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LEGISLATIVE BORROWING

By Katerina Linos*

Judges, politicians, and academics vigorously debate whether courts should borrow ideas from abroad.¹ In the United States, the debate centers on the concern that referencing foreign law allows judges to impose the views of a minority of liberal elites on the majority of ordinary Americans.² However, foreign law typically enters the United States not through the judiciary, but through the elected branches.³ My research project explores the overlooked process of legislative borrowing, and shows that foreign law often enters the United States because of, not despite, citizens' wishes.⁴

If references to foreign laws only appealed to elites, and offended ordinary Americans, as we often assume, we would expect elected politicians to behave very differently from judges. We would expect politicians to ignore what happens abroad, and downplay any similarities between foreign models and their reform proposals, lest they drive away the voters on whose support they depend. From this perspective, it would be puzzling for a president to use foreign models to promote his signature initiative. And yet President Obama did exactly this in introducing the Affordable Care Act. More specifically, President Obama and Democrats in Congress have sought to persuade swing voters of two things: that universal health care is not a radical socialist pipe dream, but a mainstream idea, and that it can succeed financially in times of tight budgets. Obama used foreign models to develop both points. To justify that the proposed expansion in health care coverage was not radical, Obama highlighted the plight of the uninsured and argued, "We are the only democracy—the only advanced democracy on Earth—the only wealthy nation—that allows such hardship for millions of its people."⁵ To explain that this expansion would be affordable, Obama claimed that "we spend one and a half times more per person on health care than any other country, but we aren't any

* Assistant Professor, University of California at Berkeley School of Law, klinos@law.berkeley.edu. These remarks form part of a larger research project, on which I have received generous help from individuals too numerous to name in these *Proceedings*. For the full project, see THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES, forthcoming, Oxford University Press.

¹ See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008); Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2011); Daniel Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007); Tom Ginsburg et al., *Commitment and Diffusion*, 2008 U. ILL. L. REV. 201 (2008); Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AJIL 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AJIL 82 (2004); Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167 (2007); Eric Posner & Cass Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Mark Tushnet, *When Is Knowing Less Better Than Knowing More?*, 90 MINN. L. REV. 1275 (2006); Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

² In other countries, left-wing critics often voice related concerns and worry that institutions like the IMF and the World Bank impose unpopular austerity measures. Similarly, academics interested in describing, rather than critiquing, norm diffusion emphasize elite networks. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); KURT WEYLAND, *BOUNDED RATIONALITY AND POLICY DIFFUSION: SOCIAL SECTOR REFORM IN LATIN AMERICA* 13 (2007); Fabrizio Gilardi et al., *Learning from Others: The Diffusion of Hospital Financing Reforms in OECD Countries*, 42 COMP. POL. STUD. 549 (2010).

³ U.S. courts cite to foreign decisions infrequently. A study of all federal court decisions in the last 60 years reveals 80 citations to foreign law for the purpose of interpreting domestic law—an average of slightly more than one citation per year. See David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 315 (2006).

⁴ See generally Katerina Linos, *Diffusion Through Democracy*, 55 AM. J. POL. SCI. 678 (2011); Katerina Linos, *How International Norms Shape Voter Choices*, 103 ASIL PROC. 278 (2009); Katerina Linos, *When Do Policy Innovations Spread?*, 119 HARV. L. REV. 1467 (2006).

⁵ Barack Obama, *Obama's Health Care Speech to Congress*, N.Y. TIMES, Sept. 9, 2009.

healthier for it.”⁶ Members of Congress eagerly picked up on these themes. The legislative record contains hundreds of references to foreign models, with many Democrats repeating and elaborating on Obama’s claims, and many Republicans contesting these.

I argue that references to foreign laws are plentiful in the legislative record because foreign models resonate with ordinary Americans, not in spite of this. My theory is built on the intuition that foreign models can serve as benchmarks against which voters can judge their government and its laws. Voters often worry that politicians are not competent and develop poorly thought-out laws that are unlikely to succeed. Voters also worry that politicians design laws in ways that enrich special-interest groups and cater to fringe ideologues. Information that foreign governments have adopted similar laws can help politicians signal that their decisions are competent and mainstream. Foreign models have two distinct advantages as compared to endorsements from domestic groups, such as industry associations, unions, think tanks, and academics. First, because it is costly to adopt a law, its adoption by foreign governments can send especially strong signals that they expect a proposal to succeed. Second, foreign governments are outsiders; they don’t stand to benefit directly from election results or policy choices in a neighboring state. When many foreign countries make the same policy choice, and when an international organization articulates this consensus and promotes it as the dominant international model, the influence of foreign models is at its peak.

To examine whether foreign models resonate with ordinary Americans, I conducted public opinion experiments on representative samples of the U.S. public. Experimental methods allow us to identify causal pathways clearly, and to separate citizens’ baseline views on a particular policy from citizens’ views on the same policy once information from abroad is presented. These experiments show that foreign models resonate with a wide range of Americans. Indeed, an endorsement from the United Nations elicits stronger positive responses than a range of other endorsements, including endorsements from domestic experts. Moreover, these effects are not concentrated among liberal elites. Diverse groups of Americans respond strongly to a UN endorsement, including Republicans. These distinctive findings are consistent with the proposed theory in which foreign models serve to reassure voters who doubt their government and its policies.

To study how politicians use foreign models to advance their projects, I compare debates on the Obama administration’s major legislative proposal, the Patient Protection and Affordable Care Act of 2010, with debates on the Family and Medical Leave Act of 1993 (FMLA). These two social policy proposals raise related concerns about risk, redistribution, and labor market regulation, but differ on a key dimension: by the time of the U.S. debates, a single international model existed on family policy, but not on health policy. In both fields, politicians made many references to foreign models, far more than to U.S. states. In both fields, politicians focused on countries prominent in the media and familiar to voters—not on countries with the most successful and appropriate reforms. In the family policy debates, politicians focused on Germany and Japan. Neither country had particularly successful family policies, but in the late 1980s and early 1990s, both were very prominent in the national media and relevant to voters. In the health care debates, politicians focused on Canada and Britain, even though experts highlighted reforms in the Netherlands and Switzerland.

In both areas, reform advocates sought to frame their policy proposals as basic rights offered by all rich country governments. Advocates’ efforts to cast the FMLA as an issue of minimum rights succeeded because they could point to a consensus international model

⁶ *Id.*

adopted by almost all countries and forcefully promoted by international organizations. Opponents' efforts to raise questions about whether family leave worked well in other countries fell on deaf ears. A common emulation argument was repeated by Democrats and even by some Republicans: everyone offers leave; therefore we should, too. Democrats also tried to frame health care reform as an effort to grant Americans a fundamental benefit afforded by all other rich countries. However, Republicans successfully used the diversity of foreign models to contest the Democrats' framing. Democrats could not simply point to an international consensus, but had to engage with Republicans in debates about policy success and failure abroad, debates that diluted the signaling power of the international model. Foreign models had some influence even in these less-than-ideal conditions.

If this theory holds true, and politicians reference foreign models to signal to voters that they are competent and mainstream, implications for several theoretical debates in domestic and international law follow. When legislatures borrow, we should be less concerned about democratic legitimacy, and more concerned about borrowing from the wrong sources—from countries that are rich, proximate, and familiar to voters, rather than from countries with especially successful and appropriate policies. Controversial references to foreign laws in judicial opinions also appear to be arguments for emulation, much like the references to foreign laws in politicians' speeches. Judicial references to foreign laws may thus also appeal to ordinary citizens, but suffer from other informational limitations. In addition, if foreign models resonate with voters, we should expect international organization recommendations that define a dominant model to be a very influential tool, even if not legally binding.

