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AMERICAN EXCEPTIONALISM  
AND HUMAN RIGHTS

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Edited by *Michael Ignatieff*

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Americans, encouraged by their judges, to come to understand themselves as participants in a transnational legal culture of rights or, if you prefer this phrase, of constitutional democracy. The gains for us could be immense in the event that it did occur, or reoccur, to Americans how profoundly we hold things in common with a family of constitutional democratic societies—moral things, things that are basic, things that are dear. The experience could help to revive among us a sense of internal moral commonality and ethical fellowship that our current, insular fights over American constitutional meanings can only tend to damage. This would not, to be sure, be an exclusively American fellowship but would be, nonetheless, an inclusive fellowship of Americans.

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Schauer, "The Politics and Incentives of Legal Transplantation," in *Governance in a Globalizing World*, ed. Joseph S. Nye and John J. Donahue (Washington, DC: Brookings Institution Press, 2000), 253, 259.

## Chapter 10

### A Brave New Judicial World

ANNE-MARIE SLAUGHTER

AMERICAN EXCEPTIONALISM in the judicial context is not exceptional so much as temporal. One of the three elements of Michael Ignatieff's definition of American exceptionalism is judicial isolation. "American judges," he writes, "are exceptionally resistant to using foreign human rights precedents to guide them in their domestic opinions." This attitude, he adds, "is anchored in a broad popular sentiment that the land of Jefferson and Lincoln has nothing to learn about rights from any other country."<sup>1</sup> Several other contributions to this volume, most notably those by Frank Michelman and Harold Koh, directly address the extent to which American judges defiantly define themselves outside the mainstream of global judicial conversation. I have also written repeatedly in this vein.<sup>2</sup> In fact, however, when American judicial behavior is examined over a decade, what is most striking is the extent to which U.S. judges have come to understand and accept that they are deciding cases in a global as well as a national context.<sup>3</sup> In this longer view, what we are witnessing is more likely a clumsy and contested process of judicial globalization than an enduring and exceptional isolationism.

Increased American judicial globalization is most evident in private commercial cases in which, owing to economic globalization, U.S.

I am indebted, as I am so often, to William Burke-White and Terry Murphy for research and editing assistance. I also thank two anonymous reviewers and Ian Malcolm of Princeton University Press.

<sup>1</sup> See Michael Ignatieff's introduction to this volume.

<sup>2</sup> See Anne-Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40 (2000): 1103–24; Anne-Marie Slaughter, "A Global Community of Courts," *Harvard Journal of International Law* 44 (2003): 191–219; Anne-Marie Slaughter, "A Typology of Transjudicial Communication," *University of Richmond Law Review* 29 (1994): 99–137.

<sup>3</sup> I first started chronicling "transjudicial communication" in 1994. In 1995 Thomas Franck held a seminal conference at New York University that was chaired by Justice O'Connor and included Justices Breyer and Ginsberg and an astonishing assembly of top supreme court judges and judges from international tribunals from all over the world. The American participants were noticeably impressed by their global colleagues. In the intervening decade, the frequency of citations to foreign law and of face-to-face meetings of judges

judges are required more and more often to apply either foreign law or a treaty to resolve the issue before them. These cases also bring them into increased contact with their foreign counterparts, who are often hearing some version of the same dispute: in parallel litigation where the plaintiff sues the defendant in one country and the defendant turns around and sues the plaintiff in another; in a *forum non conveniens* case where the defendant to a suit brought in one country tries to convince the judge that it should be transferred to another; or in cases with tentacles in many lands, such as global bankruptcies. In all these situations U.S. judges have proven themselves quite up to the task of finding, interpreting, and applying foreign or international law. Further, a number of judicial leaders, on both the Supreme Court and lower courts, have supported measures and taken steps directly to educate their colleagues about international law issues.<sup>4</sup>

Where U.S. judges are proving to be much more parochial, at least in comparison with the judges from many other nations, is their willingness to participate publicly in an ongoing global judicial conversation conducted primarily among constitutional judges. Indeed, the chief justice of the Supreme Court of Canada has openly chided the U.S. Supreme Court for its failure to engage in what she describes as a global judicial human rights dialogue. The roots of this reluctance may indeed be a form of judicial isolationism. Yet before we brand and condemn such behavior as American exceptionalism, it is worth pausing for a moment to contemplate the extent to which the conversation itself is exceptional. For these judges are not only communicating across borders because the applicable law to a case before them directs them there. They are reaching out to one another in a form of collective deliberation, clearly mindful of the differences of national legal systems and traditions and their own resulting obligations to uphold national laws, yet nevertheless recognizing how often they confront similar issues and how much they are engaged in a common professional enterprise.

In this context, American judicial foot-dragging becomes easier to understand, if not to approve. What is the precise boundary between a judge's obligations as a national public servant, sworn to uphold and

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across borders, as well as other evidence of judicial globalization, has increased at a remarkable rate.

<sup>4</sup> For example, the American Society of International Law has undertaken a wide variety of judicial outreach activities over the past eight years, including regular panels on international law topics at circuit conferences and the publication of an *International Law Handbook* that has been distributed to every member of the federal bench. These activities are guided by a Judicial Advisory Board chaired by Justice O'Connor and comprising a number of distinguished federal judges who have actively encouraged their colleagues to take the opportunity to educate themselves further on international law issues.

indeed to safeguard national law, and his or her membership in a global judicial community? Those U.S. judges and justices who are actively engaged in talking to and learning from their foreign counterparts argue that such interaction simply makes them better judges—better at their craft by virtue of having better tools. Their opponents rail against the imposition of “foreign fads and fashions” on U.S. citizens, insisting that “it is the constitution of the United States we are expounding.” This debate, while often politically charged, is neither surprising nor unreasonable in a proud and pluralist constitutional democracy.

Indeed, Frank Michelman, in an admirably Dworkinian spirit, has developed a potential justification for rejecting comparative judicial analysis that is thoughtful, carefully reasoned, and congruent with the deepest traditions of American constitutionalism. Michelman accepts the proposition that many U.S. judges, beginning with a number of Supreme Court justices, feel actively threatened by the citation of foreign judicial decisions, even though it is clear that those decisions are being cited for purposes of the information they convey and the persuasiveness of their reasoning, rather than any kind of precedent or evidence of some emerging global consensus that the United States should join. What, he asks, could the judges of the most powerful country in the world and the oldest constitutional democracy in the world possibly have to fear? His answer is “integrity-anxiety.” In a republic as pluralist as ours, he argues, vehement moral disagreements will constantly threaten to tear the society and even the polity apart. For a combination of theoretical and historical reasons, Americans look to the Supreme Court to keep those disagreements in check by finding a way through that all sides accept—not because they agree but because it is “the law.” That presumed objectivity, however, depends on the integrity of a larger constitutional “discourse,” in which lawyers and judges and commentators and litigants all draw from a limited and agreed set of sources.

If U.S. judges reaching out to and drawing on the experience of their counterparts abroad do not have at least a degree of integrity-anxiety, they should. It is precisely the kind of concern that should guide principles concerning how and when comparative analysis is used in U.S. opinions. Nevertheless, Michelman concludes, and I agree, that it should be possible for U.S. judges to engage in a global judicial human rights dialogue without in fact undermining the integrity of U.S. constitutional discourse as a political bulwark of our democracy. Indeed, the most immediate outcome of such engagement will be a greater appreciation of the distinctiveness of U.S. law and hence a search for its roots in a distinctive historical, cultural, geographic, and political experience.

Equally important, as an empirical matter, I predict that U.S. judges will increasingly participate in global judicial conversations on paper and

in practice. The reasoning behind such a prediction goes beyond the concrete evidence found in judicial opinions and speeches and the remarkable changes that have occurred over the past decade, led by what is now a solid majority of Supreme Court Justices. Judicial globalization changes not only what our judges know and need to know, as a practical matter, but also how they think about who they are and what they do. The boundaries of their professional identity expand beyond national borders. This change will come about whether or not justices and judges *cite* foreign opinions; it is enough for them simply to know of their existence, and, equally crucial, to know the individual judges who authored them. Globalization—for all individuals—operates most fundamentally at this very basic, human level.

An interesting indicator of this psychological shift is growing support, among judges, for global judicial education. The International Organization for Judicial Training (IOJT) was created in March 2002 at a conference of judges from twenty-four countries who came together “to establish a global organization dedicated to providing training and continuing education for judges” and to create a network of institutions already providing judicial education in these various countries.<sup>5</sup> American judge Clifford Wallace, a former chief judge of the Ninth Circuit Court of Appeals, is one of the founding members of the IOJT. In a recent article entitled “Globalization of Judicial Education,” he argues, based on his own experience, that principles of judicial education are far more generic than national legal establishments typically assume.<sup>6</sup> He offers various functional reasons as to why globalizing judicial education would be a good idea, such as keeping up with a “globalizing legal community” and improving the quality of national and local judicial training through information sharing and collective experimentation to supplement national judicial training with more global offerings.<sup>7</sup> But he also defines globalization in more elemental terms, as “attracting worldwide participation,” “widening the horizons” of judges from different nations.<sup>8</sup> He has come to see that the “rule of law and the concept of justice are worldwide and fundamental principles.”<sup>9</sup> Judges should thus come together to work for “the global establishment of the rule of law.”<sup>10</sup>

<sup>5</sup> Conference brochure for the Second International Conference on the Training of the Judiciary, “Judicial Education in a World of Challenge and Change,” October 31–November 3, 2004, Fairmont Château Laurier Hotel, Ottawa, Ontario, Canada.

<sup>6</sup> J. Clifford Wallace, “Globalization of Judicial Education,” *Yale Journal of International Law* 28 (2003): 355–64.

<sup>7</sup> *Id.* at 356.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 364.

<sup>10</sup> *Id.*

If American judicial parochialism is more temporal than exceptional, we need not look for more fundamental explanations of the differences between American and foreign judges. Ignatieff, however, takes a different tack. Building on the work of Paul Kahn, who argues that Americans’ suspicion of human rights law is linked to their suspicion of anything not directly authorized by American representatives and institutions, Ignatieff ponders whether what appears to outsiders as judicial narcissism might not instead be a commitment to defending the “democratic legitimacy of its distinctive rights culture.”<sup>11</sup> He hypothesizes further that “these rights, authored in the name of ‘we the people,’ are anchored in the historical project of the American revolution: a free people establishing a republic based in popular sovereignty.” The suggestion is that advocates of human rights face more obstacles in the United States than elsewhere because majority prejudice in the country is more likely to trump the rights claims of minorities.

This claim is certainly jarring to an American lawyer weaned on *Brown v. Board of Education* and footnote 4 of *Carolene Products*, which John Ely relied on to develop an entire theory of American constitutionalism based on the courts’ role as the indispensable protectors of “discrete and insular minorities.”<sup>12</sup> And lest that seem ancient history, in 2004, the year of *Brown*’s fiftieth anniversary, it was the Massachusetts Supreme Judicial Court that took the lead in protecting the right of homosexuals and lesbians to marry—hardly a national majority position.<sup>13</sup> It may be true that Americans are more reflexively nationalist than citizens of other countries (although more so than the French? the Mexicans? the Poles?), and that they cover this reflex with a comforting myth about being more attached to “democracy” than other nations, but American judges have a profound commitment to minority rights as a fundamental pillar of American liberal democracy.

These disagreements notwithstanding, however, I deeply applaud the overall spirit and message of this volume. Americans, even the most internationalist and multilateralist among us, must confront the phenomenon of American exceptionalism and try to sift myth from fact. We far too often confuse our normative commitments with our empirical assessments about what America does and is. As Ignatieff wrote powerfully in the summer of 2004, even those Americans who were the most vocal and most outraged in denouncing the abuses of Abu Ghraib saw it as a horri-

<sup>11</sup> See Ignatieff’s introduction to this volume.

<sup>12</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See, generally, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

<sup>13</sup> See, e.g., *Hillary Goodridge & others vs. Department Of Public Health & another*, SJC-08860, November 18, 2003, Supreme Judicial Court of Massachusetts.

and international law. Justice Sandra Day O'Connor has been out in front exhorting U.S. judges to realize and respond to these changes. She asks: "[W]hy does information about international law matter so much? Why should judges and lawyers who are concerned about the intricacies of ERISA, the Americans with Disabilities Act, and the Bankruptcy Code care about issues of foreign law and international law?" She answers: "The reason, of course, is globalization. No institution of government can afford now to ignore the rest of the world."<sup>16</sup>

Justice O'Connor's argument is functional. Judges who must decide more and more cases involving issues governed by international or foreign law must familiarize themselves with those bodies of law, just as they must know the general dimensions of different areas of American law. She is joined, perhaps surprisingly to some, by Justice Scalia, who is equally insistent that U.S. judges should be prepared to apply international treaties and look to the national decisions of other treaty parties in interpreting those treaties. Thus in a 2004 decision involving the application of the Warsaw Convention (a treaty governing airline liability) to a claim against Olympic Airways for the death of an asthmatic passenger—the result of secondhand smoke from the smoking section—Scalia dissented on the grounds that his colleagues in the majority had ignored decisions by Australian and British appellate courts that interpreted the relevant provision of the Warsaw Convention very differently.<sup>17</sup> In his words, "Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us."<sup>18</sup>

In still other cases judges negotiate their own treaties. Global bankruptcies, for instance, require judges to communicate directly with one another with or without an international treaty or guidelines to ensure a cooperative and efficient distribution of assets. Governments have left these matters up to courts; courts have responded by creating their own regimes. Two commentators describe these court-to-court agreements, which have come to be known as "Cross-Border Insolvency Cooperation Protocols," as "essentially case-specific, private international insolvency treaties."<sup>19</sup> Global bankruptcies could not occur absent the larger driving

<sup>16</sup> Sandra Day O'Connor, "Keynote Address," *American Society of International Law Proceedings* 96 (2002): 348.

<sup>17</sup> *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004).

<sup>18</sup> *Id.* at 1230. Justice Scalia similarly emphasized the importance of looking to decisions by the courts of treaty partners in any case raising an issue of treaty law in his address to the 2004 Annual Meeting of the American Society of International Law, forthcoming in the 2004 *Proceedings of the American Society of International Law*.

<sup>19</sup> Evan D. Flachsen and Ronald J. Silverman, "Cross-Border Insolvency Cooperation Protocols," *Texas International Law Journal* 33 (1998): 587–612, at 589. For a discussion

ble stain on what America stands for in the world, incapable of relating it back to other dark moments in our history.<sup>14</sup> This inability to absorb and indeed internalize unpleasant facts, to see ourselves as others—even our close friends and allies—see us, may help explain our celebrated optimism. Yet Ignatieff's point, offered in the spirit of friendship, is that as a national trait, this blindness is better characterized as national narcissism than as exceptionalism.

The first part of this essay reviews a number of different factors contributing to judicial globalization and distinguishes the current global judicial conversation among constitutional judges as a particularly novel and unusual phenomenon. It differs from more functional forms of judicial globalization, as well as from the classic "reception" of foreign law by newer courts. Understanding these differences is important to understanding the deeper psychological effects of participation in this conversation. The second part turns to Michelman's argument and my embellishment of his conclusion. I look to the reasons actually given by many judges regarding the benefits of engaging in regular exchange, both written and face-to-face, with their foreign colleagues. I also analyze the experience itself to support the claim that once judges have become aware that they are part of a wider judicial world they cannot go back to a more bounded existence, on the bench or off. The final section turns from the phenomenon of judicial globalization to part of Ignatieff's explanation for American judicial isolationism in the face of it. I reject the proposition that American rights are expressions of majority will rather than blocks against majority prejudice, although without trying to meet the argument in any proper depth. Given the limitations of this brief essay, I simply sketch a number of counterarguments that I suggest would at least have to be addressed if the point is to be carried.

### A Novel and Remarkable Global Judicial Conversation

Judicial globalization takes many forms and is driven by many causes.<sup>15</sup> To begin with, as the economic and social transactions that give rise to disputes become increasingly globalized, courts in countries around the world find themselves facing cases with tentacles stretching across borders, linking them to foreign courts or at least raising questions of foreign

<sup>14</sup> Michael Ignatieff, "The Unbearable Burden of Destiny: America, the Good and the Ugly," *International Herald Tribune*, June 30, 2004, at 6.

<sup>15</sup> For a much more comprehensive description of the many ways that judges are currently interacting around the world, see "Judges: Constructing a Global Legal System," in Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), 65–103.

economic forces of globalization, bringing elites everywhere, including judges, closer together.

A second set of factors behind judicial globalization are more explicitly political. The European Commission for Democracy through Law (the Venice Commission) operates a Web site called CODICES, in addition to a paper *Bulletin on Constitutional Case-Law*, which regularly collects and digests the decisions of constitutional courts and courts of equivalent jurisdiction around the world. CODICES has liaisons in more than fifty countries; it not only offers a précis of each case in the database but also makes it possible to search the entire database by keyword or phrase to allow researchers to find out quickly what courts in many different countries have said on a particular issue.<sup>20</sup>

The expressed purpose of CODICES is instructive. It is "to allow judges and constitutional law specialists in the academic world to be informed quickly about the most important judgments" in constitutional law.<sup>21</sup> But the underlying reason is explicitly political: to build democracy through law. According to the CODICES Web site, "The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional jurisdictions of Central and Eastern Europe, but will also enrich the case-law of the existing courts in Western Europe and North America."<sup>22</sup> The aim is to strengthen the new constitutional courts in the fledgling democracies and facilitate convergence of constitutional law across Europe.

Across the Pacific, LawAsia is a form of regional bar association, composed of different kinds of legal associations across the region as well as individual lawyers, law firms, and corporations. It publishes law bulletins and offers many different venues for its members to come together and exchange information and ideas. Its primary goal as a professional association has been to offer networking opportunities for its members, but a secondary goal, made quite explicit, includes promoting the rule of law through "disseminating knowledge of the law of members' countries,"

of how practitioner input, through the Insolvency and Creditors' Rights Committee of the International Bar Association, has influenced these proceedings by developing a "Concordat" ready to be adopted as a cross-border Protocol in these cases, see Bruce Leonard, "Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies," *Texas International Law Journal* 33 (1998): 543-56.

<sup>20</sup> In the CODICES homepage [cited June 1, 2004]; available from <http://www.codices.coe.int>.

<sup>21</sup> In the CODICES homepage [cited June 1, 2004]; available from [http://codices.coe.int/cgi-bin/om\\_isapi.dll?clientID=380820158&infobase=codices.nfo&softpage=Browse\\_Frame\\_Pg42](http://codices.coe.int/cgi-bin/om_isapi.dll?clientID=380820158&infobase=codices.nfo&softpage=Browse_Frame_Pg42).

<sup>22</sup> *Id.*

"promoting the efficient working of the legal systems of members' countries," and "promoting development of the law and uniformity where appropriate."<sup>23</sup> Other goals refer to the promotion of human rights and the administration of justice throughout the region.

Third, increased technological supply is facilitating if not encouraging functional demand. The extraordinary increase in information availability through the Internet has made it almost as easy to research foreign and international case law as to find domestic decisions in many countries. The two principal electronic legal databases, LexisNexis and Westlaw, now include legislation and decisions from the EU, the UK, Australia, Hong Kong, Russia, Mexico, Ireland, New Zealand, Singapore, and Canada.<sup>24</sup> Access to these foreign sources has expanded primarily in the last decade.

If judicial globalization were driven only by functional need and technological supply, however, it would be less remarkable and certainly less controversial. Yet in the same Olympic Airways case discussed above, Justice Scalia could not resist an extra dig at his colleagues.

This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing. See *Atkins v. Virginia* (whether the Eighth Amendment prohibits execution of the mentally retarded); *Lawrence v. Texas* (whether the Fourteenth Amendment prohibits the criminalization of homosexual conduct). One would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they have an actual role in applying, would be (to put it mildly) all the more relevant.<sup>25</sup>

This is the Scalia of *Thompson v. Oklahoma*, the 1988 death penalty case in which the plaintiffs cited international and foreign decisions barring the death penalty. Rejecting such evidence, Scalia expostulated, "We must not forget that it is the Constitution for the United States that we are expounding."<sup>26</sup>

Contrast the following statement by the chief justice of the Norwegian Supreme Court: "The Supreme Court has to an increasing degree taken part in international collaboration among the highest courts. It is a natu-

<sup>23</sup> "About Lawasia." In The Law Association for Asia and the Pacific homepage [cited June 1, 2004]; available from <http://www.lawasia.asn.au>.

<sup>24</sup> In the LexisNexis homepage [cited June 16, 2003]; available from <http://www.lexis-nexis.com>; in the Westlaw homepage [cited June 16, 2003]; available from <http://www2.westlaw.com/signon/default.wl?newdoor=true>.

<sup>25</sup> *Olympic Airways v. Husain*, *supra* note 17, at 1230-31.

<sup>26</sup> 487 U.S. 815, 869 (1988).



civil liberties issues.<sup>30</sup> The new South African Constitution requires the South African Constitutional Court to “consider international law” and permits it to consult foreign law in its human rights’ decisions,<sup>31</sup> in a landmark opinion holding the death penalty unconstitutional, the Court cited decisions of the U.S. Supreme Court, the Canadian Constitutional Court, the German Constitutional Court, the Indian Supreme Court, the Hungarian Constitutional Court, and the Tanzanian Court of Appeal.<sup>32</sup> More systematically, scholars have documented the use of comparative material by constitutional courts in Israel, Australia, South Africa, Canada, India, New Zealand, Zimbabwe, and Ireland.<sup>33</sup>

Is such cross-fertilization really new? It is a well-recognized phenomenon among imperial powers and their colonies.<sup>34</sup> It is well established in the Commonwealth.<sup>35</sup> Plenty of evidence of borrowing from English law can also be found in the nineteenth-century U.S. and federal reports. In this century, the traffic has largely flowed in the other direction; since 1945 recent constitutional courts around the world, frequently established either by the United States or on the model of the U.S. Supreme Court, have borrowed heavily from U.S. Supreme Court jurisprudence.<sup>36</sup>

<sup>30</sup> Ian Loveland, “The Criminalization of Racist Violence,” in *A Special Relationship? American Influences on Public Law in the UK*, ed. Ian Loveland (Oxford: Clarendon Press, 1995), 253, at 257 (citing comments by Lord Browne-Wilkinson).

<sup>31</sup> Constitution of South Africa, Sect. 39.

<sup>32</sup> *The State v. T. Makwanyane and M. Mchunu*, Case No. CCT/3/94 (South Africa June 6, 1995).

<sup>33</sup> Christopher McCrudden, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights,” *Oxford Journal of Legal Studies* 20 (2000): 499–532, 506.

<sup>34</sup> To take the most obvious example, the architects of the U.S. Constitution were steeped in the principles of the common law and in the political theories of the Age of Enlightenment. The legal ideas expounded in the Constitution in turn influenced the framing of the French Declaration of the Rights of Man and of the Citizen, and in turn spread to other continents through imperial rule. Anthony Lester, “The Overseas Trade in the American Bill of Rights,” *Columbia Law Review* 88 (1988): 537–61, at 541. On the reception and internalization of foreign law generally, see H. Patrick Glenn, “Persuasive Authority,” *McGill Law Journal* 32 (1987): 261, at 296.

<sup>35</sup> David McClean, “A Common Inheritance? An Examination of the Private International Law Tradition of the Commonwealth,” in *Recueil des Cours 1996: Collected Courses of The Hague Academy of International Law* (The Hague: Académie de Droit International ed., 1997), 9–98.

<sup>36</sup> This phenomenon is well documented. See Lester, *supra* note 34, at 541; Helmut Coing, “Europaisierung der Rechtswissenschaft,” *Neue Juristische Wochenschrift* 15 (1990): 937–41; Andrzej Rapaczynski, “Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad,” in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, ed. Louis Henkin and Albert J. Rosenthal (New York: Columbia University Press, 1990); Bruce Ackerman, “The Rise of World Constitutionalism,” *Virginia Law Review* 83 (1997): 771–97; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 158.

ral obligation that, in so far as we have the capacity, we should take part in European and international debate and mutual interaction. We should especially contribute to the ongoing debate on the courts’ position on international human rights.”<sup>27</sup> More generally, he notes, “It is the duty of national courts—and especially of the highest court in a small country—to introduce new legal ideas from the outside world into national judicial decisions.”<sup>28</sup>

Here is the strand of judicial globalization that has created the most controversy in the United States and the greatest division between the United States and much of the rest of the world. Justice Smith is not talking about cases involving international treaties or transnational disputes. He is referring to a process of constitutional cross-fertilization for its own sake, in which high court judges—judges with constitutional jurisdiction, whether or not they serve on courts limited to constitutional cases—are engaging in a growing dialogue with their counterparts around the world on the issues that arise before them. They conduct this dialogue through mutual citation and increasingly direct interactions, often electronically. In the process, as Justice Smith suggests, they both contribute to a nascent global jurisprudence on particular issues and improve the quality of their particular national decisions, sometimes by importing ideas from abroad and sometimes by resisting them, insisting on an idiosyncratic national approach for specific cultural, historical, or political reasons. Further, they are remarkably self-conscious about what they are doing, engaging in open debates about the uses and abuses of “persuasive authority” from fellow courts in other countries.

In the words of Justice Claire L’Heureux-Dubé of the Canadian Supreme Court, “More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere.”<sup>29</sup> From England comes confirmation from Lord Brown-Wilkinson, citing comments by “several senior members of the British judiciary” on their increased willingness “to accord persuasive authority to the constitutional values of other democratic nations when dealing with ambiguous statutory or common law provisions that impact upon

<sup>27</sup> Carsten Smith, “The Supreme Court in Present-Day Society,” in *The Supreme Court of Norway*, ed. Stephan Tschudi-Madsen (Oslo: H. Aschenhoug & Co., 1998), 134–35.

<sup>28</sup> *Id.* at 135.

<sup>29</sup> Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court,” *Tulsa Law Journal* 34 (1998): 15, at 16.



Thus it is difficult to show from existing data that the use of comparative materials in constitutional adjudication has in fact increased.<sup>37</sup>

On the other hand, many participating judges and a number of observers think today's constitutional cross-fertilization is new in important ways.<sup>38</sup> They point to a number of distinctive features: the identity of the participants, the interactive dimension of the process, the motives for transnational borrowings, and the self-conscious construction of a global judicial community. On the demand side, many commentators note the impact of the end of the Cold War and the resulting emergence of many fledgling democracies with new constitutional courts seeking to emulate their more established counterparts. A flood of foundation and government funding for judicial seminars, training programs, and educational materials under the banner of "rule of law" programs helped provide personal contacts and intellectual opportunities for these new judges.<sup>39</sup> However, Frederick Schauer points out that in countries seeking to cast off an imperialist past, be it colonial or communist, it is likely to be particularly important to establish an indigenous constitution, including a set of human rights protections.<sup>40</sup> Borrowing constitutional ideas is thus likely to be politically more problematic than borrowing a bankruptcy code.<sup>41</sup>

Individual courts are thus often quite particular about when they borrow and from whom. Schauer argues that governments that want to demonstrate their membership in a particular political, legal, and cultural community are likely to encourage borrowing from members of that community.<sup>42</sup> In this regard, consider again the provision in the new South African Constitution requiring the constitutional court to look abroad. The clear message, from a state emerging from pariah status during the years of apartheid, is a desire to be part of a global legal community and to make explicit the consistency of South African constitutional law with

<sup>37</sup> See, generally, Alan Watson, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974); Alan Watson, "Legal Change: Sources of Law and Legal Culture," *University of Pennsylvania Law Review* 131 (1983): 1121-46; T. B. Smith, "Legal Imperialism and Legal Parochialism," *Juridical Review*, n.s., 10 (1965): 39-54.

<sup>38</sup> In addition to L'Heureux-Dubé, *supra* note 29, at 16, Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," *Indiana Law Journal* 74 (1999): 819-91. Note that this most recent burst of scholarship contrasts with scholarship at the end of the 1980s that focused more on "one-way" traffic from the United States outward. See *supra* note 34.

<sup>39</sup> See, generally, Choudhry, *supra* note 38.

<sup>40</sup> Frederick Schauer, "The Politics and Incentives of Legal Transplantation," in *Governance in a Globalizing World*, ed. Joseph S. Nye and John D. Donahue (Washington, DC: Brookings Institution Press, 2000), 253-54, at 256.

<sup>41</sup> *Id.* at 257.

<sup>42</sup> Schauer, *supra* note 40, at 258.

the law of other leading liberal democratic legal systems. For the South African court itself, becoming part of a global judicial conversation has become a badge of legitimacy.

The identity of the most influential "lender" or "donor" courts in recent years is equally striking. The South African and Canadian constitutional courts have both been highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts.<sup>43</sup> In part, their influence may spring from the simple fact that they are *not* American, which renders their reasoning more politically palatable to domestic audiences in an era of extraordinary U.S. military, political, economic, and cultural power and accompanying resentments.<sup>44</sup> But equally if not more important is the ability of these courts themselves to capture and crystallize the work of their fellow constitutional judges around the world. Schauer argues that the "ideas and constitutionalists of Canada have been disproportionately influential" in part because "Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier."<sup>45</sup>

Canada and South Africa—one old democracy and one new—with two new constitutional courts (the Canadian Supreme Court has existed since the mid-nineteenth century, but the new Canadian Constitution was enacted only in 1982; the South African Constitutional Court was created in 1994): each is looking around the world and canvassing the opinions of their fellow constitutional courts, and each is disproportionately influential as a result. Here is the most dramatic difference from past patterns of legal transplantation or cross-fertilization. According to Canadian justice L'Heureux-Dubé, the most important break with the past is that "the process of international influences has changed from *reception to dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction."<sup>46</sup> Instead, appellate judges around the world are engaging in self-conscious conversation.<sup>47</sup>

This *awareness* of constitutional cross-fertilization on a global scale—an awareness of who is citing whom among the judges themselves and a concomitant pride in a cosmopolitan judicial outlook—creates an incentive to be both lender and borrower. Indeed, the Taiwanese Constitu-

<sup>43</sup> *Id.*; These patterns of influence operate not just among Commonwealth countries, but far more broadly as well. Schauer observes that "the phenomenon appears to be strong not only in countries with a British Commonwealth background but also in countries as culturally removed from the British Commonwealth as Vietnam." *Id.*

<sup>44</sup> Compare Schauer, *supra* note 40, at 258.

<sup>45</sup> *Id.*

<sup>46</sup> L'Heureux-Dubé, *supra* note 29, at 17 (emphasis in original).

<sup>47</sup> *Id.*

tional Court has translated large portions of its case law into English and made them available on its Web site to ensure that it is part of this global dialogue.<sup>48</sup> Further, constitutional judges in many different countries, including the United States, are actively and openly discussing the legitimacy of this phenomenon. It is one thing to borrow to fill a gap or even build a foundation, as courts in fledgling states or newly decolonized countries have long had to do. It is another to have a domestic legal system developed enough to be able to decide the case in question, but nevertheless to search out how foreign judges have responded to a comparable case. The point is less to borrow than to benefit from comparative deliberation.

Here is the larger context within which U.S. judicial parochialism must be placed and evaluated. Justice L'Heureux-Dubé chides her colleagues on the U.S. Supreme Court for lagging behind, warning that they risk loss of influence in an increasingly self-conscious and self-constituted global community of judges. Ignatieff labels this behavior "judicial isolationism" and treats it as an established facet of the larger phenomenon of American exceptionalism. Yet suppose that it is in fact more of a lag? An inevitably slow turning of the gigantic ocean liner of U.S. constitutional jurisprudence and judicial practice? After all, even Chief Justice Rehnquist now urges all U.S. judges to participate in international judicial exchanges, on the ground that it is "important for judges and legal communities of different nations to exchange views, share information and learn to better understand one another and our legal systems."<sup>49</sup> And as discussed below, the debate among Supreme Court justices—with Breyer, Ginsberg, and apparently Stevens firmly on one side; Scalia, Thomas, and Rehnquist on the other; and O'Connor and Kennedy apparently in the middle with regard to canvassing and citing foreign decisions even when they are not a necessary ingredient in reaching a decision—seems less evidence of a culture of exceptionalism than of contentiousness.

Michelman's contribution to this volume focuses precisely on this debate. His is an admirable effort to develop the best possible argument in favor of a self-contained national jurisprudence, but one that in the end he and I reject. I accept his arguments, but suggest that it is likely to be overborne by the psychology and epistemology of judicial globalization—forces that strongly favor increased forms of collective global judicial deliberation. At the same time, whether such decisions are actually cited or

<sup>48</sup> In *The Republic of China Constitutional Court Grand Justices Council Reporter* [cited June 1, 2004]; available from <http://www.judicial.gov.tw/j4e/>.

<sup>49</sup> William Rehnquist, Remarks of the Chief Justice Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference April 8, 2002. In the Supreme Court of the United States homepage [cited June 14, 2003]; available from [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-08-02a.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-08-02a.html).

not, as opposed to being part of the world of material available to judges in reaching a particular decision, will become increasingly less important.

### Persuasive Authority, Integrity-Anxiety, and Judicial Identity

Michelman challenges himself to develop a justification for judicial nationalism among U.S. judges that is rooted in something other than parochialism, elitism, or political partisanship. After carefully chronicling the recent debates among U.S. Supreme Court justices on the question of whether and how it is permissible to cite foreign law, Michelman notes that "[o]ne has to search hard in [the opinions of the resisters] for a single, cogent statement of a reason for resistance. It is as if they do not know how to name what is bothering them."<sup>50</sup> He helpfully supplies such a reason, constructing an ideal account of the resisters' position that is rooted in "integrity-anxiety": "a perceived threat to the integrity, in a certain sense, of the historic discourse of American constitutional law respecting rights."<sup>51</sup>

The core of Michelman's argument is best captured in his own words:

To view American constitutional law as a *discourse* is to see it as something beyond a raw deposit of substantive rules, doctrines, results, and precedents. It's to see the law as composed of an entire broad-sense "vocabulary" or dialect—including paradigmatic concepts, categorizations, value-orientations, and argumentative tropes—in which American constitutional lawyers and judges frame, convey, and comprehend their forensic exchanges. To speak of the *integrity* of this discourse is to speak of its unbroken identity through time as a distinctly cognizable, self-contained discursive object—a kind of discursive domain unto itself, visibly separate and freestanding from other normative discourses.<sup>52</sup>

The importance of this integrity is "nothing less than the defense of the legitimacy of government in this country . . . [against] corrosion by acridulous moral disagreement when it comes to defining and delineating people's rights."<sup>53</sup> Americans, in all their pluralist splendor, look to the Supreme Court to rescue them from their inevitable quarrels, some of which run very deep indeed. Whether or not the Court is actually as objective as it should or could be, its revered place in American political life derives from its supposed ability to hand down objective legal decisions that cut through moral disagreements. Theoretically at least, opening American

<sup>50</sup> See Frank Michelman's essay in this volume.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (Emphases in the original.)

<sup>53</sup> *Id.*

constitutional discourse to a plethora of foreign sources could adulterate it to the point that it could undermine the Court's vital legitimacy.

Michelman's is an elegant, spare argument, compelling in its invocation of something that the vast majority of American constitutional lawyers—I would go further and say all lawyers—feel in their bones. This is precisely the integrity that John Paul Stevens sought to defend so passionately in his dissent in *Bush v. Gore*, when he wrote: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."<sup>54</sup> For my own part, I am convinced. If the members of the Supreme Court who resist the citation of foreign decisions did so out of integrity-anxiety, and if their anxiety seemed likely to be justified, then I would regard this as good and even sufficient reason to question the practice by U.S. judges in U.S. decisions.

Note the "ifs." As Michelman points out, "an opening to comparative analysis could almost certainly be managed by a Supreme Court jointly on doing so without jeopardizing legal-discursive integrity."<sup>55</sup> Moreover, such an opening could actually strengthen the Court's legitimacy.<sup>56</sup> Thus in the end he makes the best possible argument for resisting public acknowledgment of judicial cross-fertilization in American judicial opinions but then knocks it down.

Michelman's rejection of his own argument is strengthened by the actual reasons given by a number of judges and justices in favor of judicial cross-fertilization, reasons that make it harder to avoid the conclusion that the resistance of a three-person minority is politically motivated. In addition, the arguments in favor of judicial cross-fertilization advert to deep processes of personal growth, of a changed awareness of the actual parameters of the world they inhabit that is almost impossible either to change back or to compartmentalize. Third, these same processes mean that whether or not U.S. judges actually *cite* the foreign law they learn about as the result of transnational cross-fertilization, their view of their own law and hence their decisions will be inalterably changed. In this context it is far better to be able to trace the evolution of their views through citations than to guess at it through their itineraries. Moreover, their personal and professional growth as members of a larger judicial world will simply mirror the evolution, willy-nilly, of vast numbers of

<sup>54</sup> *George W. Bush and Richard Cheney v. Albert Gore, Jr.*, 531 U.S. 98, 128–129 (Stevens, dissenting) (2000).

<sup>55</sup> Michelman, *supra* note 50.

<sup>56</sup> *Id.*

American citizens who are having to relocate their lives and their country on a larger map.

Foreign decisions can be persuasive because they offer new information and perspectives that may cast an issue in a different and more tractable light. Canadian Supreme Court Justice G. V. La Forest writes: "The greater use of foreign material affords another source, another tool for the construction of better judgments. . . . The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication."<sup>57</sup> Compare Justice Ruth Bader Ginsberg, writing about the motives behind and deficiencies in U.S. affirmative action programs. She noted India's experience with affirmative action, including a decision by the Indian Supreme Court imposing a ceiling on the number of positions that can be reserved for disadvantaged citizens. "In the area of human rights," she observes, "experience in one nation or region may inspire or inform other nations or regions."<sup>58</sup>

Justice Stephen Breyer agrees. After citing foreign legal decisions on the death penalty in his dissent in *Knigh v. Florida*, he wrote: "In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their view[s] [*sic*] are useful even though not binding."<sup>59</sup> Compare Justice Albie Sachs of the South African Constitutional Court, who writes: "If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their *dicta* articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/State relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text."<sup>60</sup>

Justice Shirley Abrahamson, chief justice of the Wisconsin Supreme Court and an intellectual leader among state judges, observes, "[W]hen courts from around the world have written well-reasoned and provocative opinions in support of a position at odds with our familiar American views, we would do well to read carefully and take notes."<sup>61</sup> She points

<sup>57</sup> Gerard V. La Forest, "The Use of American Precedents in Canadian Courts," *Maine Law Review* 46 (2004): 211–20, at 216 (1994).

<sup>58</sup> Ruth Bader Ginsburg, "Affirmative Action as an International Human Rights Dialogue," *Brookings Review* 18 (2000): 2, at 3.

<sup>59</sup> *Knigh v. Florida*, 528 US 990, 120 S. Ct. 459, 464 (U.S. 1999) (Breyer, dissenting from denial of cert.).

<sup>60</sup> *S. v. Lawrence; S. v. Negali; S. v. Solberg*, (4) SA 1176, 1223 (South Africa 1997).

<sup>61</sup> *Id.* at 284.

out that U.S. state court judges automatically canvass the case law of sister states for ideas and perspectives on the issues before them, yet shrink automatically from looking at case law even from so near a geographic and cultural neighbor as Canada.<sup>62</sup> "We are already comparatists," she writes. "We just don't think of ourselves that way."<sup>63</sup>

Still another argument in favor of persuasive authority is that it can help American judges come up with new approaches that they might not otherwise have thought of. Judge Calabrese of the Second Circuit, for instance, argued in a 1995 case that U.S. courts should follow the lead of the German and the Italian constitutional courts in finding ways to signal the legislature that a particular statute is "heading toward unconstitutionality," rather than striking it down immediately or declaring it constitutional.<sup>64</sup> Or recall Justice O'Connor's functionalist rationale described above, urging U.S. lawyers and judges to look abroad to prepare themselves to decide cases in a globalized world. As Michelman points out, Justice O'Connor has not yet cited a foreign decision in one of her opinions, but in her 2002 address to the American Society of International Law she said, "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts."<sup>65</sup>

Justice Kennedy, for his part, is evidently comfortable with looking abroad when the nature of the issue before the Court makes the experience of other countries directly relevant, as when claims about the nature of U.S. rights are grounded in the larger traditions and values of Western civilization.<sup>66</sup> Here he tacitly acknowledged the centuries-old reciprocal relationship between U.S. courts and their foreign colleagues, in which U.S. courts borrowed heavily from Britain. After 1945 it was the United States that was doing the lending. U.S. judges and apparently the U.S. public have never questioned the propriety or legitimacy of courts in countries around the world citing the U.S. Supreme Court on issues ranging from free speech to federalism. And indeed, U.S. judges continue actively counseling their foreign fellow jurists in setting up new courts; Jus-

<sup>62</sup> Shirley S. Abrahamson and Michael J. Fischer, "All the World's a Courtroom: Judging in the New Millennium," *Hofstra Law Review* 26 (1997): 276-92.

<sup>63</sup> *Id.* at 285.

<sup>64</sup> *United States v. Then*, 56 F.3d 464, 468-69 (1995).

<sup>65</sup> O'Connor, *supra* note 16, at 350.

<sup>66</sup> *Lawrence v. Texas*, 539 U.S. 558 (U.S., 2003) (observing that "to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct").

tices Sandra Day O'Connor and Anthony Kennedy met with newly appointed Iraqi judges two months before the planned transfer of sovereignty in Iraq.<sup>67</sup> Why should it be any different when information flows the other way?

The judges looking abroad are talking about better-reasoned and better-informed decisions, about being open to new ideas, about recognizing that the United States can learn as well as teach. Indeed, they embrace comparative analysis in part because of the ways in which it helps them appreciate the distinctiveness of U.S. law, culture, and history, an appreciation that is as likely to result in informed divergence as in convergence. Suppose, for instance, that in a conference of constitutional judges from around the world U.S. judges become aware of just how far out of line they are with prevailing doctrine in other countries. They might discover that their fellow constitutional judges from different countries, having consulted one another's decisions, virtually all agree that hate speech should not be permitted, that it should be an exception to a liberal constitutional right of freedom of speech.

Suppose further that the next First Amendment case before the U.S. Supreme Court involves hate speech. In the Court's opinion, the justices openly discuss the prevailing trends in global constitutional jurisprudence and announce that under U.S. constitutional precedents, they have decided to continue to permit hate speech as a necessary concomitant, however deplorable, of freedom of speech. They might justify their decision on the grounds that they are U.S. judges bound by a distinct legal and political tradition. Alternatively, they might declare that the U.S. historical and cultural trajectory has been sufficiently distinct from that of other nations as to warrant a different understanding of what freedom of speech must mean. Or they might invoke the specific text of the U.S. Constitution as opposed to the texts of other constitutions.

Any of these options would be informed divergence, a deliberate decision to pursue an explicitly idiosyncratic path in the face of global trends in the other direction.<sup>68</sup> It is equally possible to imagine legislators or regulators being made aware of the divergence between their laws or rules and those of a substantial number of other countries and nevertheless concluding to prize and preserve their differences on historical, cultural, political, economic, social, religious, or any other distinctive national grounds. What is critical is that the same forces pushing *toward* convergence—the forces of regulatory export, technical assistance, distilled information, and soft law—can also result in informed

<sup>67</sup> "Iraq Gets Court Aid from 2 U.S. Justices," *New York Times*, May 5, 2004, at A20.

<sup>68</sup> See Lawrence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997): 273-391, at 281.

decision, but to allow and indeed encourage judges to draw inspiration and influence where they will.

As long as they tell us about it. The worst of all worlds would be for judges to be deeply but secretly influenced by any set of sources. Yet that is the far more likely alternative to citing foreign decisions. Judges who travel abroad, learn about foreign legal systems, and interact regularly with their foreign counterparts will change in ways that cannot be compartmentalized. They will understand that they inhabit a wider and richer world, that they write for a wider audience, that they compete for the laurels of professional respect in a wider global arena. That understanding becomes gradually internalized in ways that shape the most basic conceptions of identity: the relation of oneself to others.

Two anecdotes may help to make the point. The first is related by Rita Hauser, a distinguished international lawyer who worked for Dean Roscoe Pound while she was a student at Harvard Law School. She recalls translating French legal documents for Dean Pound in the majestic reading room of the Harvard Law School library, with the names of great American judges and legal scholars engraved on a marble frieze around the ceiling. After she read him a particular passage, he paused in thought for a moment and then said, in a faintly surprised tone, "They have a better idea than we do." Hard as it may be for Americans steeped in what is indeed a great national legal tradition to imagine, foreign legal systems may indeed have better ideas than we do on some thorny legal issues, just as they may have in industrial organization, environmental protection, or scientific discovery—and just as we may also have better ideas than they do.

The second anecdote involves a young Princeton alumnus who has taken a defunct charter school in southwest Washington, DC, and transformed it into the nation's first urban public boarding school. He recounts that even among the students enrolled at the school—students who enter in the seventh grade and have chosen to try a more academically rigorous school that is specifically designed for college prep—when he asked at a school meeting how many expected to go on to college, only a few raised their hands. When he asked why, the most frequent explanation was "I'm not a good enough athlete." In the experience of these youngsters, *in their world*, the chief attribute necessary for college admission was athletic prowess. Bringing them into contact with peers who have different experiences and expectations is above all a matter of widening their world. Once they are part of that wider world, their points of reference and their standards of comparison will change forever.

Once judges have been introduced to a wider world of peers, it is impossible for them to recabin their intellectual and professional world. And trying to insulate them in the first place from foreign contacts and foreign opinions is like trying to block the Internet. Judges, like the rest of us,

divergence. They permit any subset of national officials, or indeed all three branches of a national government, to decide deliberately to affirm their difference.

In this context, the self-imposed insularity championed by Justices Scalia, Thomas, and Rehnquist looks increasingly suspect. As long as any sources other than precedent are admitted as aids to judicial reasoning, can we really justify excluding ideas of foreign provenance, even if they serve only to confirm our own uniqueness? Would the three self-proclaimed judicial "sovereignists" bar the judicial reading of law review articles authored by foreign legal scholars? Of articles published in American law reviews by non-American law students that discuss American law in comparative perspective? Or even that purport to discuss only American law but that are inevitably influenced by the author's foreign background? Justices Scalia, Breyer, and Ginsberg were all law professors before becoming judges. Should they try to block out whatever knowledge of foreign legal systems they may have acquired in the classroom?

Or is the problem rather the *citation* of foreign legal decisions, the piling up of foreign precedents on a particular side of a U.S. argument? That is the nub of the fracas between Justices Breyer and Thomas in *Knight v. Florida*, in which Thomas accuses Breyer of looking to foreign decisions because he can't find any U.S. law on point.<sup>69</sup> And certainly the views of many courts around the world on the death penalty are closer to Breyer's position than to Thomas's. To decide that twenty-seven years on death row is cruel and unusual punishment because that is the view of a majority of other nations, or even of a majority of other nations that the United States might consider its "peer group," might look like "imposing a foreign fad or fashion" on the United States. But are the contemporary views of nations such as England and Canada, Germany and Japan (where we, after all, drafted their current constitutions) really more "foreign" than the views of a group of white men who lived over two centuries ago, owned slaves, and denied women the vote?

At the 2004 meeting of the American Society of International Law, Justice Scalia denounced the citation of foreign law or judicial decisions on the grounds that it was antioriginalist.<sup>70</sup> Yet adhering dogmatically to the view of the framers is as likely to distort judicial decision making in unhealthy ways as is reflexively bowing to some kind of global consensus on a particular issue. The right answer in both cases is to eschew any notion that a set of sources other than direct precedent can "dictate" a

<sup>69</sup> *Knight v. Florida*, 528 U.S. 990, 990 (U.S. 1999).

<sup>70</sup> Antonin Scalia, Keynote Address, Annual Meeting of the American Society of International Law, April 2, 2004.



values, and experience—judgments that in the end we appoint them to make—they cannot artificially restrict their knowledge and deny their identity. On the contrary, American judges should draw on comparative analysis to further enrich American law and to reach decisions and write opinions that will in turn be cited and grappled with by judges in other countries who have long looked to us.

### Majority Will or Minority Rights?

In this final section I turn from the existence and longevity of the phenomenon of judicial exceptionalism to Michael Ignatieff's particular explanation for it. He suggests that American judges may define American rights in ways that are more connected to the will of the majority of the American people than to the desire or indeed the compulsion to protect the rights of American minorities. He begins by accepting Paul Kahn's identification of the deep connection between American national identity and popular sovereignty.<sup>73</sup> The point here is that Americans purportedly cannot accept international human rights even when they are codified in treaties ratified in accordance with the U.S. Constitution because they are still "foreign," not homegrown products of American constitutional soil.

As evidence for this proposition, Ignatieff refers to the death penalty, arguing that that if capital punishment "gives public expression to the values that ought to hold Texas society together—as repeated polls indicate that they do—it is hardly surprising that such settled domestic political preferences should trump international human rights."<sup>74</sup> He appears to assume that because European courts have apparently defied popular support for capital punishment there to let the elite imposition of no death penalty stand—as opposed to American courts, which have pulled back from their position in the 1970s finding that virtually all forms of the death penalty constituted cruel and unusual punishment—American courts see rights more as expressions of majority interest than as instruments for the protection of minorities.

To an American lawyer educated in the 1980s by law professors who were steeped in the Supreme Court decisions of the 1950s, 1960s, and 1970s, or indeed to any American engaged even distantly with the politics of desegregation, criminal procedure, feminism, prison reform, deinstitutionalization of the mentally ill, handicapped rights, Native American rights, and gay and lesbian rights, Ignatieff's claim is almost unintelligible. This reaction may simply confirm that I and others in my cohort are too

<sup>73</sup> See Ignatieff's introduction to this volume.

<sup>74</sup> See Ignatieff's introduction to this volume.

indeed like the litigants before them, live in a globalized world. They have access to more information; they have friends and colleagues across borders; they know irrevocably that even the full richness of American federal jurisprudence, which itself draws on the cumulative and ongoing experience of fifty state courts as well as almost 250 years of federal precedents, is only one way among many.

In this context, consider again Justice Rehnquist's exhortation to American judges to participate in international judicial exchanges, encouraging them precisely to "share information and learn to better understand one another and our legal systems."<sup>71</sup> I am arguing that if they heed his advice they will not be able to turn back. They will grow in sophistication and appreciation for both other legal systems and our own. Consider the following excerpt from Judge Wallace's discussion of judicial education:

Up to this point, judicial education (and training) has largely been considered to be local and insular. The assumption has been that each country's judicial system is unique and therefore requires a unique type of judicial education. After consulting with judiciaries and judicial education institutions around the world, I have come to doubt that assumption.<sup>72</sup>

This reaction to exposure to foreign systems is predictable and praiseworthy. Yet even if American judges reject some or all of what they find abroad, it will change who they are and how they think—if not in every case, then surely in some. Should they then cover their tracks and deny these influences the minute they put pen to paper or fingers to keyboard to write an opinion? Are they not supposed to track their reasoning accurately and fully to allow the litigants and the wider public who receive their opinions to have the maximum prospect of developing counterarguments the next time round? Or to allow their future colleagues a chance to understand the precise nature of the precedents established?

Judges are allowed to take judicial notice of the world around them. The parameters of that notice can be debated as a matter of identifying the precise sources of the facts relied on in an opinion. But the larger point is that judges are men and women living in the same world as the rest of us, subject to the same forces that are making that world smaller. They do not need the exhortations of scholars to feel bonds with their fellow judges in other countries, the bonds of pride in craft and devotion to the enterprise of judging as fairly and faithfully as possible. That pride and discipline should ensure that judges divulge the sources of their reasoning and accept the strictures of precedent or code as their legal system demands. But where they must make difficult judgments based on a compound of philosophy,

<sup>71</sup> Rehnquist, *supra* note 49.

<sup>72</sup> Wallace, *supra* note 6, at 355.

deeply steeped in the conventional wisdom, or worse yet, conventional wisdom compounded by sentimental and uncritical idealism. Nevertheless, four counterarguments come to mind.

First, American courts have certainly not always gotten it right: *Brown v. Board of Education* was preceded by *Plessey v. Ferguson*, after all. But an impressive number of the opinions that are most celebrated in American law are those that have stood up for oppressed minorities.<sup>75</sup> *Lawrence v. Texas*, overturning *Bowers v. Hardwick*'s upholding of the constitutional-ity of antisodomy laws is just the latest in a long list of civil rights for minorities vindicated through the courts. Conversely, those decisions that are regarded as "stains on the Court's honor," most notably *Korematsu v. United States*, the World War II decision to uphold the internment of Japanese American citizens, are those that acquiesce in the oppression of minorities.<sup>76</sup> *Korematsu*, and the behavior it legitimated, stood as such a black mark on the nation's honor that President Bush was very careful to warn against similar discrimination against Arab Americans in the days after September 11.

Second, much of the evidence cited by Ignatieff and others who purport to distinguish between the rights traditions of the United States and Europe is of very recent vintage and largely reflects a backlash against what many American voters perceived to be *excessive* interference with majority will. No court can afford to get too far out of step with its populace, as the very logic of courts requires, whether at the village or the national level.<sup>77</sup> Just as the European Court of Justice pulled back after several decades of groundbreaking constitutional decisions establishing and extending a European legal order, so too did the Burger Court and then, with a vengeance, the Rehnquist Court, go about redressing the "judicial activism" of the Warren Court—often with activism of its own. Reinstating the death penalty, restricting abortion rights, cutting back on the rights of criminal defendants, limiting the power of the federal government itself over the states—all these decisions must be understood not as expressions of American rights culture in and of themselves, but rather as part of a lively dynamic with a far more minority-rights-protective court of a previous era. That back-and-forth across decades between justices appointed by different political parties and with different understandings of both the text of the Constitution and the ideal

<sup>75</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (barring enforcement of restrictive covenants limiting occupancy of land to Caucasians on equal protection grounds); *Goldberg v. Kelly*, 397 US 254 (1970) (requiring an evidentiary hearing to satisfy equal protection requirements before the termination of welfare benefits).

<sup>76</sup> *Korematsu v. United States*, 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944).

<sup>77</sup> See Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

role of judges is a fundamental element of the American constitutional tradition, but one that moderates rather than detracts from a fundamental judicial commitment to the protection of minority rights.

Third, America's greatest judicial exports all revolve around the protection of minority rights. The institution of judicial review itself is designed to prevent the will of the majority from ever overriding the rights guaranteed in a democratically approved constitution. The United States directly ensured that the high courts of Germany and Japan would exercise judicial review; the chief architects of the European Court of Justice's assertion of the equivalent of judicial review were European judges educated in the United States; the younger courts of Canada and South Africa directly borrowed from the *Marbury v. Madison* tradition.<sup>78</sup> Further, the fruit of judicial review is the U.S. version of "rights talk." As chronicled memorably by Louis Henkin, Anthony Lester, and Mary Ann Glendon,<sup>79</sup> constitutional courts around the world looked to the U.S. Supreme Court for inspiration in protecting the rights of their own minorities and women against majority interference.

Finally, beyond the institution of judicial review and judicial decisions themselves, America's other great contribution to global legal culture is the institution of public interest litigation, in which public interest groups (in American parlance; the British call them "pressure groups"; other countries may simply call them pests) turn to the courts to protect minorities and other oppressed groups, from the Roma to indigenous peoples to endangered species. Harold Koh began his work on his theory of transnational legal process with a chronicling of the phenomenon of transnational public interest litigation; a number of scholars have documented the rise of such litigation on behalf of women and minorities in Europe, drawing on national, EU, and European human rights law.<sup>80</sup> The whole point and purpose of such litigation is social and political change through law—specifically through courts' willingness to stand up to legislatures.

It is impossible, in this short compass, to do more than to debate Ignatieff's claim with argument and hypothesis. Indeed, it is difficult to know what proof would look like. Thus I can close only with a competing hypothesis of my own. On balance, I find it far more likely that what is exceptional about American rights culture is the substance of the rights

<sup>78</sup> See Ackerman, *supra* note 36.

<sup>79</sup> See Henkin and Rosenthal, *supra* note 36; Glendon, *supra* note 36, at 158; Lester, *supra* note 34.

<sup>80</sup> See Harold Hongju Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181–207; Carol Harlow, *Pressure through Law* (London: Routledge, 1992); Karen Alter and Sophie Meunier, "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision," *Comparative Political Studies* 26 (1994): 535–61.



themselves—the peculiar twist that American courts have given them over two centuries of interpreting the U.S. Constitution in light of American history and culture. Such exceptionalism is hardly exceptional to the United States; it is the exceptionalism of virtually any proud and insular nation, great or small.

Globalization is associated worldwide with Americanization; conversely, antiglobalization often fuses murky but readily with anti-Americanism. Ironically, however, at least in the judicial realm, Americans have been slow to globalize. American corporations eagerly reach across borders to absorb and assimilate; American courts have been content to send their decisions out across the world but quite reluctant to reach out themselves. The result has been a substantial lag behind the constitutional courts of most other mature democracies, which are engaging in what participants themselves describe as a global human rights dialogue or simply transjudicial conversation.

Slow or not, the justices of the U.S. Supreme Court are now hotly disputing the propriety and the value of looking to and citing foreign judicial decisions in their own opinions, with a majority apparently in favor of the practice. Given that all nine, or at least eight, justices favor foreign travel and meetings with foreign fellow jurists to exchange information about each other's legal systems and specific opinions, they will become globalized whether they wish to or not. At that point, a refusal to cite sources that have influenced them, even if only to highlight the distinctiveness or superiority of American law in a particular case, becomes a matter more of deception than of disinclination. Moreover, judges of the quality of the majority of U.S. federal judges will naturally respond to their own desire and the pressure of their peers to rise to the bar of global competition for precision of reasoning, range of arguments considered, and empirical investigation.

Many of these changes are already happening. They mirror the experience and the composition of American society and the American polity. In a decade, perhaps two, judicial references to the decisions of their foreign counterparts will be no more surprising than the introduction of myriad foreign elements into American cuisine, which has moved in the space of several decades from "purely American fare" such as hamburgers, hot dogs, and French fries (note the irony) to fusion everything—yet that fusion is known as "the new American cuisine."

In short, I predict that American judicial narcissism, understood as a desire to be the best on any playing field, is likely to lead American judges *toward* participation in global judicial dialogues. If American judges can

travel abroad to help train their counterparts in fledgling or transitional democracies, as so many have, then they can also travel to participate in colloquies with their peers in countries such as England, Germany, South Africa, Canada, India, Argentina, and Japan, not to mention the EU. They are likely strongly to defend American jurisprudence and legal traditions in these meetings and to recall its profound impact on many of the other courts that are now active participants in a global human rights dialogue. But they are also likely to learn and to grow. As Judge Guido Calabrese, former dean of the Yale Law School, put it, in exhorting several of his panel members to follow the lead of the Italian and German constitutional courts, "Wise parents learn from their children."<sup>81</sup>

In the end, judges participating in the processes of judicial globalization, willingly or not, are likely to regard themselves as better judges as a result, and so they will be. But they will still be American judges, interpreting, implementing, and creating American law, for American citizens living in an increasingly globalized economy, society, and polity. While we hope and expect that they will be exceptionally good at their craft, and thus serve as an example for many of their colleagues around the world, they are less likely to think that they are exceptional because they are American.

<sup>81</sup> *United States v. Then*, 56 F.3d 464, 468-69 (1995).