2005

I'd Like to Teach the World to Sing (In Perfect Harmony): International Judicial Dialogue and the Muses - Reflections of the Perils and the Promise of International Judicial Dialogue 2006 Survey of Books Relating to the Law - Part V: International and Comparative Law

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

"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

*Ronald J. Krotoszynski, Jr.**

JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION. Edited by *Robert Badinter & Stephen Breyer.* New York and London: New York University Press. 2004. Pp. ix, 317. $55.

TABLE OF CONTENTS

* Professor of Law and Alumni Faculty Fellow, Washington & Lee University School of Law. B.A. 1987, M.A. 1987, Emory; J.D. 1991, LL.M. 1991, Duke. —Ed. I would like to acknowledge the support of the Frances Lewis Law Center, which provided a generous summer research grant to support this project. Professors Melissa Waters and David Zaring provided very helpful comments on an earlier draft of this Review Essay. I also wish to acknowledge the excellent research assistance provided by Clint Carpenter, Washington & Lee Class of '07. As always, any errors or omissions are my responsibility alone.

> 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.[1]
>
> * * *
>
> The essential terms of the debate about the 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? (p. 281)

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 about 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 of France), Antonio Cassese (former President of the International Criminal Tribunal for the Former Yugoslavia), Dieter Grimm (former Justice of the Federal Constitutional Court of Germany), Gil Carlos Rodriguez Iglesias (President, Court of Justice of the European Communities), and Ronald Dworkin (Professor of Law at New York University, Professor of Jurisprudence at University College London, and formerly Professor of Jurisprudence at Oxford University)—consider the countermajoritarian problem identified by Alexander Bickel.[2] In a democratic society, why should judges have the final say when judges lack the democratic mandate enjoyed by executive and legislative

---

1. I'd Like to Buy the World a Coke (Coca-Cola advertisement first broadcast Feb. 1971) (adapted from *I'd Like to Teach the World to Sing (In Perfect Harmony)*, words and music by Roger F. Cook, Roquel Davis, William M. Backer & Roger John Reginald Greenaway, 1971) (on file with author).

2. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–20, 26–28, 260–61 (1962). *But see* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 257–58 (2002) [hereinafter Friedman, *The Birth of an Academic Obsession*]. 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, 2606 (2003) [hereinafter Friedman, *Mediated Popular Constitutionalism*]. Thus, Friedman suggests, that contrary to Bickel's hypothesis, "[p]ublic opinion and judicial review are connected." *Id.* at 2635; *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1063 (2000).

branch officials?[3] Why do the other branches of government—to say nothing of average citizens—accept judicial decisions that invalidate legislative or executive actions?[4] The participants 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 on and critiques of how foreign legal systems have attempted to solve common problems. The style is entirely dialectic; indeed, *Judges in Contemporary Democracy* reads very much like a Socratic dialogue.[5]

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. In addition, however, the book also offers timely and important insight into the problem presented by transnational, or international, judicial dialogue.

Increasingly, legal academics have advocated more frequent and meaningful 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").[6] For example, Professor Anne-Marie Slaughter has called on judges to engage each other in an effort to create a global system of law.[7] 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."[8]

Objective evidence strongly suggests that the justices of the Supreme Court of the United States have been listening. The Supreme Court has

---

3. *See* BICKEL, *supra* note 2, at 16.

4. *See id.* at 17; *see also id.* at 261 ("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.").

5. *Cf.* PLATO, THE REPUBLIC 92–102 (Francis MacDonald Cornford trans., Oxford Univ. Press 1970) (discussing the qualifications and duties of judges in a well-ordered community).

6. The phrase "International Judicial Dialogue" appears to be around ten years old. *See* 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 & 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."). Other nomenclature for the idea of domestic judges invoking foreign legal materials, including judicial opinions, in their decisions exists, including "transnational judicial dialogue," "transjudicial communication," "global judicial dialogue," "transjudicialism," and "constitutional comparativism." I have used the term IJD because it is the oldest, most heavily cited formulation, and it also seems to encompass the wide range of interactions that could take place among and between jurists from different nations.

7. *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100–18 (1994).

8. *Id.* at 132.

made a conscious turn toward international judicial dialogue.[9] In cases like *Roper*,[10] *Lawrence*,[11] and *Atkins*,[12] the justices have invoked foreign legal precedents in support of the Court's interpretation of the domestic Constitution. Moreover, several of the incumbent justices have publicly advocated the incorporation of foreign legal precedents into domestic constitutional law.[13] This "borrowing" of foreign legal precedents represents one aspect of international judicial dialogue. 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.[14] One could term this "strong form" IJD.

At the same time, however, advocates of IJD also have promoted greater interaction and discussion among jurists from different courts.[15] This conversation could be extended over time 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.[16] One could style

---

9. *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.").

10. Roper v. Simmons, 125 S. Ct. 1183, 1199–1200 (2005).

11. Lawrence v. Texas, 539 U.S. 558, 572–73, 576–77 (2003).

12. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

13. *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 L. PROC. 348, 349–50 (2002) (suggesting that domestic law schools, lawyers, and the courts should adopt a more globalized vision of law and legal institutions and positing that "there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here"); Charles Lane, *The Court Is Open for Discussion: AU Students Get Rare Look At Justices' Legal Sparring*, WASH. POST, Jan. 14, 2005, at A1 (reporting on recent public debate between Justices Scalia and Breyer about use of foreign legal precedents in U.S. Supreme Court decisions).

14. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103–05 (2000); *see also* Reem Bahdi, *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); Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 370–73, 389–91 (1997).

15. *See* Tushnet, *supra* note 9, at 662; 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); *see also* Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July/Aug. 2004, at 40, 42, *available at* http://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.").

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

this approach to IJD as "weak form" IJD. Even persons skeptical of strong form IJD have expressed openness to weak form IJD.[17]

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 foreign constitutional courts function, the role that the courts play in domestic government, and the problems that the various courts confront in going about their job of safeguarding constitutional values. At the same time, however, this lack of knowledge has rather serious implications for 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 bare words on a page. A precedent is the product of a socio-legal culture: reading a text as nothing more than a text risks grave misunderstandings that could prove embarrassing to the borrowing court.[18]

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 context, one would still have to deal with another problem. 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.[19] *Roe v. Wade*[20] does not necessarily provide the

---

17. 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." Posner, *supra* note 15, at 3–4.

18. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 64–69 (2004). *See generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (2000).

19. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G), *translated in West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605 (Robert E. Jonas & John D. Gorby trans. 1976); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G). For a detailed and thoughtful discussion of German constitutional law's approach to abortion rights, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 869–72 (1986), and 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).

20. 410 U.S. 113, 152–57 (1973).

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.[21]

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 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 II then surveys and critiques the principal arguments that *Judges in Contemporary Democracy* sets forth, including a sustained defense of maintaining a strong form of judicial review as a check on the vicissitudes of more direct forms of democracy. 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.

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). Judges undoubtedly might find much of interest in the decisions of foreign constitutional courts. Moreover, globalization, as Professor Slaughter suggests, is as much a reality as an academic abstraction. Foreign law has served as a muse for U.S. domestic courts in the past and will undoubtedly continue to do so in the future. But the Muses were not clones—specific Muses had different qualities and talents and vastly different symbolic meanings. Even if one accepts the proposition that foreign law can and should serve as a kind of judicial muse, a serious question remains about precisely what kind of muse it will, or should, be.

---

21. *See, e.g.*, Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate Speech Restriction*, 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). 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 (2006).

Finally, and at a broader level, *Judges in Contemporary Democracy* raises questions about the role of judges as social and governmental actors. This context also involves judges selecting a muse, not so much as a source of inspiration, but rather as a model for understanding the judicial task itself. Thus, *Judges in Contemporary Democracy* presents both the question of appropriate sources of judicial creativity and the question of the appropriate judicial role model of the craft (or art) of judging.

I. THE MUSE MELPOMENE: THE POTENTIAL FOR TRAGEDY IN THE QUEST FOR INTERNATIONAL JUDICIAL DIALOGUE

Melpomene was the Muse of tragedy.[22] Classical representations of Melpomene usually feature a female figure wielding a sword or a club in one hand and a tragedy mask in the other. In my view, a judge committed to embracing the broadest forms of International Judicial Dialogue risks making Melpomene her patron Muse. Without belaboring the visual metaphor of a figure remarkably similar to Justice wielding a club rather than scales, I should note that efforts to incorporate a 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. To appreciate fully the potential lessons of *Judges in Contemporary Democracy*, one must have a basic understanding both of IJD theory and the means legal scholars have proposed for actually implementing it. As will be explained in Part III, *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. Accordingly, the proponents of the stronger forms of IJD must address whether most judges are actually capable of accomplishing the tasks that the advocates of IJD would set for them.[23]

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

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*, and Justice Breyer, author of several concurring

---

22. *See* RICHARD P. MARTIN, BULFINCH'S MYTHOLOGY 10, 691, 709, 711 (1991); ALEXANDER S. MURRAY, THE MANUAL OF MYTHOLOGY: GREEK AND ROMAN, NORSE, AND OLD GERMAN, HINDOO AND EGYPTIAN MYTHOLOGY 159 (Newcastle 1993) (1882); DAN S. NORTON & PETERS RUSHTON, CLASSICAL MYTHS IN ENGLISH LITERATURE 235 (1952).

23. *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 dissenting opinions citing foreign legal precedents, are arguably the principal proponents of international judicial dialogue on the United States Supreme Court.[24] On the other hand, former Chief Justice Rehnquist and Justice Scalia have been the most regular critics of this practice.[25] Moreover, "[a]ll nine Justices have addressed the matter in recent years."[26]

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."[27] Professor Slaughter's "analysis of transjudicial communication focused academic interest on the judicial use of extrajurisdictional sources,"[28] however, and she arguably serves as the academy's most visible and influential proponent of IJD.

Professor Slaughter imagines a "world of regular and interactive transjudicial communication,"[29] 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 justice, she does not (or cannot) muster even a single drawback or negative feature of such judicial interactions.[30] According to Slaughter, specific benefits from "established and frequent" IJD include improved "quality of judicial decision-making,"[31] a perception that participating courts are "members of a transnational community of law,"[32] "an increased blurring of the lines between national and international law,"[33] and "the spread and enhanced protection of universal human rights."[34] In another article, Professor Slaughter and her co-author express their hope that, by writing the article, they might "shift the debate

24. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572–73 (2003); 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).

25. *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).

26. *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 640 (2005); *see also* Justice Stephen Breyer & Justice Antonin Scalia, Debate on the Relevance of Foreign Law for American Constitutional Adjudication (Jan. 13, 2005), *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm; *see also* Lane, *supra* note 13.

27. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 410 (2003) (footnote omitted).

28. Bahdi, *supra* note 14, at 557.

29. Slaughter, *supra* note 7, at 132.

30. *See id.* at 132–36.

31. *Id.* at 132.

32. *Id.* at 133.

33. *Id.* at 134.

34. *Id.*

over supranational adjudication . . . toward the pragmatics of building regional and, perhaps, ultimately global communities of law."[35]

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. Alford argues that IJD is inappropriate "when the 'global opinions of humankind' are ascribed constitutional value to thwart the domestic opinions of Americans."[36] He also observes (correctly) that, at least up to the present, the Supreme Court has deployed international legal sources both haphazardly and selectively.[37] Finally, Alford suggests that scholarly proponents of IJD have failed, individually and collectively, to sufficiently theorize their approach and to ground it in any of the standard approaches to constitutional interpretation.[38]

Although Professor Alford mounts a powerful attack on the use of IJD to interpret the U.S. 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."[39] 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."[40]

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: Getting Beyond Mere Abstract Advocacy to Real World Implementation*

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 (for example, attending conferences or programs featuring judges from various jurisdictions, reading and writing scholarly articles, etc.). For

---

35. Helfer & Slaughter, *supra* note 14, 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 n.5 (2004).

36. Alford, *supra* note 18, at 58.

37. *See id.* at 64–69.

38. *See, e.g.*, Alford, *supra* note 26, at 641–42, 644, 713.

39. Waters, *supra* note 15, at 555.

40. *Id.*

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 spent 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. Putting the strong form of IJD into action, however, requires something more than mere intuition. Even so, only a handful of legal scholars has addressed how to operationalize the strong form of IJD.

Professor Slaughter suggests that judges engaged in an IJD-inspired borrowing exercise should, when appropriate, engage in direct communication with foreign courts.[41] Professor Slaughter also encourages weak form activities, such as having domestic judges meet foreign judges face-to-face.[42] Finally, Professor Slaughter advocates the practice of "judicial comity," which she defines as "deference not to foreign law or foreign national interests, but specifically to foreign courts."[43] She suggests that this approach is essential to operationalizing IJD successfully because globalization will require enhanced and regularized judicial cooperation across borders.[44]

On the other hand, Professor Waters emphasizes that "[r]eceptivity to foreign and international legal sources need not entail automatic deference."[45] Accordingly, judges are as much participating in IJD when they defend a domestic norm against a conflicting foreign norm as when they modify domestic norms in light of foreign norms.[46] A judge committed to IJD can adopt a foreign norm, reject a foreign norm, or attempt to strike a balance between the two.[47]

Of course, these are rather general approaches to IJD; 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 ha[d] 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.[48] The result was a method of operationalizing comparative constitutional law that he denominated "refined comparativism."[49]

---

41. Slaughter, *supra* note 7, at 104–05 (giving as examples cases involving foreign parties, recognition of foreign judgments, or questions of foreign jurisdiction).

42. *See* Slaughter, *supra* note 14, at 1120.

43. *Id.* at 1112.

44. *Id.* at 1112–14.

45. Waters, *supra* note 15, at 556.

46. *See id.* at 559.

47. *See id.* at 559–64 (discussing factors a court should consider in finding that balance).

48. *See* David Fontana, *Revised Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 541–42 (2001).

49. *See id.* at 542–43.

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."[50] 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."[51]

He then further subdivides these rationales for resorting to comparativism into "positive comparativism," which "involves an American court looking to comparative constitutional law with approval, looking to see if American constitutional law can borrow from comparative constitutional law," and "negative comparativism," which "involves looking to the failures (from the American perspective) of other constitutional regimes."[52]

Fontana 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.' "[53] 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.[54] In such cases, "[c]omparative constitutional law merely serves as another source outside of traditional sources of American law that helps resolve a case."[55] 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.[56]

Fontana suggests 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.[57] He points to 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 raise comparative law issues and would allow courts to hear such arguments.[58] 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 posits that courts could

---

50. *Id.* at 550.
51. *Id.* at 551.
52. *Id.*
53. *Id.* at 552.
54. *Id.* at 557–58.
55. *Id.* at 558.
56. *Id.* at 558–59.
57. *Id.* at 563, 565.
58. *Id.* at 563 (quoting FED. R. CIV. P. 44).

rely on Federal Rule of Evidence 706 to appoint an expert witness in the foreign law under consideration.[59] 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.[60] 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."[61] 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."[62] 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."[63]

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 from 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."[64]

The second option Waters outlines is that courts engage in IJD "by acting as transnational defenders or even advocates of key domestic norms."[65] The third option is allowing foreign norms to "influence judicial interpretations of domestic law, as the Supreme Court did in *Lawrence v. Texas* and *Roper v. Simmons*."[66] Deciding which of the three options a court should pursue in a given case depends on several factors.[67]

The first factor is "the relative strengths of the norms at issue."[68] The strength of a domestic norm depends on how "deeply rooted in this Nation's history and tradition" it is.[69] The next factor a court should consider is the

---

59. *Id.* at 564.

60. *See* Waters, *supra* note 15, at 489–91.

61. *Id.* at 489–90.

62. *Id.* at 490.

63. *Id.* at 491.

64. *See id.* at 555–56.

65. *Id.* at 555.

66. *Id.*

67. *See id.* at 561.

68. *Id.* at 559.

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

"international countermajoritarian difficulty."[70] 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."[71] 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.

The final factor courts should consider is the effect of "structural considerations [on] their capacity to mediate between domestic and international norms."[72] Waters 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 as does the South African Constitutional Court (which enjoys an express constitutional mandate to consider foreign and international law).[73]

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 (for example, he does not believe IJD is fundamentally undemocratic), but he also believes it is of limited practical 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*.[74] In this article, 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."[75]

The first step in Tushnet's analysis is finding in the Constitution a "license" to use comparative material.[76] The kind of license required and the relevance of comparative materials depend on which of three methodologies—functionalism, expressivism, or "bricolage"—the interpreter employs.

---

70. *Id.* at 560 (citing Alford, *supra* note 18, at 57, 58–62).

71. *Id.*

72. *Id.* at 562.

73. *Id.*

74. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) [hereinafter Tushnet, *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* Tushnet, *supra* note 9, at 650–55, 662–63; 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). In *Interpreting Constitutions Comparatively*, Tushnet even goes so far as to conclude that "[t]he instrumental value of learning comparative constitutional law may not be as large as some recent discussions suggest" and that "I include my original foray into the field [*Possibilities*] in this category." Tushnet, *supra* note 9, at 663 & n.61.

75. Tushnet, *Possibilities*, *supra* note 74, at 1228.

76. *See id.* at 1230–32.

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 specific functions in a system of governance.[77]

A serious problem with functionalist justifications for IJD, however, "is that functionalist analysis *always* omits some relevant variables."[78] Furthermore, "once [those] variables 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."[79]

"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 its distinctive character."[80] 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."[81] Thus, "[t]o 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."[82] 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?"[83]

"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."[84] 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.[85]

Tushnet does not find a bricolage-based license in the U.S. Constitution for using comparative materials. Rather, he suggests that "[o]ften bricolage

---

77. *Id.* at 1228.

78. *Id.* at 1265.

79. *Id.* at 1265, 1267.

80. *Id.* at 1270.

81. *Id.* at 1236.

82. *Id.* at 1237.

83. *Id.* at 1271.

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

85. *Id.*

is an unconscious process: Picking up a 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."[86]

Tushnet concludes that the need for a license and the filtering effect of the three analytical approaches severely limit the utility of comparing constitutional experience. In light of these difficulties with theorizing and operationalizing comparative constitutional law, he suggests that, at most, "[w]e 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."[87] His approach and his theoretical concerns about the legitimacy of borrowing appear to lead, by a rather direct route, to a more limited vision for IJD than Fontana and Waters seem to endorse.

Both the Fontana and Waters approaches 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*

The foregoing materials demonstrate that many legal scholars support the strong form of IJD. Even so, serious problems exist with actually making the strong form of IJD work in the real world.

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.

Professor Tushnet has cautioned that "substantive constitutional doctrine is sometimes closely tied to institutional arrangements."[88] 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."[89] The problem, however, is that "there is more

86. *Id.* at 1238.

87. *Id.* at 1308.

88. Tushnet, *supra* note 9, at 655.

89. *Id.*

institutional enthusiasm for examining substantive approaches than for examining institutional ones," a state of affairs that "suggests some caution."[90]

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" requires serious attention.[91] He observes that "the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here."[92]

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."[93] 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.[94]

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."[95] As the following section will demonstrate, *Judges in Contemporary Democracy* validates all of these concerns and, in the process, raises far more questions than it answers regarding the practicality and feasibility of strong form IJD.

---

90. *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 15, at 42. 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.*

91. Posner, *supra* note 15, at 3.

92. *Id.*

93. *Id.*

94. *Id.*

95. Tushnet, *supra* note 9, at 662.

II. 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.[96] Nevertheless, Justice Breyer and President Badinter invoke the sacred in describing the judiciary as "the secular papacy" and ask, "Has the judiciary become the twenty-first-century equivalent of the twelfth-century papacy?" (p. 4). Along related lines, they wonder, "Do ordinary citizens look to judicial decisions as sources of moral authority?" (p. 4). 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?

The discussions in *Judges in Contemporary Democracy* associated with the proper role of judges, both within society and within a particular governmental structure, provide a helpful opportunity to assess the prospects for either strong or weak form IJD. The participants often speak from experience, and it becomes very clear early on that the assumptions drawn from personal experience about how to approach these issues are often highly grounded in a specific socio-legal culture.

In my view, the most important substantive question *Judges in Contemporary Democracy* addresses is the issue of judge as moral agent. To be sure, the public expects that judges will advance "justice," which implies more than a modicum of moral authority;[97] 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 run parallel to important moral issues. I would argue that 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 at a time when, at least in the United States, a hue and cry exists over "government by the judiciary."[98]

---

96. *See* MARTIN, *supra* note 22, at 10, 711, 717; NORTON & RUSHTON, *supra* note 22, at 235–36.

97. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

98. *See, e.g.*, PHYLLIS SCHLAFLY, THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT (2004). Along similar lines, the remarkable success of MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (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. The willingness of incumbent members of Congress, congressional staff members, political activists, and leaders of religious organizations to rail publicly 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, Apr. 8, 2005, at A21; Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3; *cf.* pp. 12–13 (Badinter: "Even so Stephen, I had the feeling that in the United States the judge

Even if one finds the idea of judge as pseudo-pope highly problematic, *Judges in Contemporary Democracy* offers 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."[99] 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.[100]

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 imaginary, 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).

These two propositions—and the discussion surrounding them—represent the book's most significant contribution to the literature. The question of judicial legitimacy remains difficult and pressing; in the end, the participants generally endorse Legal Process values[101] as the best means of grounding the power of judicial review.

---

was king. When I read about your decisions on the first 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?").

99. P. 17; *see* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 266–69 (1994).

100. *See* pp. 21–22, 46; *see also* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9–12, 47–96 (1993).

101. *See* Friedman, *The Birth of an Academic Obsession*, *supra* note 2, at 241–47 (discussing main tenets and proponents of Legal Process Theory).

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 human rights through judicial interpretation and application of written documents containing guarantees of individual freedom" (p. 3).

Grimm posits that a failure of political discourse has worked to enhance the prestige of the judiciary vis-à-vis the executive and legislative branches of government (p. 25). "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 an unpopular decision.[102]

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 makes 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."[103]

Moreover, a system of government predicated on a wholesale transfer of power over basic policy decisions to judges is a symptom of a profound failure of democracy itself. Dworkin suggests that, "ideally, a democracy

---

102. *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 its 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. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 58 (1999). 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.

103. P. 38; *see* TUSHNET, *supra* note 102, at 55–58.

should decide questions about atomic energy, risks and gains, and so forth."[104] The transfer of more and more political and policymaking responsibility to judges constitutes an admission that "democracy no longer works" (p. 50). "So it is an undemocratic alternative, and an extremely unfortunate basis on which to rest the increase of judicial power" (p. 50).

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.[105]

For example, 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, "[e]very court in France can apply the Human Rights Convention *except* the Conseil Constitutionnel?" (p. 59).

In my view, the participants' lack of familiarity with the means of selection, composition, rules of procedure, 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? (p. 57). For

---

104. P. 50; *see* KOMESAR, *supra* note 99, at 261–62 & n.40.

105. For examples of this phenomenon, see Justice Breyer's discussion of the German Constitutional Court, p. 43, President Cassese's discussion on the lack of specialized administrative law courts in common law countries, pp. 45–46, Professor Dworkin's discussion on the willingness of the German Constitutional Court to supervise policies on matters like "atomic energy," pp. 49–50, President Cassese's discussion of term limits for members of various constitutional courts, p. 56, President Badinter's discussion on the ability of Congress to legislate in a fashion inconsistent with a Supreme Court decision, p. 142, and the discussions of various participants regarding French, Spanish, and German campaign finance laws and enforcement of such laws, pp. 143–52, 154–57.

example, the absence of dissenting opinions in the European Court of Justice[106] 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[107] lead to obvious anomalies: a legal provision that is struck down as unconstitutional when reviewed as part of a pending law is nonetheless fully effective as part of another law already in the statute books. It would be very easy to overread decisions of the European Court of Justice (because very small changes in the membership of the Court could cause drastic changes in its jurisprudence without much, if any, advance warning) and to underread decisions of the Conseil Constitutionnel (because the continuing effectiveness of laws that violate precedents of the Conseil Constitutionnel does not indicate a lack of commitment by this bench to enforce its prior precedents in the future).

The question of familiarity with foreign courts goes even deeper. 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 various Italian domestic courts are very different from each other in their jurisprudential outlook. Accordingly, the outcome of a case is variable:

> [I]t 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 Cassation (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 highly relevant; 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.[108]

Similarly, a court's overall status within a governmental structure could affect how it goes about its business. President Badinter describes the German Federal Constitutional Court as "the all-powerful German institution in Karlsruhe" and contrasts its power with "that of [the European Court of Human Rights], which has only jurisdictional authority delegated by Convention" (p. 61). The latter, an international court created by convention of

---

106. *See* pp. 56–57, 102–03.

107. *See* pp. 57–59.

108. *See* Alford, *supra* note 18, 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.* Fontana, *supra* note 48, at 563–64 (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 fact 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 decisionmaking by the Supreme Court of Japan).

contracting states, cannot "forget the fact" that its power is circumscribed and its legitimacy less than self-evident: "[The] 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" (p. 61). Given these circumstances, "boldness" is a relative thing; 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" (p. 61).

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.[109] 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).

This conception of rights has serious implications. Liberties and freedoms must be protected not only from government abridgment, but also "when they are threatened, not by government, but by third parties or societal forces" (p. 21). 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 potential life reflected in the fetus.[110] 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). He notes that 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 decisionmaking remains one of the central concerns of federal judges and U.S. legal academics. This kind of metadistinction hopelessly complicates the ability of one jurisdiction to borrow a decision by another.

---

109. *See* pp. 21–23; *see also* Currie, *supra* note 19, at 869–72, 877–78; Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 521, 523–30 (1992).

110. Pp. 21–22; *see supra* notes 19–21 and accompanying text.

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 "[j]udicial '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).

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.[111] 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 become 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."[112] What then legitimates the imposition of judicial values over those of the legislative or executive branch?

---

111. This, of course, is an argument that Professor Dworkin has advanced in other contexts (at least in his more recent works). *See, e.g.*, DWORKIN, *supra* note 97, at 2–4, 14, 37 (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) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY] (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").

112. P. 71; *see* BICKEL, *supra* note 2, at 16–20, 261–62 (arguing that democratic accountability enhances the legitimacy of decisionmaking). *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.").

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."[113] 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. A purely majoritarian understanding of democracy is not the only means of conceptualizing this model of government and "[i]t is not even an attractive conception of democracy" (p. 82). Why? Because "there is nothing good, even *pro tanto*, about majority rule in itself" (p. 82).

Dworkin prefers to define democracy as "fair majority rule, and majority rule becomes fair only when certain conditions are met."[114] These conditions include "a genuine and equal right to participate in the public debate that produces the majority decision" and personal autonomy with respect to "issues of distinct importance to individuals, like the choice of religious commitment" (p. 74).

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, legislators and executive officials are more directly accountable to the people for their failures to respect rights.[115] Dworkin acknowledges this point and asks, "[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" (p. 78).

Justice Breyer strongly objects to Dworkin's thesis, at least insofar as it incorporates the claim 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

---

113. P. 81. Certainly this holds true in the contemporary United States. *See supra* note 98.

114. P. 82; *see* pp. 73–75, 82–83.

115. *See* Tushnet, *supra* note 102, 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).

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 judgments and reaching "sound" or "sensible" results; in Dworkin's view, the label "sound" or "sensible" is simply a smokescreen for a moral judgment that a particular decision comports with prevailing notions of justice.[116] 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 many people in the community would nevertheless reject" (p. 89). Dworkin posits that "[i]t's turtles, all the way down."[117]

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," "methodology," and "the legal context and the legal culture in which you handle legal matters" all work to limit judicial freedom of action (p. 91).

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" (p. 95).

This broad exchange of views illustrates the strong tension between a Legal Process perspective and a Critical Legal Studies perspective regarding 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

---

116. *See* pp. 88–89 ("But we need ordinary moral judgments about what is fair or just to decide what is 'sensible' or 'works.'").

117. P. 73. Although Dworkin invokes Dr. Seuss, presumably quoting *Yertle the Turtle*, when referencing this phrase, *see* p. 73, it actually seems to relate to a cosmology anecdote associated with William James. *See* STEPHEN 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) (attributing metaphor to James, not Seuss). *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, 812 n.28 (1995) (observing that the author "cringe[s] to refer to the unending terrapin tower because it is fast becoming a banal cliché of infinite regress" but nevertheless providing a thoughtful and comprehensive etymology of the metaphor, which appears to have no relation to Dr. Seuss).

way of going about judicial business.[118] 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.[119]

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 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, 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" (p. 105). 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.[120] 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).

Justice Breyer would rest judicial legitimacy on a different predicate: the citizenry generally perceive judges 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—

---

118. *See* Herbert Wechsler, *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 offering (or withholding) particular reasons in support of the outcome. *See* KRAMER, *supra* note 115; 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 and Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AM. U. L. REV. 1 (1999).

119. 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." P. 102.

120. *See* p. 105.

that judicial discourse is more refined and more demonstrably principled than most contemporary political discourse—one has constructed a fairly durable theory of judicial legitimacy.[121]

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.[122] 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 high degree of public trust and confidence in discharging its duties.[123] 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.[124]

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 legitimate 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. 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

---

121. *See* pp. 84–85, 108–09.

122. *See* pp. 82–83, 108–09.

123. 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); Friedman, *Mediated Popular Constitutionalism*, *supra* note 2, at 2605. Professor Schauer, on the other hand, endorses legal craftsmanship as one of the keys to securing judicial legitimacy. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 654–55 (1995).

124. *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).

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 and 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 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 (p. 133).

Despite this, Justice Breyer stipulates that "granting judges the power to enforce basic constitutional rights" is not an essential, or even necessary, condition for a constitutional democracy (p. 135). For example, the United Kingdom functions as a liberal democracy although 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 protect basic constitutional rights and "we have chosen that way in the United States" (p. 135).

Even as the Supreme Court's supervision of the electoral process has increased over time, from 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" (p. 155). Moreover, very little working knowledge of foreign campaign finance rules exists among the participants; the French jurist has no knowledge of German campaign finance law.[125] The discussion prompts President Rodriguez Iglesias to exclaim that "we live in

125. *See* p. 155 (featuring President Badinter questioning Justice Grimm about how Germany regulates access to the broadcast media during election cycles and asking, "[D]oes German law forbid political advertising?").

such different worlds," to which President Badinter responds "[t]he cultural patterns are radically different" (p. 155).

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 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, you must have someone who will determine when an ad is, and when it is not, political propaganda" (p. 155). He suggests, "[t]hat would seem to be a job for a judge" (p. 155). But President Badinter responds: "We would not even do that. It is so obvious that it is political propaganda that the station would not take [the ad] because the station would be liable to the state regulatory body" (p. 155). 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.[126]

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.[127] The discussion assumes that politicians suffer from "a double standard" that gives judges "power" over politicians (p. 169).

Interestingly, Ken Starr serves as the group's exemplar for the undue harassment 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

126. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–20, 59–62, 147–50, 162–63, 178, 234–35 (1990) (discussing various factors that lead people to accept decisions as legitimate, including the importance of cultural factors and the correspondence of legal rules with prevailing norms of justice within a particular community).

127. *See* pp. 160–74.

was accused of doing" (p. 170). From this, he concludes that "[i]f you translate the matter into the language of power, the power of the judge vis-à-vis the politician is perceived as greater than vis-à-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.[128]

The European jurists participating in the meetings did not appear to appreciate fully that in the American and English legal systems executive branch prosecutors, not judges, handle criminal investigations, decide whether to bring charges, and largely get to determine which charges to bring against the persons they investigate. Moreover, in an adversarial system of criminal justice, the judge plays a much more passive role than in continental inquisitorial systems.[129] Investigations of politicians in France may give judges power over politicians to a greater degree than is the case in the United States. Important structural differences profoundly affect the institutional role of the judge 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.

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 (pp. 175–253). Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), provides a political history of international criminal tribunals ("ICTs") and their place in the development of interna-

---

128. *See* Morrison v. Olson, 487 U.S. 654, 673–77, 685–96 (1988); Krotoszynski, *supra* note 124, at 447–56 (discussing the factual and legal background of Judge Starr's investigation of the Clintons and a citizen complaint regarding the process associated with Starr's appointment as independent counsel).

129. Professor Dworkin notes that this aspect of 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.

Pp. 173–74. Badinter responds that "whatever the hand that holds the sword, it strikes the same wound." P. 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 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.

tional 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).

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 to 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). Cassese explains: "[w]e had nothing, zero" (p. 203).

But why did the ICTY face such difficulty securing support from the major powers? President Cassese posits that the effectiveness of the NATO-led and U.S.-supported military action in the former Yugoslavia caused the major powers to overlook 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 action or the military action achieves major results, you simply forget about justice" (p. 203). 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).[130]

This design effectively requires an ICT to interact on a regular basis with overtly political actors at the United Nations and in national capitals (p. 211). Cassese reports personally lobbying the United Nations General Assembly, the Security Council, and various national and local officials in the former Yugoslavia. Making "deals" and begging politicians for help comport poorly, however, with the model of a judge as a neutral adjudicator.

All of these activities are deeply problematic for the independence and legitimacy of an ICT. As Cassese points out, "[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 is quite intentional and exists by design. In a shocking concession for someone with such a direct stake in the success of ICTs, President Cassese concludes that "the 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" (p. 187).

By way of contrast, however, transnational courts that are 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

130. *See* pp. 210–12.

these critiques.[131] 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 caprices 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 check political actors at the national level, Badinter undoubtedly is correct. A court without the ability to act in aid of its own jurisdiction cannot even conduct meaningful proceedings, let alone provide meaningful relief to the litigants appearing before it. The essence of judicial legitimacy is the ability to make binding decisions that command the respect of the political branches of government.[132]

Careful consideration of ICTs provides a serious 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. Accordingly, any borrowing of precedents or procedures from an ICT should reflect this reality. 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*

In Chapter Five, 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). He notes, "[w]e 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-à-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 (pp. 255, 258); 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 (p. 255); and, finally, sometimes the tables get turned, and the media serve as the judge's critic (p. 256).

---

131. *See* pp. 196, 198–99, 236–41.

132. P. 227. One should not fail to credit, or even understate, the substantial and important accomplishments of the ICTY notwithstanding these obstacles. *See* Marlise Simons, *Details of Srebrenica Emerge as Hague Readies 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).

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). This media criticism, Badinter suggests, could present a threat to judicial legitimacy (pp. 261–63).

Professor Dworkin, however, cleverly reconceptualizes the issue. He suggests that media scrutiny is 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" (p. 264).

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."[133] 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 from good-faith argument" (p. 265). In the end, Dworkin suggests that judges should enlist the media as "partners" rather than "obstacles" (p. 265).

Although all of the judges participating in the conversation expressed serious misgivings about the operation of the press upon judicial systems (pp. 265–71), none of them offered a convincing rebuttal to Dworkin's point that transparency and free criticism of the judiciary are essential to squaring judicial review with the project of democratic self-government. Dworkin asserts that no matter how objectionably 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" (p. 268).

---

133. Pp. 264–65; *cf.* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 111, at 81 (arguing that "even when no settled rule disposes of the case, one party may nevertheless have a right to win" and that it is "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, *supra* note 97, at 2 ("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.").

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 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. *But Who Will Judge the Judges?*

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.

President Rodriguez Iglesias suggests that judicial independence is crucial to securing the rule of law (pp. 282–84). 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 judicial 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). "[T]he problem is that the need for judicial independence is hard to reconcile with the creation of a system for assuring responsibility" (p. 302).

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."[134]

More formal methods of disciplining judges obviously exist, from panels of judges who review allegations of misconduct to political controls such as impeachment. 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.[135] For example, lower court judges in France are heavily unionized, and the judges' union has great influence in promotion decisions (p. 310). President 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" (p. 310).

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, President 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" (p. 311).

Returning to the problem of judicial accountability, Justice Grimm suggests that "professionalization and institutional self-interest" provide powerful checks against judicial bad behavior (p. 311). "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 forward. And, although it might be impossible entirely to divorce 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 not 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 appear as 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.[136]

---

134. P. 285; *see* Schauer, *supra* note 123, at 633–34, 651–54 (arguing that giving reasons in support of an opinion is essential to securing public acceptance of the decision as legitimate).

135. *See* pp. 306–12.

136. Empirical investigations conducted by Professor Tom R. Tyler confirm this. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The*

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 cultural 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 ability of judges to offer convincing reasons for their decisions.[137] This is doubly so when the decision at issue runs deeply counter to the beliefs of a working majority within the community.[138]

Calliope was the oldest and wisest of the Muses; she was the Muse of eloquence and epic poetry.[139] 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

---

United States Supreme Court and Abortion Rights, 43 DUKE L.J. 703, 751, 782–83 (1994) (reporting that people will accept judicial decisions, even if they do not like the outcome, provided that they perceive judges making the decisions to be "impartial, just, and competent" and that the procedures used to reach the decisions are transparent and fair (quoting Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, *in* FRONTIERS OF JUDICIAL RESEARCH 273, 275 (Joel B. Grossman & Joseph Tanenhaus eds., 1969))).

137. *See* Tom R. Tyler & Peter Degoey, *Trust in Organizational Authority: The Influence of Motive Attribution on Willingness to Accept Decisions*, *in* TRUST IN ORGANIZATIONS 331, 338–39, 341–42 (Roderick M. Kramer & Tom R. Tyler eds., 1996) (finding that appearance of neutrality of decisionmaker, transparency of procedures, and quality of reasoning offered in support of outcome inspires public confidence in fundamental fairness of both decision and decisionmaker).

138. *Cf.* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2–7, 16–23, 31–38 (1996) (arguing that many of the major decisions of the Warren Court were not as deeply countermajoritarian as many legal scholars have assumed and suggesting that many of the decisions, including *Brown*, in fact enjoyed quite substantial public support).

139. *See* MARTIN, *supra* note 22, at 10, 691, 711; MURRAY, *supra* note 22, at 160; NORTON & RUSHTON, *supra* note 22, at 236.

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," et cetera).

In constructing a persuasive argument, it might well benefit a judge to know which reasons a jurist facing a similar problem found persuasive and which she did not. Weak form IJD could awaken a jurist to arguments that are not self-evident to someone within a 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 a way of reconceptualizing, or reframing, an existing legal problem.

If a judge can find inspiration in a monograph or law review article, 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 constitutive of domestic law. From this perspective, there is nothing wrong with members of the Supreme Court familiarizing themselves, even in a very general and 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 the best defense of IJD, whether in a strong or weak form, is that "the subject has intrinsic intellectual interest."[140] 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."[141]

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

140. Tushnet, *supra* note 9, at 663.

141. Posner, *supra* note 15, at 3.

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 with regard to 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.

CONCLUSION: THE MUSES' LOVE AND THE JUDICIAL PROJECT

Homer tells us that "[f]ortunate is he whomsoever the Muses love, and sweet flows his voice from his lips."[142] 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 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, and well traveled as these would have difficulty understanding a foreign precedent, one might well question whether *any* judges would be capable of successfully undertaking a borrowing exercise.

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. Before one could systematize borrowing exercises involving the incorporation of foreign legal rules or precedents 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

142. ANDREW LANG, THE HOMERIC HYMNS: A NEW PROSE TRANSLATION 238 (George Allen 1899).

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.

At the end of the day, the difficulties associated with strong form IJD might prove to be insurmountable. Systematic transnational interactions—and dialogue—between judges might not lead the world to sing in perfect harmony, but they 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.