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I'd Like to Teach the World to Sing (in Perfect Harmony): International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue

Terry N. Evans
evanst@wlu.edu

Ronald J. Krotoszynski Jr.
University of Alabama - School of Law, rkrotoszynski@law.ua.edu

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"I'd Like to Teach the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue

by

Ronald J. Krotoszynski, Jr.[1]

> I'd like to buy the world a home and furnish it with love,
> Grow apple trees and honey bees, and snow white turtle doves.
> I'd like to teach the world to sing, in perfect harmony,
> I'd like to buy the world a Coke and keep it company.
> It's the real thing, Coke is what the world wants today.[2]

> The essential terms of the debate about legitimacy of judicial power may be synthesized in two fundamental questions: First, what is the source of the judge's legitimacy? Second, what are its connections with other powers that a direct democracy may legitimately exercise?[3]

Proponents of international judicial dialogue would do well to read, and reflect upon, the conversations chronicled in *Judges in Contemporary Democracy*. In a lucid and candid series of interlocutions, five preeminent constitutional jurists and one highly regarded constitutional theorist ponder some of the most difficult questions that confront the role of a judge on a constitutional court. In particular, the participants – including Stephen Breyer (Associate Justice of the Supreme Court of the United States), Robert Badinter (former President of the Constitutional Council, in France), Antonio Cassese (former President of the International Criminal Tribunal for the Former Yugoslavia), Dieter Grimm (former Justice of the Federal Constitutional Court, in Germany), Gil Carlos Rodriguez Iglesias (President, Court of Justice of

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[2] *I'd Like to Teach the World to Sing (In Perfect Harmony)*, words and music by Roger Cook, B. Davis, B. Backer (William Backer), & R. Greenaway, c. 1971.

[3] JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 281 (ROBERT BADINTER & STEPHEN BREYER, EDS. 2004).

the European Communities), and Ronald Dworkin (Professor of Law at Oxford University and New York University) – consider the countermajoritarian problem identified by Alexander Bickel.[4] In a democratic society, why should judges have the final say, when judges lack the democratic mandate enjoyed by Executive and Legislative Branch officials?[5] Why do the other branches of government – to say nothing of average citizens – accept judicial decisions that invalidate legislative or executive actions?[6] The participants also posit a creeping "judicialization" (pp. 3-6) of democratic government, in which the political branches call upon judges to undertake broader and broader responsibilities.

With astonishing candor, the participants reflect upon their experiences within their own domestic legal systems, consider the advent of truly transnational judicial entities, and offer observations and critiques of how foreign legal systems have attempted to solve common problems. Over the course of six chapters, the book engages such discrete subjects as judicial

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[4] *See* ALEXANDER BICKEL, DEMOCRACY AND DISTRUST: THE SUPREME COURT AT THE BAR OF POLITICS 16-20, 26-28, 260-61 (1962); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 257-58 (2002) (questioning whether judicial review really is essentially counter-majoritarian and suggesting that legal academics should give greater attention to the role of politics in judicial decision making or present overtly normative arguments supporting or opposing specific substantive legal outcomes rather than continue to obsess about the legitimacy of judicial review in entirely abstract terms). Professor Barry Friedman has seriously questioned Bickel's paradigm, suggesting that "the public itself might favor a system in which their judges sometimes trump the public's immediate preferences." Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2605 (2003). Thus, Friedman suggests that contrary to Bickel's hypothesis "public opinion and judicial review are connected." *Id.* at 2635; *see* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1063 (2000) (arguing that enhanced scope of national power after 1937 was not fundamentally at odds with the popular will and that "[i]f anything, the public seems to have demanded this change and to have accepted it happily when it came").

[5] *See* BICKEL, *supra* note ___, at 16 ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

[6] *See id.* at 260-61 ("Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it often is the sweaty intimacy of creatures locked in combat."); *see also id.* at 17 (arguing that when the Supreme Court invalidates a statute that Congress enacted "it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against").

activism (pp. 17-65), the role of judges as arbiters of public morality (pp. 9-15, 67-115), judicial supervision of the electoral process itself (pp. 117-74), efforts to internationalize the enforcement regime associated with fundamental human rights (pp. 175-254), the relationship of the judge to the mass media (pp. 235-73), and the ability of the judiciary to police itself and ensure continued public support for judicial personnel and institutions (pp. 275-316). The style is entirely dialectic; indeed, *Judges in Contemporary Democracy* reads very much like a Socratic dialogue.[7]

Obviously, a transnational conversation of this sort provides many useful insights into the role of judges and the nature of judging. In this respect, *Judges in Contemporary Democracy* is an important contribution to our understanding of how judges themselves view the legitimacy of their labors. For a judge, what makes a decision "legitimate"? What factors should a judge consider when deciding an open question? Under what circumstances and conditions would the judiciary place at risk its popular and political legitimacy? This contribution alone would make *Judges in Contemporary Democracy* a significant new addition to the literature; however, the book also offers timely and important insight into the problem presented by transnational, or international, judicial dialogue.

Indeed, the conversations suggest that great potential exists for international judicial dialogue to contribute to the growth and understanding of universal human rights. At the same time, however, the conversations also suggest some serious difficulties associated with meaningful efforts to operationalize transnational "borrowing" of foreign legal precedents. Thus, the book both illuminates the promise of international judicial dialogue, but also (and perhaps inadvertantly) some of its dangers.

Increasingly, legal academics have advocated increased and enhanced interactions between and among judges serving on various national courts. A common turn of phrase for this kind of transnational judicial interaction is "International Judicial Dialogue" ("IJD"). For

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[7] *See, e.g.*, PLATO, THE REPUBLIC, ch. 9, § 5, at 92-102 (Francis MacDonald Cornford trans. 1941) (discussing the qualifications and duties of judges in a well-ordered community).

example, Professor Anne-Marie Slaughter has called on judges to engage each other in an effort to create a global system of law.[8] Part of her project is descriptive of a state of affairs that already exists: "Courts are talking to one another all over the world."[9] Such interations "vary enormously, however, in form, function, and degree of reciprocal engagement."[10]

In other respects, however, Professor Slaughter would like to see this ad hoc international judicial dialogue formalized and expanded.[11] She asks us to "imagine a world of regular and interactive transjudicial communication – among national courts, between national courts and supranational tribunals, and among supranational tribunals."[12] These efforts would help create "a world in which courts perceived themselves independent of, although linked to, their fellow political institutions, open to persuasive authority, and engaged in a common enterprise of interpreting and applying national and international law, protecting individual rights, and ensuring that power is corralled by law."

Objective evidence strongly suggests that the Justices have been listening. The United States Supreme Court has made a conscious turn toward international judicial dialogue.[13] In

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[8] *See* Ann-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100-18 (1994).

[9] *Id.* at 99.

[10] *Id.* at 101.

[11] *Id.* at 103-14, 129-35.

[12] *Id.* at 132.

[13] *See* Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 649 (2004) ("It has now become the conventional wisdom that many justices on the United States Supreme Court are thinking about the relevance of comparative constitutional law to the interpretation of the United States Constitution.").

cases like *Roper*,[14] *Lawrence*,[15] and *Atkins*,[16] the Justices have invoked foreign legal precedents in support of the Court's interpretation of the domestic Constitution. Moroever, several of the incumbent Justices publically have advocated the incorporation of foreign legal precedents into domestic constitutional law.[17] This "borrowing" of foreign legal precedents represents one aspect of international judicial dialogue ("IJD"). Proponents of this form of IJD assert that the consideration and incorporation of foreign legal precedents will enhance the quality and persuasiveness of domestic judgments.[18] One could term this "strong form" IJD.

At the same time, however, advocates of IJD also have advocated greater interaction and discussion among jurists from different courts.[19] This conversation could be extended over time

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[14] Roper v. Simmons, 125 S. Ct. 1183, 1199-1200 (2005).

[15] Lawrence v. Texas, 538 U.S. 558, 573, 576 (2003).

[16] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[17] *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 2-3, 8-10 (2003); Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law* (Mar. 15, 2002), *in* 96 AM. SOC'Y OF INT'L PROC. 348, 350 (2002); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2; Tom Curry, Justices Debate Use of Foreign Precedents, MSNBC.com, Jan. 14, 2005, available at http://msnbc.msn.com/id/6824149 (reporting on public colloquy between Justices Breyer and Scalia, in which Justice Breyer supported and Justice Scalia opposed incorporation of foreign legal precedents in domestic constitutional opinions); Charles Lane, *The Court Is Open for Discussion*, WASH. POST, Jan. 14, 2005, at A1 (reporting on the meeting at American University School of Law and providing relevant quotes from Justices Breyer and Scalia).

[18] *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103-05 (2000); Slaughter, *supra* note ___, at 129-35, 137; *see also* Reem Badhi, *Globalization of Judgment: Transjudicialization and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 556-58 (2002); Helfer & Slaughter, *supra* note ___, at 370-73, 389-91.

[19] *See* Tushnet, *supra* note ___, at 662 ("Learning about the way other constitutional systems address particular questions of constitutional law might enhance our ability to interpret our own Constitution."); *see also* Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July/August 2004, at 3 *available at* www.legalaffairs.org/issues/July_August_2004/ feature_posner_julaug04.msp ("I do not suggest that our judges should be provincial and ignore what people in other nations think and do."); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transjudicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487, 490, 492 (2005) ("This informal judicial dialogue is based not on a sense of

and carried out in a relatively formal fashion, such as in a series of law review writings. Alternatively, IJD could be advanced by discussions in real time among judges from different nations, serving on different national, or international, courts.[20] One could style this approach to IJD as "weak form" IJD. Even persons skeptical of strong form IJD have expressed openness to weak form IJD. As Judge Richard Posner has put it, "[t]he problem [with IJD] is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases, as if the world were a single legal community."[21]

In my view, *Judges in Contemporary Democracy* provides strong support for advocates of the weak form of IJD. The participants – even from neighboring countries! – knew relatively little about the membership, selection, and operation of each other's courts. The conversations plainly enhanced mutual understanding of how the foreign constitutional courts functioned, the role that the court played in domestic government, and the problems the various courts confronted in going about their job of safeguarding constitutional values. At the same time, however, this lack of knowledge has rather serious implications for the advocates of the strong form of IJD: how can one reliably "borrow" a precedent when one lacks even the most rudimentary understanding of the institution that issued the opinion and the legal, social, and cultural constraints that provided the context for the decision? A precedent is more than the bare words on the page; a precedent is the product of a socio-legal culture: reading a text as nothing

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shared history or legal tradition, nor on any formal, treaty-based organizational structure or hierarchy. Rather, courts are engaging each other out of a developing sense that they are part of a common enterprise. . . .").

[20] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 19-20, 52-55,72-73, 135-37 (2004) (considering and critiquing a variety of extra-judicial entities, of varying degrees of formality, that facilitate weak form IJD).

[21] Posner, *supra* note ___, at 3-4.

more than a text risks grave misunderstandings that could prove embarrassing to the borrowing court.[22]

Borrowing foreign precedents without understanding the context of the decision invites both over- and under-reading the decision. For example, the Conseil Constitutionnel in France may only review proposed legislation for consistency with the French constitution; it may not re-write or invalidate laws that already exist.[23] The implications of this structure could easily lead to false assumptions about the scope of a French decision; for example, the invalidation of a legislative veto provision[24] would not affect the continuing validity of other such provisions, provided that the French National Assembly had previously enacted these other provisions. Unless and until the other laws containing these provisions were re-enacted, the Conseil Constitutionnel would have no power to enforce its ruling against legislative vetoes.

Although the problems associated with the strong form of IJD begin with the problems of understanding the context and meaning of foreign legal precedents, they do not end there. Even if one could "teach the world to sing in perfect harmony" by overcoming the practical difficulties of understanding a foreign legal precedent in its proper doctrinal, institutional, and cultural

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[22] *See generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1995); Stanley Fish, *Intentional Neglect*, N.Y. TIMES, July 19, 2005, at A21. On the problems associated with reading a foreign judicial precedent with an incomplete understanding of the institutional limitations, governmental structure, procedures, and customs associated with a particular judicial entity, see Tushnet, *supra* note ___, at 650-55, 662-63 (setting forth institutional and doctrinal consideration that suggest caution in "the use of transnational comparative law in interpreting domestic constitutions") and Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 64-59 (2004) (objecting to reliance on foreign legal materials in domestic cases raising constitutional questions in the absence of either a domestic law mandate for such consideration or a workable theory defining when and how domestic courts should have recourse to such materials).

[23] *See* BADINTER & BREYER, *supra* note ___, at 57 ("Remember that we [the Conseil Constitutionnel] rule before the publication of the law. We do not rule on laws in existence. We simply render laws aborted; we annul."). One should note that at least two participants in the discussion, Justice Breyer and Professor Dworkin, were completely unfamiliar with this aspect of the Conseil Constitutionnel's jurisdiction. *See id.* at 57-59.

[24] *See* INS v. Chadha, 462 U.S. 919, 944-57 (1985) (invalidating, on separation of powers grounds, the use of a one-house "legislative veto" as a device for superintending execution of laws vesting discretion with Executive Branch officers).

context, one would still have to deal with the problem that, contrary to the song's suggestion, Coke is *NOT* necessarily what "the world wants today," if by "Coke" one means a fundamental rights jurisprudence that more or less mirrors the substance of contemporary U.S. human rights law.

Consider just two examples of this phenomenon. Under the German Basic Law (which serves as Germany's constitution), abortion rights are significantly more circumscribed than at present in the United States. The Federal Constitutional Court has held that the Basic Law's protection of human dignity and the right to free development of one's personality apply to gestating fetuses.[25] *Roe* v. *Wade*[26] does not necessarily provide the yardstick by which one would measure the reproductive rights of women, if the Supreme Court were to consider the question from a truly global perspective. Similarly, the primacy of free speech over other human rights, such as personal dignity, reputation, and equality is not a universally shared view; not only Germany but most of Western Europe and Canada view regulations of racist or sexist hate speech as fully compatible with a meaningful commitment to the freedom of expression and democratic pluralism.[27]

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[25] *See* Decision of February 25, 1975, 39 BVerfGE 1 (1975), *translated in* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to* Roe *v.* Wade, 9 MARSHALL J. PRAC. & PROC. 551, 605-684 (1976); Decision of May 28, 1993, 88 BVerfGE 203 (1993). For a detailed and thoughtful discussion of German constitutional law's approach to abortion rights, see David Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 869-72 (1986); Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 15-32 (1994); Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 BYU L. REV. 371.

[26] 410 U.S. 113, 152-57 (1973).

[27] *See, e.g.*, R. v. Butler, [1992] 1 S.C.R. 452, 501-02 (Can.) (upholding, against free speech challenge, government proscription against erotica that "degrades," "humiliates," or features "undue violence"); R. v. Keegstra, [1990] 3 S.C.R. 697, 746-49, 755-56 (Can.) (upholding, against free speech challenge, statute imposing criminal sanctions on "hate propaganda"); *see also* Richard Delgado & Jean Stefancic, *A Shifting Balance: Freedom of Expression and Hate Speech Restrictions*, 78 IOWA L. REV. 737, 742-47 (1993) (citing, quoting, and discussing hate speech statutes and regulations maintained in Canada and various Western European nations); Tushnet, *supra* note ___, at 650-51 (noting that "those who favor hate speech regulations in the United States often refer to transnational constitutional norms," including the

Thus, even if one could divine some means of operationalizing the strong form of IJD, it is not entirely clear that the resulting human rights regime would necessarily favor the balances presently struck by the current Supreme Court. Advocates of the strong form of IJD would do well to consider whether they would support IJD as enthusiastically if, at the end of the day, what the world really wants is not Coke, but rather a warm beer or a nice Chianti.

Part I of this Review Essay surveys and critiques the arguments that *Judges in Contemporary Democracy* sets forth in favor of maintaining a strong form of judicial review as a check on the vicissitudes of more direct forms of democracy. Part II takes up the theory of IJD and its principal features and makes some preliminary assessments of the potential costs and benefits of IJD, in both its "strong" and "weak" forms. Part III considers the lessons that a careful reader might take from *Judges in Contemporary Democracy* with respect to the possibility of actually implementing IJD; the book makes a very persuasive case for the weak form of IJD, even as it undermines the case for a strong form of IJD featuring "borrowing" of foreign precedents in domestic court opinions. In conclusion, transnational and international judicial discourse is undoubtedly a good thing; judges, like all other persons engaged in creative endeavors, must find their muses. Foreign judicial decisions could legitimately serve as a kind of judicial muse – a highly effective foil for contrasting domestic legal understandings; a mirror that reflects not the self, but the other; a kind of grist for reconsidering long-held assumptions about the way things must be (because, in a given country, they have always been thus). When, however, foreign legal precedents transcend the role of muse and assume a status co-equal with

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legal regulation of such speech in Canada and many nations in western Europe, "in defending the proposition that hate speech regulation should not be treated as unconstitutional" in the United States). For a discussion of how United States free speech principles represent something of an anomaly, at least when viewed in comparative terms, see RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (forthcoming NYU Press 2005).

domestic legal sources, serious problems are likely to arise that will lead, inexorably, to the embarrassment of borrowing courts.[28]

I. The Muse Polyhymnia: The Judge As Moral Arbiter and the Problem of Creeping Judicialization of Everyday Politics.

Polyhymnia was the Muse of sacred poetry and music and arguably would constitute a poor choice as the patron muse of judges.[29] Nevertheless, Robert Badinter invokes the sacred in describing the judiciary as "the secular papacy" and asks "[h]as the judiciary become the twenty-first century equivalent of the twelth-century papacy?" (p. 4). Along related lines, he wonders whether "ordinary citizens look to judicial decisions as sources of moral authority?" (*Id.*) These are, of course, important questions, with disturbing implications – after all, do we really want a judiciary that, viewing itself as the modern day equivalent of the Medieval Church, asserts institutional primacy as the arbiter of moral values? Should we expect judges to assume the role of priest, mullah, or rabbi and to serve as guardians of the moral order?

To be sure, the public expects that judges will advance "justice," which implies more than a modicum of moral authority;[30] even so, one might well question whether judges should overtly claim a right to deal in abstract questions of morality, rather than questions of law that

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[28] Indeed, serious legal thinkers with views as ideologically diverse and Professor Mark Tushnet and Judge Richard Posner agree on this point. *See* Posner, *supra* note __, at 1 ("Problems arise only when the foreign legal decision is believed to have some (even if quite attenuated) persuasive force in an American court merely by virtue of being the decision of a recognized legal tribunal."); Tushnet, *supra* note ___, at 662-63 (arguing that "we must be aware of the way in which institutional and doctrinal contexts limit the relevance of comparative information" and suggesting that "[o]n questions that matter a great deal, direct appropriation of another system's solution seems unlikely to succeed.").

[29] *See* RICHARD P. MARTIN, BULFINCH'S MYTHOLOGY 10, 711, 717 (1991); ALEXANDER S. MURRAY, THE MANUAL OF MYTHOLOGY: GREEK AND ROMAN, NORSE AND OLD GERMAN, HINDOO AND EGYPTIAN MYTHOLOGY 160 (1882 & 1993); DAN S. NORTON & PETERS RUSHTON, CLASSICAL MYTHS IN ENGLISH LITERATURE 235-36 (1952).

[30] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) (Most contemporary constitutions declare individual rights against the government in very broad and abstract language. . . . The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.").

run parallel to important moral issues. In my view, a judge should not take Polyhymnia as her muse, for judges are not principally the guardians of the sacred or the divine. Moreover, the judge as oracle of the gods, as divinator, seems a remarkably poor model for a judge to self-select at a time when, at least in the United States, a hue and cry exists over "government by the judiciary."[31]

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[31] *See, e.g.*, Phyllis Schlafly, THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT (2004) (arguing that federal judges have usurped improperly core political functions that belong to the President and Congress and proposing the adoption of direct political controls on the federal judiciary). Along similar lines, the remarkable success of Mark R. Levin's *Men in Black: How the Supreme Court is Destroying America* (Regnery Publishing 2005), a screed attacking the federal courts, constitutes solid evidence of the strong backlash against the federal judiciary by conservatives in the United States. *See* Charles Lane, *Conservative's Book on Supreme Court Is a Bestseller*, WASH. POST, Mar. 20, 2005, at A6 (reporting on hot sales of Levin's book and acclaim book has received within movement conservative circles). The willingness of incumbent members of Congress, congressional staff members, political activists, and leaders of religious organizations to rail publically against federal judges individually and collectively provides important additional evidence of the growing conservative assault against the federal judiciary. *See* Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress Is Partly to Blame*, WASH. POST, April 8, 2005, at A21 (quoting GOP House majority leader Tom DeLay arguing that many recent federal court decisions are the product of "a judiciary run amok" and reporting that Senator Coburn's (R-OK) chief of staff, Michael Schwartz, has called for "mass impeachment" of federal judges); David D. Kirkpatrick, *In Telecast, Frist Defends His Efforts to Stop Filibusters*, N.Y. TIMES, April 25, 2005, at A14 (quoting Rev. James Dobson, founder and leader of the conservative religious organization Focus on the Family, in describing the federal Supreme Court as "unaccountable," "out of control," and a "despotic oligarchy"); Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, April 9, 2005, at A3 (reporting on a bizarre Washington, D.C. conference sponsored by an organization called the "Judeo-Christian Council for Constitutional Restoration," at which prominent members of Congress, congressional staff members, religious leaders, and conservative political activists denounced the federal judiciary and, in particular, the U.S. Supreme Court, called for the immediate impeachment of Associate Justice Anthony Kennedy, and featured a speaker who (twice) suggested that Josef Stalin's "Death solves all problems: no man, no problem" aphorism might provide a useful plan of action for the group); Shailagh Murray, *Filibuster Fray Lifts Profile of Minister; Scarborough Has Network and Allies*, WASH. POST, May 8, 2005, at A1 (reporting that "Scarborough and other grass-roots conservative religious leaders believe the federal courts are trouncing Christian values on marriage, abortion, and other right-to-life issues raised in the Terri Schiavo case" and that "Christian conservatives have turned their attention to the courts because they believe many judges reflect a secular, liberal elite and are making rulings affecting prayer in school, religious expressions in public life, the teaching of science, and other matters that are contrary to the will of the majority of Americans"). *Cf.* BADINTER & BREYER, *supra* note ___, at 12-13 ("Even so Stephen, I had the feeling that in the United States the judge was king. When I read about your decisions on the front page of the Herald Tribune, I say to myself that the Supreme Court – here the incarnation of a supreme pontiff – enjoys supreme social recognition. Is that not so?").

Even if one finds the idea of judge as pseudo-Pope highly problematic, *Judges in Contemporary Democracy* offers up a nuanced and useful discussion of the role of the judge in contemporary society. It also considers the interaction of the judiciary with the political branches of government through supervision of the electoral process, the growth of truly supranational judicial entities, and the relationship of the judiciary to the mass media. A surprisingly high degree of consensus existed among the interlocutors regarding the sources of judicial authority, the reasons for the growth and expansion of subjects thought suitable for judicial review, and the increasingly complicated relationship of judges to the mass media.

A. Reconsidering the Judicial Role and the Scope of Judicial Power.

Judges in Contemporary Democracy advances two very bold arguments about the role of a judge and the scope of judicial authority. First, the participants consider the phenomenon of "judicial imperialism" (p. 17), which Justice Grimm defines as the idea that "judges conquer more and more terrain that was formerly reserved for political decisionmaking or societal self-regulation." (*Id.*) The basic argument is that politicians find it both convenient and desirable to transfer broader and broader responsibilities for making rather basic policy decisions (such as whether or not to pursue nuclear power) to judges.[32]

The second argument seems even bolder: "The judge is the 'great pontiff'." (p. 12). President Badinter suggests that judges today play a central role – and perhaps the central role – in defining public morality. (pp. 12, 110). He argues that "in a world in which divine justice remains imaginery, the public demands justice here on earth" and that, as a consequence, "we turn to the judge, who, in carrying out his function of saying what the law is, says what is just." (p. 11).

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[32] *See* BADINTER & BREYER, *supra* note ___, at 21-22, 46; *see also* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9-12, 47-96 (1994) (arguing that elected legislators have strong incentives to attempt to avoid political responsibility for difficult decisions that will alienate at least some portion of the electorate and that this decision-avoidance behavior will result in greater power devolving to administrative agencies and judges).

These two propositions – and the discussion surrounding them – represent the book's most significant contribution to the literature.[33] The question of judicial legitimacy remains difficult and pressing; in the end, the participants generally endorse Legal Process values[34] as the best means of grounding the power of judicial review.

1. The Ever-Expanding Judicial Universe.

The expansion of judicial review is undeniable. "For a long period of time, the United States remained alone in allowing judicial review, whereas in Europe it was regarded as being incompatible first with monarchical, and later with democratic, principles." (p. 18). Since the end of World War II, judicial review has become a regular feature of democratic governments, both in Europe and elsewhere. As President Badinter observes, "[t]oday almost all Western democracies have come to believe that independent judiciaries can help to protect fundamental rights through judicial interpretation and application of written documents containing guarantees of individual freedom." (p. 3).

Justice Grimm undoubtedly is correct when he asserts that "we can observe a constant growth of judicial power in the last century, which has as its roots a number of policy decisions." (p. 17). Part of this has to do with judicial self-help: judicial interpretation of constitutional texts "have extended the meaning of the [German] Constitution beyond the original understanding." (p. 23). He observes that "[r]estrictive interpretations are rare; in the field of fundamental rights, they are almost non-existent." (*Id.*)

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[33] *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 266-69 (1994) (noting that "the substitution of judge-made public policy for public policy made by the political process" has been a central concern of legal scholars, questioning the utility of this approach, and suggesting that institutional choice and institutional analysis might provide better framing devices because sometimes "it makes sense to have decisions made by unelected, life-serving judges" but "[i]n other settings, it makes sense to have decisions made by senators elected every six years or by representatives elected every two years or by state legislatures elected in some manner specified by the states").

[34] *See* Friedman, *supra* note ___, at 241-47 (discussing main tenets and proponents of Legal Process Theory).

Moreover, these decisions generally have met with public support. "The fact that the Constitutional Court found much popular support for its general line of expounding the Constitution (not, of course, for every single decision) reassured it in its attempt to interpret the Constitution in a way that gives utmost practical effect to its provisions." (p. 25).

Grimm posits that a failure of political discourse has worked to enhance the prestige of the judiciary vis a vis the Executive and Legislative branches of government. "As the professionalization of politics grows and electoral victory becomes the predominant concern of political actors, countervailing powers that operate under a different premise are increasingly welcome." (*Id.*) "I think that the main criterion is again the self-interest of politicians in cases where a certain issue has to be solved but is likely to provoke much resentment on the part of the voters." (p. 38). In these cases, politicians like to punt issues away to the courts to avoid political responsibility for a an unpopular decision.[35]

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[35] *See* Frank M. Johnson, Jr., *The Alabama Punting Syndrome: When elected officials kick their problems to the courts*, JUDGES J., Spring 1979, at 4, 6, 54 (observing that "the federal courts time after time have been required to step into the vacuum left by the state's inaction" and arguing that "[i]f the South is to have an independent political future. . . it must, once again, take up the mantle of constitutional responsibilities"). Professor Mark Tushnet has observed that the willingness of federal courts to enforce constitutional rights might make elected legislators less concerned about observing constitutional limitations or respecting constitutional rights. He argues that "[l]egislators may define their jobs as excluding consideration of the Constitution precisely because the courts are there." MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 58 (1999). Because legislators know that federal judges will disallow their worst transgressions, "[t]he judicial overhang may make the Constitution outside the courts worse than it might be." *Id.* From these general observations, Tushnet argues that courts should take a less active role in elucidating and enforcing constitutional norms, in the hope that elected legislators might start to take constitutional limitations and rights more seriously. *See id.* at 65-71, 107-08. Judge Frank Johnson's experience in Alabama suggests that Tushnet's approach might be unduly optimistic. And, lest one suggest that "that was then," the willingness of state governments – in the South and elsewhere – to enact facially unconstitutional laws regulating subjects like abortion rights and sexual minorities provides strong evidence that "the more things change, the more they stay the same." A more promising spin on Tushnet's overall theory that the federal judiciary should not be the sole guardian of fundamental human rights would be the idea that persons supporting a progressive agenda should look more frequently to *state* courts, rather than to the *federal* courts, for relief. Obviously, given the Supremacy Clause and *Marbury*, it is simply not possible to "take away" the federal Constitution from the federal courts; it would be possible, however, to move the locus of rights development and enforcement from the federal court system into the state courts. In fact, Judge Johnson argued that the Alabama Supreme Court shouldered its constitutional duties far more readily than either of the elected branches of state government.

The lack of commitment to firm principles exhibited by politicians both forces courts to act more aggressively to check political judgments (when those judgments transgress constitutional norms) and make it correspondingly easier for politicians to breach constitutional norms going forward. If a politician knows that a bad law will face judicial invalidation, she might be more, rather than less, inclined to vote for it. This dynamic between legislators and judges "pushes courts to even more activism." (*Id.*)[36]

President Cassese agree with Grimm that legislators have ceded more power to judges, but questions whether this was an intentional or deliberate act. "I wonder whether politicians are truly aware of this process. I think it was not deliberate." (p. 31). He posits "impotence" or "lack of imagination" as reasons for legislative defaults that lead to enhanced judicial responsibilities for safeguarding basic rights – "I would say that what Dieter [Grimm] calls the willingness of politics to subject its decisions to judicial scrutiny is questionable." (p. 32).

The question of an intentional transfer of enhanced judicial power versus enhanced judicial power by default provoked a good deal of discussion; the conclusion seems to be that both accounts carry some explanative force. Sometimes politicians intentionally subject themselves to judicial scrutiny; other times, judges find themselves forced to decide questions because of a default by the politicians. (pp. 32-37). Professor Dworkin notes that "[i]n South Africa, there was a large majority about to assume power for the first time that nevertheless

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See Johnson, *supra*, at 54 ("One example of a state institution acting responsibly in accepting and discharging its obligations and carrying on without a federal judicial chaperone is the present Alabama Supreme Court."); Roy S. Moore v. Judicial Inquiry Comm'n, 891 So. 2d 848 (Ala. 2004) (affirming removal from office of Chief Justice Roy S. Moore because of his refusal to obey lawful order of federal court to remove Ten Commandments monument from rotunda of the Alabama state judicial building); *see also* Goodridge v. Dep't of Public Health, 798 N.E. 2d 941 (Mass. 2004) (recognizing, on due process and equal protection grounds, the right of same-sex couples to seek and obtain state marriage licenses).

[36] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 55-58 (1999) (arguing that legislators avoid assuming constitutional responsibilities because they know that judges will protect adequately constitutional values and positing that "[l]egislators may define their jobs as excluding consideration of the Constitution precisely because the courts are there").

insisted that the power of the majority be subject to checks by a court." (p. 34). On the opposite side of the ledger, Dworkin suggests that Israel's politicians probably did not intend or entirely foresee the role that the Supreme Court of Israel would come to play in overseeing the political branches of government. (*Id.*)

In cases of the intentional empowerment of a constitutional court, fear of "arbitrary power" is often the catalyst. In the case of South Africa, Professor Dworkin explains that "people who had been oppressed by arbitrary power . . . somehow felt that the protection against arbitrary power came from creating a strong court" and "gave the judges great power." (p. 35). President Badinter agrees with this understanding, noting that the drafters of post-World War II constitutions established "very strong judicial defenses in order to guarantee individual and public liberties." Indeed, "[w]e find a remarkable historical correlation in all the democracies between an interest in the defense of liberty and the creation of a strong judicial authority." (p. 36).

The problem with judges serving as a brake on democratic decision making is that it encourages self-interested politicians to leave more and more issues to the judges to decide (at least when no easy solution to the problem presents itself). This, in turn, creates pressure to make judges more politically accountable. As Professor Dworkin argues, under this model, "a great deal then depends on the particular personalities of the judges." (p. 39). "You transform the democratic political process, but you have not simply shut that process out." (*Id.*)

Moreover, a system of government predicated on a wholesale transfer of power over basic policy decisions to judges is itself a symptom of a profound failure of democracy itself. Dworkin suggests that, "ideally, a democracy should should decide questions about atomic energy, risks and gains, and so forth." (p. 50).[37] The transfer of more and more political and

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[37] *See* Komesar, *supra* note ___, at 261-62 & 261 n.40 (arguing that academics, policy makers, and government officials should pay close attention to the strengths and weaknesses of particular governmental entities when assigning institutional responsibilities and urging the avoidance of "allocation by default," by which he means haphazard assignment of government duties without careful consideration of the comparative institutional advantages and

policy making responsibility to judges constitutes an admission that "democracy no longer works." (*Id.*) "So it is an undemocratic alternative, and an extremely unfortunate basis on which to rest the increase of judicial power." (*Id.*)

Thus, the participants broadly agree that, across jurisdictions, judges must undertake more duties that more often will place them at odds with the elected branches of government. Even though politicians are responsible for this increase in judicial responsibility, it seems likely that judges might face stiff criticism for actually undertaking the duties assigned – or defaulted – to them. The question then arises: How can judges preserve institutional support as their duties bring them into more open conflicts with government officials who enjoy a popular mandate?

At this point, the discussion suffers somewhat from a surprising lack of knowledge about the composition and operation of the various courts on which the interlocutors serve (or served). (pp. 56-61). Simply put, the participants were relatively unfamiliar with the various constitutional courts.[38]

For example, the European Court of Justice does not permit the issuance of dissenting opinions. (p. 56). Even if all of the participants were aware of this fact – something that is not clear (*see* ppp. 56-567, 102-03) – the full implications of this structural difference in the operation of the European Court of Justice were far more clear to Gil Carlos Rodriguez Iglesias, its former President, than to the other participants. (*See* pp. 95, 102-03).

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disadvantages that a particular government institution labors under when undertaking a discrete task).

[38] For examples of this phenomenon, *see* BADINTER & BREYER, *supra* note ___, at 43 (Justice Breyer regarding the German Constitutional Court); *id.* at 45-46 (President Cassese regarding the lack of specialized administrative law courts in common law countries); *id.* at 49-50 (Professor Dworkin regarding the willingness of the German Constitutional Court to supervise policies on matters like "atomic energy"); *id.* at 56 (President Cassese regarding term limits for members of various constitutional courts); *id.* at 142 (President Badinter regarding the ability of Congress to legislate in a fashion inconsistent with a Supreme Court decision); *id.* at 143-52, 154-57 (various participants regarding French, Spanish, and German campaign finance laws and enforcement of such laws). Because, as President Rodriguez Iglesias observes, "we live in such different worlds," *id.* at 155, one must wonder whether nuanced "borrowing" of foreign legal precedents is really plausible.

Similarly, the non-French members of the group did not realize that the French Conseil Constitutionnel can only review newly enacted laws and lacks the power to review laws already on the books. (p. 57). Indeed, Justice Breyer and Professor Dworkin both seem shocked that an existing law cannot be subjected to judicial review by a French domestic court; instead, as President Badinter explains, judicial review of existing laws must take place before transnational tribunals (the European Court of Human Rights, in Strasbourg, France and the EU's Court of Justice, in Luxembourg). (pp. 57-58). To make matters even more complicated, French domestic courts can apply treaties, including the treaties creating the EU and the European Convention on Human Rights: "in France, treaties trump statutes because of Article 55 of the [French] Constitution. And the Cour de Cassation will apply the European Convention on Human Rights." (p. 59). This leads Justice Breyer to exclaim "Every court in France can apply the Human Rights Convention *except* the Conseil Constitutionnel?" (*Id.*)

Moreover, different courts maintain different practices regarding political questions and abstention. In Germany, Justice Grimm explains that "[i]f a case is duly brought – there are some conditions. . .then the ony available course is to declare the relevant act constitutional or unconstitutional." (p. 57). By way of contrast, Justice Breyer reports that in the United States "[w]e have instances in which cases are properly brought, issues are properly presented, but we do not decide simply because of the nature of the legal issue, because it involves, say, political affairs or foreign affairs." (*Id.*)

The participants also have wildly divergent conceptions of the various constitutional courts. For example, to what degree is a particular court willing to enforce human rights at the cost of invalidating legislative or executive action? Is the European Court of Human Rights, at least in relative or comparative terms, an "activist" or "cautious" bench? Ronald Dworkin observes that "the Strasbourg Court has in many respects been less active than it could have been." (p. 60). This provokes a strong rebuke from President Badinter, who interupts Dworkin and interjects that "I do not think that you can say that Strasbourg has not been activist. It has

been very activist." (*Id.*) Badinter measures activism against the yardstick of the ECHR's creators – "mostly Christian Democrats." "Those people never thought of gay rights or transsexual's rights fifty years ago." (*Id.*) Their opposing views prove irreconcilable: Dworkin continues to insist that the ECHR has "been cautious" and Badinter counters that the Strasbourg judges "have been bold up to the limit of what is possible." (p. 61.)

In my view, the participants' lack of familiarity with the means of selection, composition, institutional duties, and institutional character of the various constitutional courts under discussion raises some serious problems for the project of international judicial dialogue. If you do not know a court's jurisdiction, its operating rules, or the effect of its precedents, how can you realistically "borrow" its precedents? For example, the absence of dissenting opinions in the European Court of Justice has the effect of making highly contested legal propositions seem more strongly held than they really are; the public simply does not know whether a case was decided by a single vote or a unanimous panel. Similarly, limits on the Conseil Constitutionnel's jurisdiction lead to obvious anomalies: a legal provision struck down as unconstitutional in a pending law under immediate review will remain fully effective in another law already in the statute books. It would be very easy to over-read decisions of the European Court of Justice and to under-read decisions of the Conseil Constitutionnel.

The question of familiarity with foreign courts goes even deeper, however. The character of a court very much depends on its membership; some courts are more progressive than others. For example, President Cassese explains that the Italian domestic courts are very different in their jurisprudential outlook. Accordingly, the outcome of a case:

> depends on whether the decision is sent to the Constitutional Court (this court normally is more progressive, because some members normally are elected by the parliament, so they are more sensitive to political considerations), or to, say, the Court of Cassasation (Supreme Court), where you normally have judges who are very old, old fashioned, and fuddy-duddies. For example, the Italian Corte Suprema di Cassazione (Supreme Court) recently decided that a woman wearing tight jeans could not be raped. (p. 41).

President Cassese's point is a highly relevant one; one needs to know something about the overall makeup and behavior of a court to understand how a particular decision fits into the overall fabric of the local law.

Borrowing in the absence of such an understanding could be dangerous – should a United States judge look to the Italian Supreme Court's understanding of gender equality in an employment discrimination case? At the risk of stating the obvious, I would suggest that the "tight jeans" decision would make the Italian Supreme Court a poor place to seek out an enhanced understanding of gender equality values. And yet, how would a U.S. judge learn about the "tight jeans" judgment if presented with a brief that simply reports that the Italian Supreme Court held "x" on a question regarding gender discrimination in the workplace?[39]

Similarly, a court's overall status within a governmental structure could effect how it goes about its business. President Badinter describes the German Federal Constitional Court as "the all-powerful German institution in Karlsruhe" and contrasts its power with "that of Strasbourg, which has only jurisdictional authority delegated by Convention." (p. 61). An international court created by convention of contracting states cannot "forget the fact" that its power is circumscribed and its legitimacy less than self-evident: "Your court is not integrated structurally within a country; it is not part of a country; it has been placed above other countries simply by a convention." (*Id.*) Given these circumstances, "boldness" is a relative thing;

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[39] *See* Alford, *supra* note ___, at 64-69 (suggesting that advocates intentionally mislead courts about the content and meaning of foreign law through a consistent practice of highly selective citation); *but cf.* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 563-64 (2001) (arguing that judges could appoint a special master or expert witness to assist the court with understanding foreign law). Even if one masters a particular legal doctrine or aspect of case law, however, the remains that courts have very different institutional roles and the cases themselves might well reflect institutional considerations rather far removed from the substance of the precise question presented. *See* Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 976-85 (discussing various cultural, political, and institutional factors that constrain constitutional decision making by the Supreme Court of Japan).

President Badinter argues that the judges of the European Court of Human Rights have, in fact, "been bold up to the limit of what is possible." (*Id.*)

The German Federal Constitutional Court provides a marked contrast in terms of institutional prestige and authority. And, its actions reflect this difference in institutional status. The Federal Constitutional Court has not only disallowed government actions that violate constitutional rights, but also has ordered the government to take affirmative steps to create the conditions necessary for citizens to exercise those rights.[40] Justice Grimm explains that "fundamental rights require the government not only to refrain from certain actions, but also to take action in order to establish or maintain substantial freedom in the segment of social reality in which a fundamental right is to take effect, *i.e.*, positive rights." (p. 21).[41] Under this expansive understanding of rights, freedom "is no longer exclusively the freedom of the individual" but rather " the institutional freedom of the societal framework in which individual freedom is exercised." (*Id.*)

This conception of rights has serious implications. Liberties and freedoms must be protected not only from government abridgment, but also from third parties "when they are threatened, not by government, but by third parties or social forces." (*Id.*) Interestingly, this approach to conceptualizing fundamental rights led the Federal Constitutional Court to invalidate a law liberalizing abortion rights in Germany and to require the government to protect the

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[40] *See* BADINTER & BREYER, *supra* note ___, at 21-23; *see also* Currie, *supra* note ___, at 869-72, 877-78; Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 521, 523-30 (1992). Professor Glendon seems to endorse the concept of positive rights, at least in some contexts. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 92-95 (1991).

[41] In some instances, this doctrine leads to legal results that closely parallel those in the United States, albeit via very different means. *See* BADINTER & BREYER, *supra* note ___, at 46-47 (discussing similarity of United States and German law regulating television and radio broadcasting). As Justice Grimm states that matter, "[w]hen you read the decisions of the American Supreme Court and the German Bundesverfassungsgericht . . . on the freedom of broadcasting, you would think that they copied from each other, although it is quite clear that nobody knew at that time about the construction of this fundamental right in the other jurisdiction." *Id.* at 47.

potential life reflected in the fetus. (pp. 21-22). Thus, "the German Basic Law obliges the state not only to respect life, but also to defend it against attacks by others." (p. 22).

At an even more theoretical level, the judges hold radically different understandings of the relation of their work to the project of democratic self-government. For example, President Cassese argues that making constitutional courts more democratically accountable enhances the quality of their decisions. (pp. 40-41, 45). Because members of the Italian Constitutional Court "normally are elected by the Parliament," this bench "normally is more progressive." (p. 41). Moreover, President Cassese and Justice Grimm argue that judges are better able to make wise policies because judges are usually less beholden to "economic groups, lobbying groups," and other special interests than elected officials. (pp. 45, 50-51). In other words, the countermajoritarian difficulty simply does not register with respect to the legitimacy of the German and Italian constitutional courts. By way of contrast, the legitimacy of judicial decision making remains one of the central concerns of federal judges and U.S. legal academics. This kind of meta-distinction hopelessly complicates the ability to borrow a decision from one jurisdiction by another.

In sum, the relative strength of a judicial institution will affect its overall jurisprudential outlook and its willingness to cross swords with the more democratically accountable branches of government. A strong, highly empowered bench, like the German Federal Constitutional Court, can issue very sweeping opinions that disallow popular decisions by elected government officials. By way of contrast, the Conseil Constitutionnel enjoys a much more limited jurisdiction and consequently plays a smaller role in the overall scheme of government. Borrowing a decision from either bench would entail adopting a decision that is the product of an institution much differently situated than an Article III court in the United States.

In the end, the participants all agree that "judicial 'activism' is a fact." (p. 63). Although the precise cause of this trend is uncertain, the role of judges in democratic polities has been increasing over time, especially since the end of World War II. Moreover, this trend seems to

be, if not universally true, then nearly so. (pp. 30-37, 63-65). In light of these expanded duties, judges must be careful not to undermine the public's confidence in their work. This subject – the question of judicial legitimacy in a world of enhanced judicial responsibilities – is the subject of Chapter 2.

2. The Problem of Judicial Legitimacy: The Judge as Moral Agent.

Professor Dworkin asserts that judges – and particularly judges serving on constitutional courts – cannot escape making difficult moral choices.[42] He describes "the role of moral judgment" as being "pervasive" because resolving most constitutional questions involves the application of "explicitly moral" considerations. (p. 68). Moreover, "[t]he notoriety of these moral issues guarantees that the judicial role in deciding them will itself comes a matter of public attention and at least occasional hostility." (p. 69).

The indeterminate and subjective nature of constitutional adjudication gives rise to questions of legitimacy. "It seems undemocratic that such fundamental issues should be decided by a small group of appointed officials who cannot be turned out of office by popular will." (p.

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[42] This, of course, is an argument that Professor Dworkin has advanced in other contexts (at least in his more recent works). *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-4, 14, 37 (1996) (arguing that "moral reasoning" permeates constitutional interpretation and suggesting that no alternative approach to enforcing the Constitution's majestic, but also "broad and abstract," guarantees would be either feasible or desirable); RONALD DWORKIN, A MATTER OF PRINCIPLE 2-3, 171-74 (1985) (arguing that no judicial judgments can be entirely "objective" and suggesting that contesting this basic reality is rather pointless). On the other hand, these views represent something of a break from Dworkin's earlier work, which tended to minimize the role of discretion and moral reasoning in judging. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 125-26, 160-61 (1977) (arguing that judges should attempt to ground judgments in widely shared community values, precedents, and general legal principles, all with "a sense of responsibility for consistency with what has gone before"). Thus, Dworkin's position regarding the legitimacy of judges relying on intuitive moral judgments to inform the judicial task has evolved over time. The views expressed in *Judges in Contemporary Democracy* seem most consistent with those expressed in *Freedom's Law*. *See* DWORKIN, FREEDOM'S LAW, *supra*, at 3-4 ("It is patent that judges' own views about political morality influence their constitutional decisions, and though they might easily explain that influence by insisting that the Constitution demands a moral reading, they never do. Instead, against all evidence, they deny the influence and try to explain their decisions in other – embarrassingly unsatisfactory – ways.").

71).[43] What then, legitimates the imposition of judicial values over those of the legislative or executive branch?

Dworkin first posits popular consent to judicial review as the basis for establishing judicial legitimacy. He notes that "most people in the nations in which judges have been given that responsibility do not object to it, and, from time to time, in different ways, endorse it." (p. 73). Nevertheless, Dworkin characterizes this justification as "a very poor response" because "[i]t is not true that almost all people accept it: Judicial moralizing is very controversial." (p. 81). Accordingly, he rejects this justification as profoundly unpersuasive.

At the same time, however, pure democracy might itself seem to suffer from legitimacy problems, because it creates a real risk that government will systematically disregard the rights of political minorities. "'Democracy' is not just the name of a form of government that Plato did not like." (*Id.*) A purely majoritarian conception of democracy is not the only means of conceptualizing this model of govenrment and "[i]t is not even an attractive conception of democracy." (*Id.*) Why? Because "there is nothing good, even *pro tanto*, about majority rule in itself." (*Id.*).

Dworkin prefers to define democracy as "fair majority rule, and majority rule becomes fair only when certain conditions are met." (*Id.*) Judicial review could serve as one means of securing the conditions necessary to create and maintain "fair majority rule." (pp. 73-75, 82-83). Dworkin explains that:

> Majority rule is fair only when certain conditions are met – only, for example, when people have a genuine and equal right to participate in the public debate that produces the majority decision, and only when issues of distinct importance to individuals, like the choice of religious commitment, are exempt from majoritarian dictate altogether. (p. 74).

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[43] *See* Bickel, *supra* note ___, at 16-20, 261-62 (arguing that democratic accountability enhances the legitimacy of decision making); *but see* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578 (1993) ("At least since Alexander Bickel's *The Least Dangerous Branch*, constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review. The endeavor has consumed the academy and. . . distracted us from recognizing and studying the constitutional system that we do enjoy.").

Thus, "democracy compromised in this way [by judicial review] is a better form of government than a purer form of democracy because the former produces a more just community by protecting the rights of minorities." (pp. 73-74).

Dworkin argues that judicial review in the service of protecting, rather than compromising, democracy should not be deemed objectionable. In assessing the desirability of judicial review, "[w]e must look, at retail, to the particular constitutional provisions that judges enforce in particular jurisdictions, and to how they enforce them, to see whether, all things considered, democracy is improved or worsened." (pp. 74-75).

One obvious objection to this model of judges as the perfectors of democracy would be that legislators and executive officials are no less capable than judges of respecting fundamental rights; moreover, they are more directly accountable to the people for their failures to respect rights.[44] Dworkin acknowledges this point and considers "[w]hy does the parliamentary model [of securing rights] now seem less attractive?" (p. 76). He argues that politicians and priests lack a duty to explain their decisions and to do so in a reasonably coherent and consistent fashion over time. By way of contrast, "responsibility for articulation is the nerve of adjudication." (p. 78). "People yearning for reasoning rather than faith or compromise would naturally turn to the institution that, at least compared to others, professes the former ideal." (*Id.*)

Judges must express themselves professionally in "reasoned" and "articulate" ways. Accordingly, "[i]f you want the people's voice expressed in a more or less natural and instinctive way, you do not turn to the judiciary"; on the other hand, if you want the "people's voice" "expressed in a reasoned or articulate way," one should turn to courts and judges. (p. 85).

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[44] *See* TUSHNET, *supra* note __, at 55-58, 65-68 (arguing that "judicial overhang" leads legislators to ignore constitutional constraints because they can rely on judges to invalidate laws that transgress constitutional limits); *see also* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 7-8, 229-31 (2004) (arguing that there is no reason, at least in the abstract, to expect legislators to be less constitutionally conscientious than judges and that the meaning of the Constitution should be vested with "the people themselves" and their elected representatives, rather than with unelected federal judges).

"That new enthusiasm for articulation adds to the case for replacing the older idea of parliamentary supremacy with a new concern for law and judicial review." (pp. 84-85).

Judicial reasoning also facilitates cultural pluralism more easily than either religious or political sources of authority because it "is more likely to be abstract and less tied to any particular cultural tradition." (pp. 76-78). Judicial discourse is neither majoritarian nor sectarian; in this sense, it transcends and bridges cultural, ethnic, religious, and political differences. (*See* pp. 78-79). The inability of religious and political leaders to speak in universal terms leads people to repose faith in "the idea of one forum, at least where argument matters." (p. 79).

Justice Breyer strongly objects to Dworkin's thesis that judges of constitutional courts engage in an essentially moral, rather than legal, enterprise. (pp. 85-86). Breyer argues that a judge does not ask, abstractly, whether a particular outcome is "fair," but rather asks in light of text, precedent, and "basic purpose" whether a particular outcome would constitute a "sensible result." (p. 86). He agrees with Dworkin that the reasoning offered in support of a particular judgment is important, but suggests that it is probably less important to the legitimacy of a judicial decision than whether the decision is "sound." (p. 87).

In a somewhat testy exchange, Dworkin mocks Breyer's attempted distinction between making moral judgements and reaching "sound" or "sensible" results; in Dworkin's view, the lable "sound" or "sensible" is simply a smokescreen for a moral judgment that a particular decision comports with prevailing notions of justice.[45] Although judges may reach a common result despite serious ideological differences, "we must not try to hide the fact that it is convergence on an essentially moral position, and that it will almost always be one that a great

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[45] *See* BADINTER & BREYER, *supra* note __, at 88-89 ("But we need ordinary moral judgments about what is fair or just to decide what is 'sensible' or 'works.'")

many people in the community would nevertheless reject." (p. 89). Dworkin posits that "[i]t's turtles, all the way down." (p. 73).[46]

Justice Grimm agrees with Dworkin that moral judgment is inexorably annexed to the judge's role on a constitutional court: "one cannot avoid relying on one's own moral judgment." (p. 91). Even so, he argues that institutional and structural factors in practice constrain a judge's discretion to implement a moral intuition. In particular, he suggests that "[t]he text of the constitution matters," "methodology matters," and "the legal context and legal culture in which you handle legal matters" all work to limit judicial freedom of action. (*Id.*)

President Rodriguez Iglesias builds on these points, suggesting that structural and procedural rules within a court also effectively constrain a judge's discretion. "I would like to note that, in our Court, there is an important element that moderates subjectivity: It is the collegial character of the decisionmaking, which is enhanced by the absence of dissenting opinions." (p. 95). He points out that "[w]hen you cannot express your dissent, even if you are in the minority, you try to cooperate in the reasoning of the decision and you try to persuade the majority not to rely on arguments that you find particularly objectionable." (*Id.*)

Justice Breyer and Professor Dworkin do not find either Grimm or Rodriguez Iglesias helpful in reconciling their positions; Dworkin argues that judges are engaged in an exercise in political morality and Breyer insists that, at least most of the time, they are not. (pp. 100-02). Breyer asserts that "judicial methodologies and objective principles of law – which I recognize can be called 'moral,' but only in a broad sense – make it [imposing a moral view] difficult." (p.

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[46] Although Dworkin invokes Dr. Seuss, and presumably *Yertle the Turtle*, when referencing this phrase, *see* BADINTER & BREYER, *supra* note __, at 73, it actually seems to relate to a cosmology anecdote associated with William James (rather than to Yertle the Turtle). *See* STEPHAN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 1 (1988) ("But it's turtles all the way down."); Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 1-2 (1986); *but cf.* Jeanne L. Schroeder, *Law and the Postmodern Mind: The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis*, 16 CARDOZO L. REV. 805, 924 n.28 (1995) (observing that the author "cringe[s] to refer to the unending terrapin tower because it is fast becoming a banal cliche of infinite regress" but nevertheless providing a thoughtful and comprehensive etymology of the metaphor, which appears to have no relation to Dr. Seuss).

101). Dworkin retorts that "we should be clear that what contrains you is not some neutral convention or universally accepted credo, but just other, more abstract moral convictions that you have about the proper role of a judge in a democracy." (*Id.*)

This interchange shows the tension between a Legal Process perspective and Critical Legal Studies perspective about the role of a judge. From a Legal Process perspective, a judge who plays by the rules is not really making any moral decisions – the decision, for example, to follow a past precedent should not be understood as indicating personal agreement with the precedent, but rather a commitment to a certain way of going about judicial business.[47] Dworkin rejects the claim that judges who simply "follow the rules" are not implementing their own values – he argues that these judges just value following the rules more than winning on the substantive outcome (if, in the case at hand, the particular judge would prefer a different substantive outcome). Hiding the moral choice as an exercise in simply "following the rules" does not excuse the judge from responsibility for her decision on the merits.[48]

Although the participants do not reach agreement about the fundamental nature of the judicial task, they do reach broad agreement on the reason judges play a greater role in

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[47] *See* HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961); HARRY WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (1991); Alexander Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Alexander Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process:* The Lincoln Mills Case, 71 HARV. L. REV. 1 (1957); Herbert Wechlser, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). From a Critical Legal Studies ("CLS") perspective, judges enjoy discretion to bend the law (if not make it up entirely to suit their preferences); it is simply nonsense for a judge to claim a lack of personal agency in both deciding a case and for offering (or withholding) particular reasons in support of the outcome. *See* LARRY D. KRAMER, THE PEOPLE Themselves (2004); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991). For a discussion of the Legal Process Movement and its major supporters, see Richard H. Fallon, *Reflections on the Hart & Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 241-43 (2002); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AM. U. L. REV. 1 (1999).

[48] As Dworkin puts it, "[y]ou give precedence to the political part of your morality. Good, I think that you are right to do so." BADINTER & BREYER, *supra* note ___, at 102.

contemporary governance. Because judges must offer reasons in support of their judgments and must follow clearly defined procedures in reaching those decisions, the quality of judicial discourse is quite high. By way of contrast, however, political discourse has become increasingly debased, both in the United States and in Western Europe. (pp. 105-09)

President Badinter observes that "[o]ne of the most striking differences between the judicial process and the political process is that, in politics, politicians do whatever they can to avoid answering fundamental moral questions," in other words, "[t]he more ambiguous you are in politics, the better." (p. 105). Unlike a politician, a judge must offer an answer when a question is properly presented to her for resolution. (*See id.*) Thus, as Dworkin suggests, courts present "[a] forum of principle" that can be distinguished from less principled (or unprincipled) political forums. (p. 106).

In the end, Dworkin would rest judicial review, and its legitimacy, on the need to correct defects associated with direct majoritarian democracy. In order to realize "the true conditions of democracy," judges enjoy the power to check the political branches of government. (p. 108). When these conditions are met, decisions should be made based on majority will. "But what those conditions are, and what they require in particular cases, are not majoritarian issues, and we cannot regard them that way without begging the question." (pp. 108-09).

President Badinter offers a different explanation – the idea that citizens look to courts for justice. (pp. 110-12). "They go to the courts, not only because they think of the courts as a better forum, with better discussion, and providing better answers, but also because they seek something more." (p. 112). Disappointingly, Badinter initially defines the "something more" as "the papal pronouncement." (*Id.*) Facing "a desert of moral sources and a drying of moral springs," the citizenry needs "to find someone to tell them what is of moral value." (*Id.*) Citing the fact that the democratic process led to Hitler rising to power in Germany, Badinter argues that judges now satisfy "a demand for the secular papal pronouncement." (*Id.*)

This particular line of reasoning strikes me as deeply flawed. At least in the United States, judges do not claim to possess any special moral compass nor do citizens seek a "secular papacy" in the federal and state judiciaries. Morever, a judiciary that claimed to enjoy a superior moral sense would undermine its own legitimacy; although Moses provided the Ten Tablets, we do not want our judges to be Moses. Professor Dworkin observes that Badinter's argument presupposes that "judges are widely thought to have a more direct line to the truth about fundamental matters" than other government officials – he rejects this proposition, noting that this understanding of the judicial role has "more of a papal aura that I myself meant to suggest." (p. 114).[49]

A far better explanation for the public's confidence in the judiciary, offered by Justice Breyer, is that judges are perceived to be honest brokers – true neutrals. Respect for judicial decisions "reflects a view that judges are not out for themselves, but rather that they think seriously about the problems at issue and are not biased." (pp. 113-14). If one couples this suggestion with Dworkin's arguments for judicial legitimacy based on procedural values – that judicial discourse is more refined and more demonstrably principled than most contemporary political discourse (*see* pp. 84-85, 108-09) – one has constructed a fairly durable theory of judicial legitimacy.

Judicial legitimacy rests on the need to correct, or leaven, the possible extremes that a directly majoritarian form of government might countenance. Dworkin's theory that a defensible form of democracy must meet certain preconditions seems plausible (*see* pp. 82-83, 108-09). Judges can and do help to legitimate democracy by facilitating the conditions necessary for democracy itself to be fundamentally fair (or legitimate). Moreover, because judges undertake their duties in a systematic, transparent, and apparently principled fashion, the judiciary enjoys a

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[49] *Cf.* TUSHNET, *supra* note ___, at 55-56 ("The Supreme Court at its best is clearly a lot better than Congress at its worst. But Congress at its best is better than the Court at its worst.").

high degree of public trust and confidence in discharging its duties.[50] Indeed, it might be that, were judges tasked with making the kinds of choices that routinely face legislators, under the same conditions, public confidence in the judiciary would decline.[51]

In sum, the panelists effectively turn the question of judicial legitimacy on its head. Rather than a judiciary needing and desperately seeking some sort of democratic mandate to legimite its work, the panelists propose a new paradigm in which it is the *judges* who legitimate the functioning of the more democratically-accountable branches of government. Under this understanding, it would be harder to justify democracy without judges or constitutional courts; the real cause for concern should not be the legitimacy of judicial review, but rather the fundamental fairness and justice of unchecked majoritarianism.

B. The Judge and the Political Process.

Two chapters of *Judges in Contemporary Democracy* focus on the relationship between the judiciary and the political process. Chapter Three considers the role judges play in supervising the electoral process and the enforcement of ethics rules against incumbent politicians. (pp. 117-74). This chapter considers whether judges can reasonably undertake supervising the process by which the public selects politically accountable officers. The paradox, of course, is that these political actors usually select the judges and enjoy some measure

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[50] Professor Friedman posits that judicial legitimacy rests in part on the reluctance of federal judges to thwart the public will too often or too much. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1455 (2001) (arguing that "[w]hen decisions are seen as contrary to the needs of society, observers are unlikely to concede judicial legitimacy, and rest entirely upon a claim about social propriety."); Friedman, *Mediated Popular Constitutionalism*, *supra* note __, at 2605 (arguing that even if the Supreme Court may not be subject to direct and immediate forms of political control that "the claim . . . that judges strike down popular laws" has little empirical support). Professor Schauer, on the other hand, endorses legal craftsmanship as the key to securing judicial legitimacy. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 654-55 (1995).

[51] *See* Ronald J. Krotoszynski, Jr., *On the Dangers of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 475-85 (1997).

of control over the judiciary. Accordingly, Justice Breyer cautions that judges should be wary of serving as election supervisors.

Chapter Four considers the inverse relationship that exists between political actors and international criminal tribunals. In the case of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the International Court of Justice, and the proposed International Criminal Court, direct forms of political control and influence appear to undermine the effectiveness and degrade the legitimacy of these transnational judicial entities. (pp. 175-254). These chapters together suggest that judicial legitimacy requires both that judges refrain from undue involvement with – much less participation in – partisan politics, but also that judicial proceedings not be directly subject to direct forms of political superintendence.

1. Judges as Referees in Partisan Elections.

Justice Stephen Breyer summarizes the relationship of judges to the political process in the United States, including supervision of the electoral process itself to ensure open and equal participation (pp. 117-20), regulation of the political parties (pp. 121-22), campaign finance regulation (pp. 123-27), and oversight of ethics rules and laws that govern candidates for office and those serving in elected offices (pp. 127-31). Essentially, Breyer argues that judges must serve as referees in the political process to ensure that democracy works. Although "democracy legitimates government," certain structural rules must exist, "such as free speech, a degree of equality, and other basic rights." (p. 133).

Breyer stipulates that "granting judges the power to enforce basic constitutional rights" is not an essential, or even necessary, condition for a constitutional democracy. Certainly, this is so; the United Kingdom functions as a liberal democracy, yet its highest judicial tribunal, the House of Lords, lacks the power of judicial review. As Justice Breyer observes, judicial review

and supervision of the political process "is one important way to do so" and the way "we have chosen" in the United States. (p. 135).[52]

Even as the Supreme Court's supervision of the electoral process has increased over time, since the 1940s (a period of relatively little involvement) to the present (a period of relatively significant involvement), "both politicians and the general public have accepted and followed the judges' decisions." (pp. 135-36). Justice Breyer attributes this acceptance "to the fact that the general public has confidence in the courts even though the general public lacks confidence in the other branches of government, *i.e.*, the legislature and the executive." (p. 136). Moving from this point, Breyer considers various cultural reasons for the relative decline in public confidence in the political branches of government. (pp. 136-39).

A general discussion of judicial appointment and judicial supervision of the electoral process follows (pp. 140-59). The degree of regulation of political campaigns varies quite widely from place to place. In France, for example, "you cannot buy TV time" to support or oppose a candidate for office. (p. 155.) "Neither a trade union nor anyone else has the right to engage in political advertising." (*Id.*) Moreover, very little working knowledge of campaign finance rules exists among the participants; the French jurist has no knowledge of German campaign finance law.[53] The discussion prompts President Rodriguez Iglesias to exclaim that "we live in such different worlds," to which President Badinter responds "[t]he cultural patterns are radically different." (*Id.*)

This aspect of the conversation is important for two reasons, one related to theorizing free speech and the other to the project of IJD. The radical differences in campaign finance rules

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[52] *See generally* KOMESAR, *supra* note ___, at 257-61 (arguing that identifying the proper governmental institution to undertake a particular task, which might or might not be a court of law, is essential to accomplishing governmental projects most efficiently and effectively).

[53] *See* BADINTER & BREYER, *supra* note ___, at 155 (featuring President Badinter asking Justice Grimm how Germany regulates access to the broadcast media during election cycles and asking "does German law forbid political advertising?").

across nations committed to safeguarding the freedom of speech suggests, rather strongly, that a commitment to freedom of expression simply does not prefigure any precise rule regarding limits on campaign contributions or expenditures. If a commitment to freedom of expression inexorably required a single approach to these issues, one would see greater convergence, rather than divergence, in both legislative and judicial approach.

The lack of familiarity with the rules governing campaign finance also suggests that transnational "borrowing" of legal precedents in this area would be particularly fraught with peril. Each nation maintains very detailed rules limiting campaign contributions and expenditures; to read a single decision about a particular regulation of the electoral process without understanding the overall background of campaign regulation would be dangerous. Indeed, successful borrowing in this area would require careful study of not only the formal rules that govern political campaigns, but also consideration of the enforcement procedures and cultural norms used to apply them.

For example, Justice Breyer, after learning about France's ban on broadcast political advertisements, observes that "[t]o enforce that rule [the ban], you must have someone who will determine when an ad is, and when it is not, political propaganda." (p. 155). He suggests that "[t]hat would seem to be a job for a judge." (*Id.*) Not so! President Badinter responds: "We would not even do that. It is so obvious that it is political propaganda that the station would not take it [the ad] because the station would be liable to the state regulatory body." (*Id.*) Justice Breyer has no reply, which is easy to understand; he simply assumed a model of judicial enforcement, when in fact the French legal rule against such advertising has sufficient cultural recognition and support that it is largely self-enforced.

Although less immediately relevant to the project of IJD, the panelists also engage in a lengthy debate about whether elected officials are subject to unfair scrutiny from the criminal justice system. (*See* pp. 160-174). The discussion assumes that politicians suffer from "a double standard" that gives judges "power" over politicians. (p. 169). President Badinter argues that

"the objective circumstance is the following: The media is [sic] likely to pay more attention to a politician than to an ordinary citizen, and, consequently, the judge has greater power to affect that politician than the ordinary citizen." (*Id.*)

Interestingly, however, Ken Starr serves as the group's exemplar for the undue harrassment of an incumbent politician (namely, President Clinton). President Badinter observes that "[w]hen you saw Starr pursuing Clinton, you thought that he did so because it was Clinton, not because Clinton committed what he was accused of." (p. 170). From this, he concludes that "[i]f you translate the matter into the language of power, the power of the judge vis-a-vis the politician is perceived as greater than vis-a-vis other citizens." (pp. 170-71). Of course, Ken Starr was not acting in a judicial capacity when he investigated the Clintons; he acted in an executive capacity.[54]

The European jurists participating in the meetings did not appear to appreciate fully that, in the American and English legal systems, prosecutors, not judges, handle investigations and also decide whether and what to charge against those persons they investigate. Moreover, in an adversarial system of criminal justice, the judge plays a much more passive role than in continental inquisitorial systems.[55] Accordingly, it might well be that investigations of

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[54] *See* Morrison v. Olson, 487 U.S. 654, 673-77, 685-96 (1988); Krotoszynski, Jr., s*upra* note ___, at 447-56 (discussing the factual and legal background of the Judge Starr's investigation of the Clintons and a citizen complaint regarding the process associated with Starr's appointment as Independent Counsel).

[55] Professor Dworkin notes that the difference in the role of judges in civil law jurisdictions makes the problem of judicial supervision more acute in those nations than in common law jurisdictions:

> There is a terminological danger here, though I may be the only one who suffers from this. For you [Badinter], the word "judge" includes a prosecutor; it embraces the whole judicial process. Not for us. Starr had been a judge, as it happens, and so he was called "Judge Starr." But that had nothing to do with his role as an independent prosecutor.

BADINTER & BREYER, *supra* note ___, at 173-74. Badinter responds that "whatever the hand that holds the sword, it strikes the same wound." *Id.* at 174. The response to this observation, is "yes, but." If the whole point of the discussion was an assumption that judges would be charged with directly enforcing ethical strictures against incumbent politicians, and that this role was one

politicians empower judges over politicians to a greater degree in France than is the case in the United States. Important structural differences profoundly affect the institutional role of the judges in these matters.

Once again, however, the conversation was useful in teasing out an important functional difference in the role of the judiciary in inquisitorial and adversarial systems of criminal justice. In this instance, weak form IJD helped to make explicit an implicit cost of the inquisitorial system. The profound differences in the systems, however, suggest that borrowing precedent from one into the other might be a difficult, if not impossible, task.[56]

2. The Challenge to Judicial Legitimacy When Politicians Superintend Courts.

An extended discussion about truly supranational courts provides the second point of focus for the panelists' consideration of the dynamics associated with the intersection of judicial and political actors. (*See* pp. 175-253). Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), provides a political history of International Criminal Tribunals ("ICTs") and their place in the development of international criminal law. (pp. 174-82). ICTs represent a response to the inability of any single national court system to address systemic, as opposed to individual, culpability for crimes against humanity. (pp. 175-76, 182).

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that perhaps ill-suited the judiciary, it applied only with respect to the civil law nations. In point of fact, from the perspective of an inquiry into judicial legitimacy and threats to it, the "hand holding the sword" matters a great deal.

[56] One final point bears noting: the judges and the law professor do not really appear to understand precisely how ethical rules actually affect politicians. The entire discussion seems oddly disconnected from reality; it is highly speculative and poorly grounded in practical realities. *See* BADINTER & BREYER, *supra* note ___, at 160-174. Toward the end of it, President Badinter announces that the group has "reached a conclusion." Namely, that "[e]thical demands are greater for the public men and bear more serious judicial consequences." *Id.* at 173. Although no one disagrees with this conclusion, the overall discussion does not really establish its truth. Moreover, none of the participants seem to have any relevant personal experience as practicing politicians. Essentially, five judges and a law professor are engaging in a guessing game about the effects of ethical strictures on practicing politicians. The discussion would have been enhanced considerably by the participation of a person, or persons, with relevant first hand experience as an elected official.

The ICTY was the first ICT; moreover, this tribunal came about despite very substantial difficulties. Robert Badinter, who was involved in the negotiations that led to the creation of the ICTY states that "[o]nce the issue was decided [to establish the ICTY], we went through hell trying find the means to make the decision work." (p. 202). Political support for the ICTY ebbed and flowed; individual members of the United Nations failed to provide sufficient financial resources to support the ICTY, including even something as basic as dedicated office space! Cassese reports that the ICTY was evicted from temporary quarters in the International Court of Justice's building at The Hague. (pp. 202-03). "We had nothing, zero." (p. 203).

In light of the lack of serious financial or logistical support for the ICTY, Cassese concludes that "[i]t is therefore clear that the establishment of the Tribunal was really an absolute alibi." (*Id.*) Badinter characterizes the entire history of the ICTY as "extraordinary." (p. 202). "We should not forget that a kind of fortuitous historical opportunity, seized upon and exploited by mad activists including you [Cassese] and me, my dear friend, led to the success of this creation." (*Id.*)

But why did the ICTY face such difficulty in securing support from the major powers? President Cassese posits that "[b]ecause the military action was effective" (p. 203), the major powers did not see the need to legalize the matter or even treat the wholesale slaughter of thousands of innocent civilians as raising a significant legal, as opposed to geopolitical, issue. "You see, whenever either the diplomatic or the military action achieves major results, you simply forget about justice." (*Id.*). In other words, the ICTY's creators never conceived of it as an independent judicial entity that would undertake its investigations and prosecutions free and clear of political and diplomatic influence (or control). (*See* pp. 210-12).[57]

This design effectively requires an ICT to interact on a regular basis with overtly political actors at the United Nations and in national capitals:

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[57] For example, the ICTY lacked even the ability to compel the presence of witnesses to testify at its proceedings; it had to beg individual national governments to facilitate the testimony of persons under subpoena. BADINTER & BREYER, *supra* note ___, at 211.

> There is a metaphor that I have used many times, namely, that a criminal international tribunal is a sort of giant without legs and without arms, and he needs artificial limbs to act, to move, to walk, and to do anything. The artificial limbs are the national enforcement agencies or NATO armed forces. If we know that an indictee is in France, we have to ask the French authorities to arrest him and to hand him over to the international tribunal. That means that really, in a way, you heavily depend on national cooperation, and you have to come to some sort of deal. (p. 211).

Making "deals" and begging politicians for help comports poorly, however, with the model of a judge as a neutral adjudicator.

Cassese reports personally lobbying the United Nations General Assembly, the Security Council, and various national and local officials in the former Yugoslavia – not to mention the Central Intelligence Agency![58] Why the CIA? Because "[i]t is alleged that the Americans have everything, the crucial evidence on the wire-tapping implicating Milosevic," but the ICTY lacks access to the evidence – "they [the CIA] do not hand over that evidence." (*Id.*)

All of these activities are deeply problematic for the independence and legitimacy of an ICT. "A judge in a national court would never do so; he would never go to a politician to ask for help to arrest people." (p. 211). This sort of regular interaction with diplomatic and political officials undermines the independence, and hence credibility, of the ICTs. But this lack of functional independence is far from accidental; it quite intentional and exists by design.

President Cassese accuses the Great Powers of politicizing the funding and operation of ICTs. "The Great Powers thus tend to use international criminal justice simply as a diplomatic tool." (p. 187). Moreover, he asserts that "the failure of the Great Powers to provide the necessary financial wherewithal, enforcement powers, and other means to those tribunals as soon as they are set up has meant that no deterrent effect has come about." (*Id.*) In a shocking conclusion for someone with such a direct stake in the success of ICTs, he concludes that "the

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[58] *See id.* at 211 ("In addition, the prosecutor has got to get the support of the CIA and the American intelligence so that the evidence can be handed over.").

tribunals' credibility has considerably suffered and the whole judicial exercise, as a diplomatic ploy to bring about changes in the behavior of the combatants, has proved pointless." (*Id.*)

Surprisingly, no one really challenges these conclusions about the effectiveness of ICTs. On the contrary, President Badinter concurs in President Cassese's rather glum assessment:

> The tools that nations make to fight against massive violations of human rights – those tools – are one thing. Using those tools is quite another. It is one thing to say, "Ha! See how willing we are to fight against massive human rights violations." It is another thing to say to Putin that he is an evil murderer carrying on that kind of campaign in Chechnya. We shall find that contradiction throughout, a contradiction between stated rights, the mechanisms, and the will to use them. (p. 195).

President Cassese responds that "international adjudication now has proved useful to politicians," remains subject to direct political controls, and constitutes a "political weapon." (pp. 195-98).

By way of contrast, however, transnational courts not subject to direct political controls, such as the European Court of Human Rights and the European Court of Justice, are entirely and expressly excluded from these critiques. (*See* pp. 196, 198-99, 236-41). President Badinter argues that "[i]f you look at Strasbourg or Luxembourg, you find international jurisdictions with primacy over national law." (p. 246). ICTs do not have this authority and are subject to the whims and caprice of national governments in granting, or withholding, support for their proceedings on an entirely ad hoc basis. President Badinter suggests that "[i]f we are to create an international criminal court, let us at least have the courage to give it the means necessary for it to act." (p. 227).

If one wants a true "court" with the power to act as a check on political actors at the national level, he undoubtedly is correct. A court without the power to act in aid of its own jurisdiction cannot even conduct meaningful proceedings, let alone provide meaningful relief to the litigants appearing before it. At the essence of judicial legitimacy is the ability to make binding decisions that command the respect of the political branches of government. ICTs have been designed to be subject to, rather than empowered over, the national governments that

constitute them. Their effectiveness as courts has suffered as a consequence – "the problems of international criminal justice are mainly problems of lack of means and also the need to rely on the cooperation of the states." (p. 227).[59]

Justice Grimm suggests that judicial legitimacy – and by implication judicial effectiveness – depends less on the manner by which judges are selected than on what they do after they are selected. (pp. 241-42). "The legitimacy of courts depends much more on their independence from those who nominate, appoint, or elect them, and, of course, it depends on whether courts succeed in demonstrating that they decide according to the law and not according to judges' personal interests or beliefs." (p. 242).

President Badinter describes an effective judge as a kind of "sorcerer's apprentice." (p. 247). Judges of both national and transnational courts receive political authority from democratically accountable governments, but then deploy their authority in opposition to the immediate interests of those who created the court and appointed its members: "[t]he story is extraordinary, for justice is no longer being rendered in the name of the state, but against its will." (*Id.*) According to President Cassese, effective courts must possess "independence and credibility" in order to be effective and to enjoy legitimacy. (*Id.*)

The clear implication of the discussion is that ICTs, the International Court of Justice, and the proposed International Criminal Court will lack legitimacy and will be less than optimally effective – at least as courts – if these institutions remain directly politically accountable to the nation-states that empower them. By way of contrast, the domestic

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[59] One should not fail to credit, or even understate, the substantial and important accomplishments of the ICTY – notwithstanding these obstacles. *See* Marlies Simons, *Details of Srebrencia Emerge as Hague Redies for a Trial*, N.Y. TIMES, July 4, 2005, at A3 (describing some of the ongoing prosecutions at the ICTY and the horrific underlying events that gave rise to these prosecutions); *see also* Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002) (discussing the operation of international criminal tribunals and providing a candid assessment of their institutional strengths and weaknesses); Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263 (2003) (discussing strengths and weaknesses of international criminal tribunals).

constitutional courts in the United States, Germany, and France, the European Court of Human Rights, and the EU's Court of Justice all have the ability to conduct their proceedings and to act independently of direct political controls. Moreover, the decisions of these courts command the respect and adherence of democratically accountable officials within the respective jurisdictions. Unless and until international criminal tribunals enjoy similar authority, their legitimacy as "courts" will suffer.

Careful consideration of ICTs provides a strong cautionary note on strong form IJD. If a court labors under direct forms of political control, its decisions, and the procedures used to reach them, are certain to reflect this state of affairs. Thus, ICTs would serve as a poor model for defining the scope and powers of a domestic constitutional court – an independent constitutional court should seriously consider the concrete institutional limitations that limit the ability of ICTs to act as genuine courts of law before looking to ICT precedents to inform domestic legal norms or procedures. At the same time, however, consideration of ICTs demonstrates powerfully the utility of weak form IJD. Examination and discussion of the difficulties that ICTs have faced and the root causes of these difficulties suggest some important preconditions necessary for the creation and maintenance of an effective and independent judiciary. Direct forms of political control – and accountability – degrade the ability of juristic entities to advance values associated with the rule of law.

C. The Judge and the Media.

Robert Badinter, former President of the French Conseil Constitutionnel, describes the relationship of the judiciary to the media as that of "the infernal couple" (p. 255). "We see them every day in France, that 'couple from hell.'" (p. 261.) He uses this metaphor to describe the conflicting relational roles that the judiciary must assume vis a vis the mass media; in one role, the judge serves as the protector of a free press against government efforts to censor or silence

the press;[60] in another role, however, the judge seeks to impose limits on a free press in order to protect other values, such as a fair trial or the equality of all citizens;[61] and, finally, sometimes the tables get turned and the media serve as the judge's critic.[62]

It is this last role, the role of critic, in which the judge is, more or less, at the media's mercy. Badinter observes that "[t]he media want to keep judicial events within the public eye" (p. 260) and this, in turn, requires commentary, including commentary "not only upon the decision, but also upon the person who made the decision." (p. 261). Of course, judges attempt to immunize themselves from the effects of media scrutiny: "You, as the judge, take the high road; you ride the white horse, and you put on your fine armor." (*Id.*) But this is only a partial and imperfect response because "matters are not so simple" and "[n]ot every judge is immune to flattery or criticism." (*Id.*)

In particular, Badinter worries that judges might seek to become media darlings and form unholy alliances "among a judge, a prosecutor, and a major media player." (*Id.*) Professor Dworkin posits "[t]he Starr with two 'r's,' not one" as the paradigm of such an alliance and Badinter endorses the example as on point.[63]

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[60] BADINTER & BREYER, *supra* note ___, at 255 ("When faced with attacks or threats, the media consequently find protection in the courts."); *id.* at 258 ("In this respect, note that the media find, by virtue of the relationship with judges, protection from the grasp of a political power that is only too ready to try to control the media, particularly in our age of audio-visual technology.").

[61] *See id.* at 255 (observing that "[i]n such cases, the judge seems to be not the protector of the media, but ultimately their censor"); *id.* at 258 ("At the first stage, it was the media who came to the judge to seek protection; at the second stage, it is private citizens or the state who seek the judges' protection.").

[62] *See id.* at 256 (noting that "the judge suddenly finds himself the subject of a media critique," which transforms the relationship between the judge and the mass media, placing the media "in a position of critical power, though not of authority, in relation to judges").

[63] *Id.* at 261 ("You are right. There is the star system with one 'r,' and the Starr system with two 'r's.'").

This infernal couple departs from its literary cousin ("I am much loved, I am much hated, we have grown old together."[64]) – Badinter suggests that the relationship between the judiciary and the media could be described as "We are much loved, we have lived together, and now we are hated." (p. 262). He posits a new "juridico-media" complex in which "the alliance between the judges and the media" threatens to subject politicians and other public figures to unfair and unflattering scrutiny. (p. 263).

Professor Dworkin, however, cleverly reconceptualizes the issue as one of media scrutiny being an essential condition precedent to judicial legitimacy:

> Steve [Justice Breyer] at some point described the black robe as a metaphor for an ideal of opacity: that the public should be encouraged to think of the judiciary as a Delphic institution that from time to time delivers judgments that must be accepted as the pronouncement of an institution whose anonymity encourages respect. I prefer a different ideal: transparency. (p. 264).

Dworkin argues that "[w]e cannot expect the public any longer to think (if reflective members of the public ever did think) that what judges do is independent of their own personal convictions." (*Id.*).

In order to secure popular acceptance and legitimacy, "judges should explain what their underlying convictions of principle are, and how these are organized into overall constitutional approaches and philosophies." (pp. 264-65).[65] Judicial opinions should be discussed by "journalists and the public" as "honest exercises of political principle." (p. 265). Under this approach, "the authority of a judge is derivative not from hidden craft or from representation, but

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[64] President Badinter identifies the source of the quote as *The Diary of M. Teste*, by Paul Valery. BADINTER & BREYER, *supra* note ___, at 262.

[65] *Cf.* DWORKIN, supra note ___, at 81 (arguing that "even when no settled rule disposes of the case, one party may nevertheless have a right to win" and that "the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively"). Obviously, Professor Dworkin's views on the legitimacy of judges applying general moral reasoning to recognize and enforce rights has broadened since the 1970s. *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note ___, at 2-3 ("Most contemporary constitutions declare individual rights against the government in very broad and abstract language. . . .The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they involve moral principles about political decency and justice.").

from good-faith argument." (*Id.*). In the end, Dworkin suggests that judges should enlist the media as "partners" rather than "obstacles." (*Id.*)

Justice Breyer thinks a cooperative model might work, "[i]f all journalists covered the courts like the *New York Times* reporter covers the Supreme Court." (*Id.*). "But they do not." (*Id.*) So much for that idea! Justice Breyer then complains that the press unduly focuses on minor errors in financial disclosure forms and "will emphasize any mistake that they find." (pp. 265-66.).

Justice Grimm sensibly suggests that because "judges exercise public power" they "must be submitted to public control." (p. 269.) At the same time, however, the spin cycle that dominates electronic media is not very effective at communicating, accurately at least, the content of judicial decisions; "the reporting gets disconnected from the case" and "[t]he subsequent reporting is of a fictitious judgment." (p. 270). At the end of the day, however, he believes that appropriate judicial accountability requires free media criticism of both judges and their decisions. (*See* pp. 270-71.)

Although all of the judges participating in the conversation expressed serious misgivings about the operation of the press, none of them offered a convincing rebuttal to Dworkin's point that transparency and free criticism of the judiciary is essential to squaring judicial review with the project of democratic self-government. Dworkin asserts that, no matter how objectionable the press behaves in reporting on particular judges or judicial proceedings, "you cannot honorably restrict or restrain the press." (p. 267). Instead, judges should write "more lucid, less legalistic opinions that bring principle and disagreements over principle more to the surface." (p. 268). In any event, Dworkin suggests that "[j]udges do not make it better by withdrawing institutionally." (*Id.*)

In sum, judges have an essentially adversarial relationship with the media, yet cannot effectively do their jobs without the media's assistance. In this way, judges and the media are a kind of "infernal couple" that cannot live comfortably with each other, nor can they live

comfortably without each other. If the legitimacy of judicial review rests in part on the duty of a judge to provide a reasoned explanation in support of her judgment, then it seems essential that the community have ready access to those reasons and an opportunity to critique them. In this sense, then, the media play a crucial role in maintaining the viability of judicial review.

This chapter offers fewer useful insights about the possibility of strong form IJD than other chapters. Even so, the easy assumption that "Judge Starr" was a judge/prosecutor in the civil law mode offers provides yet another cautionary note on the dangers of loose borrowing efforts. Similarly, the discussion strongly suggests that cultural differences strongly impact media behavior. It seems likely that differences in culture would also drive differences in the regulation of the media. Although one should not overstate the significance of these observations, they tend to lend further support to the argument that weak form IJD can serve as a useful consciousness raising exercise and to raise further questions about the viability of strong form IJD.

D. <u>But Who Will Judge the Judges?</u>

The final chapter of *Judges in Contemporary Democracy* addresses the problem of judicial misconduct and judicial discipline. A serious accountability problem arises because the independence necessary to secure the rule of law also insulates corrupt or incompetent judges from appropriate discipline (up to, and including, removal from office). If one secures effective judicial accountability, it almost certainly comes at the price of judicial independence.

European Court of Justice President Gil Carlos Rodriguez Iglesias posits the duty of reasoned explanation as the essence of the judicial task. (pp. 277-78). Although "[j]ustice's very vocation is to be objective," he observes that "it is evident that here, as in all human activities, subjective factors play a certain role." (p. 279). Judicial legitimacy relates to a judge's commitment to the rule of law, rather than to direct majoritarian preferences. "This argument begins with the recognition of the 'rule of law' as a supreme value to the extent that it stands as the only guarantee against the citizen being crushed by 'power.'" (p. 281).

Commitment to the rule of law both checks democratic power and legitimates it; the rule of law is itself "a constituitive element of a well-established democratic system." (p. 282.)

President Rodriguez Iglesias suggests that judicial independence is crucial to securing the rule of law. At the same time, however, some form of judicial accountability must exist to counter judicial malfeasance and misbehavior. "The need to guarantee the judge's independence is difficult to reconcile with the adoption of a proper system of judidial responsibility." (p. 284). Making judges directly accountable to political institutions risks the politicization of the judicial task and ultimately the rule of law itself; leaving judges free to police themselves, on the other hand, risks "corporate solidarity" and a failure to address conduct that undermines the legitimacy of the judiciary. (pp. 284-85).

In the end, "for constitutional courts to carry out their mission, they must have credibility and social acceptance, both of the court as such and of its decisions." (p. 285). A judge's duty to give reasons in support of a judgment and to accept criticism of those reasons by members of the legal and political communities constitute "important means for supervision, even though they do not amount to an organized form of supervision and do not lead to a formal body of material setting forth the judges' responsibilities." (*Id.*).[66]

The problem of securing both accountability and independence ultimately lacks any easy solution, because the advancement of one value necessarily implies the degredation of the other; "the problem is that the need for judicial independence is hard to reconcile with the creation of a system of for assuring responsibility." (p. 302-04). President Rodriguez Iglesias posits the need for "public acceptance" as an important check on judicial behavior. (p. 305). In particular, "insistence that courts give reasons for their decisions, along with criticism of their decisions, arising both in judicial circles and also political, economic, and social circles, provides an

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[66] *See* Schauer, *supra* note ___, at 633-34, 651-54 (arguing that attention to the reasons offered in support of an opinion is essential to securing public acceptance of the decision as legitimate).

important method for supervising and for insisting upon a certain public or social responsibility." (*Id.*).

More mundane methods of disciplining judges obviously exist, from panels of judges who review allegations of misconduct to political controls such as impeachment. (pp. 305-06). The participants showed a remarkable lack of familiarity with the means of selection used to name judges of foreign courts and the means of removing or disciplining members of such courts.[67] For example, lower court judges in France are heavily unionized and the judges' union has great influence in promotion decisions. (p. 310). Justice Badinter blithely observes that "we have pure corporatism with union leaders dominating the judiciary," which he considers "worse than domination by politicians, for politicians are subject to the invective and criticism of the press and in the Parliament." (*Id.*).

On the other hand, Justice Grimm notes that "[i]n Germany, unions play no role in the selection or promotion of judges." (p. 311). In response, Justice Badinter interjects that "I do not know what happens in Spain in respect to promotion or selection [of judges], but, in France, they [the judges' unions] are ardent." (*Id.*)

Justice Breyer questions why, given the risks associated with too much political control and too little judicial accountability, it is relatively rare for judges to behave badly. "[D]espite those risks, but for rare instances, judges decide cases without being affected by those influences – even in the United States in states with systems that elect judges. Why?" (p. 311). Justice Grimm responds that "professionalization and institutional self-interest" serve as important checks on judicial behavior. (*Id.*) "The institution of the judiciary can only be upheld in its importance if it shows that it is something different from politics." (pp. 311-12).

In other words, the judge must consider the impact of her decision on the future legitimacy of the court; a judgment that seems to be based on little more than personal whim or prejudice would undermine the ability of the court to command acceptance of its decisions going

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[67] *See* BADINTER & BREYER, *supra* note ___, at 306-12.

forward.[68] And, although it might be impossible to divorce entirely abstract questions of morality from difficult questions of constitutional law, a judge who abandons the language of law and the traditional building blocks of legal argument (constitutional or statutory text, precedent, historical practice, community tradition) risks losing the ability to command respect not only for her decisions, but also for future decisions issuing from her court.

Thus, Polyhymnia constitutes a poor choice as a judicial muse. The judicial task is no oracular or an exercise in divination. The persuasive force of a judicial opinion rests on its transparency and on the ability of the public to understand and critique the strengths and weaknesses of a judge's logic. Moreover, the willingness of the public to repose trust in judges requires judges to both seem and be honest brokers; true neutrals without a vested interest – either professionally or personally – in the outcome of the particular disputes that come before them.

II. The Muse Melpomene: The Potential for Tragedy in the Quest for International Judicial Dialogue.

Melpomene was the Muse of tragedy.[69] Classical representations of Melpomene usually feature a female figure wielding a sword or club in one hand and a tragedy mask in other.[70] In my view, a judge committed to embracing the broadest forms of International Judicial Dialogue ("IJD") risks making Melpomene her patron Muse. Without belaboring the visual metaphor of a figure remarkably similar to Justice wielding a club rather than scales, efforts to incorporate a

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[68] *See* Schauer, *supra* note ___, at 656-59 (arguing that the quality of the reasons provided in support of a decision will significantly affect the persuasive force of a judicial decision).

[69] *See* MARTIN, *supra* note ___, at 10, 691, 709, 711; MURRAY, *supra* note ___, at 159; NORTON & RUSHTON, *supra* note ___, at 235.

[70] *See* Micha F. Lindemans, *Melpomene*, *available at* http://www.pantheon.org/articles/m/melpomene.html ("She is usually represented with a tragic mask. . .[s]ometimes she holds a knife or a club in one hand, and the [tragedy] mask in the other."); *see also* MURRAY, *supra* note ___, at 159 (reporting that Melpomene "wears a diadem or a wreath of cypress, and holds a short sword or club in her hand").

strong form of IJD, such as the direct incorporation of foreign legal precedents, risks judicial disaster.

This section considers the theory of IJD, the principal arguments of IJD's proponents and detractors, and the possibility of real world judges actually attempting to implement IJD – at least in its strongest forms. As will be explained below, *Judges in Contemporary Democracy* provides a compelling warning about the remarkable lack of familiarity that most judges possess regarding foreign legal systems, foreign courts, and foreign legal precedents.[71] Accordingly, the proponents of the stronger forms of IJD must address whether most judges are actually capable of accomplishing the tasks that they would set for them.[72]

A. A Brief Review of IJD, Its Proponents, and Its Critics.

The term "international judicial dialogue" is of relatively recent vintage and appears to be about ten years old.[73] In a highly cited unsigned, student-authored "Developments in the Law" piece in the *Harvard Law Review*, the author observes that:

> Justice Claire L'Heureux-Dubé of the Canadian Supreme Court has described the current practice of citing, analyzing, relying on, or distinguishing the decisions of foreign and supranational tribunals as a "dialogue." This Part builds on the terminology of Justice L'Heureux Dubé and refers to this phenomenon as the "international judicial dialogue" or the "international judicial conversation."[74]

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[71] *See infra* text and accompanying notes ___ to ___.

[72] *See generally* Patricia M. Wald, *The "New Administrative Law" – With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 657-59 (arguing that any theory of judicial review of agency action must take into account the realistic abilities of the judges staffing the federal courts to operationalize it and suggesting that federal judges are probably not capable of engaging in a dialogue with agency administrators about "good government" in the context of highly technical regulatory programs).

[73] Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 378 & 378 n.16 (1995) ("I use [the phrase 'international judicial dialogue'] to refer to the discussion that could take place between members of different courts and even different judiciaries.").

[74] Developments in the Law—International Criminal Law, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2049-50 (2001) (citing Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 24 (1998)).

Many subsequent scholarly works that have engaged the concept of "international judicial dialogue" have cited this "Developments in the Law" piece.[75] Over time, however, the phrase has become commonplace and the current practice among most legal scholars seems to be to invoke the phrase without any particular attribution.[76]

IJD is not, however, the only term used to describe the "practice of citing, analyzing, relying on, or distinguishing the decisions of foreign and supranational tribunals."[77] Professor Melissa Waters has coined the phrase "transnational judicial dialogue" to describe the phenomenon of "national, supranational, and international courts. . . increasingly citing and discussing at length foreign legal precedent on a wide range of legal issues, particularly constitutional law issues."[78] Along similar lines, Professor Anne-Marie Slaughter uses the term "transjudicial communication" to describe "communication among courts—whether national or supranational—across borders."[79] In addition, other scholars have used the phrases "global

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[75] *See, e.g.*, Brent Wible, *"De-Jeopardizing Justice": Domestic Prosecutions for International Crimes and the need for Transnational Convergence*, 31 DENV. J. INT'L L. & POL'Y 265, 280 (2002); Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 196 (2003).

[76] *See* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 700 (2005); Roger P. Alford, *In Search of a Theory for Constitutional Comparitivism*, 52 UCLA L. REV. 639, 644 (2005); Waters, *supra* note __, at 489.

[77] Developments in the Law, *supra* note ___, at 2049-50.

[78] Melissa A. Waters, *"Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-constitutive Dialogue?"* 12 TULSA J. COMP. & INT'L L. 149, 150 (2004).

[79] Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994) [hereinafter *Transjudicial Communication*]. For examples of such communication, see *id.* at 99-102.

judicial dialogue"[80] and "transjudicialism"[81] as variations on the same theme. In some instances, scholars have used the term "constitutional comparativism" to denote the concept of IJD.[82]

Although the Supreme Court of the United States has never bothered to name or explain precisely how it will approach the citation and quotation of foreign legal precedents, the Justices have increasingly included such references in their formal opinions. Justice Kennedy, author of the majority opinion in *Lawrence* v. *Texas*,[83] and Justice Breyer, author of several concurring and dissenting opinions citing foreign legal precedents,[84] are arguably the principal proponents of international judicial dialogue on United States Supreme Court. On the other hand, Chief Justice Rehnquist and Justice Scalia have been the most regular critics of this practice.[85] Moreover, "[a]ll nine Justices have addressed the matter in recent years."[86]

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[80] Kenneth Anderson, *A New World Order*, 118 HARV. L. REV. 1255, 1289 (2005) (book review); Victor V. Ramraj, *Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia*, 6 SING. J. INT'L & COMP. L. 302, 305-06, 332, 334 (2002).

[81] Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555 (2002).

[82] *See, e.g.*, Alford, *supra* note ___, at 639 (defining "constitutional comparativism" as "the notion that international and foreign material should be used to interpret the U.S. Constitution"); *see also* Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 3 (Vicki C. Jackson & Mark Tushnet eds., Praeger 2002).

[83] *See* Lawrence v. Texas, 539 U.S. 558, 572-73 (2003).

[84] *See, e.g.*, Knight v. Florida, 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting from denial of certiorari); Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

[85] *See Lawrence*, 539 U.S. at 597-98 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting); *id.* at 347-48 (Scalia, J., dissenting).

[86] *See* Alford, *supra* note ___, at 640; *see also* Roper v. Simmons, 125 S. Ct. 1183, 1215 (2005) (O'Connor, J., dissenting); *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting); Lawrence v. Texas, 529 U.S. 558, 572-73, 576-77 (2003) (Kennedy, J.); *id.* at 598 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304 (2002) (Stevens, J.); *id.* at 340-41, 347-48 (Scalia, J., dissenting); Foster v. Florida, 537 U.S. 990, 990 (2002) (mem.) (Thomas, J., concurring in denial of certiorari); Knight v. Florida, 528 U.S. 990, 990 n.1 (1999) (Thomas, J., concurring in denial of certiorari); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J., plurality opinion); *id.* at 977 (Breyer, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 710, 718

Within the academic world, "Professor Anne-Marie Slaughter and a handful of others have written about when, why, and how courts engage in transnational communication, but questions about the appropriateness and effects of comparative analyses in judicial decision-making remain relatively unexamined."[87] Professor Slaughter's "analysis of transjudicial communication focused academic interest on the judicial use of extrajurisdictional sources,"[88] however, and she arguably serves as the academy's most visible and influential proponent of IJD.[89]

Professor Slaughter imagines a "world of regular and interactive transjudicial communication"[90] and her description of this world seems remarkably optimistic (perhaps even bordering on utopian). It seems that she would "like to teach the world to sing in perfect harmony." Emphasizing the many potential benefits of a more global system of justices, she does not (or cannot) muster even a single drawback or negative feature of such judicial

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n.16 (1997) (Rehnquist, C.J.); *id.* at 785-87 (Souter, J., concurring); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265 (2003); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348 (2002); William H. Rehnquist, *Constitutional Courts--Comparative Remarks* (1989), reprinted in *Germany and Its Basic Law: Past, Present and Future—A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004); Justice Stephen Breyer & Justice Antonin Scalia, Debate on the Relevance of Foreign Law for American Constitutional Adjudication (Jan. 13, 2005) (transcript and recording available at http://www.wcl.american.edu/secle/founders/2005/050113.cfm); *see generally* Waters, *supra* note ___, at 570 (observing that "six Justices on the Court agree that, at a minimum, international norms have a confirmatory role to play in constitutional adjudication.").

[87] Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 Yale J. Int'l L. 409, 410 (2003). For some of the relevant scholarship in this areas, see *id.* at 410 n.7 (listing representative scholarship advocating or critiquing IJD).

[88] Badhi, supra note ___, at 557.

[89] *See generally* Slaughter, *Transjudicial Communication*, *supra* note ___; Slaughter, *Judicial Globalization*, *supra* note ___.

[90] Slaughter, *Transjudicial Communication*, *supra* note ___, at 132.

interactions.[91] Specific benefits that she suggests would be associated with "established and frequent" IJD include "the quality of judicial decision-making should improve worldwide,"[92] "courts engaged in such communication could come to perceive themselves as members of a transnational community of law,"[93] "an increased blurring of the lines between national and international law,"[94] and "the spread and enhanced protection of universal human rights."[95] In another article, Professor Slaughter and her co-author express their hope that, by writing the article, they might "shift the debate over supranational adjudication . . . toward the pragmatics of building regional and, perhaps, ultimately global communities of law."[96]

Professor Roger Alford is the main academic critic of IJD, at least insofar as it advocates that domestic judges in the United States should consider foreign legal precedents and materials when interpreting the U.S. Constitution.[97] Alford argues that IJD is inappropriate "when the 'global opinions of humankind' are ascribed constitutional value to thwart the domestic opinions of Americans."[98] He also observes (correctly) that, at least up to the present, the Supreme Court

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91 *See id.* at 132-36.

92 *Id.* at 132.

93 *Id.* at 133.

94 *Id.* at 134.

95 *Id.*

96 Helfer & Slaughter, *supra* note ___, at 391. Another prominent proponent of IJD is Dean Harold Hongju Koh. For him, however, IJD is only one aspect of his "transnational legal process" theory, which "posits the internalization of international norms into domestic law." *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004)); *see also* Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Harold Hongju Koh, Bringing International Law Home, 35 HOUS. L. REV. 623 (1998).

97 *See generally* Alford, *supra* note ___; Alford, *Misusing International Sources to Interpret the Constitution*, *supra* note ___.

98 Alford, *Misusing Sources*, *supra* note ___, at 58.

has deployed international legal sources both haphazardly and selectively.[99] Finally, Alford suggests that scholarly proponents of IJD have failed, individually and collectively, to theorize sufficiently their approach and to ground it in any of the standard theories of constitutional interpretation.[100]

Although Professor Alford mounts a powerful attack on the use of IJD to interpret the domestic Constitution, the fact remains that the theory's advocates far outnumber its critics. Moreover, one cannot ignore the fact that several incumbent members of the U.S. Supreme Court have embraced the concept. Accordingly, as Professor Waters has observed, the question of domestic judges engaging in the project of IJD is really no longer open for debate. As she puts it, "total non-participation in transnational judicial dialogue . . . is becoming infeasible in many circumstances."[101] This is so because "[i]n an increasingly globalized world, many transnational legal disputes require that U.S. courts engage in some dialogue with foreign courts."[102]

Logically, the next question that a proponent of IJD must address is "How would one go about engaging in IJD?" In other words, how might one seek to operationalize the idea of transnational judicial interaction?

B. Operationalizing IJD: Strong Form and Weak Form IJD.

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[99] See id. at 64-69.

[100] *See, e.g.*, Alford, *supra* note ___, at 641-42 (arguing that "[a]dvocates of constitutional comparativism—principally international rather than constitutional scholars. . . . commend constitutional comparativism not to promote a particular constitutional theory (or perhaps even result), but rather to advance a conception of transnational law in American courts"); *id.* at 644 ("While the community of constitutional law scholars is obsessed with the latest nuance of a grand constitutional theory, the community of international law scholars is obsessed with the latest application of international norms. . . . One finds then a band of comparative commentators who simply assume the utility of international and foreign material in interpreting the Constitution, without offering a rigorous theoretical case for this particular mode of constitutional analysis."); *id.* at 713 (arguing that, under "classic" theories of constitutional interpretation, no existing theory can "sustain[ ] the full freight of the comparativist agenda").

[101] Waters, *supra* note___, at 555.

[102] *Id.*

As the preceding discussion makes plain, advocates of IJD have in mind several different means of advancing the concept. In its strongest form, IJD would involve intentional and overt borrowing of foreign legal precedents; in a weaker form, IJD might involve activities aimed at raising the consciousness of judges, but these activities might fall well short of overt borrowing (e.g., conferences or programs featuring judges from various jurisdictions, reading and writing scholarly articles, etc.). For the most part, however, advocates of IJD have spent more time and effort defending the idea of IJD as a concept or a theory than they have attempting to provide specific directions on how to go about engaging in it. This is particularly the case with respect to the strong form of IJD. Indeed, it might be the case that a road map for the weak form of IJD would be unnecessary: Most judges already know how to attend and participate in professional meetings and conferences or how to write scholarly articles.

Operationalizing the strong form of IJD, however, requires something more than mere intution. Even so, only a handful of legal scholars have addressed how to operationalize the strong form of IJD.

One of the most popular models of IJD involves judicial efforts to incorporate foreign legal precedents within domestic law by using foreign law as persuasive authority in domestic cases. This strong form of IJD is highly likely to raise objections because foreign legal authority – whether in the form of a judicial opinion, a legislative statute, or an administrative regulation – usually lacks any formal domestic legal status (most obviously including some sort of legislative approval or mandate). Nevertheless, Professor Badhi suggests that:

> judges who invoke international law in national courts [should] seek to alleviate the anxiety of their critics by providing a justification for their reliance on international law. . . . Judges invoke international law for five interdependent yet discrete reasons: (1) concern for the rule of law; (2) desire to promote universal values; (3) reliance on international law to help uncover values inherent within the domestic regime; (4) willingness to invoke the logic of judges in other jurisdictions; and (5) concern to avoid negative assessments from the international community. These rationales are not universal in that they are not cited by all judges all of the time; however, they

> also are not unique to a particular jurisdiction and can be found in the case law across jurisdictions.[103]

Along similar lines, Professor Waters' method of operationalizing IJD posits that a judge borrowing foreign or international legal precedents should discuss the reasoning of a foreign court's decision, why the judge finds it persuasive, and if foreign courts are in disagreement on the issue, why the views of certain foreign courts should be preferred over others.[104]

Professor Slaughter suggests that judges engaged in an IJD-inspired borrowing exercise should, when appropriate, engage in direct communication with foreign courts.[105] Professor Slaughter also encourages weak form activities, such as having domestic judges meet foreign judges face-to-face.[106] They also should practice "judicial comity," which Professor Slaughter defines as "deference not to foreign law or foreign national interests, but specifically to foreign courts."[107] She suggests that this approach is essential to operationalizing IJD successfully.[108]

On the other hand, Professor Waters emphasizes that "[r]eceptivity to foreign and international legal sources need not entail automatic deference."[109] Accordingly, judges are as much participating in IJD when they defend a domestic norm against a conflicting foreign norm

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[103] Bahdi, *supra* note ___, at 556-57.

[104] Waters, *supra* note ___, at 566-67 (criticizing Justice Kennedy for his failure to undertake any of these duties in his majority opinion in *Lawrence*).

[105] Slaughter, *supra* note ___, at 104-05 (giving as examples cases involving foreign parties, recognition of foreign judgments, or questions of foreign jurisdiction).

[106] *See* Slaughter, *Judicial Globalization*, *supra* note ___, at 1120.

[107] *Id.* at 1112 (citation omitted) .

[108] *Id.* at 1112-14 (citations omitted).

[109] Waters, *supra* note ___, at 556.

as when they modify domestic norms in light of foreign norms.[110] A judge committed to IJD can adopt a foreign norm, reject a foreign norm, or attempt to strike a balance between the two.[111]

Of course, all of these approaches to IJD are rather general; although they attempt to provide judges with guidance about *how* to borrow foreign legal precedents, they are not very instructive about *when* such borrowing should take place. Determining that – at least as of 2001 – "there has been no American scholarship examining when and how judges should use the constitutional insights of other countries," David Fontana decided to undertake the project himself.[112] The result was a method of operationalizing comparative constitutional law that he denominated "refined comparativism."[113]

Fontana's methodology begins by identifying the rationales an American court may invoke to justify using comparative constitutional law. The first is "genealogical comparativism," in which a court "looks to comparative constitutional law because some [historical, legal, and/or cultural] relationship exists between the lender country . . . and the United States."[114] The most common example of genealogical comparativism is when a court

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[110] *See id.* at 559.

[111] *See id.* at 559-64 (discussing factors a court should consider in finding that balance).

[112] *See* Fontana, *supra* note ___, at 541-42. Fontana also notes that "no [United States] scholar has yet directly posed the important question: Should American constitutional law borrow from comparative constitutional law?" *Id.* at 542. Fontana quickly answers the question in the affirmative, but he explains why only indirectly; he seems to assume from the start that U.S. judges should borrow, and then goes about making a persuasive argument for this conclusion. In doing so, he identifies early in the article that from a historical perspective, "American judges have occasionally been using . . . comparative constitutional law," *id.* at 542, and that all of the current Supreme Court justices have done so, *see id.* at 545-49. That said, Fontana provides no other justification for the practice, nor does he really suggest there is any, until Part III of his article, in which he identifies some benefits of utilizing "refined comparativism." *See id.* at 566-72. Those benefits include the development of "better law" due to the wider range of options available to courts and a "broadening [of] the cultural horizon of constitutional law — it can help constitutional law come to grips with the evolution of a multicultural society." *See id.* at 566.

[113] *See* Fontana, *supra* note ___, at 542-43.

[114] *Id.* at 550.

studies English legal history.[115] The second is "ahistorical comparativism," in which "the American court looks to the constitutional solution of the other country for its own sake, regardless of that country's historical, legal, and cultural similarity with the United States."[116]

These rationales for resorting to comparativism are then further subdivided into either "positive" or "negative" comparativism:

> Positive comparativism involves an American court looking to Comparative constitutional law with approval, looking to see if American constitutional law can borrow from comparative constitutional law. By contrast, negative comparativism looks to comparative constitutional law as a way of devising principles of American constitutional law by testing what it is not. Negative comparativism involves looking to the failures (from the American perspective) of other constitutional regimes.[117]

Fontana then identifies the three roles in which comparative constitutional law may be used in a judicial opinion: "1) in dicta, 2) to create a workable principle of law, or 3) to prove a 'constitutional fact.'"[118]

Fontana suggests three instances in which comparative constitutional law could be used to create a workable principle of domestic law:

> First of all, a court may find . . . use of comparative constitutional law helpful when it is addressing an issue for the first time, and there are no helpful American judicial precedents. . . . Second of all, a court creating a rule or standard may use comparative constitutional law when the American sources are unclear, and therefore the constitutional answer to the question before the court is hard to find. . . . Finally, an American court crafting a rule or standard may use comparative constitutional law to help it bridge the "concept" and "conceptual" distinction. . . . [when t]he American sources may be clear enough to help guide the court somewhat . . . but not clear enough to help the court come up with a workable rule or standard.[119]

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115 *See id.*

116 *Id.* at 551.

117 *Id.*

118 *Id.* at 552.

119 *Id.* at 553-54.

In explaining the third role, Fontana defines "constitutional facts" as "those facts that can be discovered by observing experience (legal and otherwise) to answer a particular legal question posed by a case."[120] "This frequently involves 'law canvassing'—looking to the laws of many countries to help define a term or assess the rationality or acceptability of a practice."[121]

Fontana argues that comparative constitutional law should be used only in "hard cases." A "hard case" is one in which higher order domestic law sources of constitutional meaning fail to provide concrete answers and he suggests that "many difficult questions" lack clear answers.[122] In such cases, "comparative constitutional law merely serves as another source outside of traditional sources of American law that helps resolve a case."[123] Finally, even in "hard cases," using comparative constitutional law should be considered optional because comparative constitutional cases are only persuasive authority rather than binding precedent.[124] Once a judge uses such cases in an opinion, however, "the judge would have the power to determine whether or not these cases themselves (and their predecessors and progeny) are binding precedent."[125]

Fontana argues that "the use of comparative constitutional law by judges in their opinions would encourage litigants to make comparative constitutional law part of their briefs and part of their efforts at trial" and that courts should actively request that litigants do so.[126] He points to

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[120] *Id.* at n.60 (citing Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 11-12 (1998).

[121] *Id.* at 554-55.

[122] *Id.* at 558.

[123] *Id.* Fontana also points out that "[w]hether courts cite to classics of literature or to legal scholarship, they have frequently looked beyond the traditional domestic legal sources for answers." *Id.*

[124] *Id.* at 558-59.

[125] *Id. At 559-60.*

[126] *Id.* at 563, 565.

Federal Rule of Civil Procedure 44—"[a] party who intends to raise an issue concerning the law of a foreign country should give reasonable notice"—as a means already in place that would allow litigants to do so and would allow courts to hear such arguments.[127] Recognizing, however, that a court is likely to be relatively ignorant of foreign law, and that lawyers may take advantage of this lack of familiarity to misrepresent affirmatively the meaning of foreign law, Fontana also suggests that courts could rely on Federal Rule of Evidence 706 to appoint an expert witness in the foreign law under consideration.[128] By using these methodologies, Fontana believes that courts could overcome their relative institutional isolation to use refined comparativism effectively.

Professor Waters, like Fontana, has sought to shift the debate surrounding IJD.[129] She would balance the present emphasis on whether U.S. courts should be internalizing international norms with a discussion of "the potential role of U.S. courts in the process of *international norm creation*—that is, in shaping both the content of international legal norms and the process by which those norms are created."[130] Waters believes that such balance is warranted because "the relationship between international and domestic legal norms is more properly conceived of as a co-constitutive, or synergistic, relationship."[131] As part of her co-constitutive theory, Waters "develop[s] a model for shaping the role of domestic courts—in particular U.S. courts—as transnational actors."[132]

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[127] *Id.* at 563.

[128] *Id.* at 564. Fontana also points to FED. R. CIV. P. 3 as allowing the appointment of a special master, "who would help the court with a foreign law issue." *Id.*

[129] *See* Waters, *supra* note ___, at 489-91.

[130] *Id.* at 489-90.

[131] *Id.* at 490.

[132] *Id.* at 491. In addition to offering her own model, Waters also considers whether *Lawrence* and *Roper* suggest a model. She concludes that Justice Kennedy's analysis of foreign sources in *Lawrence* "blurs the line between comparative law and customary international law," *id.* at 567, thus "prevent[ing] him from laying out an analytical framework for U.S. courts' roles

In this model, Waters outlines three options for a court faced with the prospect of incorporating IJD in its decision. The first option is total non-participation. This is the position advocated by Justice Scalia in *Lawrence* and *Roper*. Waters notes, however, that total non-participation is becoming increasingly unrealistic, given the proliferation of litigation between parties of different nations. In such cases, judges must, to some degree, engage in IJD — at a minimum, "a court's decision whether to exercise jurisdiction in such a case is inevitably a decision to defend—or to refuse to defend—domestic norms at the transnational level."[133]

Furthermore, Waters argues that even when non-participation is feasible, few reasons support choosing this option. Non-participation risks impoverishing U.S. courts' decisionmaking, whereas participation risks little in that "[r]eceptivity to foreign and international legal sources need not entail automatic deference."[134] Additionally, non-participation "impoverishes international legal discourse. . . . [and] greatly decreases the likelihood that U.S. norms will influence the development of international legal norms."[135]

The second option Waters outlines is that courts engage in IJD "by acting as transnational defenders or even advocates of key domestic norms." The third option is allowing foreign law to "influence judicial interpretations of domestic law, as the Supreme Court did in *Lawrence v. Texas* and *Roper v. Simmons*."[136] Deciding which of the two options a court should pursue in a given case—"mediating between conflicting international and domestic norms"—depends on several factors.

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as mediators, *id.* at 568. This analysis seems spot on. In her view, *Roper*, unlike *Lawrence*, sets out a "fairly conservative" framework that "suggests international norms can play a *confirmatory* role." *Id.* at 569. Despite the limited character of this approach, and its flawed application in *Roper*, *see id.* at 570-72, Waters views it favorably as signaling the Court's willingness to participate in IJD, *id.* at 569-70.

133 *See id.* at 555-56.

134 *See id.* at 556.

135 *Id.* at 557.

136 *Id.* at 555.

The first factor is "the relative strengths of the norms at issue."[137] The strength of a domestic norm depends on how "deeply rooted in this Nation's history and tradition" it is.[138] The more deeply rooted the domestic norm, the more cautious the court should be in allowing a foreign norm to change it.[139] But a domestic norm's roots are not dispositive, and the court also should consider "whether the norm remains consistent with contemporary American values."[140] Thus, "the more strongly rooted the [foreign] norm, the more U.S. courts should allow the norm to influence their interpretations . . . of conflicting domestic norms."[141]

The next factor a court should consider is the "international countermajoritarian difficulty."[142] The countermajoritarian difficulty "addresses the problem of reconciling the need for democratic institutions to be responsive to the popular will with the concomitant need for a branch of government that can prevent the majority from infringing on the rights of the minority."[143] In other words, a court's incorporation of foreign law into U.S. domestic law might lack democratic legitimacy in the absence of an agreeable domestic consensus. Furthermore, courts' use of foreign law may be "doubly countermajoritarian when they import into domestic law international norms that are the product of judicial consensus among the world's courts rather than the popular consensus."[144] Waters acknowledges that the difficulty "is a major concern," but argues that it is "simply one factor (albeit an important one) that U.S. courts

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137 *Id.* at 559.

138 *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

139 *See id.* Waters suggests U.S. norms on free speech are a good example of a "deeply rooted" norm. *See id.*

140 *See id.* at 559-60.

141 *Id.* at 560.

142 *Id.* (citing Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58-62 (2004)).

143 *Id.*

144 *Id.* at 561.

should weigh in the balance when mediating between conflicting domestic and international norms."[145]

The final factor courts should consider is the effect of "structural considerations [on] their capacity to mediate between domestic and international norms."[146] Waters's observations on this concept, as it applies to U.S. courts, are limited to comparing U.S. courts to the South African Constitutional Court. She posits that the U.S. federal courts' lack of an "explicit constitutional authorization to consider foreign and international sources" suggests that it may be inappropriate for them to import foreign law as aggressively the South African court.[147] On the other hand, the domestic legitimacy U.S. courts enjoy because of their "advantage of history, experience, and prestige . . . . provides a kind of informal authorization that may compensate to some degree for a lack of explicit constitutional authority to consider foreign and international norms."[148]

Describing Mark Tushnet as an advocate of IJD would be overstating his position. It would be more accurate to say that he is not an opponent of IJD (e.g., he does not believe IJD is fundamentally undemocratic), but he also believes it is of limited utility in interpreting U.S. law. His method of operationalizing IJD, which is still more of a theoretical method than a practical one (especially when contrasted with the approaches advocated by Fontana and Waters), is primarily captured in *The Possibilities of Comparative Constitutional Law*.[149] In this article,

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145 *Id.*

146 *Id.* at 561-62.

147 *Id.* at 562.

148 *Id.*

149 Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) [hereinafter *Possibilities*]. This article outlines a very limited place for IJD, and when taken together with Tushnet's other writings on the subject, it is difficult to see how, under his proposed approach, there can be any practical utility to using IJD in interpreting U.S. law. *See* Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 348-49 (1998) (proposing a functionalist argument for applying IJD to the issue of legislator standing but ultimately

Tushnet suggests that "U.S. courts can sometimes gain insights into the appropriate interpretation of the U.S. Constitution by a cautious and careful analysis of constitutional experience elsewhere."[150]

The first step in Tushnet's analysis is finding in the Constitution a "license" to use comparative material.[151] The kind of license required and the relevance of comparative materials then depends on which of three methodologies — functionalism, expressivism, or *bricolage* — the interpreter employs. The methodology can then be used to import comparative materials into U.S. law, subject to the limitations Tushnet sets out.

"Functionalism" is Tushnet's first proposed justification for engaging in transnational borrowing. He explains that:

> Functionalism claims that particular constitutional provisions create arrangements that serve particular functions in a system of governance. Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems. It might then be possible to consider whether the U.S. constitutional system could use a mechanism developed elsewhere to perform a specific function, to improve the way in which that function is performed here.[152]

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finding that contextual differences between constitutional systems makes the utility of IJD doubtful and suggesting that "even if the study of comparative constitutional law proves not to have the kind of reciprocal pay-off about constitutional policy that we might hope for, it still may be useful as part of a lawyer's liberal education"); Mark Tushnet, *Interpreting Constitutions Comparatively*, *supra* note ___, at 650-55, 662-63 (arguing that domestic courts should be cautious when attempting to incorporate foreign legal precedents into domestic law because differences in the institutional, doctrinal, and cultural contexts between domestic and foreign constitutional systems may render the substantive approaches of the foreign systems largely irrelevant). In *Interpreting Constitutions Comparatively*, Tushnet even goes so far as concluding that "[t]he instrumental value of learning comparative constitutional law may not be as large as some recent discussions suggest," *id.* at 663, and that "I include my original foray into the field[, i.e., *Possibilities*] in this category," *id.* at 663 n.61.

150 Tushnet, *supra* note ___, at 1228.

151 *See id.* at 1230-32 (deriving the necessity of a license from 1) the Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which rejected the relevance of foreign practice to the court's interpretive task in determining if execution of those who committed their offenses as juveniles violates the Eight Amendment, and 2) from older Court decisions that "found a limited license for interpreting the Due Process Clause with a view to the experience of the Anglo-American people").

152 *Id*. at 1228.

A serious problem with functionalist justifications for IJD, however, "is that functionalist analysis *always* omits some relevant variables."[153] Furthermore, "once [those] variable[s] are taken into account, the number of cases . . . turns out to be too small to support any functionalist generalization. . . . [unless] they are supplemented by a theoretical account that provides reasons for thinking that particular cases exemplify more general social tendencies."[154] Such theoretical accounts are difficult to develop and so Tushnet concludes that "we might properly be rather skeptical about what we can truly learn when we think about constitutional experience elsewhere in functionalist terms."[155]

"Expressivism" is Tushnet's second proposed justification for engaging in the strong form of IJD. "For the expressivist, constitutions emerge out of each nation's distinctive history and express it distinctive character."[156] He posits a constitutional license to use comparative materials because:

> judges of wide learning . . . may see things about our society that judges with narrower vision miss. . . . To the extent that we think that judges are licensed to rely on what they take from great works of literature as they interpret the Constitution, we should think that they are licensed to rely on comparative constitutional law as well.[157]

Making use of this license, however, "raises a difficult question: How can we learn from experience elsewhere as we try to interpret our Constitution, if that Constitution expresses *our* national character?" Of course, as Tushnet observes, our "constitutional character" is not easily

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153 *Id.* at 1265.

154 *Id.* at 1265, 1267.

155 *Id.* at 1269.

156 *Id.* at 1270. Tushnet distinguishes between "constitutions with a small *c* . . . and documents like the U.S. Constitution. The expressivist claim is plausible . . . with respect to the former class. In contrast, nations vary widely in the degree to which their written constitutions are organically connected to the nation's sense of itself." *Id.*

157 *Id.* at 1236-37.

defined and is frequently a matter of perspective.[158] He also acknowledges that "[o]ne could, of course, see the U.S. Constitution in expressivist terms without looking elsewhere."[159] Even so, "seeing how things are done in other constitutional systems may raise the question of the Constitution's connection to American national character more dramatically than reflection on domestic constitutional issues could."[160]

"Bricolage" constitutes the third and final justification Tushnet posits for engaging in transnational borrowing. The term "bricolage" comes from the social scientist Claude Lévi-Strauss. It describes "the assembly of something new from whatever materials the constructor discovered."[161]

A judge engaged in bricolage – for example, Justice Kennedy in *Lawrence* – uses foreign materials as a kind of foil or judicial fashion accessory. Moreover, the bricoleur usually does not fret too much about the legitimacy of his decorative use of foreign legal materials:

> Functionalists and expressivists worry about whether appropriating selected portions of other constitutional traditions is sensible, or whether the appropriation will "work" in some sense. The *bricoleur* does not have these concerns about maintaining proper borders among systems. . . .[B]ricolage cautions against adopting interpretive strategies that impute a high degree of constructive rationality to a constitution's drafters.[162]

Tushnet does not find a bricolage-based license in the Constitution for using comparative materials. Rather, he suggests that "[o]ften bricolage is an unconscious process: Picking up a

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158 *See id.* at 1274-81 (using various perspectives on implementing hate speech regulations in the U.S. as an example)

159 *Id.* at 1285.

160 *Id.*

161 *Id.* at 1229 (citing CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 16-17 (University of Chicago Press 1966) (1962).

162 *Id.*

piece from somewhere just seems like a natural thing to do. . . . To the extent that bricolage has this unconscious, natural character, the practice warrants its own use."[163]

Tushnet concludes that the need for a license and the filtering effect of the three analytical approaches limits the utility of comparing constitutional experience. As a result, "we can learn from experience elsewhere by looking at that experience in rather general terms, and then by seeing how those terms might help us think about the constitutional problems we confront."[164] His approach and his theoretical concerns about the legitimacy of borrowing seem to lead, by a rather direct route, to a more limited vision for IJD than either Fontana or Waters endorse.

Both the Fontana and Waters approach to operationalizing the strong form of IJD would require judges to master and apply foreign legal materials or to allow "experts" to do it for them. In fairness to both of them, they readily acknowledge that judges might face difficulties in accomplishing this task in a satisfactory fashion. In my view, the discussions featured in *Judges in Contemporary Democracy* tend to bear out Tushnet's fears and raise serious questions about the optimism reflected in the Fontana and Waters approaches to operationalizing IJD.

C. The Serious Difficulties Associated with the Strong Form of IJD.

First, the ability of a judge in one nation to understand fully a precedent handed down by a court in another jurisdiction is doubtful. A judicial decision is not simply words on a page; it is the product of a complex set of interactions within the court itself, between the court and the advocates and litigants, and also between the judiciary and the other branches of government. To take an opinion at face value is to risk complete misunderstanding of its real meaning, its true importance.

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[163] *Id.* at 1238. Tushnet goes on to say, however, that constraints on the effectiveness of bricolage may cause "judicial bricoleurs" to accomplish so little that there is no need for serious concern about their license or lack thereof. *See id.* at 1238, n.63. This, of course, begs the question of why he spends over twenty pages discussing bricolage.

[164] *Id.* at 1308.

Professor Tushnet has cautioned that "substantive constitutional doctrine is sometimes closely tied to institutional arrangements."[165] Thus, before examining a nation's substantive approach to a particular legal question, a borrowing court "ought to attend to the possibility that [it] could do so profitably only if [it] also examined – and considered adopting – the relevant institutional arrangements."[166] The problem, however, is that "there is more institutional enthusiasm for examining substantive approaches than for examining institutional ones," a state of affairs that "suggests some caution."[167]

Professor Tushnet's concerns seem very well stated. Decisions do not arise in a vacuum, and attempting to understand, much less incorporate, a foreign legal precedent without attending to the institutional, political, and cultural context that surrounds it is, to put the matter simply, fraught with peril. Advocates of strong form IJD have failed to suggest an effective means of overcoming this problem – other than moving the problem from the judge to an "expert" who will tell the judge what a foreign precedent means and presumably also about how and why the issuing court established it.

Beyond the practical difficulties associated with implementing strong form IJD, serious theoretical issues exist that compromise the legitimacy of borrowing foreign legal precedents. Judge Richard Posner suggests that "the undemocratic character of citing foreign decisions"

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165 *Id.* at 655.

166 *Id.*

167 *Id.* Judge Posner, no ideological fellow traveler of Professor Tushnet, shares this concern. He argues that judicial decisions "emerge from complex socio-historio-politico-institutional background of which our judges, I respectfully suggest, are almost entirely ignorant." Posner, *supra* note ___, at 2. To understand a foreign judgment properly, Posner suggests that one must "know such things as how the judges of that court are appointed" and how those judges "conceive of their role." *Id.*

requires serious attention.[168] He observes that "the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here."[169]

Posner argues that a final problem with simplistic borrowing is the appearance that judges are engaged in "one more form of judicial fig-leafing, of which we have enough already."[170] Because "judges are timid about speaking in their own voices, lest they make legal justice seem too personal and discontinuous," they instead "dig" for quotations from any materials that might make a particular outcome seem more, rather than less, objective.[171]

In light of these practical and theoretical difficulties, successful borrowing – strong form IJD – does not seem particularly promising. As Tushnet suggests, "[o]n questions that matter a great deal, direct appropriation of another system's solution seems unlikely to succeed."[172] *Judges in Constitutional Democracy* raises far more questions than it answers regarding the practicality and feasibility of strong form IJD.

III. The Muse Calliope: International Judicial Dialogue as a Source of Inspiration and a Means of Enhancing Judicial Understanding of Fundamental Human Rights.

Ideally, a judge should not only be learned in the law, but also possess a broad understanding of the political, social, and culture effects of the law on the community. Law does not exist in a vacuum and a judge who is utterly insensitive to the effects of a judgment would be less effective at advancing the values associated with the rule of law. A judge must respect the rule of law, but a judge also must be perceived as an agent of justice; moreover, the willingness of the citizenry to accept the legitimacy of judicial review depends, in no small measure, on the

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168 Posner, *supra* note ___, at 3.

169 *Id.*

170 *Id.*

171 *Id.*

172 Tushnet, *supra* note ___, at 662.

ability of judges to offer convincing reasons for their decisions.[173] This is doubly so when the decision at issue runs deeply counter to the beliefs of a working majority within the community.

Calliope was the oldest and wisest of the Muses; she was the Muse of eloquence and epic poetry.[174] A judge must invoke the spirit of Calliope when deciding the harder cases that come before her; the cases that involve the most fundamental interests and which lack a clear cut resolution. Does equal protection or due process of law privilege a decision to seek to end one's life, with the assistance of a doctor? Do these concepts prohibit the state from regulating consensual intimate associations between adults? Do they require not merely that the state stay the hand of the criminal law, but also grant the same legal recognition to same-sex relationships that it bestows on opposite-sex couples? May a polity, as part of a broader effort to overcome a legacy of racism, take race into account in admissions decisions at government operated colleges and universities? Even if judges are not "secular popes," clearly they are more than mere judge-o-matic machines.

All of the participants in the conversations associated with *Judges in Contemporary Democracy* agree on one point: judicial legitimacy rests on the duty of a judge to give reasons – persuasive reasons – in support of a judgment. And this, of necessity, means that eloquence matters. If a decision is to command the obedience of the coordinate branches of government and the citizenry, it must not merely provide reasons ("because I say it is so"), but reasons that transcend mere personal moral preferences ("because the Constitution commands it," "because our precedents require it," etc.).

In constructing a persuasive argument, it might well benefit a judge to know what reasons a jurist facing a similar problem found persuasive, and which she did not. Weak form IJD could awaken a jurist to arguments that do not come self-evidently to someone within a

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[173] *See* Schauer, *supra* note ___, at 633-34, 651-54, 656-59.

[174] *See* MARTIN, *supra* note ___, at 10, 691, 711; MURRAY, *supra* note ___, at 160; NORTON & RUSHTON, *supra* note ___, at 236.

given legal culture. For example, for someone steeped in the adversarial model of criminal justice, the idea of dispensing with a jury might seem entirely alien. Fundamentally fair systems of criminal procedure exist in civil law nations that do not use a jury-based adversarial system, but rely instead on a judge-based inquisitorial process. Although a U.S. judge would be wrong to "borrow" the inquisitorial system of criminal procedure, knowledge of its existence and operation might uncover unstated assumptions that undergird the adversarial system. Even if application of foreign procedures would be inappropriate, mere knowledge of them might be quite helpful.

In thinking about problems like hate speech, or the scope of property rights, or the quest for securing gender equality, a judge's thinking might well be improved through knowledge of how other nations – and other judges – have addressed similar problems. To be clear, I do not believe that a judge in country A can ever fully appreciate the meaning of a judgment issued by a court in country B. But perfect understanding is not really required if the judgment is serving merely as way of reconceptualizing, or reframing, an existing legal problem.

If a judge can find inspiration in a monograph or law review article,[175] why should she refrain from finding such inspiration in a foreign legal text (even if imperfectly understood)? But even if a judge finds inspiration in a foreign legal text, persuasive reasons for the judgment must exist in domestic legal sources. In this way, foreign legal sources might influence the interpretation and application of domestic legal sources, but would not themselves be constituitive of domestic law. From this perspective, there is nothing wrong with members of the Supreme Court familiarizing themselves, even in a very general an imprecise way, with the content of foreign law.

Professor Tushnet argues that "knowing more rather than less is generally a good thing" and posits that best defense of IJD, whether in a strong or weak form, is that "the subject has

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[175] *Compare* CATHERINE MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN *with* Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-67, 72 (1986) (holding that Title VII provides a right of action for sexual harassment in the workplace based on gender).

intrinsic intellectual interest."[176] Along similar lines, Judge Posner admonishes that "I do not suggest that our judges should be provincial and ignore what people in other nations think and do."[177]

With all due respect, however, I think that Tushnet and Posner might be understating the potential utility of weak form IJD. It is very easy to become unduly comfortable with existing legal rules and the standard rationales mustered domestically to explain and justify them. Weak form IJD has the potential to challenge these untested assumptions and inspire judges to consider alternative conceptions of both the content and scope of legal rights (and particularly fundamental human rights). To the extent that difficulties exist with IJD, they relate principally to a judge's effort to morph foreign legal materials from a source of inspiration, like a poem or a favorite piece of art, into a formal reason supporting a conclusion involving the disposition of a domestic legal question. Thus, *Roper* and *Lawrence* were objectionable precisely because the majority used foreign law not merely as an informal source of inspiration, but rather as a predicate for creating new domestic constitutional rules. On the other hand, the kind of international judicial interaction memorialized in *Judges in Contemporary Democracy* seems incredibly useful – not only to the participants themselves, but also to those who review and contemplate their conversations.

IV. Conclusion: The Muses' Love and the Judicial Project.

Homer tells us that "[f]ortunate is he whomsover the Muses love, and sweet flows his voice from his lips."[178] If a court's legitimacy in fact relates to the judges' ability to muster persuasive reasons in support of their decisions, then most judges would do well to seek the favor of the Muses. *Judges in Contemporary Democracy* offers powerful evidence of the

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[176] Tushnet, *supra* note ___, at 663.

[177] Posner, *supra* note ___, at 3.

[178] ANDREW LANG, THE HOMERIC HYMNS: A NEW PROSE TRANSLATION, ch. XXIV, at 238 (1900).

potential benefits that weak forms of IJD could provide in inspiring judges to think creatively about the law and the role of a constitutional court in a democratic polity. At the same time, however, judges should take care not to mistake a muse for more than what it is – an ephemeral source of motivation and inspiration.

The participants in the dialogue harbored many false assumptions and displayed an alarming lack of familiarity with the composition, institutional powers, and institutional role of the various constitutional courts. If judges as smart, sophisticated, well-traveled as these would have difficulty understanding a foreign precedent, one might well question whether any judges would be capable of undertaking a borrowing exercise successfully.

Even as *Judges in Contemporary Democracy* establishes the value and potential of weak forms of IJD, it offers a strong cautionary note about the dangers of haphazard efforts at stronger forms of IJD, such as the direct borrowing of foreign legal precedents. The book brings into appropriate focus important institutional differences that help to explain why courts in different nations, starting from common legal principles, reach radically different results on similar facts.[179] Before one could systematize borrowing exercises as a routine feature of domestic constitutional law, one must first understand the circumstances and context that helped give rise to the foreign legal rule or precedent in the first place. Indeed, it would not be going too far to suggest that *Judges in Contemporary Democracy* is a kind of prolegomenon to the transnational borrowing of legal rules and precedents. In my view, the United States Supreme Court would do a much better job of operationalizing the borrowing of foreign legal precedents if it paid more attention to the relevant systemic differences associated with the role and function of foreign constitutional courts.

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[179] The most basic issue that a constitutional court must address is the issue of judicial review itself; to what extent does a constitutional democracy tolerate the effects of judicial review? How self-conscious are judges about second-guessing basic policy decisions adopted by democratically legislators?

At the end of the day, the difficulties associated with strong form IJD might prove to be insurmountable. In the meanwhile, however, systematic transnational interactions – and dialogue – between judges might not lead the world to sing in perfect harmony, but it will lead to better, more thoughtful judges both here and abroad. Even if what the world wants ultimately proves not to be Coke, our judges will be better at articulating our domestic constitutional values if they have a broader appreciation of the contingencies associated with the creation, articulation, and enforcement of human rights.