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The Perils and the Promise of Comparative Constitutional Law: The New Globalism and the Role of the United States Shaping Human Rights

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I. INTRODUCTION

The world is getting smaller, whether we like it or not. The evidence is clear, and growing, that the United States increasingly has less ability than ever before to control the global ebb and flow of events.[1] The Federal Reserve seeks cooperation with foreign counterparts, such as the European Central Bank or the Bank of Japan, with mixed results.[2] Our President asks oil-producing nations to increase production, and thereby supply, in order to lower the risk of inflation.[3] In order

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1. *See* Adam Liptak, *U.S. Court, A Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1.

2. *See* Mark Landler, *Europe's Central Banker Engineers His Economics*, N.Y. TIMES, Feb. 5, 2008, at C1 (reporting on European Central Bank President Jean-Claude Trichet's refusal to coordinate interest-rate policy with the United States Federal Reserve Bank, despite requests for cooperation from United States Federal Reserve Chairman, Ben Bernanke); *see also* Mark Landler, *European Bank Leaves Rate at 4%: Euro Reaches New High Against Dollar Amid a Focus on Inflation*, N.Y. TIMES, Mar. 7, 2008, at C5 (reporting on the European Central Bank's refusal to follow the United States' policy, by lowering interest rates to stimulate the global economy, primarily because Jean-Claude Trichet's main concern was fighting inflationary forces); Martin Fackler, *Frailty of U.S. Finances Has Japanese Agonizing: Some Say It's Time to Play a Surrogate Role*, N.Y. TIMES, Jan. 25, 2008, at C5 (reporting on reticence of the Japanese Central Bank to follow the American lead by cutting interest rates to stimulate economic activity despite increasing signs of inflation).

3. Michael Abramowitz, *Oil Efforts Are Best Possible, Saudis Say: Bush Unable to Win Concessions Likely to Lower Gasoline Prices*, WASH. POST, May 17, 2008, at A1 ("Saudi leaders told President Bush on Friday that they are doing all they can to increase oil production, gently turning aside the president's efforts to bring down prices more

to obtain extradition of an accused murderer, a state government has to agree not to seek the death penalty, even though the local law permits this penalty.[4]

In the early years of the republic, our ability to go it alone was substantially more limited than in the years following World War I and World War II. Indeed, without French assistance in what amounted to a proxy war between the French and English crowns, it is uncertain whether Cornwallis would have surrendered at Yorktown.[5] By the mid-twentieth century, however, American economic and military created the opportunity for the United States to play a much larger role on the world stage. Instead of simply attempting to maintain our own institutions and political values, the federal government increasingly sought to export these values to others.

Lawyers in the United States effectively drafted the post-war constitutions of Germany[6] and Japan,[7] which remain in

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rapidly."); Steven Mufson, *Crude Oil Hits Record, Pump Prices Keep Rising: Cheney Visit to Saudi Arabia May Include Plea on Output*, WASH. POST, Mar. 11, 2008, at D1 ("A White House announcement that Vice President Cheney would probably ask Saudi Arabia to boost oil output during a trip to the Middle East next week did nothing to blunt the rise in oil prices yesterday. Much of the nearly $3-a-barrel increase came after the announcement.").

4. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 444, 491-92 (1989) (prohibiting the extradition of a German national to Virginia because he would be subject to the death penalty for murder in Virginia); *see also* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 191 (1998) (noting the effect of the *Soering* decision on extradition and Human Rights); Richard B. Lillich, *The* Soering *Case*, 85 AM. J. INT'L L. 128, 128 (1991) (discussing *Soering* and its effect on extradition of foreign nationals from signatory nations of the European Convention for the Protection of Human Rights and Fundamental Freedoms to the United States in circumstances where the defendant might face capital charges in the United States); Ginger Thompson, *An Execution in Texas Strains Ties With Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6 ("Many nations, including the 15 members of the European Union, South Africa and Canada, have refused to extradite suspects to a country without assurances that the suspects will not face the death penalty."). For a thorough, if rather graphic overview of the case and the murder at issue, see KEN ENGLADE, BEYOND REASON (1990).

5. *See* CHARLES LEE LEWIS, ADMIRAL DEGRASSE & AMERICAN INDEPENDENCE 149-90 (1945); *see also* Brian Logan Beirne, Note, *George vs. George vs. George: Commander-in-Chief Power*, 26 YALE L. & POL'Y REV. 265, 288-89 (2007) (noting that French naval assistance was crucial to the victory of the American forces over the British at Yorktown).

6. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 7-10, 30-49 (1994) (discussing the circumstances surrounding the adoption of the Basic Law, or *Grundgesetz*, in the aftermath of World War II); *see also* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A

effect to this very day.[8] In fact, the United States model of a written constitution, with a Bill of Rights enumerating particularly important human rights, has become an almost universal norm. As Robert Badinter, former President of the French Constitutional Council, and United States Supreme Court Justice Stephen Breyer have explained, "Today 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."[9]

Only a few years ago, former Chief Justice Aharon Barak, of the Supreme Court of Israel, tied these developments directly to the contribution of United States constitutional law stating, "United States public law in general, and United States Supreme Court decisions in particular, have always been, to me and to many other judges in modern democracies, shining examples of constitutional thought and constitutional action."[10] He also noted that "[t]he United States is the richest and deepest source of constitutionalism in general and of judicial review in particular."[11] Further, he acknowledged, "We foreign jurists all look to developments in the United States as a source of inspiration."[12]

If the United States can export legal ideas and structures abroad, it only seems reasonable to ask whether we might be able to learn from the experiences of those who share our constitutional structure and commitment to securing fundamental human rights.[13] In suggesting consideration of this

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COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 93-94 (2006) (analyzing the history of Germany's adoption of the Basic Law).

7. *See* KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 6-36 (1991) (discussing the drafting process of the Japanese Constitution of 1947, which was quite literally drafted on General MacArthur's battleship in Tokyo Bay); *see also* KROTOSZYNSKI, *supra* note 6, at 139-40.

8. *See* KROTOSZYNSKI, *supra* note 6, at 93, 139-40, 181-82.

9. JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION, at 3 (Robert Badinter & Stephen Breyer eds., 2004).

10. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court Judge in a Democracy*, 116 HARV. L. REV. 16, 27 (2002).

11. *Id.*

12. *Id.*

13. *See* Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (arguing that consideration of foreign legal precedents interpreting similar constitutions, although lacking any formal precedential force in the United States, "may nonetheless cast

topic, I do not mean to endorse giving precedential effect to foreign legal statutes or judicial decisions. Instead, the larger question is whether United States law could be enhanced or enriched if participants in our legal system have some familiarity with foreign legal materials. This is not to displace domestic sources of law, but rather to enhance and enrich our understanding of these domestic legal materials.[14] Regardless of the desirability of such interactions, Justices Ginsburg and O'Connor have observed that international interaction has long been a feature of American life.[15] In this sense, concerns about globalism come too late, for the ship sailed long ago.

The world is smaller, however, in significant ways that affect how we think about problems domestically.[16] Our awareness of foreign laws, foreign customs, and foreign legal systems is broader and more general than it has ever been. Organized interactions between national judiciaries are both stronger and broader than ever before.[17] Perhaps most importantly, judges themselves believe that they are engaged in a transnational judicial enterprise that is not limited to the laws enacted by their local domestic governments.[18] As Dean

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an empirical light on the consequences of different solutions to a common legal problem"); *see also* United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("Wise parents do not hesitate to learn from their children.").

14. For a more detailed exposition of my views on the role of foreign legal materials in domestic constitutional law, see Ronald J. Krotoszynski, Jr., *"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*, 104 MICH. L. REV. 1321, 1356-59 (2006) (reviewing JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (2004)).

15. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 234 (Craig Joyce ed., 2003); *see also* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 1-10 (2003) (arguing that international and comparative law have been relevant to judicial decision-making in the past, and are likely to remain so in the future); Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1637-38 (2004) (arguing that state constitutional interpretation could benefit from consideration of foreign legal materials and judicial decisions).

16. *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100-18 (1994) [hereinafter Slaughter, *Transjudicial Communication*]; *see also* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103-05 (2000) [hereinafter Slaughter, *Judicial Globalization*].

17. *See* Slaughter, *Transjudicial Communication*, *supra* note 16, at 132-36.

18. Slaughter, *Judicial Globalization*, *supra* note 16, at 1123 ("Judges are globalizing."); *but cf.* Liptak, *supra* note 1, at A1 (noting that "American legal influence is

Slaughter has observed, "Constitutional courts—or any courts concerned with constitutional issues—will be forging a deeply pluralist and contextualized understanding of human rights law as it spans countries, cultures, and national and international institutions."[19]

In this sense, foreign legal fads and fashions can have a much larger effect, not only on the content of domestic law, but on the way we conceive legal problems. Moreover, we do not have a choice about participating in this transnational dialogue about human rights and the limits of democracy. Even if our courts do not actively participate in the process of transnational judicial dialogue, the way we think about legal problems changes as we become aware that things do not necessarily work the same way abroad as they do here.[20]

In thinking about the new globalism, we need to keep a keen eye out for both the obvious and non-obvious effects of borrowing. Sometimes, the effects of increased globalism are self-evident. For example, when a person with SARS or a superbug flies from Atlanta to Europe and back,[21] or when toxic

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waning" and observing that "a diminishing number of foreign courts seem to pay attention to the writings of American justices").

19. Slaughter, *Judicial Globalization*, *supra* note 16, at 1124.

20. Professor Melissa Waters has made this point in a lucid and persuasive fashion: We engage in the project of comparative constitutionalism as much when we consider but reject a foreign legal norm as when we adopt one. *See* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 555-56 (2005). For example, in *Washington v. Glucksberg*, Chief Justice Rehnquist noted the practice of euthanasia in the Netherlands, not to support an argument for creating such a right in the United States as a matter of substantive due process or equal protection, but rather as a negative citation for the problems that can arise with legal sanction for physician-assisted suicide. *See* 521 U.S. 702, 734 (1997); *see also id.* at 785-86 (Souter, J., concurring) ("There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshal evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity."). Similarly, Justice Scalia cited the Ontario provincial court decision legalizing same-sex marriage in his dissenting opinion in *Lawrence v. Texas*, not to endorse the practice of same-sex marriage, but rather to support his view that the legal arguments set forth in the majority opinion and also in Justice O'Connor's concurring opinion could not logically exclude judicial recognition of same-sex marriage. *See* 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

21. *See* David Brown, *The Two Faces of Tuberculosis: Lawyer's Illness Brings the World's Public Health Woes Home*, WASH. POST, June 19, 2007, at F1; *see also* David Brown, *All 26 Americans Who Sat Nearest TB Patient Found: Officials Will Monitor Airline Passengers Potentially Exposed to 'Extensively Drug-Resistant' Strain*, WASH. POST, June 2, 2007, at A3; *see also* L. Masae Kawamura, Op-Ed, *Have Germs. Will Travel*,

pet food finds its way into your local supermarket[22] or, worse yet, toxic milk finds its way to your child,[23] the ties between and among nations are made plain in ways we do not consider on a regular basis. The effects of globalism, however, are not limited to obvious and self-evident phenomena; instead, they also include less obvious, but no less important, cross-boarder and cross-cultural interactions.

II. A NEED FOR SELF-AWARENESS

In approaching the new globalism, we need to be self-aware, meaning that if we are going to borrow, we should do so consciously, intentionally, and not by default. In thinking about how to address a legal problem, there is no good reason not to consider how another industrial democracy, facing the same issues, chose to resolve them.[24] For example, I firmly believe that abortion politics would be less toxic in the United States had the Supreme Court issued a less categorical opinion in *Roe*

N.Y. TIMES, June 2, 2007, at A13. For a policy-oriented discussion of the difficulties of containing infectious diseases in a world of highly interconnected nation-state communities, see Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53 (2007).

22. *See* David Barboza, *China Moves to Improve Quality of Its Seafood: Safety of Exports at Issue Around the Globe*, N.Y. TIMES, Dec. 28, 2007, at C4 ("China was hit by a wave of product recalls this year involving everything from tainted toothpaste and contaminated pet food ingredients to toys coated with toxic lead paint."); Rick Weiss & Nancy Trejos, *Crisis Over Pet Food Extracting Healthy Cost: Owners, Manufacturers, Suppliers All Feel Fallout*, WASH. POST, May 2, 2007, at D1 (discussing various scandals associated with Chinese products, including the importation of pet food tainted with melamine, which killed many pets in the United States).

23. *See* Marc Kaufman, *FDA Sets Safety Threshold for Contaminant Melamine*, WASH. POST, Oct. 4, 2008, at A5 (discussing a more recent tragedy in China involving the distribution of milk tainted with melamine, including dairy products and candy, which caused the deaths of at least four children). The melamine-tainted products scandal provides an object lesson in the potential downside of a world without borders:

> In China, melamine-tainted baby formula has sickened thousands and led to at least four deaths, mainly from kidney problems, according to the World Health Organization. The chemical, which can make it appear that a product is more nutritious and protein-rich than it actually is, has also been found in candies, chocolates, coffee drinks and other items made from Chinese dairy products.

Id.

24. *See* Krotoszynski, *supra* note 14, at 1357 ("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)?").

v. Wade.[25] I am not alone in making such a supposition—Justice Ruth Bader Ginsburg has lucidly advanced this precise argument in a well-known law review article.[26]

By way of contrast, the Supreme Court of Canada in *Morgentaler v. The Queen* issued an opinion invalidating the federal abortion law, not on the theory that government cannot prefer birth to abortion but rather on the less controversial basis that in early pregnancy, the risks of child-bearing far exceed those of an abortion.[27] In other words, Canada's Supreme Court grounded the right to terminate a pregnancy, not in some abstract notion of autonomy or privacy, but rather on the Canadian analogue to our Fourth Amendment. Bodily integrity, not privacy, justified the decision. Moreover, the Supreme Court of Canada left open the door to a new, less burdensome statute—no trimesters or quasi-legislative pronouncements telling the legislature how to do its job. Obviously, United States courts must apply our Constitution, not Canada's, but the Supreme Court of Canada's modest approach to a highly charged issue provides a useful counterpoint to *Roe*. Indeed, as previously noted, Justice Ginsburg has cogently argued that a more incremental approach to the abortion question might have better secured abortion rights in the United States, leaving greater room for the political process to act in the aftermath of *Roe*.[28]

Even if federal judges should not cite *Morgentaler* or accord a Canadian decision precedential effect, it would be

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25. 410 U.S. 113 (1973).

26. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385-86 (1985) [hereinafter Ginsburg, *Thoughts on Autonomy*]; *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

27. *See* [1988] 1 S.C.R. 30, 33 (Can.); *see also* RAYMOND TATALOVICH, THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY, 78-79 (1997); *see also* F.L. MORTON, PRO-CHOICE VS. PRO-LIFE: ABORTION AND THE COURTS IN CANADA 243, 246 (1992); Mark Tushnet, *Policy Distortion and Democratic Deliberation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 266-67 (1995) (discussing *Morgentaler*).

28. *See* Ginsburg, *Thougts on Autonomy*, *supra* note 26, at 379-82, 385-86; *but see* David J. Garrow, Roe v. Wade *Revisited*, 9 GREEN BAG 2d 71, 73 (2005) (reviewing WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (2005)) (noting that the political consensus in favor of abortion on demand was remarkably weak in 1973 and that very few states had significantly liberalized their abortion laws at the time the Supreme Court decided *Roe*).

potentially very helpful for them to understand how Canada resolved a problem in a way that avoided the politicization of judicial appointments. Thus, we should make some effort to know what is happening abroad and to consider whether different approaches to old problems might lead to better results, or better decision-makers.[29] In thinking about the reality and effects of the new globalism, we should be proactive and thoughtful, rather than merely reactive and reflexive.

All United States jurisdictions today have workers' compensation programs, which were initially developed in Germany and adopted in legislative form in the United Kingdom.[30] Notwithstanding the foreign origins of workers' compensation (in lieu of a system of negligence and contributory negligence as an employer-defendant's shield against liability for on-the-job injuries), in 2008 the foreign origin of workers' compensation has been entirely lost to the mists of time. Whatever its original sources, the concept has been entirely domesticated.

Moreover, we borrow internally within the states. Most traffic rules and innovations, including the right-turn-on-red rule and the use of High Occupancy Vehicle ("HOV") lanes, originated in California.[31] Given that state's longstanding love affair with the automobile, particularly in Southern California, it is not surprising that California would pioneer new ways of making traffic move efficiently. Today, all states and most foreign nations observe some form of a right-turn-on-red rule. Does the California origin of the practice make it unsuitable for Mississippi—or Quebec? I argue that it does not. If a rule or public policy works in one jurisdiction, and social conditions and problems are sufficiently similar in another, good reason exists to suppose that the rule could be transplanted

29. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3-10 (1994).

30. *See* Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 952-55, 959-60 (2006); *see also* Mark R. Whitmore, Note, *Denying Scholarship Athletes Worker's Compensation: Do Courts Punt Away a Statutory Right?*, 76, IOWA L. REV. 763, 767 (1991).

31. CAL. VEH. CODE § 21453 (B) (West 2008); CAL. GOV'T CODE § 14181 (West 2008).

effectively.[32] If we can adopt our driving rules in light of a better way discovered at home or abroad, why should more important regulatory matters not benefit from the insights that we can glean from a comparative perspective?

Because we live in a world of instant communications within and between nations, it is simply unrealistic to think that we conceptualize rights in a cultural vacuum. For example, physician-assisted suicide, legal now only in Oregon,[33] is more plausible because of Oregon's experiment, but Oregon's experiment plainly reflects some awareness, and approval, of physician-assisted suicide regimes in places like the Netherlands.[34] Similarly, an episode of "The Wire," entitled "Amsterdam," featured a local district Baltimore police captain declaring an open drug market in one part of his district and strictly enforcing drug laws in all other areas.[35] Again the writers were clearly inspired by the Netherlands' decision to decriminalize many recreational drugs.

Attitudes toward gays, lesbians, and same-sex marriage plainly have evolved in part through domestic cultural changes and shifts in attitudes, but these shifts probably reflect the more tolerant European attitude toward sexual identity.[36] To be clear, I am not suggesting, much less advocating, that Europe leads

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32. *See, e.g.*, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 96 (1974) (arguing that similar contract laws of differing countries can be unified despite coming from different places); *see generally* Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994).

33. The Oregon Death With Dignity Act, OR. REV. STAT. §§ 127.800-897 (Repl. 2003).

34. *See* Washington v. Glucksberg, 521 U.S. 702, 711, 734-35 (1997); *see also id.* at 785-86 (Souter, J., concurring).

35. *See* Clarence Page, *After the 'Wire': The Team Behind the HBO Drama Takes on Our Broken Drug Laws*, BALTIMORE SUN, Mar. 14, 2008, at A21; David Zurawik, *Compelling Third Season of 'Wire' Goes Inside City Hall: Critic's Picks: New DVDs*, BALT. SUN, Aug. 6, 2006, at E8; *see also* Doug Donovan, *'The Wire': A Different Kind of Reality TV: Local Facts, Fictions Merge in a Show Some Love, Others Condemn, Baltimore . . . Or Less*, BALT. SUN, Dec. 19, 2004, at E3.

36. *See* Lawrence v. Texas, 539 U.S. 558, 572-73, 576-77 (2003) (discussing law-reform efforts in the United Kingdom and jurisprudence of the European Court of Human Rights with respect to criminal proscription of consensual sodomy between adults in private); *cf. id.* at 598 (Scalia, J., dissenting) ("Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence . . . because *foreign nations* decriminalize conduct.").

and we blindly follow.[37] Instead, I would suggest a kind of transatlantic dialectic in which competing views of the good vie for acceptance. Smoking bans in public places, for example, gained acceptance in the United States well before "progressive" nations like France, Germany, and the United Kingdom attempted to curb the health effects of secondhand smoke.[38]

Even at very informal, non-governmental levels, we are aware of socio-cultural differences much more today than at any other time in our national history. Even if judges in the United States assiduously and conscientiously avoid direct citation of foreign legal materials, they cannot isolate themselves from culture. Additionally, they cannot escape a media in which we learn of new experiments in legal, social, and economic regulation twenty-four hours a day, seven days a week, in an endless and infinite news cycle.

III. GLOBAL DIALOGUE

Whether we like it or not, the United States is part of the broader global dialogue about the content and scope of human rights. I do not suggest that we must adopt the European view of hate speech or the death penalty. It would be unrealistic, however, to think that European enthusiasm for hate-speech regulation and antipathy toward the death penalty has no effect on how American judges, politicians, and citizens think about these issues. Furthermore, the reverse also holds true: The fact that the United States takes a different approach to hate speech

37. *See id.* at 577 (majority opinion) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

38. *See generally* Lainie Rutkow et al., *Banning Second-hand Smoke in Indoor Public Places Under the Americans with Disabilities Act: A Legal and Public Health Imperative*, 40 CONN. L. REV. 409, 412-13, 446-48 (2007) (providing an overview of the movement to limit or ban smoking in places of public accommodation in various states); *id.* at 447 n.288 (discussing legislation to ban smoking in certain European nations); Marot Williamson, Comment, *When One Person's Habit Becomes Everyone's Problem: The Battle Over Smoking Bans in Bars and Restaurants*, 14 VILL. SPORTS & ENT. L.J. 161, 186-89 (2007) (discussing relatively late adoption of smoking restrictions in European nations, such as the United Kingdom); Samuel J. Winokur, Note, *Seeing Through the Smoke: The Need for National Legislation Banning Smoking in Bars and Restaurants*, 75 GEO. WASH. L. REV. 662, 666-88 (2007) (providing a history of the adoption of smoking bans in the United States and arguing that national legislation is needed to address the problem of secondhand smoke).

than Canada or Europe requires some reflection on the part of Canadian and European judges, politicians, and citizens.

The United States is no less an exporter of legal norms as it is an importer of legal norms. Our resolutions of common legal problems will affect the way other nations think about problems, whether we seek this outcome or not. My own view is that attempting to export some legal values makes a great deal of sense, if only from a purely self-interested perspective. If democratic self-government tends to create more stable nation states, it would behoove the United States to encourage democratic self-government in areas where the country has a strong strategic interest.

We need not have a utopian view of the world to find it useful, expedient, and efficient to export legal institutions and legal norms to other countries. Indeed, utilitarianism, more than sunny-eyed optimism, might serve as the best predicate for efforts to export the American conceptions of government, separation of powers, federalism, and human rights. In sum, we are in the game of norm creation whether we wish to play or not. If we must play, we should play to win (or, at a minimum, consider carefully the potential consequences of defaulting the match). One should, indeed must, keep in mind that a meaningful commitment to active participation in the new global legal system does not imply adopting foreign rules or incorporating foreign legal norms in domestic constitutional law. Our domestic courts engage in transjudicial dialogue as much when they consider but reject a foreign legal norm as when they embrace it.

Too much of the discussion of transnational judicial dialogue has focused on whether the citation and quotation of foreign legal precedents is appropriate in domestic constitutional adjudication. Reference to foreign legal decisions or foreign legal rules does not necessarily mean that American courts will make our law consistent with foreign law. Instead, courts could, and should, reject borrowing when doing so cannot be squared with our Constitution's text, the precedents arising under it, and our historical practices.

Jury trials are rare in the United Kingdom and largely foreign in civil-law jurisdictions like Germany and France. Adopting an inquisitorial model for criminal procedure is plainly

not a road open to our courts. That being said, how is the American legal system harmed if our judges, in discussing the jury trial system, acknowledge the existence of a radically different tradition in Europe? One can acknowledge difference without attempting to resolve it.

Free speech rules and civility codes provide an even better example of how just societies, committed to protecting fundamental human rights, can reach diametrically opposite conclusions on very basic questions.[39] The American approach to protecting the freedom of speech is highly idiosyncratic, at least when viewed from a global perspective. Most nations in western Europe, as well as Canada, maintain criminal proscriptions against hate speech that seeks to incite racial hatred.[40] In the United States, one is free to use the most vile, racist language imaginable unless a clear and present danger of imminent lawlessness exists.[41]

In other nations, like Germany, tort law protects the right of personal dignity more strongly than in the United States. The German Federal Constitutional Court upheld an injunction blocking distribution of a magazine containing a cartoon featuring the German equivalent of a state governor as a rutting pig.[42] According to the court, the cartoon denied the incumbent politician his right to human dignity—a right that has paramount value under the German Basic Law.[43]

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39. *See* CURRIE, *supra* note 6, at 237 ("Examination of the German law of free expression reminds one once again how easily two well-intentioned societies, starting from substantially identical premises, can arrive at significantly different results."); *see also* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1310-12, 1328-29, 1387, 1391 (2000) (noting that France and Germany elevate concerns rooted in securing personal honor and dignity, even when protection of these interests substantially infringes on freedom of expression).

40. *See* KROTOSZYNSKI, *supra* note 6, at 3-7, 214-22.

41. *See* Brandenburg v. Ohio, 395 U.S. 444, 444-49 (1969) (holding protected an utterly racist Ku Klux Klan diatribe suggesting the necessity of a race war); *see also* Am. Booksellers Assoc. v. Hudnut, 771 F.2d 323, 328-31 (7th Cir. 1985) (noting that "racial bigotry, anti-semitism, violence on television, [and] reporters' biases" are not "directly answerable by more speech, unless that speech too finds its place in the popular culture," holding nevertheless that "all is protected as speech, however insidious," and explaining that "[a]ny other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us"), *summarily aff'd*, 475 U.S. 101 (1986).

42. *See* KROTOSZYNSKI, *supra* note 6, at 112-14 (discussing the *Strauss Caricature* Case decided by the German Federal Constitutional Court).

43. *See id.* at 113.

Conversely, the United States Supreme Court protected a fake Campari ad in *Hustler* magazine that suggested the Reverend Jerry Falwell's first sexual encounter involved a drunken rendezvous with his mother in an outhouse.[44] In *Hustler*, Chief Justice Rehnquist explained that:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[45]

Accordingly, a publisher who attempts to assassinate a public figure's character through vulgar parody enjoys broad protection for its political speech under the First Amendment.

As the *Hustler* Court explained, "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate."[46] To be sure, political caricatures have often been coarse, unfair, and vulgar. Nevertheless, "From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them."[47] Accordingly, a public official's or figure's interest in avoiding the intentional infliction of highly targeted insult, up to and including insults that intentionally cause severe emotional distress, must give way to the community's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[48]

Professor James Whitman has argued that in places like Germany and France, the honor reserved for the aristocracy was

44. Hustler v. Falwell, 485 U.S. 46, 48, 57 (1988).
45. *Id.* at 55.
46. *Id.* at 54.
47. *Id.* at 55.
48. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

democratized and generalized as everyone was leveled up.[49] In the United States, by way of contrast, we tend to level everyone down.[50] Thus, "[I]t is not wrong, in contrasting them with the United States, to describe Germany and France as modern honor cultures."[51]

IV. MAINTAINING PROACTIVE AND THOUGHTFUL ATTITUDES

In thinking about the reality and effects of the new globalism, we should be proactive and thoughtful. This means defending our values, even if they appear exceptionalist from a global or comparative perspective, as much, if not more, than modifying our legal rules to square them with foreign views. Just because Germany has a different rule does not imply that the German rule is better, or a better rule for the United States. That said, we do need to at least think about the possibility that things could be different than they are presently.

The fact that other democratic societies value rights more, or less, highly than we do should at least make us pause. It seems rude either to pretend these differences do not exist or, worse yet, that these differences simply do not matter. As I have observed in another context, "[A] circular jurisprudence that posits its own conclusions as justifications is intellectually indefensible."[52] The alternative to active global engagement, attempting to maintain a kind of intellectual isolationism, is neither attractive nor feasible because ideas travel faster and more easily than superbugs. We should be just as actively concerned and engaged about the transnational marketplace of ideas as we are about the transnational sale of pet food, lead-painted toys, or the safety of air travel.

As scholars like Anne-Marie Slaughter and Harold Koh have suggested, it is not a question of whether transnational legal rules will develop—it is a question of how they will develop and the role that the United States will play in their

49. *See* Whitman, *supra* note 39, at 1387.

50. *Id.* (stating "Germany and France have *leveled up*" whereas "the United States has *leveled down*").

51. *Id.* at 1391.

52. KROTOSZYNSKI, *supra* note 6, at 25.

development.[53] In the case of freedom of expression, foreign law is very different, in myriad ways, and the United States contributes to the global discussion of this human right as much by refusing to get with the program as it would by redefining domestic First Amendment law to bring it into conformity with prevailing foreign attitudes.

The development of new global legal understandings of fundamental human rights is not limited to courts. Courts are not the only source of transnational understanding of human rights, as the behavior of Congress and the executive branch also signals the content and scope of our commitment to human rights. To say that we oppose torture generally but not in the specific context of the war on terrorism has the effect of undermining the norm against torture as inconsistent with fundamental human rights. Similarly, holding persons in indefinite detention, without access to lawyers or judicial process sends a very mixed message. When the Soviet government engaged in this sort of behavior, the United States denounced it.[54] Our credibility in arguing for a right to a fair trial by an impartial tribunal, to the assistance of counsel, and to the right to be free of unreviewed (and unreviewable) executive detention has taken a hit lately.

Our behavior and our practices have the effect of modeling acceptable government practices, whether we wish them to have that effect or not. We should be cautious in accepting an argument that observance of the rule of law lies within the discretion of the executive branch of government. It is said that "as one sows, so shall one reap."[55] The new legal globalism will reflect this truism. Simply put, if we ever had the luxury of saying one thing while doing another, that time has come and gone. The best way of convincing others that they must observe a particular human right would be that we observe it ourselves as a matter of course. Thus, the process of exporting legal rules is not solely a job for the judiciary, nor should it be.

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53. Slaughter, *Transjudicial Communication*, *supra* note 16, at 1112 ("The global economy creates increasingly global litigation."); *see also* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44, 56 (2004); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193-99 (2003).

54. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME AND JUSTICE 441, 501 (2006).

55. GALATIANS 6:7 ("Whatsoever a man soweth, that shall he also reap.").

V. AMERICAN CONTRIBUTIONS

Over the last 200 years, the United States has been remarkably successful at exporting its legal ideas. Since World War II, the notion of limited government, checked by a written constitution with judicially enforceable rights, has become the most commonly accepted model of legitimate government.[56] The old British model of parliamentary supremacy, as a means of securing democratic control, has fallen into something of a rut.[57] The modern trend has been entirely in favor of judicial review (judicial supremacy, some might say) with democratically elected legislatures being limited by enumerated constitutional rights.[58]

The separation of powers is another structural innovation of the United States that has proven quite popular. The British model of legislative, executive, and judicial power all being vested in a single body (like the Parliament) no longer seems a successful way to run a railroad. Although parliamentary systems remain popular, and involve the merger of executive and legislative power, the structural separation of courts has become a standard feature of modern democracies. In this sense, the separation of powers has become the global norm rather than the exception.

Federalism provides a third major contribution to constitutionalism that the United States pioneered and which has achieved substantial adoption abroad. In a nation featuring ethnic, religious, or cultural differences, federalism provides a means of securing some measure of local autonomy that can accommodate these differences. Additionally, even in the contemporary United Kingdom, federalism has found a foothold, with local parliaments now sitting for Scotland, Wales, and Northern Ireland, and plans for an English Parliament.[59] The European Union itself represents a federalism solution to

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56. *See* Liptak, *supra* note 1 ("The signature innovations of the American legal system—a written Constitution, a Bill of Rights protecting individual freedoms and an independent judiciary with the power to strike down legislation—have been consciously emulated in much of the world.").

57. *See* JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 9, at 25-50.

58. *See id.* at 3-4, 73-82.

59. Michael Burgess, *Constitutional Change in the United Kingdom: New Model or Mere Respray?*, 40 S. TEX. L. REV. 715, 725-26 (1999).

the problem of a divided, and less efficient, Europe. By dividing power among various levels of government, centralization can coexist with local autonomy and choice.

Judicial review, the separation of powers, and federalism are all contributions that the United States has made to constitutional democracy. Indeed, it would not be an overstatement to suggest that the American model of constitutionalism is to modern government as the Microsoft Corporation's "Windows" operating system is to computing. Having had so much success in defining the institutions and structures of a just government with reference to the structures and doctrines reflected in our own Constitution, why should we fear the outcome of constructive engagement with the world?[60]

In this regard, it bears noting that our own framers, meeting in Philadelphia during the summer of 1787, were themselves very familiar with government structures dating back to ancient Rome and Athens. The Framers consciously considered various constitutional arrangements, including those of Great Britain, but also of Athens, Sparta, and Rome.[61] To be sure, the Framers did not overtly borrow any particular constitutional system, but developed one of their own self-styled a new order for the ages ("*novus ordo seclorum*"). Given this history of familiarity with comparative constitutional law, the success of American constitutional innovations, and the stakes, why should we shrink from engaging the world in defense of our domestic conception of fundamental human rights?

VI. CONCLUSION

We must recognize that we will participate in the new legal globalism whether we choose to be active participants in the process or passive recipients of the results. If the United States wants to impact the content of emerging human-rights norms, we need to join the conversation, even if we do so as defenders

60. *See* Liptak, *supra* note 1 (noting that "American constitutional law has been cited and discussed in countless decisions of courts in Australia, Canada, Germany, India, Israel, Japan, New Zealand, South Africa, and elsewhere").

61. THE FEDERALIST NO. 38, at 231-33 (James Madison) (Clinton Rossiter ed., 1961) (discussing the constitutions of Athens, Sparta, and Rome); THE FEDERALIST NO. 39, at 240-41 (James Madison) (Clinton Rossiter ed., 1961) (discussing the constitutions of Holland, Venice, Poland, and England).

(or exporters) of our legal norms.[62] The alternative, a kind of default, will simply mean that the United States has less impact on the development and content of both emerging legal systems and the scope and content of transnational human rights.[63] To engage the world does not require the United States to abandon its own idiosyncratic legal values, any more than consideration of American legal norms requires the Supreme Court of Canada or the German Federal Constitutional Court to abdicate responsibility for articulating and enforcing local legal imperatives.

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62. *See* Barak, *supra* note 10, at 27 ("If I am occasionally critical of the American Supreme Court, it is because I regret that it is losing the central role it once had among courts in modern democracies.").

63. Professor Roger Alford has correctly insisted that advocates of comparative constitutional law offer some sort of theoretical justification for reliance on foreign legal materials in deciding domestic questions of constitutional law. *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 640-45 (2005). As he puts the matter, "[C]onstitutional comparativism should turn to first principles." *Id.* at 644; *see also* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228-32, 1236-37, 1265-71 (1999) (offering various theories in support of comparative constitutional analysis, but ultimately questioning whether any of them, other than "bricolage," are persuasive in justifying the use of foreign legal materials in domestic constitutional adjudication). Nor do I disagree with Professor Alford's related assertion that "[c]onstitutional comparativism is a methodology in search of a theory." Alford, *supra*, at 712. I also agree with his observation that "[c]omparativists do themselves no favors when they advocate a practice, but offer no compelling theory to justify it," rendering comparative constitutional analysis little more than "a fashionable constitutional accessory." *Id.* at 714. Even with all of these concessions, however, the fact remains that societies no longer exist in splendid isolation. Even if affording foreign legal materials official precedential or merely persuasive status in judicial decision-making requires some sort of license, the broader sociocultural effects of citizens of nation *A* knowing that the citizens of nation *B* approach a common problem in a very different fashion can and will affect the way that judges in each jurisdiction view the problem. Weak forms of international judicial dialogue will occur, and are occurring, even if strong forms of international judicial dialogue do not make much progress. In thinking about problems like same-sex marriage and the moral status of the death penalty, we cannot help but take into account, at some level of consciousness, the fact that other nations do not share our moral (or legal) commitments. *See* Waters, *supra* note 20, at 555-56, 560-62 (arguing that judges need some sort of basis for looking to foreign legal materials in a formal, official capacity, noting that the problem of democratic legitimacy is particularly pressing in the United States because no constitutional or statutory enactment instructs federal judges to incorporate foreign law, but also noting that negative consideration of foreign legal materials constitutes a form of transnational judicial dialogue).