THE NEW LEGAL TRANSNATIONALISM, THE GLOBALIZED JUDICIARY, AND THE RULE OF LAW

KEN I. KERSCH[*]

INTRODUCTION

In recent years in the United States, constitutional reasoning and practice has been going global. For many, this trend became apparent for the first time when, in the course of its analysis in the recent affirmative action and gay rights cases, the U.S. Supreme Court made frank references to foreign practices, public opinion, and court decisions, as well as international agreements—those ratified by the United States and those not.[1] While, strictly speaking, not unprecedented, the Court's transnational references in these cases were notable for a number of reasons. First, because they took place in decisions not involving international affairs, as traditionally defined, but rather in cases involving domestic policy issues that are at the heart of partisan political contention, they were unusually prominent. Second, rather than amounting to casual allusions, they represent a calculated step by key justices on the Court—led by Justice Breyer, but also joined by Justices Ginsburg, Kennedy, and O'Connor—to bring the Court's approach toward constitutional interpretation into line with new approaches being taken by justices in the courts of other

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* Assistant Professor of Politics, Princeton University. B.A., Williams; J.D., Northwestern; M.A., Ph.D., Cornell. Earlier versions of this paper were presented at the Workshop on Democracy and the Rule of Law at the University of Maryland, co-sponsored by the Democracy Collaborative at the University of Maryland and the Key Centre for Ethics, Law, Justice, and Governance of Griffith University (Australia), and at the Conference on Global Constitutionalism at the University of Toronto, co-sponsored by Toronto's Department of Political Science, Center of the Study of the United States, and the Faculty of Law, and Princeton University's Program in Law and Public Affairs. An earlier and significantly abridged version of this article was published in *The Good Society* (Fall 2004). I am particularly indebted to Martin Flaherty, Mark Graber, Noga Morag-Levine, Jeremy Rabkin, Charles Sampford, and Karol Soltan for their extensive critiques and suggestions. Creighton Page, Princeton '05, provided research assistance. I would also like to thank Sujit Chaudhry, Chris Eisgruber, Stephen Elkin, John Finn, James Fleming, Howard Gillman, Leslie Goldstein, Doug Grob, Ran Hirschl, Vicki Jackson, Gary Jeffrey Jacobsohn, Ronald Kahn, Andrew Moravcsik, Lawrence Mead, Adam Naiman, Tom Round, Kim Scheppele, Rogers M. Smith, George Thomas, Mark Tushnet, Robin West, and Keith Whittington, for helpful comments and criticisms.

1. Lawrence v. Texas, 539 U.S. 558, 575 (2003); Grutter v. Bollinger, 539 U.S. 306, 344 (2003). *See also* Roper v. Simmons, 125 S. Ct. 1183 (2005). *See* Ken I. Kersch, *Multilateralism Comes to the Courts*, 154 PUB. INT. 3 (2004) (discussing the use of foreign practices as a yardstick for American decisions).

countries.[2] And third, these efforts in the American judiciary are taking place in a distinctive reformist intellectual context in which many scholars and activists, both in the United States and around the world, are coming to understand legal transnationalism as an imperative.[3] As is evident from even the most casual perusal of the increasingly high profile journals of international law, scholars are now hard at work trying out alternative doctrines, seeking those that will be least politically vulnerable. Debates involving the applicability of the law of nations, customary international law, treaties, international agreements and pronouncements, and foreign practices, precedents, judicial reasoning (under the guise of "constitutional borrowing"), and public opinion to the decisionmaking processes of American judges deciding domestic constitutional cases, more and more are filling pages of these law journals. These calculated efforts to transform the way in which the Court considers domestic constitutional issues may very well mark the beginning of a major departure in the direction of American constitutional law.

This essay argues that the current transnational trend amongst judges and scholars is not, as some have argued, business as usual in the American courts. It contends that this transnational turn is notably distinctive in its historical and political origins and goals. Moreover, while the new legal transnationalism evinces a concern for the claims of democracy and the rule of law, as applied within advanced industrial democratic states like the United States, at least as it is directed toward domestic political and constitutional questions, it is part of an elite-driven, politically-motivated worldwide trend toward judicial governance, which is antithetical to democratic self-rule, if not to the rule of law itself.[4] More

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2. *See, e.g.*, Stephen G. Breyer, The Supreme Court and the New International Law, Speech to the American Society of International Law (Apr. 4, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html (last visited Jan. 6, 2005); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 231–35 (2003); Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society for International Law*, 96 AM. SOC. INT. L. PROCEEDINGS 348 (2002), *available at* http://www.humanrightsfirst.org/us_law/inthecourts/HSIL_Keynote_Add_2002_Just_O'Connor.pdf (last visited Jan. 6, 2005); Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue*, 18 BROOKINGS REV. 1, 3 (Winter 2000); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 341–58 n.39 (2004).

3. KERSCH, *supra* note 2, at 341–58.

4. *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (describing the worthwhile trend toward judicial empowerment); ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds., 1995). *See also* JEREMY A. RABKIN, THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE (2004) (arguing for greater national independence from world bodies and trends); JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT

specifically, this movement ties a highly ideological vision of an emerging global polity to jointly moralized and administrative visions of judicial power, in the service of global judicial empowerment aimed at readily identifiable reformist political goals. Political activists within the United States, who have failed to achieve these goals through political campaigns at home, have turned their hopes to a newly autonomous globalized judiciary, through which they hope to secure their goals by alternative means.[5]

SOME HISTORICAL CONTEXT: WHY NOW?

In the last few years, legal scholarship has swelled with discussions concerning the relationship between domestic legal decisions, foreign practices, and international law. Spirited debates about the applicability of treaties, international agreements, and the law of nations to domestic legal disputes have attracted the attention of law reviews. Discussions of the significance of foreign public opinion, foreign rulings, and international court decisions for constitutional decisionmaking, including the propriety of "constitutional borrowing," have triggered wide-ranging interest.[6] Denunciations of the "provincialism" and "legal xenophobia" of the American judiciary have become commonplace.[7] In related initiatives, foundations and political activists have sponsored an increasing number of workshops and seminars aimed at persuading lawyers and judges to adopt a global sensibility in arguing and deciding domestic constitutional cases.[8] As recently as a decade ago, these were relatively arcane topics, and the ostensible "problems" they are aimed at addressing, for all intents and purposes, did not exist. Why this intense and sudden interest in these matters? And why now?

Certainly, the subject of comparative constitutionalism is not new. In its broadest sense, the modern interest in deepening our comparative understanding of constitutions began after the Second World War, when,

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REQUIRES SOVEREIGN STATES (2005).

5. *See* JEREMY RABKIN, WHY SOVEREIGNTY MATTERS (1998).

6. *See* Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004) (discussing transnational jurisprudence and the challenge to comparative constitutional theory); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999) (discussing the globalization of the practice of modern constitutionalism).

7. *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) (discussing the emergence of constitutionalism globally); Jack Balkin, *Legal Xenophobia*, July 7, 2003, *at* http://balkin.blogspot.com/2003_07_06_balkin-archive.html (last visited Nov. 13, 2004).

8. KERSCH, *supra* note 2, at 357–58.

following dark days, the free world's sovereign nations (including, in time, the newly de-colonized nations) manifested a commitment to constitutional self-government. Sovereignty—understood then as a pre-condition of constitutional democracy—was, in this post-war context, highly valued. So long as free nations were committed to the rule of law and a few bedrock democratic principles (set out in hortatory fashion in the U.N. Charter and a series of prominent international declarations), the choice of institutions was considered the province of sovereign, self-governing states. What was important was that nations had constitutions. A comparative perspective was judged useful because the best choices concerning institutional design were made in light of learned understandings of the institutions and experiences of others.

At the same time, certain aspects of the post-war order cut against this renewed commitment to sovereignty and the claims that a constitutional charter was sufficient. The human rights aspirations in the U.N. Charter and the Universal Declaration of Human Rights, although first articulated in a form that was respectful of national sovereignty, were framed in reaction to the legal positivism used to justify the Nazi genocide.[9] For a significant number of post-war scholars, intellectuals, and politicians, this post-sovereign, post-positivist thrust was the era's most significant, and potentially transformative, development. While some defended the future of sovereign, self-governing nation states, these figures proposed a cascade of visionary schemes for the establishment of "cosmopolis," or a "world government." Such calls, the leading historian of this now largely-forgotten intellectual movement observed, reached a fever pitch in "the five plastic years between Hiroshima and Korea," and became "a major national pastime of especially the English-speaking intelligentsia."[10] "The chorus grew until it seemed for a brief, deceptive moment, irresistible."[11]

Far from celebrating the United Nations as a coming together of independent, self-governing states, the scholars and intellectuals who comprised this movement (who in the 1940s were dubbed "one worlders") lambasted the United Nations as an opportunity tragically missed to abolish sovereignty and institute a world state.[12] Others of a more

9. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 117–78 (1973). *See also* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

10. W. WARREN WAGAR, THE CITY OF MAN: PROPHECIES OF WORLD CIVILIZATION IN TWENTIETH CENTURY THOUGHT 65 (1967).

11. *Id.* at 221.

12. *See, e.g.*, JOHN EHRMAN, THE RISE OF NEOCONSERVATIVISM: INTELLECTUALS AND FOREIGN AFFAIRS 1945–1994, 5–9 (1995) (discussing the difficulties of "one worlders" in the post

managerial or technocratic caste, who saw themselves as less utopian and more grounded, spoke not of "cosmopolis" or "world government," but rather—in precisely the same nomenclature currently in circulation—of a "new world order," and a "world constitution," which, while recognizing national sovereignty, nonetheless worked to displace its authority gradually in a proliferating array of policy areas.[13]

One of the reasons this high-profile movement is now largely forgotten is that the grandest hopes of its most visionary members were soon dashed by world events. As a practical matter, the Cold War, while not killing the belief that there were global human rights standards, proved rocky soil for any conviction that those standards could blossom into morally-rooted, universal "laws" enforceable by a world government worldwide. When the Cold War ended in 1989, however, the entire gamut of the transcendent visions of the 1940s—from renewed calls for a world government to a "new world order"—miraculously blossomed once again. As nations moved out of the ruling orbits of a bipolar world, the conditions mitigating against notions of a genuinely enforceable universal law on which all reasonable and fair people could agree seemed suddenly to have disappeared. In a significant advance from 1945, the concept of sovereignty seemed to these thinkers to have been devalued by the successes of the European Union and by the maturation of the once-anathematized United Nations as a bureaucratic entity and a presence with "unique legitimacy" on the world stage. A series of institutions of multinational ordering—The North Atlantic Treaty Organization, Bretton Woods, the International Monetary Fund, and the GATT, later the World Trade Organization—had apparently proved effective in ordering the free world.

In the midst of this revival, September 11 struck. Transfixed by an ideological vision, large swaths of the intelligentsia were infuriated less by the attacks themselves than by the U.S. response to them. They experienced the latter as a threat to the imminent realization of the dream of "global governance" and a "world constitution," the last best hope for bringing perpetual peace and global justice to the world.

World War II period).

13. *Id.* at 65, 221; *See generally* FREDERICK L. SCHUMAN, THE COMMONWEALTH OF MAN: AN INQUIRY INTO POWER POLITICS AND WORLD GOVERNMENT (1952); E.B. WHITE, THE WILD FLAG: EDITORIALS FROM THE NEW YORKER ON FEDERAL WORLD GOVERNMENT AND OTHER MATTERS (1946). *But see* REINHOLD NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE (1944) (discussing the importance of democracy in checking the power of rulers); *see also* EHRMAN, *supra* note 12, at 5–9.

Much discussion concerning the transnational turn in the law focuses on distinct arguments concerning the propriety of a single jurisprudential path involving, for example, the treaty power, customary international law, or constitutional borrowing. It is important, however, to understand the arguments as a collection, and in context. Contemporary interest in them as a whole is the result of complicated and deeply-rooted historical trends.

TOWARD A JUDICIALIZED "WORLD COMMUNITY"

The contemporary globalist revival is distinct from its 1940s predecessor in one crucial respect: it post-dates the consolidation of what many have come to call "judicial supremacy" in the United States.[14] This notion, which holds that judges are (absent the adoption of a constitutional amendment) the supreme and final arbiters of constitutional meaning, was forged in the mid-twentieth century as part of the struggle for civil rights.[15] Contemporary regard for the U.S. Supreme Court as the ultimate hope for constitutional justice was heavily shaped by the Court's landmark rulings in a series of school segregation cases, culminating in *Brown v. Board of Education* (1954).[16] Intervening in the standoff at Little Rock's Central High several years later, the Court declared itself the supreme and final arbiter of constitutional meaning.[17]

These events had a profound impact on the moral and constitutional authority of assertions of Court power, in both popular consciousness and in law.[18] In their aftermath, the Court launched its "rights revolution," in which, in the name of constitutional and moral progress, it took up an aggressively reformist project of enormous constitutional and political significance in a wide variety of areas.[19]

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14. *See* Keith E. Whittington, *To Support this Constitution: Judicial Supremacy in the Twentieth Century*, *in* MARBURY V. MADISON: DOCUMENTS AND COMMENTARY 101 (Mark A. Graber & Michael Perhac eds., 2002) (discussing the rise of judicial supremacy); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (discussing the role of a constitution in a republican government).

15. Whittington, *supra* note 14, at 102.

16. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

17. Cooper v. Aaron, 358 U.S. 1 (1958). *See* Keith E. Whittington, *The Court as Final Arbiter of the Constitution: Cooper v. Aaron*, *in* CREATING CONSTITUTIONAL CHANGE: CLASHES OVER POWER AND LIBERTY IN THE SUPREME COURT 9 (Gregg Ivers & Kevin McGuire eds., 2004) (analyzing the Court's assertion as ultimate authority); KRAMER, *supra* note 14, at 221; NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 9–28 (2004) (discussing judicial supremacy as orthodoxy).

18. The most significant visual representation of the twentieth century constitutionalism, Norman Rockwell's painting of a small, dignified black girl in a white dress being led to school by four federal marshals, as they are pelted by tomatoes, stems from these events. Norman Rockwell, *The Problem We All Live With*, LOOK MAG. (1964).

19. *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000)

The court-led rights revolution in the United States was closely followed abroad and proved highly influential around the world, inspiring many countries to accept the radical empowerment of their judiciaries at the expense of democratically-elected legislatures. *Brown*, the proliferation of litigation advocacy groups it inspired, and the rise of the public law litigation movement, reversed the traditional progressive suspicion of judges as the (anti-democratic) handmaidens of economic elites, and helped create the modern identification of judicial power with progress, civil liberties, and civil rights.[20] The rise of Kantian legal theory in the American legal academy in the 1970s—a development aimed at providing a coherent theoretical grounding for (and defense of) Warren Court (1953–1969) activism—promulgated a picture of the judge (famously dubbed "Hercules") as the heroic tribune of universal morality. These influential initiatives within the legal academy reinforced the moral authority and, hence, the political power of the judge, and inflated his governing pretensions worldwide.[21]

After 1989, foreign judges, for various reasons, found the highly judicialized American style of politics increasingly attractive. The European Court of Justice (ECJ) noted that the U.S. Supreme Court had helped to nationalize American politics by gradually negotiating away key aspects of the sovereignty of the American states.[22] Nations newly emerging from dictatorships and countries paralyzed by legislative and executive sclerosis knew that the Warren Court had broken the Southern stranglehold on Congress in the name of unimpeachable national goals.

(discussing the direction of the Court from 1953 to 1968); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE; RICHARD KLUGER, SIMPLE JUSTICE (1975) (discussing black America's struggle for equality under the law). It is just recently that scholars have begun to question the legitimacy, propriety, and usefulness of a constitutionalism premised on aggressive judicial leadership and supremacy. *See, e.g.*, GERALD ROSENBERG, THE HOLLOW HOPE: CAN THE SUPREME COURT BRING ABOUT SIGNIFICANT SOCIAL CHANGE (analyzing the extent to which the Court can help produce liberal change); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Kramer, *supra* note 14.

20. *See generally* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); DEVINS & FISHER, *supra* note 17, at 12; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1975–1976). On the earlier progressive suspicion of judicial power, see WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994).

21. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985). *See also* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 48–54 (2004) (discussing the Court's modern activism).

22. *See* Anne-Marie Slaughter & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT. ORG. 41 (1993) (discussing the legal integration of Europe); Martin Shapiro, *The European Court of Justice*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY (Peter H. Russell & David M. O'Brien eds., 2001).

Cognizant of this American success story, these countries turned optimistically to courts to break their own policy deadlocks and advance the causes of civil liberties and human rights.[23]

Unlike their American counterparts, however, these judges were not able to defend their assertiveness by appealing to a centuries-old tradition that anchored judicial review in constitutional popular sovereignty. Instead—and crucially—they anchored their claims to political power in their participation, as fellow professionals, in a global project involving the identification and protection of human rights, the stewardship of the "new" international law, and the technical improvement of the quality of constitutional reasoning in general through transnational professional consultation. For judges in nations that, not so long ago, were living in isolation and tyranny, drawing a demonstrable connection to a worldwide project involving a movement toward "global governance" became a key source of constitutional legitimacy. For them, the process of "judicial globalization" was itself the *sine qua non* of the construction of judicial legitimacy.

A feedback loop soon developed. After decades of sustained battering at home, which included major intellectual assaults on their use of substantive due process and equal protection to justify their assertiveness, American judges—and a wide array of political activists and legal academics interested for strategic reasons in the aggrandizement of American judicial power—began to see the opportunities in connecting themselves to this worldwide movement by tapping into its freshened wellsprings of legitimacy. The current intense interest of scholars in the role of judges worldwide is a direct outgrowth of this process.

AN OVERVIEW OF THE NORMATIVE CASE FOR JUDICIAL GLOBALIZATION

Until recently, these developments moved ahead relatively unselfconsciously and attracted precious little attention or criticism. Lately, however, this has changed.[24] In response, a debate has begun to

23. *See* JENNIFER WIDNER, BUILDING THE RULE OF LAW (2001); GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 4; HIRSCHL, *supra* note 4.

24. *See generally* Bork, *supra* note 4; Kersch, *supra* note 1; Jed Rubenfeld, *The Two World Orders*, WILSON Q. 22 (2003); Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003); Carlos F. Rosenkrantz, *Against Constitutional Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269 (2003); Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40. *See also* Steve Lash, *Supreme Court Citations to Foreign Law Rankle Scalia*, CHI. DAILY L. BULL., July 22, 2004, at 1.

take shape. As this debate unfolds, the terms of the argument are becoming clear. And those favorable to judicial globalization are beginning to articulate defenses for this developing set of practices and perceived imperatives.

Advocates of judicial globalization, who span an array of academic specialties, have defended the process on a number of grounds. To date, three have become most prominent. The first involves appeals to moral universalism. The second involves appeals to the refinement of technical and administrative competence. And the third involves appeals to diplomatic or foreign policy considerations.[25]

The first set of appeals—those made on behalf of moral universalism—are made chiefly by philosophers and philosophically-oriented legal and constitutional theorists. For many, the new legal transnationalism represents a promising new departure, a new constitutionalism for a new century. Kantian constitutional theory, as practiced most influentially by Ronald Dworkin, has long envisaged the interpretive process as involving, in its fundamentals, a debate about universal morals, or "the good."[26] This theory is essentially a philosophical conversation about the nature of justice and the good. Such a theory, at least in its fundamental orientation, has little need for constitutional boundaries, because the good (unlike the requirements of the U.S. constitutional text, more strictly construed) is universal. In this regard, there is no reason to limit participation in the conversation about the nature of the good to domestic actors. Within this seminar model of constitutional reasoning, which understands the constitutional assessments as akin to seminars in moral philosophy, the more thoughtful people who contribute to the conversation, the better.

Indeed, the more voices heard in French or German, the better. Both countries, after all, have deep philosophical traditions; traditions, many would contend, that are much more august than that of the United States. To the extent that judges can enter into more conversations with a wider array of thinkers around the world about the nature of justice, fairness, liberty, and equality, the better off they (and we) will be. After all, by their very nature, such conversations are beneficial. Judges who are more thoughtful philosophically and more learned are preferable to judges who are less so.

The second set of appeals for judicial globalization also trumpets the virtues of extending the circles of conversation. But rather than focusing

25. The arguments in particular writings do not always divide so hermetically. I offer this categorization as a useful way to isolate distinct conceptual arguments.

26. *See, e.g.*, DWORKIN, A MATTER OF PRINCIPLE, *supra* note 21.

on philosophical questions involving the nature of the good, the second set of appeals is more technical, pragmatic, and problem-focused. This set emphasizes the virtues of having professional problem-solvers—judges—learn from the technical competence of their fellow professionals operating in an increasingly interconnected world system.[27] These justifications are offered most prominently by figures, such as Justice Breyer,[28] who have a deep pragmatic orientation. These figures may, like Breyer, have extensive backgrounds in the design and implementation of effective, scientifically-sensitive regulatory regimes.[29] Here, the virtues of looking abroad have less to do with philosophical debate than with data collection. Justice Breyer captured the essence of this justification: looking abroad is helpful because the experiences of other countries may "cast an empirical light on the consequences of different solutions to a common legal problem."[30]

The third set of appeals for judicial globalization is diplomatic. Many scholars, particularly political scientists writing as scholars of international relations, see steps toward harmonization as an important form of effective diplomacy. One of the major divides in contemporary politics (at least as framed in popular political discourse) is between proponents of multilateralist and unilateralist approaches to foreign policy. Evidence of this divide includes the growing diplomatic gulf between Europe and America, a debate that has grown especially bitter in the aftermath of the Second Iraq War. These scholars argue that constitutional borrowing and allusions in Supreme Court opinions to foreign opinions, practices, and precedent help the Court convey respect to and cooperation with foreign

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27. The notion that the judge's role is defined by his abilities as a pragmatic problem-solver took flight at the time of the rise of the modern American administrative state. *See* R. JEFFREY LUSTIG, CORPORATE LIBERALISM: THE ORIGINS OF MODERN POLITICAL THEORY, 1890–1920, at 25 (1982). "[M]odern developments [change] the form of law, what fundamentally is. Rather than a settled framework of activity, rooted in precedent, known to citizens, and focused on the judicial individual, 'law' becomes equated with changing policies and social purposes as defined by powerful groups. It also becomes the paradigmatic form of law in the modern state." *Id*. *See generally id.*, ch. 7; THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979) (describing the evolving political system). *See also* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 1–25, 348–49 (1998) (discussing the role of courts in the modern administrative state).

28. *See* Ken I. Kersch, *The Synthetic Progressivism of Justice Stephen Breyer*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 241–76 (Earl Maltz ed., 2003) (discussing the nature of Justice Breyer's pragmatism).

29. *Id. See also* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

30. J. Breyer, *supra* note 2, at 2.

governing institutions, particularly those in Europe.[31] Recent statements by Justice O'Connor make clear that at least some of the Court's justices consider themselves peacemakers in this regard, and increasingly see themselves as ambassadors doing their part, through judicial globalization, to improve the reputation of United States abroad.[32] Such a self-conception, among some members of a Court frequently noted for its attraction to aggrandizing its power,[33] is a phenomenon worth noting in its own right.

These diverse arguments in defense of judicial globalization can be isolated and debated individually and on their own terms, as is likely to happen in law journals, the popular press, and even Congress (which has already held hearings on these trends).[34] From the broader perspective of the way ideas work in history, however, one gains a better sense of their likely influence by considering the arguments together, in the aggregate. Intellectual movements tend to take off when there are a multitude of arguments on their behalf swirling in public discourse. Such arguments will often be mutually inconsistent. Some will be highly visionary. Some will be relatively careful and sober. The sheer profusion of arguments heading in a single direction suggests a process in which the end is clear.

It is worth noting that in the 1940s, the intellectual atmosphere surrounding these questions was strikingly similar to today's intellectual atmosphere. At that time, as today, the perceived need for a diplomatic "new world order" and transnational convergence in service of more effective governance coincided with soaring visions of the imminence of a "world state" or "cosmopolis" and fevered intimations of moral, philosophic, and religious convergence and transcendence.[35] When a

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31. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (describing transnational networks through which government officials work to solve problems).

32. *See, e.g.*, Justice Sandra Day O'Connor, Remarks at the Southern Center for International Studies 2–3 (Oct. 28, 2003), *at* http://www.southerncenter.org/Oconner_transcript.pdf (last visited Jan. 13, 2005).

33. *See* KECK, *supra* note 21.

34. *See* Jacobsohn, *supra* note 6, at 1764 n.12.

35. WAGAR, *supra* note 10, at 223. An additional way to world political integration is the "functionalist" approach, most closely identified in recent years [the 1940s] with David Mitrany . . . For the functionalist, the best hope for world order is through the proliferation and gradual interlocking of nonpolitical regional and international agencies . . . As [H.G.] Wells foresaw the new world order, it would not be a "state" at all, but something more like a world technocracy, managed by non-political experts. Mitrany and most other recent functionalists, while not going this far in their depreciation of politics and government, tend in a distinctly Wellsian direction. *Id.* at 223. *See also* H.G. WELLS, THE OUTLOOK FOR HOMO SAPIENS: AN UNEMOTIONAL STATEMENT OF THE THINGS THAT ARE HAPPENING TO HIM NOW, AND OF THE IMMEDIATE POSSIBILITIES CONFRONTING HIM (1942); SLAUGHTER, *supra* note 31. Religious transcendence was clearly part of this list in the 1940s. Today, as secularists have wrested control of intellectual life in Europe and the United States, it has been dropped from the list.

dynamic such as this is in full swing, the real interest among participants is less the end to be pursued than the most effective instrumental grounds on which to justify it.

THE STRUCTURE OF JUDICIALIZED COSMOPOLITAN REVOLUTION: JUDGES AS QUASI-AUTONOMOUS COSMOPOLITAN ADMINISTRATORS

To determine why so many intellectuals and scholars are passionate about the new transnationalism, it is most helpful to study it as a form of political ideology. Visionary articulations of the imminence of a world government and cosmopolitan citizenship and fevered descriptions of a world poised on the verge of moral and philosophical convergence and transcendence make for fascinating reading. And they can be found in abundance today in mainstream journals of law, political theory, and political science.[36] However, the arguments most likely to influence public opinion of developments in this direction are not these evangelical works. Instead they are the arguments of scholars who, while often sharing these evangelical convictions, prefer to advance them through more strategic and pragmatic means. These scholars are now advancing a number of sober arguments in service of the same ends.

The most reasonable justifications for judicial globalization have a heavily pragmatic and administrative caste. The most commonsensical justifications trumpet the advantages to American judges of gathering evidence from around the world, which improves the quality of their constitutional interpretations and problem-solving abilities. If other judges have reasoned about federalism and affirmative action, then why should American judges be ignorant of their thought-processes and decisions? Framing the question in this manner evinces a strong faith in judges' abilities to act as expert administrators as part of a quasi-autonomous problem-solving class. As such, arguments of this sort repeat arguments made by the proponents of progressive government in the late nineteenth and early twentieth centuries in studies not of comparative *law*, but rather of comparative *administration*.[37] That today these arguments are directed

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See generally WAGAR, *supra* note 10, 173–88.

36. For a brief overview, see KERSCH, *supra* note 2, at 343–48; Kersch, *supra* note 1.

37. *See, e.g.*, Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 218–20 (1887).

> [I]t is necessary to see that for all governments alike the legitimate ends of administration are the same, in order not to be frightened at the idea of looking into foreign systems of administration for instruction and suggestion; in order to get rid of the apprehension that we might perchance blindly borrow something incompatible with our principles. That man is blindly astray who denounces attempts to transplant foreign systems into this country. It is

toward judges is a further sign of the ever-increasing governing pretensions of judges.

Interestingly, the scholars who have argued judicial globalization as an imperative, by framing the issue as one involving the development of pragmatic and professional administrative expertise, have provided us with keen insights into the process by which, empirically and politically, a truly globalized judiciary is likely to come about. While this may not have been a wise political move by scholars who favor this process, it is insightful nonetheless. This scholarship suggests that if the newly globalizing judiciary is best seen as a process in which judges around the world are working together transnationally to hone their performance, abilities, and

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> impossible: they simply would not grow here. But why should we not use such parts of foreign contrivances as we want, if they be in any way serviceable? We are in no danger of using them in a foreign way. We borrowed rice, but we do not eat it with chopsticks. We borrowed our whole political language from England, but we leave the words "king" and "lords" out of it. What did we ever originate, except the action of the federal government upon individuals and some of the functions of the federal supreme court?
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> We can borrow the science of administration with safety and profit if only we read all fundamental differences of condition into its essential tenets. We have only to filter it through our constitutions, only to put it over a slow fire of criticism and distill away its foreign gases.
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> I know there is a sneaking fear in some conscientiously patriotic minds that studies of European systems might signalize some foreign methods as better than some American methods; and the fear is easily to be understood. But it would scarcely be avowed in just any company.
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> It is the more necessary to insist upon thus putting away all prejudices against looking anywhere in the world but at home for suggestions in this study, because nowhere else in the whole field of politics, it would seem, can we make use of the historical, comparative method more safely than in this province of administration. Perhaps the more novel the forms we study the better we shall sooner learn the peculiarities of our own methods. We can never learn either our own weaknesses or our own virtues by comparing ourselves with ourselves. We are too used to the appearance and procedure of our own system to see its true significance.
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> Let it be noted that it is the distinction . . . between administration and politics which makes the comparative method so safe in the field of administration. When we study the administrative systems of France and Germany, knowing we are not in search of political principles, we need not care a peppercorn for the constitutional or political reasons which Frenchmen or Germans give for their practices when explaining them to us. If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots. He may serve his king; I will continue to serve the people; but I should like to serve my sovereign as well as he serves his . . . . [B]y studying administration as a means of putting our own politics into convenient practice, . . . we are on perfectly safe ground, and can learn without error what foreign systems have to teach us. . . . We can thus scrutinize the anatomy of foreign governments without fear of getting any of their diseases into our veins; dissect alien systems without apprehension of blood-poisoning.

Id. (emphasis original). As the chief proponent of the League of Nations, Wilson, of course, was a leader in the movement for global administration. *See* JOHN MILTON COOPER, JR., BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS (2001).

expertise, it may be instructive to consider the processes by which administrators who are not judges do the same thing.

Recent work by influential political scientists has improved our understanding of these processes. Studies of the construction of administrative autonomy suggest that, to succeed in consolidating their authority and autonomy, judges will need to work effectively in ways similar to those in which "bureaucratic entrepreneurs" have succeeded in analogous endeavors by building political coalitions, publicizing their accomplishments, and grounding their authority in appeals to problem-solving expertise. Analogously, these judges will also need to proceed gradually. "[B]ureaucrats who value their autonomy," Daniel Carpenter has written,

> will act in measured ways to preserve it, refraining from strategies of consistent fiat or defiance . . . [B]ureaucratic autonomy lies less in fiat than in leverage. Autonomy prevails when agencies [and, increasingly, judges] can establish political legitimacy—a reputation for expertise, efficiency, or moral protection and a uniquely diverse complex of ties to organized interests and the media—and induce politicians to defer to the wishes of the agency when they prefer otherwise.[38]

With respect to the emerging globalized judiciary, scholars have described a process that looks very much like that of bureaucratic formation at work among judges around the world. In charting the development of transnational judicial networks and support structures, Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood have suggested that "a wide range of possibilities exist for strengthening formal and informal links between international and domestic institutions in ways that blur the distinction between international and domestic law."[39] As this process develops, she and her co-authors add, "it is possible that domestic institutions will become more interested in and receptive to their counterpart international institutions as they begin to perform the same functions horizontally rather than vertically."[40]

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38. DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATIONS IN EXECUTIVE AGENCIES, 1862–1928, at 9, 14 (2001). *See also* HIRSCHL, *supra* note 4, at 213–18.

39. Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT. L. 367, 391 (1998).

40. *Id.* at 392.

And, indeed, this is precisely what they observe happening among judges. "[D]omestic judges, at least in the United States," they add, "are beginning to articulate their responsibility to 'help the world's legal systems work together, in harmony, rather than at cross purposes.' Such cooperation includes not only procedural mechanisms of deference and collaboration, but also substantive evaluation of the degree of convergence between domestic and foreign law."[41] This cooperation has been made possible by "a deep sense of participation in a common global enterprise of judging."[42] "It [involves]," Slaughter asserts, "a vision of a global community of law, established not by the World Court in The Hague, but by national courts working together around the world."[43] "Constitutional cross-fertilization," as Slaughter calls it, is a crucial part of this trend.[44]

The construction of governing autonomy by judges worldwide depends heavily upon the effective cultivation of a political support structure. "A flood of foundation and government funding for judicial seminars, training programs, and educational materials under the banner of 'rule of law' programs has significantly expanded the opportunities for cross-fertilization," Slaughter writes.[45] "Equally important, however," she adds, "is a growing sense of participation in a common enterprise, backed up by the growing opportunities for face-to-face meeting among judges . . . ," where "judicial networks" are forged.[46] "All this activity," she emphasizes,

> from the most passive form of cross-fertilization to the most active cooperation in dispute resolution, requires recognition of participation in a common judicial enterprise, independent of the content and constraints of specific national and international legal systems. It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders.[47]

Judges, Slaughter makes clear, "are remarkably self-conscious about what they are doing" as they participate in "the self-conscious construction

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41. *Id.* at 392 (quoting Howe v. Goldcorp Inv., Ltd., 946 F.2d 944, 950 (1st Cir. 1991) (J. Breyer)).
42. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT. L. 1103, 1104 (2004).
43. *Id.* at 1114.
44. *Id.* at 1116–19.
45. *Id.* at 1117.
46. *Id.*
47. *Id.* at 1124.

of a global judicial community."[48] "Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to a visible international consensus on various issues—a consensus that, in turn, carries compelling weight."[49] Through the construction of "courts as quasi-autonomous actors in the international system,"[50] courts may not be able to create and administer "a formal global legal system," but she concludes, it "may be as close as it is possible to come."[51]

"Transnational civil society," an agglomeration of advocacy groups analogous to the one that sprung up around American judges in the aftermath of *Brown*, has proved crucial to the efforts of judges worldwide to construct themselves as a self-consciously powerful, quasi-autonomous governing class.[52] These groups, including non-governmental organizations or NGOs, in conjunction with transnational social movements and with the financial backing of private and public contributors, now "undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest."[53] Altering "the structures of power and meaning," including the ways that actors within governmental institutions—like judges—understand their governing roles, is a major part of their portfolio.[54]

Richard Price, drawing from the more narrowly focused studies of others, has distilled a taxonomy of the types of transnational political activities that these advocacy networks undertake to change domestic and international policy and institutions.[55] First, they work to set agendas by

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48. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 195–96 (2003).

49. *Id.* at 202.

50. *Id.*

51. Slaughter, *supra* note 48, at 218.

52. Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 WORLD POL. 579, 579 (2003). *See generally* Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883 (2003); EPP, *supra* note 20; HIRSCHL, *supra* note 4.

53. Price, *supra* note 52, at 580.

54. *Id.* at 583. *See also* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1988) (discussing how nations obey international law).

55. Price, *supra* note 52, at 584. The books from which Price draws from are SUSAN BURGERMAN, MORAL VICTORIES: HOW ACTIVISTS PROVOKE MULTILATERAL ACTION (2001); ANN MARIE CLARK, DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS (2001); MATTHEW EVANGELISTA, UNARMED FORCES: THE TRANSNATIONAL MOVEMENT TO END THE COLD WAR (1999); THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY (Ann Florini ed., 2000); NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM (Richard Higgott et al. eds., 2000), MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS (Sanjeeu Khagram et al. eds., 2002).

"identifying a problem of international concern and providing information."[56] Second, they propose solutions in light of that agenda by "creating norms or recommending policy change."[57] Third, they construct political support for this policy change transnationally by "building networks and coalitions of allies."[58] And, fourth, they implement the changes by "employing tactics of persuasion and pressure to change practices and/or encourage compliance with norms." All of these activities are now routinely aimed at domestic judges deciding domestic cases in constitutional democracies around the world. Within the United States, domestic political actors with clearly articulated—typically liberal—policy objectives have made common cause with these transnational movements, and have sought to augment their influence upon American judges.[59]

For those involved in pushing this endeavor in the face of democratic resistance or indifference, preserving "the mask" of law is essential.[60] The most effective way of proceeding is by working incrementally off-shore, quietly creating new "norms" and "laws" through small insertions of language into international declarations and other documents.[61] The next step is to appeal to these norms and laws in arguments made before judges around the world eager to sign up as participants in the new "global consensus" and "global governance" project.

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56. Price, *supra* note 52, at 584.

57. *Id.*

58. *Id.*

59. In many respects, this dynamic is simply a move in a classic political game, involving effort by the losing side to broaden the scope of the conflict by welcoming into the ring like-minded players from abroad. *See generally* E.E. SCHATTSNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALISTS VIEW OF DEMOCRACY IN AMERICA (1960); RABKIN, *supra* note 5 (describing the reach of international law); Ken I. Kersch, The Semi-Sovereign People, Paper Presented at the Conference on the Declaration of Independence, James Madison Program in American Ideals and Institutions, Princeton University (Apr. 2002) (on file with author). Additional evidence of the link between the transnational turn and liberal policy goals is that the "take-off" in the current turn toward transnationalism was coincident with the rise to power in Western democracies of left-of-center governments. Price, *supra* note 52, at 593.

Moreover, international relations scholar, Andrew Moravcsik, has demonstrated that, while the domestic public policy agenda supported in substance by the emerging transnational order and movement do not align with partisan divides in Europe, they track closely those within the United States, with transnationalism tied to a Democratic Party policy agenda and opposition tied to that of the Republicans. Andrew Moravcsik, *Why is U.S. Human Rights Policy So Unilateralist?*, *in* THE COST OF ACTING ALONE: MULTILATERALISM AND U.S. FOREIGN POLICY 345 (Patrick Stewart & Shepard Forman eds., 2002). *See also* Jeffrey Rosen, Supreme Mistake: How the Election Affects the Court, the New Republic (Nov. 8, 2004); Lee Epstein & Jack Knight, *Constitutional Borrowing and Non-Borrowing*, 1 INT'L J. CONST. L. 196 (2003).

60. Slaughter & Mattli, *supra* note 22, at 72.

61. Price, *supra* note 52, at 584. *See* RABKIN, *supra* note 5.

A recently leaked legal policy memo of the International Legal Program (ILP) of the Center for Reproductive Rights (CRP), a pro-abortion transnational advocacy group, discusses the organization's *modus operandi*. The group's self-declared "overarching goal" is "to ensure that governments worldwide guarantee reproductive [i.e. abortion] rights out of an understanding that they are legally bound to do so. We see two principal prerequisites for achieving this goal: (1) strengthening international reproductive rights norms . . . [and] (2) [c]onsistent and effective action on the part of civil society and the international community to enforce these norms."[62] There is, however, no internationally recognized norm protecting abortion as a basic reproductive right. The CRP calls this a "normative gap."[63] Eliminating this gap

> involves developing a jurisprudence that pushes the general understanding of existing, broadly accepted human rights law to encompass reproductive rights. Such a jurisprudence *is developed within a globalized judiciary* primarily through: Report[ing] to the treaty monitoring bodies; bring[ing] cases to international and regional adjudicative bodies; [and] bring[ing] claims based on international law to national level courts.[64]

As for the strategy of proceeding by "piggybacking"—persuading judges to adopt, in conjunction with their fellow professionals worldwide, expansive interpretations of clearly articulated "hard" norms—the CRP calculated as follows:

> There are several advantages to relying primarily on interpretations of hard norms. As interpretations of norms acknowledging reproductive rights are repeated in international bodies, the legitimacy of these rights is reinforced. In addition, the gradual nature of this approach ensures that we are never in an "all-or-nothing" situation, where we may risk a major setback. Further, it is a strategy that does not require a major, concentrated investment of resources, but rather it can be achieved over time with regular use of staff time and funds. Finally, there is a stealth quality to the work: we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile

62. 149 Cong. Rec. E2534-E2535 (daily ed. Dec. 9, 2003) (statement of Rep. Smith).
63. *Id.* at E2537.
64. *Id.*

> victories will gradually put us in a strong position to assert a broad consensus around our assertions.[65]

As such interpretations proliferate, they become more concrete. Assuming the status of norms through the consensus of the relevant actors, they become legitimized.

THE GLOBALIZED JUDICIARY: THE DEVELOPING NORMATIVE DEBATE

So far, this essay has discussed the transnational turn in constitutional law and, in particular, the emerging imperative of a globalized judiciary, primarily as historical and political—that is, empirical—phenomena. In questions of law (and politics more generally), however, normative arguments concerning what should be done affect the empirical outcome of what actually is done. Normative arguments are component parts of empirical phenomena. Both for this reason, and because it has implications for the project of constitutional self-government in the United States in the future, those arguments are worth describing and evaluating.

This discussion does not aspire to be comprehensive. The transnational turn in law, which is to be abetted by an increasingly globalized judiciary, is a multifaceted phenomenon. The legal arguments for the turn, to say nothing of the prudential and political ones, are varied, highly technical, and proliferating. Each is debated on its own terms in lengthy law review articles, and each is devoted to a single subject or point of entry. Those who are interested in detailed discussions regarding the establishment of universal jurisdiction; the greater empowerment of transnational and supranational courts; a more robust reading of treaty obligations by national courts; a ratcheted-up level of "constitutional borrowing;" fidelity to the law of nations (including customary international law); greater attentiveness to "global norms;" increased deference to "global public opinion;" and, generally speaking, an increased recognition by judges of all types at all levels that their jobs are "no longer a domestic enterprise," with each issue treated in isolation from the others, should recur to these articles.[66]

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65. *Id.* at E2538 (emphasis added); Price, *supra* note 52, at 584.

66. *See* Peter J. Spiro, Who's Afraid of Global Courts?, Paper Presented at the Workshop on The Promises and Pitfalls of International Courts, Bellagio, Italy (May 19–24, 2003). For an illustration of how these diverse questions are treated in contemporary progressive political discussions as part of a single imperative, see Symposium, *Bringing Human Rights Home: Why Universal Rights Protect America*, AM. PROSPECT (Oct. 2004).

The brief discussion that follows is limited to considering the question raised most directly by the Supreme Court's *Lawrence* and *Grutter* (and the recent *Roper v. Simmons*) decisions: whether the U.S. Supreme Court should look abroad more extensively when thinking through its future constitutional rulings. In some cases, doing so might be described as "constitutional borrowing," but in others it is simply a question of heightened cosmopolitanism or awareness by American judges. This discussion will raise some general themes that may be applicable to our understanding and contextualization of the wide variety of more narrowly focused technical debates. I will begin by briefly isolating the two chief claims that have been made on behalf of this trend. The first claim is that it is a historical imperative, given the more general process of globalization that is taking place around the world. The second claim is that it improves the quality of judicial decisionmaking. This essay will then address a set of criticisms of these developments (and answers to them) that have received less attention to date than they deserve.

WHY AN INCREASINGLY GLOBALIZED AMERICAN JUDICIARY IS A WELCOME DEVELOPMENT

Some have argued that the trends evidenced in *Lawrence*, *Grutter*, and *Roper* are imperative in light of the inexorable historical process—the historical destiny—of globalization. American judges, this argument goes, are only a small part of these world-historical developments, and they necessarily must find their proper place within them. If they do not, our judges risk being left behind by the sweep of history.[67] One form of this argument takes the globalization of American judges to be a foreign policy imperative in an increasingly globalized world. Sage American judges should understand that, when others are borrowing from you, your decision not to return the favor by borrowing from them amounts to a diplomatic snub. And good judges will work diplomatically to improve America's image abroad rather than to mar it.[68] In a similar vein, a nation

67. Anne-Marie Slaughter, *Courting the World*, FOREIGN POL'Y, Mar.–Apr. 2004, at 78.

68. Jonathan Ringel, *O'Connor Speech Puts Foreign Law Center Stage*, FULTON COUNTY DAILY REP., Oct. 31, 2003, at 1, *available at* Westlaw, 10/31/2003 Daily Rep. (Fulton County) 1; Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 245 (2003). It should be noted that, broadly speaking, although the contemporary institutional context is radically different, this is not a new concern. The early Supreme Court under John Marshall took seriously their obligations, as a representative of a nation new to the world system, to issue decisions in line with the law of nations. *See* R. KENT NEWMEYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 272–91 (2001). Marshall, however, was dealing exclusively with traditional matters of international law such as seizures of ships as prizes and the treatment of ambassadors. He was not advocating

with an outward-looking judiciary shows the world that its government, as represented by its judges, is not unilateralist or isolationist, but is a "player" in the global game. Globalizing its judiciary is a manifestation of a government's adherence to the same restrictions on (or aggrandizements of) governmental power as other members of the club of legitimate governments around the world.[69]

A different class of justifications for a globalized judiciary has pointed to the wealth of information that a willingness to look abroad can bring to a judge's decisionmaking process. The argument here is simply that more information is better than less. "A good idea is still a good idea," Anne-Marie Slaughter says, "even if it comes from France."[70] The benefits are even stronger to the extent that one is convinced that key features of constitutional government are either widespread or universal. So, for example, if principles of subsidiarity and proportionality are inherent in both the U.S. and foreign constitutions, then judges in the United States will benefit from knowing how their foreign counterparts have grappled with those principles and dealt effectively with concrete problems of governance. The benefit is likely to be greater (and, hence, more justified) when a judge's domestic legal system bears a genealogical relationship to the foreign legal system from which he hopes to learn.[71] More information is better than less for a number of reasons: it is an aid to both standard and aspirational interpretation aimed at moral improvement—making imperfect constitutions the best that they can be—as well as to the problem-solving process.[72]

OBJECTIONS TO AND DEFENSES OF THE NEW TRANSNATIONALISM IN THE AMERICAN JUDICIARY

Some scholars have raised serious questions about many of these justifications, and about the propriety of constitutional borrowing more generally. One set of arguments against borrowing raises the question of whether constitutional borrowing is truly "constitutional" at all in the

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"constitutional borrowing."

69. Osiatynski, *supra* note 68, at 249; Rosenkrantz, *supra* note 24, at 281.

70. Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, Paper Presented at the Program in Law and Public Affairs, Princeton University 12 n.43 (Apr. 12, 2004), *available at* http://www.law.columbia.edu/center_program/legal_theory/papers/fall04?exclusive=filemgr.download&file_id=94190&rtcontentdisposition=filename%3DFlahertyCLS.pdf (last visited Jan. 17, 2004).

71. *See* Vicki Jackson, *Yes Please, I'd Love to Talk With You*, LEGAL AFF., July–Aug. 2004, at 43; Choudhry, *supra* note 6, at 838; Rosenkrantz, *supra* note 24, at 278.

72. Jackson, *supra* note 71; J. Breyer, *supra* note 2; Jacobsohn, *supra* note 6.

traditional American sense of the term. In other words, the argument illuminates the failure of borrowing's proponents to be explicit about the implicit theories of constitutional government upon which their recommendations rest.

Seth Kreimer, for example, has identified three operative models of constitutionalism that are implicitly—but, often, not self-consciously—invoked in the constitutional borrowing debates. The first is the "operating systems" model, which conceives of a constitution as something like a computer operating system—that is, as a program designed to serve its users by achieving with maximum efficiency the best that government can offer. In this model, the central questions are instrumental. Will confining our knowledge to our own borders bring us the best results in the most direct way? Or might a robust engagement with the universe of constitutional mechanisms, regardless of their provenance, be a better way of improving our system? In its most sensible forms, this model counsels prudence in constitutional borrowing. It allows that efforts to transport an operating system, or parts of one, from one institutional environment to another may or may not be successful, depending upon the particulars of the cases and circumstances.[73]

The second model of constitutionalism is a moral model, which understands it as "a series of moral conceptions that constitute the best account of moral ideals by which a society should be guided."[74] While the operating systems model is anchored in a policy instrumentalism, the moral model is grounded in an ethical or philosophical universalism. This model presumes both that "best" answers to moral questions—chiefly those involving civil liberties and civil rights (or, in the transnational idiom, "human rights" or "human values")—are possible, and that it is the job of judges in interpreting their domestic constitution to make good faith efforts to arrive at the "best" answers to these universal questions.[75] Looking abroad, while hardly determinative, is helpful to judges in this endeavor. If the rest of the world's western liberal democracies have eliminated their death penalties, for example, it might imply that the United States is wrong about a fundamental moral question—whose correct answer is presumed to be implicit in the American constitutional tradition.[76]

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73. Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999).

74. *Id.* at 640.

75. *Id.* at 645–46. *See* DWORKIN, *supra* note 21; Jacobsohn, *supra* note 6.

76. *See generally* Thompson v. Oklahoma, 487 U.S. 815 (1988); Atkins v. Virginia, 536 U.S.

The third model of constitutionalism, while not necessarily exclusive of the other two, places significant emphasis on a nation's constitution as the foundation of its national identity and as the touchstone of its civic religion or civic nationalism. According to this model, what a nation is as a people is defined by its commitment to a common and unique constitutional culture. This model, many have noted, is particularly powerful in the United States, which has a unique (and uniquely successful) history of civic nationalism anchored in a single, written constitutional text.[77]

MEETING THE TECHNICAL COMPETENCE ARGUMENT

Many have argued that judges are not particularly well-suited to the calibration of effective operating systems through constitutional borrowing. Intertwined as they are with long histories and unique cultural and institutional environments, living constitutions are enormously complex, organic things. For this reason, scholars have argued that efforts at constitutional functionalism undertaken by judges "may founder on problems associated with identifying functions and the institutions that perform them in different legal systems."[78] In such a context, the danger of botched translations is severe. Thoughtful comparative work has shown that this can be the case even when the desirability of the function, stated abstractly, is unimpeachable—such as "judicial independence."[79]

It may be, given the diversity and complexity of successful constitutional cultures, that "it is possible to conceive of many different yet equally reasonable ways to address each area of constitutional concern."[80] Moreover, because they are essentially technocratic, defenses of constitutional borrowing anchored in the operating systems model cannot make any useful distinction between common law borrowings (whether across countries or across American states) familiar in U.S. legal history and transnational constitutional borrowings. All involve "problem solving" and, as such, encourage the gathering of more information rather

304 (2002); *Roper v. Simmons*, 125 S. Ct. 1183 (2005); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002).

77. Kreimer, *supra* note 73, at 648–49 (stating, "[u]nlike many other politics, we have had only one constitution over the course of our national history."); Jed Rubenfeld, *The Two World Orders*, WILSON Q. (Aug. 2003) (distinguishing between international and American constitutionalism).

78. Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 327 (1999).

79. *See* Osiatynski, *supra* note 68, at 264–65 (discussing the principle of "Judicial Independence").

80. Rosenkrantz, *supra* note 24, at 282.

than less, regardless of the source. But, of course, in terms of legitimate sources of authority, requirements of the rule of law, and the institutional role of judges, common law borrowing and constitutional borrowing are not at all the same. Judicial uses and interpretations of extra-jurisdictional common law are amendable through ordinary legislative processes. Constitutional borrowings, by contrast, stand above legislative revision, and are amendable only through supermajoritarian processes.

In addition, despite the vague mood of "diversity" surrounding borrowing, proponents are actually *troubled* by the prospect of diverse opinions, world views, and approaches to governance. Judges excited by the potential of borrowing from others will have a strong tendency to undervalue diverse forms of liberal, democratic constitutional governance and will, ironically, work in the interest of diversity toward convergence.[81] To be sure, a diversity of legal cultures may be undesirable when some of those cultures are non-constitutional and non-liberal. But in liberal states, true diversity may simply be a sign of the vibrancy and well-developed state of domestic constitutional cultures. For this reason, in advanced liberal states with long histories of constitutional government, borrowing may be simply unnecessary.[82] On the other hand, in relatively new, still developing liberal states, too great an enthusiasm for borrowing on the part of judges and scholars may work to stifle the development of a richly organic indigenous constitutional culture that will provide future generations with the deepest and most stable foundation for constitutional self-government.[83]

Viewed in strictly technical terms, there are plausible arguments to be made that the difficulties presented to judges by the call to engage in more comparative work and more constitutional borrowing in reaching their decisions are not of a greater magnitude than the other interpretive difficulties they face on a daily basis. The problem of translation, some will rightly argue, is inherent in the judicial role.[84] Judges are constantly

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81. *Id.* at 279 (arguing that "multiplicity and divergence are not necessarily an evil when they occur in different jurisdictions.").

82. Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284 (1998).

83. Rosencrantz, *supra* note 24, at 294 (arguing that using foreign law hampers the development of a constitutional culture); Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224, 232 (2003).

84. *See* Lawrence Lessig, *Fidelity And Constraint*, 65 FORDHAM L. REV. 1365, 1371 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1191 (1993) (discussing the link between translation and legal interpretation); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (arguing that the courts of necessity change meanings and values in interpretation).

called upon to consider the texts, precedents, and experiences of the past and to give them a current meaning that is faithful to their earlier meaning under the altered legal, historical, and political conditions of the present.

Space travel, Mark Graber has suggested, may not be all that different from time travel.[85] To be sure, judicial forays into space travel require that judges have the ability to understand the social, political, and legal systems of other countries. We may think that judges are not likely to be very good at this. But, we have no reason to believe that the judges' understanding of their own system, particularly as it pertains to history, is especially good.[86] Even if we give American judges the benefit of the doubt with regard to their successes as time travelers within the American constitutional tradition, we could say their successes in this regard are due to sound training and experience. If we want judges to do a better job at space travel, then we simply need to do a better job at offering more courses in comparative constitutionalism. A generation of lawyers and judges with better training in comparative and international law than that provided to previous generations is likely to do a much better job of engaging in persuasive and successful comparative analysis. As American law schools are now making major efforts to turn legal education in precisely this direction, the prospects for more successful space travel are improving every day.

Ultimately, the real question is not whether it is good to look abroad or not, but rather whether, in a particular case, it is done well or done poorly. When the Court looked around the world to totalitarianism, it moved to make sure that, within the limits of its power, nothing like that would happen here. It may have successfully influenced the Court's criminal process jurisprudence in stimulating a renewed appreciation for the proprieties of basic due process in race cases coming out of the segregated South. Because at least some of the Court's justices, however, with the aim of preventing totalitarian "mind control," began an aggressive assault on religious influence in education, particularly Roman Catholic education, as part of its Establishment Clause jurisprudence, we may be considerably more dubious about the inclination.[87]

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85. I am grateful to Graber for raising this issue during his comments on an earlier version of this paper at the Conference on Global Constitutionalism at the University of Toronto, cited at this essay's outset.

86. *See generally* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524 (1995) (stating that judges are drawn to using history, but their work is often "replete" with problems).

87. *See generally* KERSCH, *supra* note 2, at 94–96, 292–325; RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 224–33 (1999); John T. McGreevy, *Thinking on One's Own: Catholicism in the*

Were the Court to look abroad to Europe's free speech jurisprudence, particularly as it concerns matters of "hate speech," it would trouble many who value the Court's recent expansive readings of free speech protections. Some critical race scholars and feminists, however, would welcome a more cosmopolitan turn in this area of the law. Justice Breyer's more purposive understanding of the judicial role leads him to believe that in federalism cases, for example, it is instructive to look to the experiences of others for guidance in achieving our own constitutional goals and purposes.[88] Those of a more formalist inclination, like Justice Scalia, have rejected that understanding.[89] Again, ultimately, the question is not whether to look abroad in the abstract, but rather whether looking abroad is done well for legitimate ends, or poorly, for illegitimate ones. As much as we may look abroad, the debate is still, in the last analysis, conducted on our own terms.

If the Court's current interest in transnational consultation and increasing cosmopolitanism were taking place in a historical and intellectual vacuum, these technical arguments might be fairly convincing. However, the current interest in these matters is not taking place in a vacuum and is fueled by a belief among many prominent intellectuals, both in the United States and around the world, that the U.S. Constitution, is outmoded and badly designed, and that a "globalized judiciary" should work to update and re-design it.

There is a belief that the United States is a global laggard in many policy respects and that a "globalized judiciary" should play a role in bringing it up to date. Additionally, there is a belief that the U.S. Constitution, with its stubborn belief in sovereignty, is a constitutional laggard as well, and that a "globalized judiciary" can work to transcend this.[90] In this ideological and political context, it is not true that a cosmopolitan turn in American constitutional law can only be discussed in narrow, and highly legalist and technical terms. In light of recent and quite academically popular calls for broadening the terms of constitutional discourse and debate, resistance to moving this discussion beyond its technical, legalistic vacuum, seems very odd indeed.[91]

American Intellectual Imagination, 1928–1960, 84 J. AM. HIST. 97, 122 (1997).

88. *See* Kersch, *supra* note 28.

89. For an example of Justice Scalia's strict interpretation, see, for example, Printz v. United States, 521 U.S. 898, 905 (1997).

90. *See* KERSCH, *supra* note 2, at 348–49.

91. *See, e.g.*, KRAMER, *supra* note 14; TUSHNET, *supra* note 19.

It does not follow from the observation that the process of translation is a necessary and routine concomitant of judging that the process, undertaken in certain contexts and in a certain spirit, cannot serve as a critical adjunct to the process of revolutionizing constitutional thought. The key political and constitutional theorists of the Progressive Era, Herbert Croly and Woodrow Wilson, both spoke of what they clearly saw as transformative and, indeed, revolutionary new thinking in terms of translation. In the classic progressive statement of "The New Nationalism," *The Promise of American Life*, which became the anchor of Theodore Roosevelt's governing political philosophy, Herbert Croly argued that, in a context in which "underlying social and economic conditions are themselves changing," a simple fidelity "to traditional ways of behavior, standards, and ideals" would no longer be sufficient to realize "the promise of American life."[92] Under these conditions, a rigid, fatalistic, and conservative fidelity would be stifling rather than fulfilling. The solution, Croly famously argued, was to find new means for achieving what, in a broad sense, were considered the traditional ends.[93] Croly's call for the pursuit in modern America of Jeffersonian ends through the Hamiltonian means of a newly empowered, activist central state was an appeal for translation.[94] In many respects, his call was heeded, and a revolution in American government, and American constitutionalism, was at hand.[95]

Woodrow Wilson, a constitutional scholar and (in conjunction with his advisor Louis D. Brandeis) the chief articulator of the alternative transformational progressive vision, "The New Freedom," spoke of a process that involved both revolution and translation simultaneously. Wilson asserted: "We are upon the eve of a great reconstruction. It calls for creative statesmanship as no age has done since that great age in which we set up the government under which we live."[96] In the years to come, Wilson prognosticated, "revolution will come in peaceful guise, as it came when we put aside the crude government of the Confederation and created the great Federal Union which governs individuals, not States . . ."[97] At the

92. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 5 (Arthur Schlesinger, Jr. ed., 1965) (1908).

93. *Id.*

94. *Id.* at 17.

95. *Id. See also* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1997).

96. WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 32 (William E. Leuchtenburg ed., 1961) (1914).

97. *Id.*

same time, he declared, "I am not one of those who wish to break connection with the past . . ."[98] "If I did not believe that to be progressive was to preserve the essentials of our institution, I for one could not be a progressive."[99] The Declaration of Independence, he affirmed, was a great document. But "the Declaration of Independence did not mention the questions of our day. It is of no consequence to us unless we can *translate* its general terms into examples of the present day . . ."[100] "Unless we can *translate* it into the questions of our own day, we are not worthy of it."[101] In effectuating this translation, Louis D. Brandeis famously argued that there needed to be a revolution in the sorts of evidence to which courts were willing to listen. A judicial opinion, he asserted, "derives its authority, just as law derives its existence, from all the facts of life. The judge is free to draw upon these facts wherever he can find them, if only they are helpful."[102]

In light of this history, we must take care not to make the mistake of assuming that because translation is a routine part of what judges do that there is something inherent in the process of translation that makes it routine. In the Progressive Era, a large number of intellectuals called for a broad-ranging project of translation in service of revolutionary, transformational purposes. A similar intellectual movement is currently pushing for a new commitment to transnational translation by the American judiciary.[103] Informed discussion of the new transnationalism must consider this broader intellectual and political context.

THE PROBLEM OF CONSTITUTIONAL SELF-GOVERNMENT

Constitutional borrowing may be particularly problematic for the American constitutional tradition. As noted earlier, it is understandable that judges in post-communist states and in a Europe ostensibly committed to an ever-closer union would welcome borrowing. Their powers are new, as is their claim to exercise judicial review—as is the case in many new

98. *Id.* at 38.
99. *Id.* at 40.
100. *Id.* at 42.
101. *Id.* at 44.
102. DEVINS & FISHER, *supra* note 17, at 36 (quoting Benjamin N. Cardozo, *Introduction* to Selected Readings on the Law of Contracts (Association of American Law Schools 1931)) (Oxford University Press 2004) (citing Chester A. Newland, *The Supreme Court and Legal Writing Learned Journals as Vehicles of an Anti-Antitrust Lobby*, 48 GEO L.J. 105, 140 (1959)).
103. For more detailed evidence on this point, see KERSCH, *supra* note 2, at 341–58 (exploring the rise of global constitutionalism); Kersch, *supra* note 1, at 4 (exploring the intellectual push for appeal to multilateral and international standards by the Court).

democracies with correspondingly new commitments to the rule of law. These judges need to justify their newly claimed power and authority in ways that American judges, whose judicial review powers were institutionalized over two hundred years ago, do not.

In the United States, that power was justified by recourse to a theory of popular sovereignty, anchored in the necessity of a judge interpreting a written constitutional text.[104] In Europe, that power has been justified by judicial claims to join as participants in a post-sovereign order, whether it involves a unified European Union or a global human rights regime. To be sure, American judges in the Founding era understood the new country as appealing to universal values and joining the family of nations; they believed in natural law and the law of nature. But these appeals, they knew, were most prominent, not in the Constitution, but in the Declaration of Independence—and in decisions involving international relations, such as the seizure of prizes, piracy on the high seas, and the treatment of ambassadors.[105] These values had nothing to do with the grounding of power of judges to void statutes involving domestic political matters. In short, judicial power in the United States is anchored in a commitment to the rule of law of the U.S. Constitution as written, not in claims to be participants in a world system (or, in the contemporary parlance, "global governance").[106]

If constitutional traditions are organic—and no one denies that to a significant extent they are—the U.S. constitutional tradition is one of the most richly developed and longest standing organic constitutional traditions in the world, and the oldest, most deeply institutionalized tradition of judicial review under a written constitution. The doctrine that has been developed under these conditions is intricate and mature.

Many of the judges most enthusiastic about constitutional borrowing, and most critical of U.S. judges for their failures to borrow, come from countries with constitutions little more than a decade old. This is clearly the case in Eastern Europe and South Africa, but it is true in Western Europe as well. Western Europe was the seedbed of dictatorship for significant periods of the twentieth century. Indeed, Spain was a fascist country until the 1970s. When *Marbury v. Madison* was decided, France

104. THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the Court's role in interpretation.); Marbury v. Madison, 5 U.S. 137 (1803).

105. *See* BORK, *supra* note 4, at 26 (discussing the principal offenses against the law of nations in 1789).

106. *See* Childress, *supra* note 24, at 217 (presenting an example of the problem of comparative analysis in a constitutional democracy).

was ruled by an emperor. Many European countries, even those that were longstanding democracies, worked their way through multiple constitutions over the course of their histories. Given this context, the increasingly heard plea that "they borrowed from us, so why shouldn't we borrow from them?" makes much less sense. The truth is that judges around the world borrow from the jurisprudence of the United States because the countries in which those judges sit, including those in western Europe, have relatively limited experience with constitutional self-government.

In contrast, the United States has over two centuries of *continuous* experience with such government under a written constitution that has served as an anchor to its unique form of civic nationalism. When the United States was a new nation, its judicial opinions contained many more allusions to foreign law, particularly English common law, than they do today. As America and its constitutional tradition grew, the usefulness of such references and allusions declined. Today, it is hardly necessary at all.

NONSENSE—BORROWING AND TRANSNATIONAL CONSULTATION BY JUDGES IS A LONGSTANDING PART OF THE AMERICAN CONSTITUTIONAL TRADITION

In a broad sense, the decision by the Supreme Court to look abroad is not new. Although few scholars have examined foreign influences on the Supreme Court's jurisprudence in any great detail, a preliminary reflection suggests certain categories of influence. As noted, citations to English common law decisions were common during the nation's early years. From its beginning, where appropriate, the Supreme Court—typically in cases involving international shipping and trade—frequently referred to the law of nations. In addition to references to international law and foreign case law, the Court and others who discussed the appropriate constitutional arrangements and practices also cited foreign experience as a guide to constitutional wisdom. The *Federalist Papers*, for instance, looked to the experiences of, among others, the English, Greeks, Romans, and Swiss as part of the process of working toward an intelligent constitutional design. Nineteenth and early twentieth century political reformers, operating before the courts and elsewhere in politics, made aggressive appeals to foreign, typically European, practices. They did so both to proffer alternatives to American constitutional habits and policies,

and to gather empirical evidence concerning the likely consequences of particular institutional arrangements and policies.[107]

European comparisons played a major role in the late nineteenth and early twentieth century Progressive Movement and in progressive policy arguments in general.[108] However, the comparisons were also evident in the record and, sometimes, in the opinions of landmark Progressive Era Supreme Court decisions. European experience with social welfare legislation, for example, was cited in legal briefs to lend authority to novel social legislation taking place at home. The famous "Brandeis Brief" filed in *Muller v. Oregon*, for example, is a case in point.

Viewed more broadly, of course, the entire notion of a living and evolving constitution was in many respects an import; it was largely the product of an historicist turn in the social science, and, particularly, in German social thought.[109] At mid-century, the anti-model of totalitarianism was referred to repeatedly in, among others, criminal law and church-state decisions.[110] In articulating a baseline standard of basic human dignity, Justice Frankfurter famously referred to the understandings of "English speaking peoples" in *Rochin v. California*.[111] Recent studies, in an echo of earlier, less known, scholarship, have demonstrated the degree to which those struggling for civil rights routinely made arguments that appealed simultaneously to the standard of enlightened world opinion, U.N. declarations and treaties, and foreign policy imperatives.[112]

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107. *See, e.g.*, NOGA MORAG-LEVINE, CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE 40–73, 79–82 (2003) (discussing the development of pollution control in the United States and abroad).

108. *See generally* DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998) (discussing the intellectual shift to internationalism during the Progressive Era); JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920 (1986) (discussing political action and cultural change in progressive politics).

109. *See generally* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE; BERT JAMES LOEWENBERG, AMERICAN HISTORY IN AMERICAN THOUGHT: CHRISTOPHER COLUMBUS TO HENRY ADAMS 346–62, 380–424 (1972).

110. *See* PRIMUS, *supra* note 87 (on the post World War II Court's jurisprudence as, in significant part, a reaction to totalitarianism); KERSCH, *supra* note 2 (constructing historical views of the analogy between Catholicism and totalitarianism).

111. Rochin v. California, 342 U.S. 165 (1952) (quoting Malinski v. People of State of N.Y., 324 U.S. 401, 417 (1945)).

112. *See* KERSCH, *supra* note 2, at 97 n.187; MARY DUDZIAK, COLD WAR CIVIL RIGHTS; AZZA SALMA LAYTON, INTERNATIONAL POLITICS AND CIVIL RIGHTS POLICIES 58 (2000) (arguing civil rights leaders packaged their arguments in an international context). *See generally* THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA (2001) (linking the struggle between race relations in the United States with international relations); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS (2003) (examining the African-American appeal to

For many, this history will suggest that the interest of key justices of the current Supreme Court in international and foreign precedent and practice, and the gathering of evidence from around the globe is business as usual for the Court. However, this is not the case. Some of the transnational turns cited above are more relevant to the Court's current transnational turn than others. Less relevant as legitimating precedent for the current turn are the borrowings undertaken by those either seeking to design a new constitution to be submitted to the states for ratification—and those turns abroad to a progenitor legal system, i.e. that of England, by common law judges in a newly independent nation with very little guiding law by which to steer. Also less relevant are citations to the law of nations in classic matters of international law, such as deciding the law of prizes in shipping cases. We can certainly debate the purity of the categories of "domestic" and "international," and we can point to situations in which the line between them is neither hard nor fast. However, appeals to international law or agreements in cases involving admiralty, trade, and the seizure of vessels on the high seas, are very different than appeals in cases involving wealth redistribution or the constitutional status of racial preferences at the University of Michigan.

Most relevant as precedent are situations where the transnational appeals are made as part of a reformist political and intellectual movement that has transformational, and, indeed, revolutionary, constitutional potential. What seems like a surge in transnational reference points in public policy arguments generally and, in some cases, in legal appeals and decisions during the Progressive Era is very much a precedent for the current Court's transnational turn. It is important to point out, however, that this earlier transnational turn was intricately tied to a revolution in theories of the role of the state in American government.[113] This revolution in political and social scientific thought radically re-made American

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international human rights standards).

See also DANIEL KRYDER, DIVIDED ARSENAL (2000) (discussing the conflict between U.S. goals in World War II and biased conduct at home); WILLIAM C. BERMAN, THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION 63–67 (1970) (discussing Truman's goal of addressing discrimination in America as a means of strengthening democracy abroad); DONALD R. MCCOY & RICHARD T. REUTTEN, QUEST AND RESPONSE: MINORITY RIGHTS AND THE TRUMAN ADMINISTRATION (1973) (discussing President Truman's motivations for improving minority rights as a logical progression from America's rationale in World War II).

113. *See generally* THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH CENTURY CRISIS OF AUTHORITY (2000); PURCELL, *supra* note 9; RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN POLITICAL THOUGHT (1955) (discussing evolution in the context of social theory and government); LESTER F. WARD, THE PSYCHIC FACTORS OF CIVILIZATION 319 (Ginn & Co. ed., 1906) (discussing laissez-faire policies and the role of the state.)

constitutionalism and, in the process, empowered the modern, centralized, bureaucratic "New American State."[114]

The contemporary transnational turn is similarly tied to a major, reform-oriented intellectual and political movement. One thing that distinguishes the current turn from its predecessor in the Progressive Era, however, is that transnationalism is itself, in many respects, the *raison d'etre* of the current turn. As the constitutional aim of the earlier movement was to transfer increasing governing authority to the central government in Washington, the constitutional aim of the new movement is to transfer governing authority to the arms and competences of the new regime of "global governance." The leap from the national to the global level may be comparable to the earlier leap from the state to the national level in some respects. In its fundamentals, however, it represents a radical new step beyond the Constitution. This is not a simple continuation of a long history of transnational citations and references. As part of a reformist movement with revolutionary potential, it is no ordinary move. Accordingly, it should not be treated as such.

IT'S A FOREIGN POLICY IMPERATIVE

If constitutional borrowing is an imperative in the current environment in which there is deep concern that anti-Americanism abroad is thwarting the nation's abilities to achieve its objectives, it is the diplomatic, foreign-policy justifications that many will find the most persuasive. The very fact that our constitutional tradition is more richly developed and longstanding than any liberal democratic constitutional tradition in the world, and that our powers of judicial review under a written constitution within that tradition are so deeply institutionalized, may help convey the unhelpful impression abroad that Americans are constitutionally self-sufficient in a way that other nations (and their judiciaries) are not. This patent self-sufficiency, taken as a form of unilateral arrogance, clearly arouses resentment and anxiety among some governmental professionals abroad.

Consultation and constitutional borrowings are balms to these resentments and anxieties. While borrowing may be good diplomacy and helpful foreign policy, it does not absolve U.S. judges from their responsibilities to their proper roles at home. These considerations may apply when matters traditionally associated with international affairs come before the Court. But if every issue traditionally viewed as domestic is

114. *See generally* SKOWRONEK, *supra* note 95 (discussing the development and attributes of the "New American State").

recast as transnational simply because other nations disagree with our resolution of the issue, the implications for the nature of self-government at home will be revolutionary. Anxieties about American indifference and constitutional self-sufficiency on these matters might be better assuaged, with less damage to the processes of domestic self-governance, not by ever-escalating efforts at judicial cosmopolitanism, but by a renewed commitment to educate others abroad about the organic roots and democratic imperatives of truly successful, long-lived liberal constitutions.

A PLEA FOR CONTEXT: THE NEW LEGAL TRANSNATIONALISM IS PART OF A TRANSFORMATIVE SOCIAL AND INTELLECTUAL MOVEMENT

This essay does not argue that the Supreme Court has never before been influenced by international and transnational events or that it has never before cited foreign experience or precedent for a variety of purposes in reaching its decisions. It argues instead that, in the past, the Court has done so in diverse contexts and for diverse purposes. In a few instances, the Court's recurral to transnational and international touchstones was evidence that a transformational intellectual and constitutional project—with its center outside the Court and instead inside much broader currents of intellectual and political life—was underway, and that legal and constitutional doctrines were being altered to fit the Court and American law into that reformist political project. This, for example, was clearly the case during the Progressive Era, when European social policy experience was cited by Progressives both in broader political debate, but also to the Court, to help transform the way the Court thought about the constitutionality of social and economic regulatory legislation that would previously have been voided for violating traditional constitutional strictures. What was different in that case was that the argument based on the European experience was largely an argument on behalf of judicial quietism and deference: European experience was cited for purposes of persuading the judges to permit people's elected representatives to legislate with greater freedom what they had determined to be the greater public interest. Judicial deference is not at the heart of the current Court's transnational turn.

The current Court's turn toward transnationalism, while sharing affinities with the turn in the early twentieth century, is most closely analogized to the ultimately thwarted transnational turn of the 1940s. The geopolitical conditions that stimulated belief in a perceived global imperative in the 1940s are remarkably similar to those conditions perceived today. For those willing to look beyond technical legal

arguments and arguments from precedent and pragmatism, it is apparent that what is regarded as the new legal transnationalism is arising from a much broader intellectual movement that is systematically re-thinking the very future of the nation-state itself, and, with renewed hopefulness, the prospects for either world government or global governance. To pretend that the Court's current transnational turn has nothing to do with this major intellectual project is to misunderstand fundamentally what is happening in American law and in the jurisprudence of the U.S. Supreme Court.

To be sure, many legal scholars who suggest that American judges would benefit from being less provincial and from looking abroad more often when deciding American constitutional cases will bristle at any effort to yoke them with a movement by others to move toward a system of world government or global governance. They will argue that they are offering rather technical justifications for such a turn because they actually believe in such justifications: they advocate neither world government nor global governance. It is only fair to take such scholars at their word.

Viewed from a broader perspective, however, it seems clear that the arguments made by these scholars would not have anywhere near the prominence they have today had the broader intellectual movement not put a powerful wind in their sails. Some careful and grounded scholars have been preaching the virtues of judicious comparative analysis for a very long time. This work did not have any great audience before. Now, it has an audience that is large and growing. New courses are being created. The topics of customary international law, constitutional borrowing, and the propriety of looking abroad are suddenly very exciting topics. Why? Because they now raise questions that fit into a much larger intellectual and political project. For this reason, the current transnational turn cannot be discussed in purely technical or pragmatic terms. While it is theoretically possible that the substantive content of this turn of the Court will operate wholly independently of the substantive political commitments of the movement that is inspiring and empowering it, in light of the history of the relationship between American political thought and American constitutional development, it would be foolish indeed to bet on that prospect. The substantive commitments of the project will determine the interpretive tendency of the courts.

As in the 1940s, the current reformist intellectual movement, when taken as a whole and viewed at a wide angle across academic disciplines and throughout broader intellectual life, has transformational, and, indeed, revolutionary objectives. It is rethinking the nature of sovereignty and of constitutional government. And, in a strain that is much more highly

developed than it was in the 1940s, it is rethinking the institutional role of judges as key actors in that broader political project. The effort to build a judiciary that sees itself as a highly professionalized, quasi-autonomous, and globalized governing class, is keyed into this larger project, and is a key adjunct of it. The movement is not asking simply that judges be willing to look abroad when it is helpful to them. It is seeking to routinize transnational consultation within American constitutional law.

Recently, a number of influential constitutional scholars have begun to emphasize the influence of social and intellectual movements on the development of American constitutional law.[115] This article has characterized the current Supreme Court's turn in this direction as directly related to such a reformist political and intellectual movement. Interestingly enough, however, there is a pronounced unwillingness among both law professors and political scientists to discuss it as such. Most legal scholars insist that it be discussed solely in terms of precedent and utility. While they may be interested in the literature on social and intellectual movements on law in other contexts (e.g., in describing the past triumphs of the labor movement, feminism, and the civil rights movement), when it comes to the new transnationalism, they insist that the two relevant questions are: first, is this really something new, or, rather, is it consistent with routine practice in the past; and, second, is it helpful to judges in deciding cases. The answers, typically, have been "we've always done it this way," and "it helps, so why not?" This raises the question of whether discussions of the influence of social and intellectual movements on the law must always take place in the past tense. The answer is likely in the affirmative because describing an ongoing and potentially revolutionary reform movement as a political and ideological endeavor serves to undermine its legitimacy as "law." To gain authority as law, the new legal transnationalism cannot be discussed as politics.

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115. *See, e.g.*, Reva B. Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional L*aw, http://islandia.law.edu/sela/SELA%202004/SiegelPaperEnglishSELA2004.pdf (last visited Apr. 16, 2005) (examining the role played by social movements in shaping the development of U.S. constitutional law); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948 (2002) (exploring the impact of the women's suffrage movement on U.S. constitutional law); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) (examining the influence of politics in shaping constitutional policy in the context of section 5 of the 4th Amendment); William N. Eskridge, Jr., *Channeling: Identity Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) (arguing that social movements are a major force driving constitutional evolution); Jack M. Balkin, *Brown, Social Movements, and Social Change* (forthcoming 2005), *available at* http://www.yale.edu/lawweb/jbalkan/brownsocialmovementandsocialchange1.pdf (last visited Feb. 14, 2005); KERSCH, *supra* note 2.

It is for this reason that much of the discussion of the transnational turn has been rather technical in focus. Are we legally bound by treaty obligations in certain areas? Is customary international law binding on American judges? Is looking to foreign experience helpful in resolving complicated legal issues? Is constitutional borrowing appropriate and helpful? All these questions remain open to debate. To truly understand the significance of this phenomenon for our constitutional future, we must discuss it at an altogether different level.

CONCLUSION: THE GLOBALIZED JUDICIARY AND CONSTITUTIONAL SELF-GOVERNMENT UNDER THE RULE OF LAW

Most discussions of the impending transnational turn in American law involve highly technical debates concerning the domestic applicability of various forms of international law, or the propriety of introducing transnational evidence and arguments into domestic constitutional argument. What is missed by these discussions, and what is illuminated here in a largely, though not exclusively, descriptive and empirical manner, is that, viewed from a broader perspective, the mere fact that vigorous interest is now being shown in this entire constellation of questions is itself of major significance. That departure is reflective of a broad current of bold thinking among intellectuals in an array of academic disciplines concerning not only the place of the United States in the world, but also of the future of the nation state itself—thinking that, in a post-*Brown* era, has considerable implications for the politics of courts.

The highly technical and legalistic aspects of many of the discussions of related doctrinal questions involving such matters as treaty powers and customary international law as they are taken up particularly within the legal academy tend to obscure the profound issues of constitutional self-government at stake. The oscillation from the visionary to the legalistic has created an odd climate of discussion. The call for the globalization of American judges, for example, is simultaneously an open and furtive affair. Justice Breyer, for one, ended a recent speech encouraging judicial globalization by citing Wordsworth's paean to the French Revolution ("Bliss was it in that dawn to be alive/But to be young was very heaven"),[116] and yet, right-wing alarmism notwithstanding, its partisans insist, it is utterly routine.[117]

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116. WILLIAM WORDSWORTH, THE PRELUDE 444, Book X, line 693 (J.C. Maxwell ed., 1971) (1805).

117. J. Breyer, *supra* note 2.

In a similar spirit, Dean Harold Hongju Koh of the Yale Law School has characterized an increasingly celebrated federal court decision putting its imprimatur on the use of customary international law in human rights cases in U.S. courts as both business as usual for American courts and the *Brown v. Board of Education* of the transnational public law litigation movement.[118] Anne-Marie Slaughter has both trumpeted the increasing autonomy of judges around the world and the forging among them of self-conscious identity as instruments of global governance.[119] She has also reassured those who may be disturbed by such developments of the all but unchanged position of these judges within sovereign domestic constitutional systems.[120]

These shifts in emphasis obscure the highly ambiguous, if not hostile, relationship between the modern form of "judicial globalization" and the fundamental requirements of the rule of law. On the one hand, paradoxically, this new departure draws its sustenance from a renewed commitment to both constitutional government and international law around the world.[121] At the same time, however, in its marked preference for judges and interpretation over legislatures and legislating, its preoccupation with constitutional sovereignty as a problem, and its impatience with policy and rights divergences, even between advanced, democratic states, it casually conflates its increasingly deracinated understanding of "law" with the evolving policy preferences of the movement members. Emblematic work praising "global governance" purports to be fully committed to constitutional self-government under the rule of law and national sovereignty by noting that, even with a transnational turn by a globalized judiciary, old-style governments retain ultimate authority and veto power over the emerging networks of global governance. Judges are not obligated to follow foreign practices and preferences (except when, as is argued in more and more cases, they are),[122] but merely to actively involve themselves in transnational networks and consultations so as to redefine their professional touchstones and identity. They are then perfectly free to decide cases independently as

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118. Harold Hongju Koh, *Transnational Public Law Litigation*, YALE L.J. 2347, 2366–68 (1991) (discussing Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)).

119. Slaughter, *supra* note 67. "[J]udges . . . are rarely motivated by a missionary zeal to build a global legal system. Rather, they are driven by more prosaic concerns, such as judicial politics, the demands of a heavy caseload, and the impact of new international rules on national litigants. *Id.* at 78–79.

120. *Id.*

121. *See* KERSCH, *supra* note 2, at 341–42.

122. *See id.* at 348–58.

constitutional actors and organs of American sovereignty. And, after due consultation with their fellow professionals abroad, whatever they decide must have been based on a reading of American constitutional values. As such, their newly globalized institutional milieu changes both everything and nothing.

Underlying these legal debates is politics—plain and simple. Legal scholars have become preoccupied with the "provincialism" of American judges because, in going about their business of deciding constitutional cases involving domestic matters such as affirmative action, federalism, welfare, homosexual rights, election law, and the death penalty, they have been reaching the wrong results—that is, results that have not coincided with those that the Warren Court ostensibly would have reached, results consonant with the policies of European social democracy. There is a sense that the United States is a global outlier because it is not a European social democracy.[123] Such a state of affairs has not been corrected by the elected officials in the United States. There is now some hope that it may be corrected by an increasingly autonomous, outward-looking, globalized American judiciary. Scholars and activists have been laboring indefatigably to construct just such a judiciary in the United States.

The palpable sense in American academia and elsewhere, that the United States is a global outlier, is strange in many respects. Far from being an outlier, the United States, in crucial aspects of its politics and its culture, including its commitment to democracy and the rule of law, is clearly within the mainstream of contemporary liberal democratic political orders.[124] In fact, so far as the normative case for constitutional borrowing is concerned, this simply must be the case. If our constitutional system and its underlying culture is significantly different from that of countries we seek to borrow from, the decision to borrow from those countries is on the weakest normative grounds. If, on the other hand, the countries we seek to borrow from are essentially similar to our own, it is not clear why the fact that we arrive at different conclusions about particular policy issues presents a problem in need of a solution.

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123. *See id.* at 342; Ackerman, *supra* note 7, at 773 (arguing that American judicial practice is provincial because "it does not engage the texts that have paramount significance for the rest of the world."); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNIFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (arguing that the U.S. should adopt Franklin D. Roosevelts' proposed second bill of rights, citing numerous international constitutions in support of broadening United States citizens' rights).

124. Indeed, it is quite plausible to argue that its commitment to constitutional self-government is more firmly rooted and stable here than elsewhere, which may itself be causing the very "problem" that the partisans of constitutional borrowing and other transnationalist trends are working so fervently to correct.

The United States is not an outlier vis-à-vis other liberal democratic constitutional states. In fact, it is quite possible that it was this same allegedly vexatious belief in its uniqueness and stubborn unwillingness of the United States to embrace ostensibly "inevitable" historical trends (as identified by leading European intellectuals and their followers in the United States) that kept the nearly extinguished flame of democracy and freedom alive through their darkest days in the twentieth century.[125]

The problem is less that the United States is a global outlier in a world committed to liberal constitutional self-government than that many Europeans *believe* that the United States is a global outlier. These are very different things.[126] The politics and ideology behind this perception are a complicated matter, having much to do with cultural dispositions toward ideas and history, not to mention ignorance.[127] Suffice it to say, a fervent belief among intellectuals and scholars that judges and governing officials in the United States are not seizing the moment of destiny to bring about a "new world order" characterized by a stipulated agreement on a range of domestic public policy issues is hardly a reason for concluding the U.S. officials must have gone horribly wrong.

The feeling by many scholars that a newly globalized judiciary is unproblematic has many roots. Despite the fact that the discussion is an apparently legal one, its more proximate roots are to be found in the legal profession's comfortable assimilation of the constitutional ethos of the post-New Deal administrative state, which is impatient with the distinction between pragmatic policymaking and law.[128] Political scientist Theodore J. Lowi observed that the public philosophy of that state nourishes a belief in the promise of a world beyond law. Contemporary work on judicial policymaking celebrates rather than criticizes these developments on the grounds of their effectiveness.[129]

In it most sober, and, hence, politically influential, incarnations, the appeal for a new transnationalism, and the insistence that this new

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125. *See* MARK MAZOWER, DARK CONTINENT: EUROPE'S TWENTIETH CENTURY (1999); MARK LILLA, RECKLESS MIND: INTELLECTUALS IN POLITICS (2001).

126. *See* JEAN-FRANCOIS REVEL, L'OBSESSION ANTI-AMERICAINE: SON FONCTIONNEMENT, SES CAUSES, DES CONSEQUENCES [ANTI-AMERICAN OBSESSION: ITS OPERATION, ITS CAUSES, ITS CONSEQUENCES] (2002); PHILIPPE ROGER, L'ENNEMI AMERICAINE: GENEAOLOGIE DE L'ANTIAMERICANISM FRANCAISE [THE AMERICAN ENEMY: GENEAOLOGY OF FRENCH ANTI-AMERICANISM] (2002).

127. Though it should go without saying, Americans are not the only people ignorant of other people's cultures and histories. To those in other countries, America's culture is, naturally, foreign.

128. *See* LUSTIG, *supra* note 27, at 25. *See also id.* ch. 7.

129. *See* FEELEY & RUBIN, *supra* note 27, at 1–25, 348–49 (explaining that the modern administrative state requires an active, policy-making judiciary).

transnationalism is best accomplished through increased judicial consultation and borrowing in constitutional cases, is fundamentally *an administrative vision*. Its naked focus is on judges as policymakers, searching the globe for expert advice and experience on the best means of solving public policy problems, and the fact that it is being undertaken by judges rather than bureaucratic officials should not deceive us in this regard. It is decidedly a post-legal vision.[130]

In his classic book, *The End of Liberalism*, Lowi warned of the emergence in the late nineteenth and early twentieth centuries of a new governing order with a public philosophy committed to the practice of administration without law. In this philosophy, "interest group liberalism," centered around the new, relatively autonomous administrative agencies governed beyond the oversight of the people's democratically elected representatives, even if, strictly speaking, Congress always had the ultimate authority to rein them in. Scholars looking for evidence that the New Deal shattered the practice of constitutional government in the United States need only look at much of the new work on the perceived imperative of a "globalized judiciary" to see these Progressive and New Deal dynamics traced out to global level. This work also had the added twist that it simply assumed that *judges*, and not just bureaucratic officials working within administrative agencies, should be relatively autonomous policymakers.[131] The literature on constitutional borrowing studies their ever-tightening relationship with other members of their professional class involved in a common administrative project—judges in other countries.

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130. *See* Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934) (arguing that U.S. courts have shaped the Constitution to meet current policy goals as they have seen fit). In this regard, it is no accident that the Court's most sophisticated proponent of the new transnationalism and a globalized judiciary is Justice Breyer, a professor of administrative law and admirer of the French Conseil d'Etat. Justice Breyer's chief interest has long been in designing efficient and effective regulatory regimes. *See* Kersch, *supra* note 28. Breyer's framing of the transnational imperative, like that of the chief academic proponent of a "globalized judiciary" and "a global community of courts," Anne-Marie Slaughter, is plainly rooted in a classically progressive ideological vision that will at once be apparent to anyone who has studied the Progressive Movement and the late nineteenth and early twentieth century rise of the modern American administrative state. This framing evinces a strong faith in the judgment of elite expert administrators, whom it aspires to construct as a quasi-autonomous problem-solving class. In this project, the transnational imperative is frankly cosmopolitan, anti-formalist, and, in the final analysis, anti-legal. At the same time, like earlier Progressives, particularly those most inclined toward scientific government by experts, it is possessed both of a healthy distrust of democracy, and by marked public policy commitments on substantive issues. *See* ELDON J. EISENACH, THE LOST PROMISE OF PROGRESSIVISM (1994).

131. It is telling that, in her new book, Anne-Marie Slaughter treats judges as indistinguishable from the other government officials who, through their transnational "networks" and their participation in the process of "global governance," are building the "new world order." *See* SLAUGHTER, *supra* note 31.

The literature on "transnational civil society" also studies their ever-tightening relationship with transnational advocacy groups, who increasingly file policy briefs before them in an effort to influence their decisions.

Lowi's attack on the flight from self-government under the rule of law at the time of the New Deal was domestic in focus. That the same dynamics are now taking place at the global level and, in key policy areas, through the rulings of federal judges who are even less accountable than administrators, is a truly worrisome development. It is not too much to say that, although it is in its early stages, the very future of self-government under the rule of law within the United States is now at stake in these initiatives and debates.[132]

Longstanding, stable and successful democratic constitutions, like that of the United States, are defined by their relatively clear and transparent lines of responsibility and authority. The deliberate blurring of offices and authorities championed by proponents of judicial globalization are, as such, moves in an anti-legal and anti-constitutional direction.[133] Constitutions create a government; they do not launch quasi-autonomous "networks" of "governance." Rule by networks of governance that have succeeded in cultivating a quasi-autonomy through a constructed legitimacy is not constitutional government as Americans have traditionally understood it.

The academics and judges who expect to rule in the age of "global governance" will not likely raise strenuous objections to these trends. In the 1940s, the visionary hopes of the predecessor world government and

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132. When viewed in the long term, it does not appear this view is overstated. Those who are not careful students of the politics of judging often do not appreciate the ways in which judges affect major change by often imperceptible degrees. *See* Martin M. Shapiro, *The European Court of Justice*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 277–78 (David M. O'Brien & Peter H. Russell eds., 2001).

> [J]udicial decision or policy or lawmaking will be incremental, for incrementalism is the best method of making new policy while maintaining stability and predictability. Moreover, incrementalism is the best solution to the principal institutional problem in courts: that they must make law but must appear not to be doing so . . . Judges become expert at manipulating [the] general-particular dynamic [inherent in a case] so as initially to embed policy changes of great long-term significance in what appear to be minor, insignificant decision-making occasions. The new law is established in a series of minor, esoteric, technical cases. By the time its full policy impact is perceived by other, the new doctrine is well established and the judges and their supporters are asking why others are complaining now about a long-established, long-accepted law.

Id. (citations omitted). *See also Essays of "Brutus" to the Citizens of the State of New York*, *in* ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 301–60 (Michael Kannen ed., 1986) (warning that the U.S. Constitution gives the judiciary virtually unchecked power).

133. *See* RABKIN, LAW WITHOUT NATIONS?, *supra* note 4.

global governance movement were dashed both by world events that belied their ideological understandings (such as the eruption of the Cold War) and, as the movement began to attract public attention, by popular political and constitutional resistance in the name of law, democracy, and self-governance.[134] As it grows in strength, this seemingly inevitable turn toward transnationalism and an increasingly globalized judiciary, at least in a vibrant and grounded democracy like the United States, will remain vulnerable to such events.

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134. *See* KERSCH, *supra* note 2, at 103–11 (describing the willingness to draw on international treaties in the wake of World War II); DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988) (describing the political battle between President Eisenhower and the anti-internationalist movement that provided the Bricker Amendment controversy). A rejoinder to allusions to the Bricker Amendment controversy that opponents of the transnational turn can expect is that, of course, there was popular resistance to an earlier transnational turn on the Court, but that it was motivated by racism. It is a familiar move among contemporary constitutional scholars who understand themselves as "progressives" to link constitutional provisions and decisions they do not like with racism, the ultimate trump card in contemporary progressive politics. Recent discussions of the electoral college and *Bush v. Gore*, and, for that matter (and bizarrely), the Clinton impeachment, have moved predictably along these lines. There is no doubt that white Southern concerns about racial issues were an important component of the Bricker Amendment controversy. But it is usually forgotten that two other worries concerning importations from abroad were also important: the issue of socialized medicine (Truman had proposed a national health care scheme) and the augmentation of labor union power in the wake of a series of paralyzing post-War strikes. While I certainly have no brief for racism, I believe the constitutional resistance provided by the Bricker-ites regarding the last two issues was both helpful and fortunate. Regardless, the key point is that this resistance to the aggressive judicial importation of foreign public policy standards, as a matter of historical fact, occurred, and, if the Court gets too aggressive in this regard, could very well occur again.