *See* supra text accompanying note 37 (list items 1-3).

46 *See id*. (items 7 and 11).

47 Harold Berman, JUSTICE IN THE U.S.S.R. 226-66 (1963).

48 *See* Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L.J. 1207 (noting synetheses in common law and code-based principles); Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1 (1938) (general); F. Aumann, *The Influence of English and Civil Law Principles Upon the American Legal System During the Critical Post-Revolutionary Period*, 12 U. CIN. L. REV. 289, 306-07 (1938) (especially noting influence on contract law).

49 17 U.S. (4 Wheat.) 316 (1819).

50 *Id*. at 354: "Our history furnishes abundant experience of the utility of a national bank as an instrument of finance."

51 *Id*. at 407: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."

52 *Id*. at 407.

By the middle of the twentieth century, the movement away from the code-law ideal was so complete in American constitutional law that nothing seemed to remain. A perfect example is the Supreme Court's opinion in *Harper v. Virginia Board of Elections*,[53] in which the Court invalidated Virginia's head tax collected as a condition for voting. Although the tax had been collected for over 100 years without constitutional complaint or question, the Court found the long tradition of the tax was irrelevant. It nevertheless violated the constitutional guarantee of equal treatment *because the Court had changed its concept of equality*. Justice Douglas' opinion stated,

> "The Equal Protection Clause is not [tied] to the political theory of a particular era. In determining what lines unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

By the late middle of the last century, one noted professor even wrote an article posing the most fundamental question: *Do We Have an Unwritten Constitution?*[54] The implication, of course, was that the United States had rejoined its common law progenitor, the United Kingdom, the Old World nation with no written constitutional text. But, in fact, we had not simply reverted to British practice, we had also violated Montesquieu's most basic idea. In Britain the constitution is unwritten and is changed by legislative fiat; in the U.S. the power to dictate and change the constitutional order had passed from the legislature to the judiciary, raising serious modern concerns about the separation of governmental power to avoid tyranny.[55]

The change from a code-law basis for constitutional law to a common-law basis for constitutional law has not come without dissent. In the *Harper* case, for example, Justice Black wrote a dissenting opinion that could have been written by a civil-law judge. He said:

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53 383 U.S. 663 (1966).

54 Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (and answering the question, yes).

55 *See* Learned Hand, THE BILL OF RIGHTS 1-30 (1958) (judicial review violates the constitutional text).

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> "I join the Court in disliking the policy of the poll tax, [but] this in my judgment is not a justifiable reason for holding this . . . law unconstitutional. Such a judgment on my part would ... be an exercise of power which the Constitution does not confer on me . . . . I . . . express my strong belief that there is no constitutional support whatever for this Court [to make] changes which a majority of the Court at any given time believes are needed to meet present-day problems."[56]

Unfortunately, however, the last half of the 1900's saw this dispute between code-law and common-law traditions harden into a political debate, for those pushing for a judicially amended constitution usually proposed leftist solutions for U.S. society, while those who opposed these leftist changes were usually rightists. Thus the debate between code-law and common-law became in the public mind a dispute between left and right.[57]

B. The Current Argument for the European Code-Law Tradition

More regularly, however, what others see as merely a political dispute can be more fundamentally recognized as a conflict between the common-law and code-law traditions in the United States Supreme Court. An important recent example is *Rogers v. Tennessee*,[58] a decision from less than two years ago. In that case, the state of Tennessee punished murder by statute, but case law supplemented the statute. Case law provided that no defendant can be convicted of murder unless his victim dies within a year and a day of the defendant's act. (In the days when the rule arose, long before the development of modern medical science, the rule provided an easy guideline for causation: if a victim dies more

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56 383 U.S. at 675; *see also id.* at 677:

> "The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be 'shackled to the political theory of a particular era,' and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightening theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution...."

57 *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

58 532 U.S. 451 (2001).

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than a year and a day after the defendant's harmful act, it was likely that some other event, not the crime, had caused the victim's death.) In *Rogers*, the Tennessee Supreme Court abrogated this common law rule and permitted the defendant to be charged and convicted of murder when his victim died after 15 months.[59] Rogers challenged his conviction under the federal Constitution's Due Process Clause[60] because Tennessee's reinterpretation of its murder statute clearly made criminal conduct that was non-criminal before his case was decided.

Justice O'Connor's opinion for a majority of the Justices held that the states may retroactively punish crimes when the change is foreseeable by consulting the relevant cases. In other words, if the evolving cases suggest that a defense is losing its persuasiveness, people should expect that the state courts will eliminate the defense and punish the crime fully.[61] Most interesting is the reason she gives for accepting this conclusion. Strict enforcement of the concept of fair notice, she explained, "would place an unworkable restraint on normal judicial processes."[62] Notice that phrase, "normal judicial processes." In other words, she assumes that the normal process is the common law process of judicial evolution of law, and to make this system of law permissible, she must interpret the Constitution to authorize ex post facto punishments. In a final parochial sentence, she adds that failure to permit judges this power

> "would be incompatible with the resolution of uncertainty that marks *any* evolving judicial system. In the context of common law doctrines . . ., there often arises the need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business . . . ."[63]

Justice Scalia's dissenting opinion captured the essence of the code-law horror at what the majority had decided. He wrote:

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59 *Id.* at 454.

60 The Due Process Clause simply provides that no state shall deny a citizen the due process of law. The original Ex Post Facto Clause more specifically covers criminal punishment, but it applies only to prosecutions by the federal government, *see* art. I, § 10, cl. 1. The Fourteenth Amendment's Due Process Clause makes similar rules applicable to the states. *See* Bouie v. City of Columbia, 378 U.S. 347 (1964). These rules were at issue in the *Rogers* case.

61 *Rogers*, 532 U.S. at 460-61.

62 *Id.* at 461.

63 *Id.* at 452.

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> "Today's majority opinion produces a curious constitution that only a judge could love [— one] in which the elected representatives cannot retroactively make murder [a crime] but in which unelected judges can do precisely that [, one] in which the predictability of lawmaking cannot validate the retroactive creation of crimes, but the predictability of judicial lawmaking can do so."[64]

It is interesting to note that the *Rogers* case proves the continued viability of the European tradition in American constitutional law because the lineup of majority and dissenting justices does not correlate with the usual political positions ascribed to the individual justices. Joining Justice Scalia in dissent were two of the most liberal justices on the Supreme Court, Stevens and Breyer, as well as one of the most conservative. The majority was also composed of a mixture of justices usually described as leftist or rightist in political terms, O'Connor, Rehnquist, and Kennedy on the right, and Ginsburg and Souter on the left.[65]

III. What Caused This Change? And How Did It Lead Back to Europe?

A. Speculation About the Change

Searching for the causes of this cultural change from a code-law constitution to a common-law constitution, and partially back again, is no easy task. While the first signs of change could be seen within thirty years after the 1789 Constitution was written, the fullest manifestations and the clearest judicial statements were not seen until the 1960's. Since the change and battle continues today, we are discussing a period of probably 200 years. Though the period is a long and complex one, we can begin to speculate about the causes for the change. I limit myself here to just four factors.

1. Cultural Affinity. Though American revolutionists thought of themselves as rebels, their cultural roots were in England, not in France. More immediately, all the lawyers who worked in law in the immediate post-revolutionary period had been trained primarily in British common law, not code-based law. Despite an early fascination with French and other code-law materials, substantial changes had occurred by the 1820's and 1830's, when truly American commentators began to assert a systematic American-grown statement of law that largely synthesized English and French law, but did it in the traditional case-law or common-law

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64 *Id.* at 468.

65 *See id.* at 453.

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method.[66] In short, the drafters of the Constitution may have admired European concepts about legal rationalism, but all those who actually enforced society's legal rules, including the constitutional rules, were common-law lawyers in method, if not always in substantive legal rule.

2. *Rapid Industrialization and Social Change.* By the end of the 1800's, the United States had undergone a rapid industrialization and urbanization that changed the nation from primarily rural to primarily urban.[67] In effect, the same social change that had occurred when America split from Britain occurred again as the new urban America split from the old rural America. Beginning in the late 1880's, several American legal philosophers began openly to argue that the common law was not fixed and was instead a process of legislation conducted by judges. It was in 1897 that Oliver Wendell Holmes, Jr., later a Justice on the U.S. Supreme Court, wrote that the "life of the [common] law has not been logic [or rationalism], but experience, the felt necessities of time."[68] This served further to break down the idea that law should be fixed and unchanging, and it also led to more explicit recognition that constitutional law also changed in the judiciary's hands.

3. *The Rise of the Baby Boom Generation and the Social Ethic of a Living Constitution.* The rapid social change that the U.S. had seen in the early 1900's occurred again in the late middle of that century as the post-WWII "baby boomers" grew to early adulthood. Primarily fueled by the sexual revolution and the emancipation of women and racial minorities, American society changed dramatically in ways that made written law inconsistent with how a substantial majority of the population actually acted and felt.[69] This might not have been enough for the Court to reinvigorate its practice of common-law interpretation of the Constitution except for one thing – during this period the Court overruled the practiced of racial segregation, reversing 65 years of American constitutional law.[70] In order to justify that change, social philosophers created the ideal of a growing, living Constitution

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66 *See* Francis Aumann, *supra* note 48, at 315-16 (works by Kent and Story credited).

67 *See* M. Keller, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA 8-12 (1990) (dramatic and unprecedented change in the organization of business and resultant social changes). *See generally* THE AMERICAN ECONOMY IN TRANSITION 515 (Martin Feldstein, ed., 1980) (creation of national markets).

68 Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897).

69 *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (decrying "old notions" animated laws that could not be justified in a modern society).

70 *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

as a positive social good.[71] It must also be admitted that, at least at the state level, many legislatures had become seriously misrepresentative of their populations due to failure to reapportion their seats.[72] In effect, those who would benefit by a change in the constitutional order had come to believe that the original European conception of a permanent written constitution was a mistake. In other words, there had been a revolution in social thought, and judges who once claimed that they were not legislating when the rewrote the Constitution now openly claimed that they were permitted and even required to change the Constitution through a process like common lawmaking.

4. *The Process of American Legal Education.* I have put this consideration last because it may be a product of conceit, of the thought that legal education is important enough to matter. But the fact is that the change toward recognizing that law evolves with judicial interpretation coincides with the creation of modern legal education and its spread throughout the nation. Two distinct developments are relevant here. First, modern legal education, especially at elite schools that form legal values, began in the 1900's to use the "case law" system of education that literally showed students a string of related cases so that they could see the principles of law, common law and constitutional law, as they evolved. This was the birth of the idea of a living law, including a living constitutional law.[73] Second, legal education grew rapidly in the years after 1900, to the point today that there are over 150 American law schools with over 5,000 law professors.[74] American law schools consist of a large and heterogeneous group of independent professors who owe little or no allegiance to their *barone*. In such a system, it is impossible to maintain the discipline, the consistency of interpretation that gives code-law its certainty, or illusion of certainty.

B. Returning the Gift to Europe

The common law process, of course, is not unique to the United States or the United Kingdom. A group of eminent European scholars and universities, for example, has recently created a project for revealing and teaching the evolving

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71 *See* Thomas Grey, *supra* note 54.

72 *See* Baker v. Carr, 369 U.S. 186 (1962) (political question doctrine narrowed); Reynolds v. Sims, 377 U.S. 533 (1964) (apportionment overturned).

73 *See supra* note 2 (citing first casebook). Strangely, the first casebook authors saw themselves as engaged in a scientific enterprise, reflecting some ideas from code-based systems, whereby students could see the rationality of law. *See id.*

74 *See* AMERICAN ASSN. OF LAW SCHS., THE AALS DIRECTORY OF AMERICAN LAW TEACHERS, 2000-2001 at 25-222 (listing schools and faculty).

common law of member nations of the European Union.[75] The EU's Court of Justice has also created arguably the same living constitutional law for Europe that is seen in the United States.[76] It seems to me that much of the same process of tension between code-law and common-law traditions may also be see in Europe. If I am correct, it may be for reasons somewhat similar to the four reasons I noted above for the changes in U.S. constitutional process. Your traditions, especially in Germany, have always valued pre-code bases for law[77], and you have undergone the same rapid economic and social changes that the U.S. has experienced, even down to the rapid development of additional law schools that undermine unified, unchallenged interpretations of law.

IV. Conclusion

You will notice that I have said nothing about which system of law is better – the code-based view of a static constitutional law or the common-law-based view of a living and evolving Constitution. Some Americans might argue that it is difficult to disagree with success, and the American constitutional court has been remarkably successful as measured by two factors – public assent to its decisions and the very few times that its decisions have been overturned by constitutional amendment.[78] Certainly the American Supreme Court's common-law approach to constitutional law is often imitated even in code-law countries such as Germany

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75 *See Casebooks for the Common Law of Europe: Presentation of the Project*, 4 EUROPEAN REVIEW OF PRIVATE LAW 67 (1996). The project now envisions a series of casebooks on private-law topics where the common-law process contributes to the making of legal rules:

> "In the casebook project, the emphasis is not put on the drafting of uniform rules or on doctrinal comparisons, as in other projects, but on the search for similarities in the living laws. With its "bottom-up" approach, the project wants to complement the other projects." *See* www.era.int/www/mirror/ius_comune.

76 Paolo Mengozzi, EUROPEAN COMMUNITY LAW xliii (Del Duca trans., 1999) (first reason for the expansion of EC law has been development of "principles which Community case law has embraced"). *See* Jurgen Schwarze, ed., THE BIRTH OF A EUROPEAN CONSTITUTIONAL ORDER 12-13 (M. Geiss trans., 2001) (proposing that the constitutional law of the EU has also affected its member states' constitutional law); Paolo Mengozzi, CASI E MATERIALI DI DIRITTO COMMUNITARIO 1 (1994) (development of EU legal principles "ha, corellativamente, determinato profune innovazione dei sistemi giuridici dei Paesi membri della Communita").

77 *See* von Mehren & Gordley, *supra* note 5, at 59-62 (discussing battle between reception of Roman law and residual respect for German legal traditions in pre-Savigny nineteenth century Germany).

78 *See* U.S. CONST. amend. XI, amend. XIV, amend. XVI, amend. XXIV, amend. XXVI.

and Italy. But whatever the results of that research, it is enough today to say that the American Constitution and American constitutional law, with the 200th anniversary of *Marbury v. Madison* upon us, have strayed very far from their European code-law aspirations.

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