# Judicial Globalization in the Service of Self-Government

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or at least the past several decades, judges around the world have been looking beyond their own states' jurisprudence to international law and the decisions of foreign courts in order to apply domestic law. This widespread practice is part of a phenomenon that Anne-Marie Slaughter calls "judicial globalization." The American judiciary, however, has exhibited a distinct diffidence toward the use of comparative and international law to decide domestic cases, a diffidence that extends to many elected officials as well.

To a non-American audience, opposition to judicial borrowing of international and comparative legal materials might appear mystifying. Outside the United States, judicial globalization of this sort is all but taken for granted. Leading national courts in this regard cut across all imaginable lines: India, Canada, Zimbabwe, Hong Kong, South Korea, and Botswana all borrow from legal sources outside their borders. Some states, most notably South Africa, constitutionally require reference to international and comparative law for domestic interpretation. Last and here not least, other states frequently cite the case law of the U.S. Supreme Court, including, among others, the Irish Supreme Court and the U.K. House of Lords.<sup>2</sup>

The U.S. Supreme Court has not returned the favor until very recently—at least from a short-term perspective. In the longer view, the justices for over a century relied on international and foreign sources (at least for common law, in the latter case) extensively before entering an isolationist phase which it only

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<sup>&</sup>lt;sup>1</sup> Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), p. 66. Other aspects of judicial globalization include: judges meeting with their foreign counterparts, or taking advantage of international sojourns, and courts of different national jurisdictions coordinating with one another in complex international litigation (Ibid., pp. 65–103).

<sup>&</sup>lt;sup>2</sup> See Martin S. Flaherty, "Aim Globally," *Constitutional Commentary* 17 (2000), p. 285. See also "Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms," Bangalore, India, reproduced as an appendix to Michael Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms," *Australian Law Journal* 514, no. 62 (1988), pp. 531–32 (reproducing the "Bangalore Principles," which commend the "growing tendency for national courts to have regard to" international norms in cases where "domestic law—whether constitutional, statute or common law—is uncertain or incomplete").

lately appears to be leaving.<sup>3</sup> Despite this history, the Court's recent embrace of non-U.S. materials remains tentative and contested. Widely observed have been recent allusions to outside sources in important decisions on privacy,<sup>4</sup> affirmative action,<sup>5</sup> and the death penalty.<sup>6</sup>

Wide, too, has been the opposition. As noted above, some objections have come from within the judiciary itself. Other objections have come from more expected quarters, such as the academy, the executive, and the legislature—in the last case, even to the point of a congressional bill to prohibit judicial reliance on foreign law. There are various rationales behind this opposition, ranging from the ease with which unfamiliar sources can be manipulated to the concern that looking abroad may diminish certain fundamental rights at home. But by far the greatest source of hostility flows from a potent mix of American exceptionalism and democratic theory. The Constitution of the United States, and the laws made pursuant thereto, derive their force from the positive consent of the American people. Interpreting U.S. law with reference to international and comparative standards empowers an unelected judiciary to privilege the views of outsiders at the expense of the American people, and so is inconsistent with our fundamental conceptions of self-government. At no time does this inconsistency become more insufferable than when unelected judges apply a Constitution ordained by We the People of the United States to invalidate laws enacted by our elected representatives based upon legal materials in whole or in part foreign to American democracy. Put in European terms, the practice suffers from a near total "democratic deficit."<sup>7</sup>

Various defenses of the Supreme Court's reliance on international and comparative sources have been made, not least by some of the Supreme Court justices themselves.<sup>8</sup> None of the defenses, however, have met the democratic

<sup>&</sup>lt;sup>3</sup> See Sarah H. Cleveland, "Our International Constitution," Yale Journal of International Law 31, no. 1 (2005).

<sup>&</sup>lt;sup>4</sup> Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>&</sup>lt;sup>5</sup> Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (opinion of Ginsburg, J., concurring).

<sup>&</sup>lt;sup>6</sup> Roper v. Simmons, 543 U.S. 551 (2005); and Atkins v. Virginia, 536 U.S. 304, 316–17, no. 21 (2002).

<sup>&</sup>lt;sup>7</sup> See Andrew Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union," *Journal of Common Market Studies* 40 (2002), p. 603.

<sup>&</sup>lt;sup>8</sup> Justices Scalia and Breyer debated the practice at American University, "A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication"; available at www.wcl.american.edu/secle/founders/2005/050113.cfm. Justice Ginsburg has also weighed in, stating: "In the area of human rights, experience in one nation or region may inspire or inform other nations or regions. . . . In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups" (Ruth Bader Ginsburg, "Affirmative Action as an International Human Rights Dialogue," *Brookings Review* 18, no. 1 [2000]).

objections head-on. Instead, justifications have mainly defended the general utility of referencing additional sources rather than the specific legitimacy of referencing sources from outside the U.S. legal system. The defenses to date fall short for at least two sets of reasons. They fail to grapple with legitimate concerns about the practice. In consequence, they offer no reasons for those opposed to this practice to reconsider their resistance.

Yet, despite the failings of the defenses, there are perhaps a surprising number of democratically based justifications for judicial borrowing. One, which may be called the "global mirror" justification, holds that where a true global consensus exists in the form of customary international law or *jus cogens*, international and comparative legal materials presumptively reflect commitments that are held domestically as well as internationally, especially with regard to a discrete set of fundamental rights. Another, which may be termed the "judicial foreign affairs authority" justification, argues that courts are institutionally superior to the executive or legislative branches in determining the existence and weight of international and comparative law determinations.<sup>10</sup>

This essay will develop two other defenses that are potentially more powerful still: a "forward-looking" defense with roots in international relations and therefore of general applicability, and a "backward-looking" one that sounds in U.S. history with unique force, in American constitutional doctrine in particular. Looking forward, judicial globalization becomes not just permissible but imperative once the hoary doctrine of separation of powers is itself considered in a global context. Global separation of powers theory views globalization as enhancing the powers of the executive in any particular country. It follows that any form of globalization that works to enhance the authority of a corresponding judiciary (or legislature) works to maintain and restore the goal of balance among the principal branches of government that is a central feature of separation of powers doctrine.

Looking to the past, a more distinctively American defense of judicial borrowing potentially comes from originalism, an approach to constitutional interpretation usually co-opted by supporters of American exceptionalism.

<sup>&</sup>lt;sup>9</sup> See Eric A. Posner and Cass R. Sunstein, "The Law of Other States," Chicago Public Law and Legal Theory Working Paper No. 119 (2006); available at www.law.uchicago.edu/academics/publiclaw/119.pdf.

<sup>&</sup>lt;sup>10</sup> Preliminary efforts to develop other democratic justifications—as well as these at greater length—are available in Martin S. Flaherty, "Judicial Globalization in the Service of Self-Government" (Princeton Law and Public Affairs Paper No. 04-017, 2004, unpublished); available at ssrn.com/abstract=600677.

As is often the case, historical sources present a picture that is more complex and counterintuitive than these originalists themselves assume. In this instance, there is ample evidence to suggest that the Founding generation, especially its Federalist leadership, held the law of nations in sufficient regard as to create a presumption that the Constitution should be interpreted consistent with international law where possible. This has in fact been settled doctrine almost since the Founding with regard to statutes under the "Charming Betsy" canon.

Democratic justifications also suggest new angles on more conventional defenses. In particular, grappling with historical considerations calls into question the principal nondemocratic objection to judicial globalization, which is that international and comparative legal materials are susceptible to manipulation, self-serving citation, and cherry-picking generally. The widespread misuse of historical materials, among other interdisciplinary sources, at a minimum shifts the burden onto opponents to demonstrate why nondomestic sources are any more manipulable than the conventional run of legal materials.

## JUDICIAL GLOBALIZATION VERSUS DEMOCRATIC SELF-GOVERNMENT

The Current Contest over Judicial Globalization in the United States

The United States Supreme Court has cited "foreign law" with gusto since the early days of the republic. For present purposes, "foreign" means international law, whether treaties or customs, as well as comparative sources, such as the jurisprudence of other national courts, common-law jurisdictions especially. Often the Court's invocation of foreign law has been tightly cabined, as in cases that turned on "the law of nations," or demanded the application of other nations' jurisprudence on conflict of laws grounds. Yet, to a surprising degree, the federal courts also relied on foreign law when applying purely domestic standards. What all this meant, to what extent it has continued, and its relevance to current practices are questions to which scholars are only now turning. <sup>11</sup>

Nonetheless, for the past several generations the conventional wisdom has been that the Supreme Court has been parochial, or at least a net exporter of legal ideas rather than an importer—that is, until recently. <sup>12</sup> In the past several years, U.S. justices and judges have begun to "borrow" foreign law in a series of

<sup>11</sup> See Cleveland, "Our International Constitution," n. 4.

<sup>12</sup> See Flaherty, "Aim Globally," n. 3.

high-profile cases that have required interpretation of the Constitution on many of the most controversial issues of the day. Not surprisingly, the combination of what appears to be a new practice with the adjudication of hot-button controversies has drawn strident opposition.

Among the most telling early examples occurred when Justice Stevens made the barest reference to global practice (or nonpractice) in *Atkins v. Virginia*, where he observed: "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." That passing comment drew the extended wrath of Chief Justice Rehnquist and Justice Scalia, jurists who acknowledged reference to evolving domestic traditions, however grudgingly. Justice Scalia in particular put his contempt on full display: "But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called 'world community.' . . . Irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."

The type of judicial globalization that Justice Scalia attacked has continued to infiltrate the United States nonetheless. To great fanfare the Court, or at least individual justices, has cited international and comparative law sources in a number of recent and high-profile cases. In *Lawrence v. Texas*, the Court relied in part on European Court of Human Rights jurisprudence when declaring unconstitutional a state law criminalizing sodomy. For Justice Ginsburg, international human rights treaties mattered in deciding to uphold law school affirmative action programs. As noted, the Court, however fleetingly, referred to comparative law in voiding the death penalty for the mentally challenged. Though less noted, Justice Breyer looked to European Union practice in seeking, unsuccessfully, to justify federal "commandeering" of local officials.

<sup>13</sup> Atkins, 536 U.S. at 304 (2002).

<sup>&</sup>lt;sup>14</sup> Ibid., at 337, 347–48 (Scalia, J., dissenting). In less flamboyant fashion, the chief justice agreed, stating: "For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries are simply not relevant" (Ibid., at 312, 325 [Rehnquist, C. J., dissenting]).

<sup>&</sup>lt;sup>15</sup> See Anne-Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40 (2000), p. 1103; and Harold Hongiu Koh, "Bringing International Law Home," *Houston Law Review* 35 (1998), p. 623 (noting and advocating the phenomenon).

<sup>&</sup>lt;sup>16</sup> Lawrence, 539 U.S. at 576-77 (2002).

<sup>&</sup>lt;sup>17</sup> Grutter, 539 U.S. at 342 (Ginsburg, J., concurring).

<sup>18</sup> Atkins, 536 U.S. at 304.

<sup>&</sup>lt;sup>19</sup> Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting).

As with globalization in general, the phenomenon—and the reactions to it promise only to continue. In last year's Roper v. Simmons, the Court not only declared that the execution of prisoners convicted of capital crimes committed as minors violated the Eighth Amendment's prohibition on "cruel and unusual punishment,"20 but Justice Kennedy's majority opinion also did so with a discrete section devoted to both international human rights instruments and comparative practice, including discussion of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, as well as a global survey of state practice.<sup>21</sup> On cue, sharp disagreement and defense followed both within and outside the Court. Justice Scalia's dissent reserved special disdain for the majority's reliance on international and comparative materials, declaring: "though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage,"22 and continuing: "that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."23 While this past term did not produce any fresh examples of judicial borrowing on this scale, it did show the Court engaged in exceptionally careful interpretation of rights protections in treaties that the United States has ratified. The most noted example is Hamdan v. Rumsfeld, in which, among other things, the Court held that Common Article 3 of the Geneva Conventions, at the very least incorporated into domestic law by Congress in the Uniform Code of Military Justice, affords protections to alleged members of al-Qaeda.<sup>24</sup>

Outside the Court, the debate continued as Justices Scalia and Breyer famously joined issue in a debate at the U.S. Association of Constitutional Law.<sup>25</sup> So too, as will be discussed, have American scholars. And so too, not for the first time, did the Congress, which more than once ominously considered a

<sup>20</sup> Roper, slip op. at 6.

<sup>21</sup> Ibid., at 21-23.

<sup>22</sup> Roper, slip op. at 16.

<sup>&</sup>lt;sup>23</sup> Ibid., at 18.

<sup>&</sup>lt;sup>24</sup> 548 U.S. \_\_ (2006), slip op. at 49–72. For an approving commentary, see Martin S. Flaherty, "More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive 'Creativity' in *Hamdan v. Rumsfeld*," *Cato Supreme Court Review 2005–2006* (Cato Institute, forthcoming 2006). Conversely, the Court rejected claims that the Vienna Convention on Consular Relations mandated either the exclusionary rule for a state party's failure to advise a foreigner placed under arrest of the right to see a consular official of his or her own country or that the treaty precluded a state's reliance on procedural default rules to preclude assertion of such a claim (*Sanchez-Llamas v. Oregon*, 548 U.S. \_\_\_ [2006]).

<sup>&</sup>lt;sup>25</sup> Justices Scalia and Breyer, "A Conversation on the Relevance of Foreign Law."

bill that would have prohibited the federal judiciary from committing similar sins in future.<sup>26</sup>

Perhaps most important of all, the question of the legitimacy of judicial globalization arose during the hearings for the two most recent justices. Chief Justice Roberts appeared to betray a degree of Scalia-like skepticism without committing himself. To take the most suggestive example, he firmly rejected the possibility of relying on a hypothetical interpretation of the U.S. Constitution by a German judge. Roberts mentioned two concerns with regard to reliance on foreign precedents to interpret the U.S. Constitution: first, "democratic theory," suggesting that only the views of those who participate in American democratic processes should count; second, the concern that "relying on foreign precedent doesn't confine judges" to the extent that domestic precedent does.<sup>27</sup> Of course even the most wild-eyed internationalist has yet to make an argument that goes that far, almost certainly one reason the nominee felt he could oppose it without causing anyone offense. The signal was nonetheless clear enough. Justice Alito left less to the imagination. He summed up his views on constitutional interpretation by stating simply, "We have our own law. We have our own traditions. We have our own precedents. And we should look to that in interpreting our Constitution."28

### Democratic Objections

By far the more strident opposition to judicial borrowing stems from the idea of democratic self-government. This objection in some fashion argues that the people of a state make their own laws, that courts should rely only on domestic sources to be faithful to the will of the people, and that national court invalidation of homegrown laws ostensibly on the basis of the domestic constitution—but in reality on the grounds of foreign materials—represents the worst kind of judicial usurpation of power, especially where judges are not elected. Justice Scalia notably made the stakes clear in his *Atkins* dissent, quoting himself in an

<sup>&</sup>lt;sup>26</sup> In response to *Roper*, resolutions were introduced in the House and Senate indicating that U.S. judges should not rely on foreign legal materials in interpreting the U.S. Constitution, unless these reflect the Constitution's "original understanding." H. Res. 97, 109th Cong., 1st sess. (February 15, 2005); and S. Res. 92, 109th Cong., 1st Sess. (March 20, 2005). A year before a similar resolution had been introduced in the House, H. Res. 568, 108th Cong., 2nd Sess. (March 17, 2004). None of these resolutions passed, however.

<sup>&</sup>lt;sup>27</sup> Testimony of John Roberts before the Senate Judiciary Committee, September 13, 2005 (responding to a question from Senator Jon Kyl).

<sup>&</sup>lt;sup>28</sup> "Alito Responds to Senator Kyl on the Use of Foreign Law: Siding with the Anti-Internationalists?" Opinio Juris (January 10, 2006); available at lawofnations.blogspot.com/2006/01/alito-responds-to-senator-kyl-on-use.html.

even earlier foreign law skirmish: "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."

Such critics assert related deficiencies. Not only do comparative and international legal materials lack a democratic approval by U.S. institutions—absent ratification in the case of treaties—these materials often lack a democratic pedigree on their own terms: comparative materials to the extent they are opinions by unelected judges; customary international law norms because they lack a specific, deliberative vote up or down; multilateral treaties because they seem to be distant "top-down" instruments, even when ratified.<sup>30</sup> Judicial globalization, moreover, has the effect of undermining democratic processes, not to mention national pride, both in the United States and abroad by diminishing the power of elected institutions.<sup>31</sup> As if this were not enough, foreign legal materials are undemocratic because they are simply too alien from American values, even those from Western Europe.<sup>32</sup>

Framing the practice in terms of self-government raises the stakes in terms of reward and challenge for all who take part on either side of the debate. Greater reward, at least as a practical matter, comes from the apparently greater commitment American legal culture has to self-government theories than to their rivals.<sup>33</sup> At least in constitutional theory, theories premised on self-government attract a more widespread following than their competitors.<sup>34</sup> Democratic, or

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<sup>&</sup>lt;sup>29</sup> Atkins, 536 U.S. at 347–48 (Scalia, J., dissenting) quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 (1988) (Scalia, J., dissenting).

<sup>&</sup>lt;sup>30</sup> See John O. McGinnis, "Foreign to Our Constitution," *Northwestern University Law Review* 100 (2005), p. 303.

<sup>&</sup>lt;sup>31</sup> Ken I. Kersch, "The New Legal Transnationalism, Globalized Judiciary, and the Rule of Law," *Washington University Global Studies Law Review* 4, no. 2 (2005), n. 31; and McGinnis, "Foreign to Our Constitution," n. 32.

<sup>&</sup>lt;sup>32</sup> See Steven G. Calabresi and Stephanie Dotson Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision," n. 2; Ernest A. Young, "Foreign Law and the Denominator Problem," *Harvard Law Review* 119 (2005), pp. 148, 165; and Jed Rubenfeld, "Unilateralism and Constitutionalism," *New York University Law Review* 79 (2004), pp. 1971, 1999.

<sup>&</sup>lt;sup>33</sup> This is not to say, as Jed Rubenfeld argues, that U.S. legal culture is distinctively democratic compared to other systems, such as those that comprise the European Union. Jed Rubenfeld, "The Two World Orders," Wilson Quarterly 27, no. 4 (2003), pp. 22–36. For analyses that are more rigorous, see Anne-Marie Slaughter, "Leading Through Law," Wilson Quarterly 27, no. 4 (2003), pp. 37–44; and Moravcsik, "In Defence of the 'Democratic Deficit,'" n. 10.

<sup>&</sup>lt;sup>34</sup> This is frankly an impressionistic statement based upon years of surveying the literature on constitutional interpretation as well as participating in related conferences. See also Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45 (1999), pp. 611, 613.

self-government, theories currently appear to resonate more deeply as well. Carry the day on these grounds, in other words, and in current American legal culture one has gone a long way toward carrying the day in general. Conversely, the greater reward comes with greater difficulty. Even formal, transparent, and democratically approved international law norms, such as treaties, appear remote from popular processes when compared with most types of domestic lawmaking. Precisely for this reason, the term "democratic deficit" dogs international lawmaking more tellingly than any other current criticism.<sup>35</sup>

The challenge therefore becomes meeting the democratic objection head-on. The balance of this essay will suggest ways to do exactly this.

#### LOOKING FORWARD: GLOBAL SEPARATION OF POWERS

Perhaps the most promising democratic justification for judicial reliance on foreign sources of law arises from considering separation of powers in a global context—or "global separation of powers" for short. The premise is straightforward. It assumes, first, that globalization generally has resulted in a net gain in power not for judiciaries but for the "political" branches—and above all for executives-within domestic legal systems. In other words, the growth of globalized transnational government networks has yielded an imbalance among the three (to four) major branches of government in separation of powers terms. Such an imbalance threatens democracy insofar as most modern forms of democratic government entail separation of powers in some significant measure. Such an imbalance also threatens fundamental rights insofar as separation of powers doctrine serves as a brake on abuse of government power. Even international human rights law, which is generally agnostic about the structure of domestic legal orders, prescribes aspects of separation of powers. Article 14 of the International Covenant on Civil and Political Rights requires that criminal adjudication be insulated from executive or legislative control in providing that, "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."36

<sup>35</sup> Compare Moravcsik, "In Defence of the 'Democratic Deficit."

<sup>&</sup>lt;sup>36</sup> International Covenant on Civil and Political Rights, art. 14(1), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976.

And just as separation of powers analysis helps identify the problem, it also suggests the solution. If globalization has comparatively empowered executives, it follows that fostering—rather than prohibiting—judicial globalization provides a parallel approach to help restore the balance. In this way, judicial separation of powers justifies judicial borrowing on both democratic and nondemocratic grounds. From a nondemocratic perspective, transnational judicial dialogue with reference to international law and parallel comparative questions gives national judiciaries a unique expertise on one aspect of foreign affairs, and so undermines the usual presumption that the judiciary is the least qualified branch of government for the purposes of foreign affairs. More important, from a democratic point of view, restoring the balance that separation of powers seeks promotes self-government to the extent that separation of powers is itself seen as a predicate for any well-ordered form of democratic self-government.

#### Globalization and Imbalance

As any human rights lawyer would be quick to point out, the post-World War II emergence of international human rights law represents one of the most profound assaults on the notion that state sovereigns are the irreducible, impermeable building blocks of foreign affairs.<sup>37</sup> But the nation-state model has been eroding no less profoundly in more informal ways, as well. Governments today no longer simply interact state to state, through heads of state, foreign ministers, ambassadors and consuls. Increasing, if not already dominant, is interaction through global networks in which subunits of governments directly deal with one another. In separation of powers terms, executive branches at all levels interact less as the representative of the nation than as a partner of the counterpart education ministry, intelligence agency, or health and education initiatives. Likewise, though lagging, legislators and committees from different jurisdictions meet to share approaches and discuss common ways forward. Last, and least powerful if not dangerous, judges from different nations share approaches in conferences, teaching-abroad programs, and by formally citing one another in their opinions. Only recently has work by Slaughter, among others, given a comprehensive picture of this facet of globalization.<sup>38</sup> That work in turn suggests that among the results of this process have been a net shift of domestic power in any given state

<sup>&</sup>lt;sup>37</sup> Harold Hongju Koh, "Complementarity Between International Organisations on Human Rights/The Rise of Transnational Networks as the 'Third Globalization,'" *Human Rights Law Journal* 21 (2000), p. 307.

 $<sup>^{38}</sup>$  Slaughter has developed her previous writings on the subject in A New World Order.

toward the executive and away from the judiciary and the protection of fundamental rights.

Where international human rights lawyers seek directly to pierce the veil of state sovereignty, international relations experts have chronicled the no less significant desegregation of state sovereignty through the emergence of subgovernmental networks. Nowhere has this process been more greatly marked than with regard to the interaction of various levels of regulators within the executive branches—in parliamentary systems, the governments—of individual nations. Starting with pioneering work by Robert Keohane and Joseph Nye, current scholarship offers a multifaceted picture of what may be termed "executive globalization." <sup>39</sup>

Slaughter, somewhat consciously overstating, terms government regulators who associate with their counterparts abroad "the new diplomats." This characterization immediately raises the question of who they are and in what contexts they operate. Perhaps ironically, desegregation begins at the top, as presidents, prime ministers, and heads of state gather in settings such as the G-8 not only as the representatives of their states but as chief executives with common problems, which may include dealing with other branches of their respective governments. Moving down the ladder come an array of different specialists who meet across borders with one another both formally and informally: central bankers, finance ministers, environmental regulators, health officials, government educators, prosecutors, and today—perhaps most significantly—military, security, and intelligence officials. The frameworks in which these horizontal groups associate are various. One type of setting might be transnational organizations under the aegis of the UN, the EU, NATO, or the WTO. Another arrangement can be networks that meet within the framework of executive agreements, such as the Transatlantic Economic Partnership of 1998. Others meet outside governmental frameworks, at least to begin with, with examples ranging from the Basel Committee to the Financial Crime Enforcement Network. 40

As important as is executive officials crossing borders is what they actually do. The activities that make up "executive transgovernmentalism" may be sliced in various ways. One breakdown divides the phenomenon into: information networks, harmonization networks, and enforcement networks. An obvious yet vital

<sup>&</sup>lt;sup>39</sup> See Robert O. Keohane and Joseph Nye, Jr., "Transgovernmental Relations and International Organizations," World Politics 27 (1974), pp. 39–62.

<sup>40</sup> Slaughter, A New World Order, pp. 36-64.

activity, many government regulatory networks interact simply to exchange relevant information and expertise. Such exchanges include simple brainstorming on common problems, sharing information on identified challenges, banding together to collect new information, and reviewing how one another's agencies perform. Harmonization networks, which usually arise in settings such as the EU or NAFTA, entail relevant administrators working together to fulfill the mandate of common regulations pursuant to the relevant international instrument. <sup>42</sup>

For present purposes, however, enforcement networks most greatly implicate separation of powers concerns precisely because they generally involve police and security agencies sharing intelligence in specific cases, and more generally in capacity building and training. As one example, Northern Ireland's former and highly controversial police force, the Royal Ulster Constabulary (RUC), maintained "numerous links with other police services, particularly with those in Britain, but also with North American agencies and others elsewhere in the world . . . [including] the Federal Bureau of Investigation." Likewise, the Independent Police Commission charged with reforming the RUC recommended further international contact, in part because "the globalisation of crime requires police services around the world to collaborate with each other more effectively and also because the exchange of best practice ideas between police services will help the effectiveness of domestic policing."

It is exactly at this point, moreover, that September 11–era concerns render this aspect of executive globalization ever more salient, and often more ominous. Consider the shadowy practice of "extraordinary renditions"—that is, the security forces of one country capturing a person and sending him or her to another, where rough interrogation practices are likely to take place—all this outside the usual mechanisms of extradition. <sup>45</sup> To this extent, transnational executive cooperation moves from simply consolidating expertise to actual

<sup>&</sup>lt;sup>41</sup> See Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Frameworks and the Future of International Law," *Virginia Journal of Transnational Law* 43 (2002), pp. 1–26.

<sup>&</sup>lt;sup>42</sup> See Sydney A. Shapiro, "International Trade Agreements, Regulatory Protection, and Public Accountability," *Administrative Law Review* 54, no. 1 (2002), p. 435.

<sup>&</sup>lt;sup>43</sup> The Independent Commission for Policing in Northern Ireland, *A New Beginning: Policing in Northern Ireland* (September 1999), p. 101; available at www.pixunlimited.co.uk/pdf/news/Northern\_Ireland/fullreport.pdf. <sup>44</sup> Ibid.

<sup>&</sup>lt;sup>45</sup> For a discussion of the practice with regard to international human rights law, see Association of the Bar of the City of New York and Center for Human Rights and Global Justice, NYU School of Law, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'" *Record of the Association of the Bar of the City of New York* 60 (2005), p. 13.

expansion of at least de facto executive jurisdiction in the most direct and concrete fashion possible.

All this, in turn, suggests a profound shift in power to the executives in any given state. At least in the United States, the conventional wisdom holds that the executive branch has grown in power relative to Congress or the courts, not even counting the rise of administrative and regulatory agencies—all this in purely domestic terms. Add the specter of enlarged executives worldwide enhancing one another's power through information and enforcement networks in particular, and the conclusion becomes presumptive. Add further the cooperation of executives in light of September 11 and the pro-executive implications of government globalization become more troubling still.

This pro-executive conclusion becomes even harder to resist given the slowness with which national legislators have been interacting with their counterparts. Several factors account for the slower pace of legislative globalization. Membership in a legislature almost by definition entails not just representation but representation usually keyed to subnational units, such as provinces, states, or districts. The turnover among legislators typically outpaces executive officials and, for that matter, judges. In further contrast to legislators, regulators need to be specialists, and specialization facilitates cross-border interaction, if only because it is easier to identify counterparts and focus on common problems.<sup>47</sup>

Transnational legislative networks exist nonetheless, and are growing. To take one example, national legislators have begun to work with one another in the context of such international organizations as NATO, the Organization for Security and Co-operation in Europe, and the Association of Southeast Asian Nations. To take another example, independent legislative networks have begun to emerge, such as the Inter-Parliamentary Union and Parliamentarians for Global Action. 48

Yet even were national legislators to "catch up" to their executive counterparts in any meaningful way, the result would not necessarily be more robust or adequate protection of fundamental rights in times of perceived danger or the protection of minority rights at any time. Human rights organizations around the world are all too familiar with the democratic pathology of draconian statutes hastily enacted in response to actual attacks or perceived threats, including the Prevention of Terrorism Act in the U.K., the USA PATRIOT Act in the United

<sup>&</sup>lt;sup>46</sup> See Martin S. Flaherty, "The Most Dangerous Branch," Yale Law Journal 105 (1996), p. 1725.

<sup>&</sup>lt;sup>47</sup> Slaughter, A New World Order, pp. 104–106.

<sup>&</sup>lt;sup>48</sup> Ibid., pp. 104-30.

States, and the Internal Security Act in Malaysia.<sup>49</sup> It is for this reason that the essential player in the matter of rights protection must remain the courts.

Finally, there is what Slaughter terms the "construction of a global legal system" through both formal and informal transnational judicial networks.<sup>50</sup> Such judicial globalization, broadly conceived, occurs in several ways. The most mundane yet potentially transformative are the increasing number of face-to-face meetings through teaching, conferences, and more formal exchanges. Next, and directly tied to classic economic globalization, courts of different nations have transformed the idea of simple comity to coordination in tackling complex multinational commercial litigation. Of immense regional importance, the dialogue between the European Court of Justice and national courts constitutes a more formal, horizontal aspect of direct interaction among judiciaries.<sup>51</sup>

For the purposes of present analysis, however, by far the most important aspects of judicial globalization involve national courts' use of comparative materials and international law—above all international human rights law. Ostensibly new and controversial in the United States, these aspects of globalization are familiar in most other jurisdictions. As noted, national, supreme, and appellate courts have with apparent frequency cited comparable case law in other jurisdictions as at least persuasive authority to resolve domestic constitutional issues. Likewise, such courts also cite with increasing frequency the human rights jurisprudence of such transnational tribunals as the European Court of Human Rights and its Inter-American counterpart. In striking fashion, the U.K. House of Lords has recently been doing both. Likewise, the still-recent South African Constitution expressly requires judges interpreting its Bill of Rights to consult international law, while expressly allowing them to consult "foreign"—that is, comparative—law. South African Constitution expressly allowing them to consult "foreign"—that is, comparative—law.

<sup>&</sup>lt;sup>49</sup> For critiques, see Lawyers Committee for Human Rights, "Human Rights and Legal Defense in Northern Ireland: The Abuse and Intimidation of Defense Lawyers and the Murder of Patrick Finucane" (1993) (on U.K. legislation); Human Rights First, "A Year of Loss: Reexamining Civil Liberties Since September 11" (2002) (on the USA PATRIOT Act and related measures), available at www.humanrightsfirst.org/us\_law/loss/loss\_main.htm; and Crowley Program in International Human Rights, "Unjust Order: Malaysia's Internal Security Act" (2002), available at papers.ssrn.com/sol3/papers.cfm?abstract\_id=447802.

<sup>&</sup>lt;sup>50</sup> Slaughter, A New World Order, p. 65; see also Slaughter, "Judicial Globalization," p. 16.

<sup>51</sup> Slaughter, A New World Order, pp. 82-99.

<sup>&</sup>lt;sup>52</sup> See "Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Judgment No. S.C. 73/93," Human Rights Law Journal 14 (1993), p. 323 (surveying comparative and international law in interpreting the Zimbabwean Constitution regarding delay in application of the death penalty).

<sup>53</sup> See HKSAR v. Ng Kung Siu (1999) 2 HKC 10 (opinion of the Court of Appeal of Hong Kong).

<sup>&</sup>lt;sup>54</sup> See A (FC) and others (FC) v. Secretary of State for the Home Department (2005) UKHL 71.

 $<sup>^{55}</sup>$  Constitution of the Republic of South Africa, arts. 39(1) b & c (1996).

In all these ways the global interaction of judges works to strengthen their hands within their respective countries. In both theory and in the substance of these interactions, the bolstering of judiciaries generally works toward a greater protection of individual and minority rights. But while leading authorities view judicial globalization as outpacing its legislative counterpart, <sup>56</sup> so too do they describe a world in which executive and regulatory interaction outpaces them all.

To this extent, judicial globalization helps identify a problem yet also suggests a solution. The problem, simply, is that transgovernmental globalization taken as a whole draws power to national executive branches and away from rights-protecting judiciaries. Against this problem, the solution becomes fostering the judicial side of the phenomenon, particularly with regard to the use of comparative and international materials.

#### Restoring the Balance

Given the comparative strengthening of the executive, transgovernmental globalization violates the core tenets of separation of powers doctrine in any given country, including and especially the United States. These tenets have long made separation of powers in some form a predicate for properly functioning democratic self-government. First and foremost, separation of powers theory promises balance among the major branches of government to prevent a tyrannical accretion of power in any one. In the United States, the Founding generation prized this facet of the doctrine above all else. And though they viewed the "most dangerous branch" as the legislature, subsequent history has clearly established the executive as the greatest threat to the type of balance that separation of powers presupposes.<sup>57</sup> Beyond this, the American Founders also believed that separation of powers could facilitate democracy not simply by preserving liberty, but by widely dispersing democratic accountability.<sup>58</sup> For this reason they ensured that all three branches of government had a direct or indirect democratic provenance: the House of Representatives through direct elections; the Senate initially through election by the state legislatures; the president through the electoral

<sup>&</sup>lt;sup>56</sup> See Slaughter, A New World Order, pp. 104–107, 127–30.

<sup>&</sup>lt;sup>57</sup> The Federalist No. 48 (Madison), Clinton Rossiter, ed. (New York: New American Library, 1961), p. 309; and Flaherty, "The Most Dangerous Branch," pp. 1810–39.

<sup>&</sup>lt;sup>58</sup> Flaherty, "The Most Dangerous Branch," pp. 1767–68, 1821–26; and Peter M. Shane, "Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking," *Arkansas Law Review* 48 (1995), pp. 161, 212.

college; and not least, the judiciary through presidential appointment and senatorial approval.<sup>59</sup> Of course not all liberal democracies, especially in the parliamentary mode, follow the U.S. model in these and other specifics. They do, however, share the idea that an independent judiciary, itself at least indirectly accountable, serves as a check on behalf of individual rights against too great concentrations of power in the legislature and executive in the service of energetic government. Not only is this idea commonly evident in democratic constitutions, it is also express in various international human rights instruments.<sup>60</sup>

It is precisely on the grounds of rights and self-government, therefore, that the judicial facet of globalization ought to be encouraged rather than attacked—and not just in the United States. The point applies with particular force to judicial reliance on foreign materials. It is precisely because both critics and defenders see this aspect of judicial globalization as strengthening courts that the phenomenon has generated so much heat. On this point the conventional wisdom so far has it right. To date, the Supreme Court's essays in judicial borrowing have all come in a context in which foreign materials provide a greater degree of rights protection than their domestic counterparts. While counterexamples are possible, especially in the context of free speech, they have yet to appear and do not seem likely to any time soon. Should such a case arise, global separation of powers would offer no support for borrowing in that context precisely because the effect would be to diminish rather than enhance receding judicial power.

In its current incarnation, judicial borrowing bolsters judicial power in several ways. First, it simply affords the additional power associated with the additional information of other courts tackling similar problems. Second, it adds persuasive authority directly, to the extent that rationales that other judges offer may be convincing on their own terms. Third, the practice may be further persuasive insofar as those rationales are widely accepted worldwide, on the theory that such widespread acceptance likely reflects a correct view. Fourth, reliance on foreign materials can strengthen a conclusion in which domestic sources may alone suffice through confirmation. Justice Scalia, for example, surely viewed American sources as sufficient to decide that detainees accused of waging war against the United States cannot be detained without charge absent Congress suspending the obligation of the writ of habeas corpus. <sup>61</sup> Yet so too did Justice Jackson in

<sup>&</sup>lt;sup>59</sup> U.S. Const. art. I, secs. 2 & 3; art. II, secs. 1 & 2.

<sup>60</sup> See Universal Declaration of Human Rights, art. 21.

<sup>&</sup>lt;sup>61</sup> Hamdi v. Rumsfeld 542 U.S. 507 (2004) (Scalia, J., dissenting).

deciding that President Truman could not seize domestic steel mills, a conclusion that did not stop him from broad excursions into comparative law about the dangers of unchecked executive authority. Finally, where domestic doctrine calls for certain materials to have more than persuasive effect, it follows that judicial authority increases not just as a matter of persuasive, but also of formal, authority.

At least in a U.S. setting, this strongest, formal case could arise only in a constitutional setting in which international or comparative materials would serve as a tiebreaker between two competing yet similarly plausible interpretations based upon solely domestic sources. That is, where conventional domestic materials fail to yield a clear answer to a constitutional question, a court should select among rival interpretations the one that best comports with either an applicable international law norm or a prevailing comparative consensus. Of course many devils lurk in the details. Not least among these would be: what counts as a "clear" answer from domestic materials; how much weight the foreign materials should be given; and whether the application of the canon should differ in the constitutional setting. That said, at least preliminary answers to these and other matters in the first instance would come from the Court's existing jurisprudence with regard to statutes. <sup>63</sup> Further answers, ironically, might well come from how the judiciaries of other nations, from the House of Lords to the South African Constitutional Court, grapple with foreign materials in domestic interpretation. For present purposes, what matters is not resolving any of these questions, but establishing the threshold principle.

Whether encouraging judicial borrowing, or the resulting practice itself, will suffice to redress the imbalance may be an open question. But to paraphrase Justice Jackson in *Youngstown*, those concerned with self-government should be the last, not the first, to oppose it.

#### LOOKING BACKWARD: COSMOPOLITAN ORIGINALISM?

Another justification for judicial reliance on foreign materials arises from the possibility that "We the People" who "ordained and established" the Constitution

<sup>&</sup>lt;sup>62</sup> Youngstown Sheet & Tube Co. v. Sawyer, 543 U.S. 579, 650–54 (1952) (Jackson, J., concurring). Indeed, most recent uses of foreign materials purport to "confirm" conclusions already achieved through domestic analysis. See Roper, slip op. at 21 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty").

<sup>&</sup>lt;sup>63</sup> See text below accompanying notes 72 and 73.

expected this practice to take place and approved it. In a word, originalism. On this theory, the Constitution's status as supreme law over mere statutes and treaties derives from approval by the American people that is quantitatively—through supermajority requirements—and qualitatively—through the more searching deliberation that results—superior to ordinary law. Were the appropriateness of resort to foreign legal materials to have been approved by the Founding generation, then this practice would be as democratic as the Constitution itself.

The Supreme Court itself has never weighed in on the matter from an originalist perspective or otherwise. An early case, emanating from a jurist who was present at the creation, is nonetheless tantalizing. In Murray v. The Schooner Charming Betsy, Chief Justice John Marshall made the broad declaration that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction obtains."64 This rule requires U.S. judges interpreting ambiguous federal statutes to adopt a plausible meaning that avoids conflict with international law over an interpretation that would result in an international law violation. In a somewhat softer version, the Charming Betsy canon has remained part of U.S. foreign relations law ever since. 65 Marshall's opinion did not elaborate the basis for the canon that bears its name. Yet Marshall's very authorship suggests an originalist foundation. A young but significant member of the Virginia Ratifying Convention, Marshall commonly articulated mainstream Federalist defenses of the new Constitution. 66 Marshall, in short, articulated views widely held by the Constitution's supporters in the state conventions that ordained and established the document as the nation's supreme law.

Applying the *Charming Betsy* canon to the Constitution, however, is not the same thing as applying it to statutes. The canon precludes only interpretations that *violate* international law. Construing the Eighth Amendment not to prohibit the juvenile death penalty would not violate an international prohibition of the practice but would instead merely open the possibility that the federal or state governments might violate the right. A constitutional *Charming Betsy* canon

<sup>64</sup> Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added).

<sup>&</sup>lt;sup>65</sup> See Restatement (Third) of the Foreign Relations Law of the United States (1986), sec. 114 ("Where fairly possible, a United States statute should be construed so as not to conflict with international law or with an international agreement of the United States"). This modern version replaces Marshall's "if any other possible construction obtains" with the less demanding "where fairly possible."

<sup>66</sup> Compare Martin S. Flaherty, "John Marshall, McCulloch v. Maryland, and We the People: Revisions in Need of Revising," William & Mary Law Review 43 (2002), p. 1339.

would therefore have to require that a provision left unresolved by conventional domestic analysis should be interpreted in a manner *consistent* with international law. For that matter, a constitutional *Charming Betsy* rule would further require consistency with comparative law when global practice reflected the type of consensus that raises a norm to international custom, and so collapses the distinction between the two forms of law. *Roper*, in noting the world's overwhelming rejection of the juvenile death penalty, was on the road to putting this type of rule in place. <sup>67</sup>

Justifying an enhanced version of the *Charming Betsy* standard for the Constitution follows for two sets of reasons. First, although interpreting a constitutional right in a manner that would make it inconsistent with international law may not itself be a violation, it would effectively act as an invitation to some number of the over fifty governmental units within the United States to themselves engage in a violation. Exactly this occurred with the juvenile death penalty, where a significant minority of states persisted with the practice. It follows that in the constitutional setting, the *Charming Betsy* canon should be strengthened as a prophylactic measure to head off such violations. Second, and more germane to a democratic defense, originalism may show that just as the Founding generation accepted the *Charming Betsy* rule for statutes, so too it may have accepted an enhanced version for the Constitution, for the first set of reasons or simply out of a commitment to the law of nations.

Whether expanded or not, the *Charming Betsy* canon differs in the constitutional context for another set of reasons. Professor Curtis Bradley has explained why through focusing, appropriately enough, on separation of powers. An internationalist presumption applied to statutes is subject to formal democratic check by the president and Congress, who can make clear their intent to depart from international law by passing a statute that clearly does so. If the Supreme Court interprets an ambiguous statute to comport with international law, Congress is always free to pass a new one with a clear meaning that would result in an international law violation if it so desires. In this way, the so-called political branches remain free to determine that, in certain instances, violation of international law may better promote justice or, more likely, further U.S. interests in a stable world. As with any statutory presumption, the canon's accommodation of

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<sup>&</sup>lt;sup>67</sup> The *Roper* Court noted that since 1990 only Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China had executed juvenile offenders, and that each of these nations had since either abolished the penalty or made a public disavowal of the practice (*Roper*, slip op. at 23).

other concerns ultimately bows to the demands of self-government in a fairly straightforward and transparent fashion. <sup>68</sup>

The balance shifts in the constitutional context. Should the Supreme Court interpret an ambiguous constitutional provision in a way that comports with international law, it is infinitely more difficult to overturn that interpretation even if a clear majority of the nation so desires. This comparative lack of democratic checks in this setting weakens the case of an internationalist presumption from a self-government perspective. It does not mean, however, that the possibility of a democratic response is wholly absent. Dissatisfaction at the polls could always lead to the election of a president and Senate who will approve a less internationally inclined judiciary. Then there is the difficult option of constitutional amendment. At least the possibility of these weaker democratic checks would provide some justification of a *Charming Betsy* canon in the constitutional context, but not to the same extent as with more readily enacted statutes.

But at least for some—and among them are the greatest opponents of judicial globalization—a theoretically more powerful justification comes not from the availability of attenuated democratic checks. Rather, as with an expanded version of the rule, the better democratic defense would come from an originalist authorization of the canon by We the People of the United States.

There is reason to suppose that We the People did just that. Relevant sources suggest that, for the American Founders, discerning the law of nations complemented the project of constitutional thought, that American thinkers were particularly open to the influence of the law of nations, and that an important stream in Founding thought supported the idea that, where possible, interpretation of the Constitution should conform to international law.

The law of nations did exert an enormous influence over the Founding generation in part because the "science" of government proceeded together with the "science" of international law. Historians and legal scholars commonly reference Vattel, Burlamaqui, Puffendorf, and Grotius as comparable to Locke, Montesquieu, and Blackstone in their influence on American thinkers.<sup>70</sup> Among others, Franklin, Hamilton, Jefferson, Jay, and John Adams cited the work of

<sup>&</sup>lt;sup>68</sup> Curtis A. Bradley, "The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law," *Georgetown Law Journal* 86 (1998), p 86.

<sup>&</sup>lt;sup>69</sup> Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001), pp. 64–66.

<sup>&</sup>lt;sup>70</sup> Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, Mass.: Belknap Press, 1967), p. 27.

the era's great international jurists, and not only for international propositions. As Bernard Bailyn notes, "In pamphlet after pamphlet the American writers cited . . . Grotius, Puffendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of government."

The law of nations and domestic constitutional thought complemented one another in purpose, method, and result. Each project, among other things, sought to reconcile and develop general propositions about law and government with consideration of actual human and institutional behavior—with constitutional thought focusing on the place of the individual, and international law on the place of the relatively new nation-state. This parallel orientation led not only to substantial cross-fertilization, but also to mutually reinforcing conclusions. This is not to ignore the primacy of national sovereignty, perhaps the chief legacy of international law during this period. Yet sovereignty—especially the idea that how a state treated those subject to its jurisdiction within its borders was generally not a concern of international law—did not then mean the same type of impermeable barriers that the concept would come to mean later for at least two reasons. First, the principles of justice that informed the law of nations also informed domestic thought precisely because of the two projects' parallels. Second, Vattel's work in particular emphasized a fairly robust conception of both legal and moral obligations nations assumed with regard to established international law rules.<sup>72</sup>

Independence augmented this theoretical commitment to international law for several practical reasons. First, the revolutionary act of the American people assuming "among the Powers of the Earth, the separate and Equal Station to which the Laws of Nature and Nature's God entitle them" of necessity reoriented thinking about the direct applications of international law from questions of how constituent units fit within an empire to the place of the new republic itself within the law of nations. Second, Vattel especially sought to adapt the classical law of nations in ways that promoted the interests of comparatively weak republics in the face of aggrandizing empires. Third, and related, U.S. violations

<sup>&</sup>lt;sup>71</sup> See Curtis A. Bradley and Martin S. Flaherty, "Executive Power Essentialism and Foreign Affairs," *Michigan Law Review* 105 (2004), p. 525.

<sup>&</sup>lt;sup>72</sup> See David Lang, *Foreign Policy in the Early Republic* (Baton Rouge, La.: Louisiana State University Press, 1985); and Thomas H. Lee, "Making Sense of the Eleventh Amendment: International Law and State Sovereignty," *Northwestern University Law Review* 96 (2002), p. 1027.

<sup>&</sup>lt;sup>73</sup> Declaration of Independence, para. 1.

<sup>&</sup>lt;sup>74</sup> See Thomas H. Lee, "International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Theory Today," *Law & Contemporary Problems* 67 (2004), p. 147.

of its treaty obligations as a result of the Confederation Congress's inability to secure the compliance of the several states posed a tangible threat to national security by giving the United Kingdom and other powers the pretext to commit their own violations, often with military force.

It would fall to the federal Constitution to determine how far to translate the general affinity for the law of nations seen so far into lasting imperatives. As is a basic feature of U.S. foreign relations law, the document itself deals with international law-and foreign affairs generally-in a scattered fashion. Nor does the text specifically deal with the matter at hand—that is, the interpretive weight for international law—the type of textual gap that is a common feature of constitutional law in general. Added up, however, the various specific provisions demonstrate an internationalist bent. More strikingly, "all Treaties made, or which shall be made," are rendered not just self-executing, but "the Supreme Law of the Land."<sup>75</sup> Significant in this regard is the further decision to facilitate treatymaking by involving the president and omitting the House of Representatives, while impeding involvement in conflict by vesting the War Power in Congress. Worth mentioning as well is Article III's express grant of jurisdiction for maritime and admiralty cases as well as for an array of possible cases involving foreign envoys and nations. On a strict reading, of course, these provisions may be seen as exhaustive, and so leave no place for judicial appeal to international law in other instances. The larger context, however, suggests that these clauses instead reflect a more general commitment.

Such a commitment specifically emerges in the Federal Convention. Although the delegates did not discuss international law frequently, the statements they made reveal a pronounced affinity. Madison set the tone in focusing upon the volatile mix of the states' violations of international law and national security. Critiquing the rival Pinckney Plan, Madison asked, "Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? . . . The existing confederacy does not sufficiently provide against this evil." Whatever their differences, moreover, Madison and Pinckney both supported Madison's pet dream of a congressional veto on state legislation, in part as a way to police local laws violating treaty

<sup>&</sup>lt;sup>75</sup> U.S. Const. art. VI, cl. 2. See Marin S. Flaherty, "History Right?: Historical Scholarship, Original Understanding, and Treaties as 'Supreme Law of the Land,'" *Columbia Law Review* 99 (1999), p. 2095.

<sup>&</sup>lt;sup>76</sup> Max Ferrand, ed., *Records of the Federal Convention of 1787*, vol. 1 (New Haven: Yale University Press, 1966), p. 316.

commitments in particular.<sup>77</sup> To Congress, moreover, is given the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>78</sup>

The ratification debates—for many originalists the most authoritative source—address the need for the nation to play the part of good international citizen both more clearly and more extensively. Two venerable sources must suffice to convey the general picture. One is the ratification debates in Virginia, which dealt with international law and foreign relations more thoroughly than any other state. Despite sharp disagreements over questions such as whether the treaty-making process safeguarded regional interests, Federalists and Anti-Federalists alike agreed on the necessity of the United States honoring its specific obligations and comporting with the law of nations generally.<sup>79</sup> In one colloquy, one of the Constitution's defenders went so far as to assure opponents that the president and Senate could not make a treaty ceding territory without approval of Congress because such an action would violate the law of nations.<sup>80</sup>

The Federalist, that popular chestnut source, likewise stresses the urgency for good international citizenship. So in the Virginia debates, certain passages proceed fairly far down the road. While he stops short of a *Charming Betsy* presumption for the Constitution, John Jay for example clearly anticipates the rule that the federal courts shall expound customary international law, even though the Constitution itself makes no express incorporation. Arguing for the primacy of the national government in foreign affairs, Jay declared that "treaties, as well as the law of nations, will always be expounded in one sense, and executive in the same manner" by the federal judiciary, as opposed to the thirteen judiciaries of the several states.

All this notwithstanding, much more work would need to be done before a dispositive case could be made for a constitutional *Charming Betsy* canon. Even then, such a case would not necessarily quiet the concerns of those who seek a contemporary or ongoing justification for judicially globalized borrowing. For these reasons, the search for democratic sanction should not end aboard the *Charming Betsy*.

<sup>&</sup>lt;sup>77</sup> Ibid., p. 164.

<sup>&</sup>lt;sup>78</sup> U.S. Const. art. I, sec. 8, cl. 10.

<sup>&</sup>lt;sup>79</sup> See Flaherty, "History Right?" pp. 2140-49.

<sup>80</sup> Ibid

<sup>81</sup> See The Federalist Nos. 78-83 (Hamilton), pp. 465-510.

<sup>82</sup> The Federalist No. 3 (Jay), p. 15.

#### BEYOND DEMOCRACY

Judicial globalization will almost certainly prevail in the United States, and democratic justifications will likely play a significant role in this result. Yet democratic self-government offers but one source of defenses. Of these others, principles of justice and international peace have commonly been put forward as the more promising justifications for judicial cosmopolitanism. As with other aspects of global judicial practice, at least briefly considering these alternative justifications helps clarify the normative stakes.

Concerns about international peace, stability, and the rule of law offer another basis for justifying deference to international law. Here the basic argument holds that courts should as much as possible conform domestic practice to international rules because doing so at a minimum will reduce the pretexts that foreign states might have for intruding upon the state's affairs, and at a potential maximum will promote orderly relations among states in general. Whatever its other features, this approach relates more distinctively to international law more than any other. In part for this reason, it has a distinguished historical pedigree dating to the earliest days of the republic. <sup>83</sup>

Consider, next, reliance on international human rights standards in the name of justice. On the assumption that courts are properly charged with making this type of determination, the argument runs, there is every reason domestic judges should look to foreign materials. In this regard such sources operate less as binding rules than as relevant information, much like reliance on the views of thinkers with no special connection to the domestic legal regime. This approach appears best to characterize the use of external legal rules the foreign courts commonly make. This understanding perhaps most accurately describes what Justice Kennedy was up to in *Lawrence* then he invoked European law to refute the position that the *Bowers* Court had taken on whether the scope of privacy extended to consensual sexual relations between adults. This approach likewise characterizes his follow-up performance in *Roper*, invoking foreign legal materials to "confirm" the determination that the Court had reached about the execution of minor offenders. The same proper is the proper of the the proper of

<sup>&</sup>lt;sup>83</sup> See text above accompanying notes 47–57.

<sup>&</sup>lt;sup>84</sup> See "Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General," pp. 323, 329.

<sup>85</sup> Lawrence, 539 U.S. at 576-77.

<sup>86</sup> Bowers v. Hardwick, 478 U.S. 186 (1986).

<sup>87</sup> Roper, slip op. at 21.

The normative case for this approach would appear just about impossible to refute. Among other things, making the best judgment on fundamental questions of justice, rights, or even institutional arrangements and procedures will depend upon the persuasiveness of arguments advanced, intuitions based upon human experience, and consequences evident from applications of earlier judgments. None of these bases varies a priori in light of national borders. The extent that such variations may occur, moreover, may justify discounting the weight of external materials, but hardly a per se prohibition. <sup>88</sup> One may treat arguments to the contrary pretty much with the respect they deserve by observing that a good idea is still a good idea even if it comes from France.

It is against such assertions that critics respond with the selectivity argument, which more or less amounts to the nondemocratic half of objections most commonly advanced. Worries about this aspect of foreign legal materials begin with their ostensibly unique susceptibility for selective reading and similar abuse. As both Justice Scalia and then-Judge Roberts intimated, seeking an international consensus is all but an invitation to selective and idiosyncratic cherry-picking among scores of national and transnational jurisdictions. Scalia made the point with particular brio in his *Roper* dissent: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry." Better, then, to simply have a prophylactic rule barring this inherently misleading material to begin with.

Prominent American scholars echo this theme. Professor Ernest Young chides internationalists, arguing, "We might well compare foreign citation to the classic quip about legislative history: it is like 'looking over a crowd and picking out your friends.'" Young, along with such commentators as Professors Kenneth Kersch, John McGinnis, and Michael Ramsey, further asserts that U.S. judges have not done a very good job when they have borrowed from foreign legal materials in any case. The conclusion follows that they should refrain from doing so at the very least pending the advent of better training, a more coherent framework for borrowing, or both. <sup>91</sup>

<sup>&</sup>lt;sup>88</sup> For a discussion, see Martin S. Flaherty, "Are We to Be a Nation?: Federal Power vs. 'States' Rights' in Foreign Affairs," *University of Colorado Law Review* 70 (1999), pp. 1288–89.

<sup>89</sup> Roper, 84 (Scalia, J., dissenting).

<sup>&</sup>lt;sup>90</sup> Young, "Foreign Law and the Denominator Problem," p. 167 (citation omitted).

<sup>&</sup>lt;sup>91</sup> See ibid., pp. 167–68; McGinnis, "Foreign to Our Constitution," n. 32; Kersch, "Globalized Judiciary," n. 31; and Michael D. Ramsey, "International Materials and Domestic Rights: Reflections on Atkins and Lawrence," *American Journal of International Law* 98 (2004), p. 69.

Such arguments collapse of their own weight. First, the charge of selectivity has been, and will probably always be, grossly exaggerated when it comes to foreign sources in particular. In practice the major Supreme Court cases citing foreign sources have either pointed to positions approaching genuine global consensus, 92 or, at a minimum, a clear trend in those constitutional democracies most like the United States in economic, social, and cultural terms. 93 Moreover, the readiness of critics to pounce on any real selectivity or manipulation will likely discourage the practice from occurring. Add to this the nature of international law, which in this context will almost by definition involve either a widely ratified treaty or customary international law, which itself requires a high degree of global practice as a threshold requirement. None of this is to say that greater efforts should not be made to develop better standards for foreign law citation, or to make American legal education more cosmopolitan. Those prescriptions are entirely different from counseling an outright ban against a growing portion of legal knowledge.

More generally, the charge of selectivity attaches to *any* set of complex and wide-ranging legal materials. Among others, it applies to legislative history, economic materials, philosophical sources, and evidence derived from the practices of the several states. Perhaps most damning of all, it applies to historical sources. Many of the same critics who advance the selectivity objection most vigorously also tend to view reliance on the Constitution's original understanding as a preferred method to constrain judicial choice. Yet few sources are or have been more spectacularly prone to ambiguity, manipulation, or selectivity than the thousands of primary source pages, and hundreds of historical monographs, written on the Founding.<sup>94</sup>

If historical sources can be held out as the sine qua non of precise guidance, it is unclear why foreign law sources cannot at least be admitted for consideration. Then again, perhaps two wrongs should not make a right. This objection, such as it is, does not change the problem that critics of foreign sources will have difficulty claiming that their opposition is itself selective rather than principled. Nor does it answer the larger difficulty that banning all wrongs in the form of any materials—whether foreign, historical, economic, legislative, state, or

<sup>92</sup> Atkins, 536 U.S. at 316-17, n. 21; Roper, at 21-25.

<sup>93</sup> Lawrence, 539 U.S. at 576-77.

<sup>94</sup> Martin S. Flaherty, "History 'Lite' and Modern American Constitutionalism," *Columbia Law Review* 95 (1995), p. 523.

philosophical—subject to manipulation, would not just utterly transform legal interpretation but, in part for that reason, would not likely be feasible. It follows that critics somehow would have to demonstrate that foreign legal sources are significantly more open to the selectivity charge than other materials in common use and on which they rely. No one as yet has remotely even begun to make that case.

Judicial globalization merits defenses that are as wide-ranging as its benefits. The rewards may first arise in legal systems, but they move well beyond them. Domestic reliance on jurisprudence of other jurisdictions will lead to better informed judges, lawyers, and commentators—as much of the rest of the world has discovered. Greater comparative knowledge in turn will continue to produce better considered and usually more just decisions that affect society in general. And outside any particular jurisdiction, the practice can only help fortify the international rule of law, and so foster greater global order and stability.

Any development that tends toward a better informed, more just, and more stable world might well be worth some sacrifice. But sacrifice of democratic self-governance is not among the costs here. Even for the most ardent American exceptionalist, judicial borrowing may well be more consistent with Founding commitments. Around the world more generally, judicial borrowing can serve as a vital check on the escalating prerogatives of globalized executives in particular. Judges who look abroad serve many fundamental goods, not least among them the good of democratic self-government.