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### Linnaean Taxonomy and Globalized Law

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SCHOOL OF LAW

**Linnaean Taxonomy**

Ronald J. Krotoszynski, Jr.

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2017

## Linnaean Taxonomy and Globalized Law

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# LINNAEAN TAXONOMY AND GLOBALIZED LAW

Ronald J. Krotoszynski, Jr.\*

THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES. By *Stephen Breyer*. New York: Andrew A. Knopf. 2015. Pp. 8, 284. \$27.95.

## INTRODUCTION

In the mid-seventeen hundreds, Carl Linnaeus, the famed Swedish botanist, invented the system of binomial nomenclature to identify and classify all living organisms.<sup>1</sup> Binomial nomenclature involves associating all living things, plants and animals alike, with a name that indicates the genus and species of the organism.<sup>2</sup> Linnaeus believed, correctly, that in order to understand the natural world, one first had to organize and classify living organisms for future study.

Although law is not biology, properly identifying and classifying categories of legal phenomena is no less important to understanding similarities and differences in the legal world than it is in the natural world.<sup>3</sup> This is particularly true in the context of comparative law; to borrow a commonplace metaphor, one must be sure that a comparative law exercise compares apples to apples, rather than apples to oranges.<sup>4</sup> So too, insofar as our domestic law is becoming increasingly globalized—in response to economic,

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1. See generally CARL LINNAEUS, *SPECIES PLANTARUM* (Ray Society ed., Bartholomew Press 1957) (1753); CARL LINNAEUS, *SYSTEMA NATURAE* (n.p., Engelmann ed., 1894) (1735) (providing an overview of Linnaeus's revolutionary taxonomy scheme).

2. See MARGARET J. ANDERSON, *CARL LINNAEUS: FATHER OF CLASSIFICATION* 6–8 (rev. ed., 2009) (describing the creation and operation of Linnaeus's system of binomial nomenclature).

3. For example, the American Law Institute's restatements are efforts to isolate legal rules and principles in particular subject areas in order to better understand and evaluate them; the restatements seek to identify existing legal rules and, having done so, to improve them. See, e.g., Ronald J. Krotoszynski, Jr., *A Prolegomenon to Any Future Restatement of Privacy*, 79 BROOK. L. REV. 505, 505–06 (2014) (describing the ALI's efforts to reform privacy law and observing that the ALI has made “tremendously important contributions to the development and protection of privacy rights in the United States”); see also *id.* at 509 n.19 (discussing the ALI's restatements of property law).

4. But cf. Russell A. Miller, *The Taxonomy Problem in Comparative Law* 1–2 (Oct. 2, 2015) (unpublished manuscript) (on file with author) (expressing “worr[y] about comparative constitutional lawyers' interest in the broader discipline's traditional taxonomic compulsion” and positing that “[c]omparative law's taxonomy is superficial and static and often simply wrong”). Professor Russell Miller's objection to taxonomy relates principally to efforts to categorize legal systems holistically, by using broadly drawn categories such as “legal families,” that

political, and social globalization—it is essential to specify the particular modalities of globalization that are at work. Positing the existence of “legal globalization” in highly generic terms will preclude a careful observer from testing the persuasive force of the claim that legal globalization is taking place in the United States (and, more broadly, across many other national legal systems).

Framed in terms of Linnaeus and his system of binomial taxonomy,<sup>5</sup> in order to understand the globalization of law, both in the United States and abroad, one must first make a serious effort to identify and classify different types of interactions among and between domestic and international legal systems—including, but not limited to, the transplantation of legal rules and ideas among and between local legal systems.<sup>6</sup> This Review constitutes an initial effort to do just this: to identify, disentangle, and name different kinds of contemporary, legal globalization. In undertaking this effort, I will give sustained and focused attention to Justice Stephen Breyer’s provocative new book, *The Court and the World: American Law and the New Global Realities*.<sup>7</sup>

Justice Breyer mounts a highly persuasive case that the question for debate today is not whether domestic courts in the United States will consider foreign and international law; instead, he posits that globalization already is a reality in many important legal contexts. He observes that “[m]ore and more, cases before the Court involve foreign activity” (pp. 3–4) and sees “new challenges imposed by an ever more interdependent world” (p. 4). Ultimately, Breyer hopes that

an understanding of the nature of our current engagement with foreign matters will persuade the reader that the best way to preserve American constitutional values (a major objective that I hold in common with those who fear the influence of foreign law) is to meet the challenges that the world . . . actually presents. (p. 8)

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tend to understate differences and overstate points of similarity. *See id.* at 22–23. He questions whether efforts to make totalizing claims about entire legal systems are at all useful or helpful to understanding particular legal systems. *See id.* at 11–13. By way of contrast, my call for developing a taxonomy to govern recourse to foreign and international legal materials makes a considerably narrower claim than those Miller finds most objectionable. Identifying the facts and circumstances, under U.S. domestic law, when recourse to foreign law is warranted—and when it is not—does not constitute a Procrustean bed. *See id.* at 1–2, 11–14, 23–24. Accordingly, the “taxonomy” that I advocate is more in the nature of an ALI restatement than an arbitrary effort to declare material equivalence between and among fundamentally different domestic legal systems. *See* Krotoszynski, *supra* note 3, at 505–06, 509 n.19.

5. For an excellent discussion of taxonomy in the biological sciences, see Miller, *supra* note 4 (manuscript at 4–11).

6. *See generally* ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (providing an overview of the discipline of comparative law and analyzing “transplanted” systems, including the use of Roman law in Scotland).

7. Justice Stephen Breyer is an Associate Justice of the Supreme Court of the United States. Justice Breyer was appointed to the Supreme Court in 1994. He previously served on the U.S. Court of Appeals for the First Circuit, and before that as a Professor of Law at Harvard Law School.

If one properly disentangles various strands of transnational judicial engagement, however, the case for globalization is weakest in the context of reading and applying the U.S. Constitution.<sup>8</sup> This is so precisely because globalizing domestic constitutional law clearly reflects an act of judicial will rather than an act born of decisional necessity.<sup>9</sup> Just as the Supreme Court should avoid deciding constitutional questions absent some clear need to do so to resolve a case at bar,<sup>10</sup> justices should abjure consideration of foreign and international law absent a clear need for engaging such materials in the pages of the *U.S. Reports*.

This Review will proceed in four parts. Part I provides an overview of Justice Breyer's important new book, *The Court and the World*, and sketches his main arguments, ideas, and proofs. *The Court and the World* seeks to convince the reader of two main points. First, Justice Breyer argues that the domestic courts must consider foreign and international law in an important subset of cases (pp. 95–235). Second, and more controversially, he argues that domestic law would be improved if U.S. judges routinely “cross-

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8. In general, it is possible to distinguish between transnational judicial engagement that arises by necessity and engagement that reflects only judicial will or curiosity. See *infra* notes 55–70 and accompanying text. It is possible to think about judicial engagement, as Justice Breyer does, in terms of international law and comparative law. See pp. 91–97, 169–71. Although international and comparative law are two distinct forms of transnational law, the legitimacy question that plagues “cross-referencing” by U.S. courts tracks not the precise source of foreign authority, but rather the *reason* that a domestic court considers it. See pp. 236–39. In this sense, then, the typology I posit relates to the motivation for a court engaging foreign legal materials rather than to the precise nature of those materials. Simply put, recourse to public international law materials might be illegitimate in a particular instance, whereas recourse to comparative legal materials might well be essential to deciding a case correctly. Compare *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing and invoking as legal authority “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia,” and observing that this provision “contains an express prohibition on capital punishment for crimes committed by juveniles under 18”), with *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 496–98 (2008) (considering the domestic law of torts in Australia, Austria, Canada, France, Germany, Italy, Japan, Switzerland, and the United Kingdom to determine if exemplary damages should be available in claims arising under U.S. admiralty jurisdiction). A further distinction exists between strong forms of transnational judicial engagement (the use of foreign legal materials when deciding domestic law questions) and weaker forms of transnational judicial engagement (informal dialogue between and among judges serving on various domestic and transnational juridical entities). See pp. 249–54 (discussing informal ways that jurists on various tribunals interact with each other, including “informal meetings, visits, and lectures”). Weak forms of transnational judicial engagement are entirely voluntary, and they do not raise the same problems of institutional legitimacy associated with “cross-referencing” foreign legal materials.

9. See *infra* notes 61–70 and accompanying text.

10. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.” (internal quotation marks omitted) (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905))). Just as the Supreme Court avoids deciding questions on constitutional grounds, it should approach the use of foreign and international law in the same fashion—by applying a rule of necessity. See *infra* notes 74–89 and accompanying text.

referenced” foreign and international legal materials, even when doing so is not required in order to decide a pending case (pp. 236–46, 254–80).

Part II, attempting a kind of Linnaean taxonomy, posits that multiple forms, or typologies, of globalization exist in U.S. domestic law and must be identified and understood. More specifically, two distinct genera of transnational law appear to exist: (1) legal globalization born of necessity and (2) voluntary legal globalization (i.e., globalization born of judicial will). The first genus is unavoidable and already a fact of everyday judicial decision-making in the federal and state courts. In contrast, the second genus is, quite appropriately, the subject of serious normative objections, practical difficulties, and political controversy.

Part III considers the normative and practical difficulties associated with voluntary judicial efforts to harmonize legal rules across national borders. It posits that harmonization, particularly with respect to constitutional rules, presents very difficult theoretical and practical questions—questions that are much harder than those associated with resolving conflicts of law or applying international law rules (whether derived from treaties or *jus cogens*<sup>11</sup>). Some of the most important of these questions are related to the legitimacy of unilateral judicial efforts to harmonize constitutional rights and the process of constitutional adjudication across independent, domestic legal systems. Part III also examines the potential costs and benefits of transnational judicial dialogue and so-called judicial diplomacy,<sup>12</sup> which can involve both formal and informal interaction between courts and jurists.

Finally, the Review concludes by offering a brief summary and arguing that the case for legal globalization is considerably stronger in some contexts than in others. Accordingly, judges, lawyers, and legal scholars should work to create and implement a legal taxonomy that disentangles cases that require judges to take account of foreign and international law from those that do not. In the end, Justice Breyer’s claim that U.S. domestic courts must interact with foreign and international law more frequently today than ever before is indisputably true (pp. 3–6, 91–93, 281–82). But this fact does not answer the more difficult question of whether judges serving on domestic

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11. *Jus cogens* consists of universally accepted principles of international law—such as proscriptions against slavery, piracy, and narcotics trafficking—that are binding on all nation states as “peremptory norms.” *Reports of the International Law Commission to the General Assembly*, Doc. A/6309/Rev. 1 (1966), reprinted in [1966] 2 Y.B. Int’l Law Comm’n 169, 247–49 (discussing and applying the concept of *jus cogens* and explaining “that to-day [sic] there are certain rules from which States are not competent to derogate at all by a treaty arrangement [or otherwise], and which may be changed only by another rule of the same character”); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1987).

12. See David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 943–44 (2015). Professor Law explains that “[c]ourts engage in a variety of activities, ranging from translation of their own opinions and citation of foreign law to engagement with international organizations,” to advance “political, economic, and diplomatic objectives.” *Id.* He posits that “courts sometimes engage in comparativism for reasons that have less to do with adjudication than diplomacy.” *Id.* at 944.

constitutional courts should feel obliged to attempt to harmonize fundamental human rights rules with those of other nations.

In sum, social, political, and economic globalization have forced courts to grapple with how and when to apply local rather than foreign law. Nevertheless, globalization born of necessity is qualitatively different from voluntary judicial efforts to create a new system of global human rights law.<sup>13</sup> Justice Breyer's arguments in favor of transnational borrowing born of necessity stand on considerably firmer jurisprudential ground than his broader arguments in favor of "cross-referencing" legal rules across national boundaries.<sup>14</sup>

#### I. LEGAL GLOBALIZATION AS A FAIT ACCOMPLI: JUSTICE BREYER'S CASE IN CHIEF FOR LEGAL INTEGRATION ACROSS NATIONAL BORDERS

The resolution of local legal disputes can have serious global consequences. For example, the outcome of a legal dispute between Apple and the federal government over a warrant requiring Apple to create a protocol that would unlock an iPhone used by a person who planned and executed a terrorist attack in San Bernardino, California, could have produced serious effects both inside and outside the United States.<sup>15</sup> This dispute demonstrates how domestic legal rules cannot be viewed solely in local—rather than global—terms. If the federal government had succeeded in forcing Apple to create a technology that can unlock an iPhone, other nations would inevitably have demanded that Apple make this new technology available to their law enforcement and national security agencies as well.<sup>16</sup>

13. *But see* Anne-Marie Slaughter, *A Typology of Transnational Judicial Communication*, 29 U. RICH. L. REV. 99, 100–18 (1994) (describing the creation of a global system of human rights law and suggesting that judges on domestic courts are well suited to undertaking this project with—or without—the support of the political branches of government). Professor Anne-Marie Slaughter calls for the creation of "a world in which courts perceive[ ] themselves [as] 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." *Id.* at 132.

14. *Compare* pp. 91–97, 132–33, 227–35 (discussing cases that require domestic courts to consider foreign and international law in order to decide them correctly), *with* pp. 236–46 (arguing that domestic courts should seek to "cross-reference" foreign human rights law when deciding domestic constitutional law questions, even if doing so is not necessary to the decisional process).

15. *See* Devlin Barrett & Daisuke Wakabayashi, *U.S. Prosecutors Again Blast Apple in San Bernardino iPhone Dispute*, WALL STREET J., Mar. 10, 2016, at A1, <http://www.wsj.com/articles/federal-prosecutors-blast-apple-in-san-bernardino-iphone-court-filing-1457645575> (on file with the *Michigan Law Review*).

16. The federal government found a "private entity" that successfully unlocked the iPhone, obviating, for the present, the need for Apple's assistance. *See* Devlin Barrett & Daisuke Wakabayashi, *FBI Says It Cracked Terrorist's iPhone*, WALL STREET J., Mar. 29, 2016, at A1, <http://www.wsj.com/articles/fbi-unlocks-terrorists-iphone-without-apples-help-14592023> 53 (on file with the *Michigan Law Review*). Nevertheless, "the broader fight over encryption-protected technology is likely to continue." *Id.* at A5. And however this legal question is ultimately resolved in the United States will affect this question's resolution in other countries.



To be sure, the ultimate resolution of the question in the United States will not, perforce, have direct transnational legal application. The revision of the legal and technological rules governing the privacy of smartphones will not be the result of intentional harmonization efforts by domestic courts borrowing, or to use Justice Breyer's preferred nomenclature, "cross-referencing" (pp. 236–38), the U.S. approach. Instead, the outcome will be the entirely predictable effect of one sovereign successfully rejecting a privacy claim and forcing a corporation doing business within the jurisdiction to assist with an ongoing criminal investigation—if this is how matters ultimately come to rest.<sup>17</sup> *The Court and the World* is at its most persuasive in circumstances like the iPhone controversy; the adoption or rejection of a legal rule in one jurisdiction will have readily foreseeable consequences in others.<sup>18</sup>

Justice Breyer begins his argument by considering the Supreme Court's efforts to enforce constitutional constraints against the president—particularly in the context of foreign and military affairs.<sup>19</sup> He notes that the Supreme Court initially took a very deferential approach in cases challenging presidential authority and generally sustained the president's unilateral assertions of executive authority (pp. 25–41). Over time, however, the justices became increasingly insistent on enforcing constitutional limits on the scope of executive power—even in contexts involving foreign and military affairs (pp. 42–80).

Pointing to landmark constitutional decisions such as *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure)<sup>20</sup> and *Boumediene v. Bush*,<sup>21</sup> Justice

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17. Serious questions exist about whether the federal courts could lawfully order Apple to create a "back door" that circumvents the iPhone's security protocols and also whether Apple's programmers would comply with such a judicial order. See John Markoff, Katie Benner & Brian X. Chen, *Reluctant Staff Could Impede iPhone Ruling*, N.Y. TIMES, Mar. 18, 2016, at A1, <http://www.nytimes.com/2016/03/18/technology/apple-encryption-engineers-if-ordered-to-unlock-iphone-might-resist.html> (on file with the *Michigan Law Review*). Moreover, the FBI's use of a private company to unlock the iPhone used by the San Bernardino attacker "is unlikely to avert the long-term conflict over how secure electronic communications should be, and what firms should have to do to help the government access their customers' data." Barrett & Wakabayashi, *supra* note 16, at A1, A5.

18. Legal cross-pollination can take place through judicial channels—a court in one jurisdiction overtly considers and either adopts or rejects a ruling on the same legal issue from another jurisdiction. See, e.g., *R. v. Tessling*, [2004] 3 S.C.R. 432, paras. 2–3, 45, 57–62 (Can.) (considering at length, but ultimately declining to follow, the U.S. Supreme Court's analysis of whether the use of thermal imaging technology on a private residence constitutes a search that requires a warrant or the proper invocation of a warrant-requirement exception). Such borrowing could also occur through the political branches; legislation adopted in one jurisdiction could be adopted in another. For example, the traffic rule permitting a right turn under a red light originated in California and spread to other U.S. and foreign jurisdictions. See Ronald J. Krotoszynski, Jr., *The Perils and the Promise of Comparative Constitutional Law: The New Globalism and the Role of the United States in Shaping Human Rights*, 61 ARK. L. REV. 603, 610 (2009).

19. See pp. 16–87.

20. 343 U.S. 579 (1952).

21. 553 U.S. 723 (2008).

Breyer posits that “today’s Court will be more engaged when security efforts clash with other constitutional guarantees” (p. 80). He argues that the Supreme Court’s evolution from a posture of general deference to one of strict application of constitutional constraints arose because of “[t]he intrusion of the world’s realities into our national life” (p. 81). Thus, “[i]f the world seems too much with us, it can hardly help to pretend nothing has changed” (p. 81).

This is a perfectly plausible way to frame cases involving the application of rule-of-law values, such as procedural due process, to questions of military and foreign affairs. Cases like *Steel Seizure* and *Boumediene*, however, did not involve any generalized consideration of how other nations attempt to constrain the executive branch’s conduct of military and foreign affairs. Rather than looking abroad to find the governing rule, the Supreme Court decided these cases using exclusively domestic legal rules and principles—more specifically, the separation-of-powers doctrine in *Steel Seizure*<sup>22</sup> and the Suspension Clause<sup>23</sup> and procedural due process values<sup>24</sup> in *Boumediene*.<sup>25</sup>

Justice Breyer nevertheless argues that, going forward, “the Court will find itself looking abroad not only to understand the nature of the threats we face, but to develop an effective approach to addressing them” (p. 81). This is so because “[o]ther courts and legislatures have faced and are facing similar threats to their nations’ peace and safety” (p. 81). Solutions developed and applied in other nations “may serve as constructive examples that our Court could put to good use” (p. 82). Breyer then discusses the practical and theoretical difficulties of providing counsel to alleged enemy combatants and suggests that the approaches adopted in the United Kingdom, Israel, and Spain might be usefully transplanted to the United States.<sup>26</sup>

To be sure, Justice Breyer hedges his bet:

I do not argue for or against either the British, Israeli, or Spanish system in particular. I simply point out that other democracies with the same commitment to basic human rights have led the way in developing solutions to the problem we face, and that we may learn something from examining their practices rather than considering our own in a vacuum. I am not

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22. See *Steel Seizure*, 343 U.S. at 587–89 (holding that “[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times” and that under the separation of powers, all legislative powers reside in the Congress).

23. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

24. *Id.* amend. V (providing that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”).

25. See *Boumediene*, 553 U.S. at 781 (“The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.”). The Court held that the rigor of habeas review should depend on the reliability of the procedures used to determine whether a person is an enemy combatant because “[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.” *Id.* at 783.

26. See pp. 82–83.

saying we can or should accept other nations' solutions. I am saying only that their examples can help us to find our own Constitution's answer to what is ultimately an American constitutional problem. (p. 83; footnote omitted)

But the obvious objection to these hedges and caveats is that, in point of fact, Justice Breyer plainly *is* suggesting that the Supreme Court should consider harmonizing U.S. law regarding fair process for alleged enemy combatants with foreign law by incorporating solutions developed abroad (specifically in the United Kingdom, Israel, and Spain).

This task plainly would be better suited to Congress and the president—who are democratically elected and therefore politically accountable—than to the federal courts (whose judges are not).<sup>27</sup> If Congress and the president decide to model U.S. law on Spanish law, for example, their decision will be subject to a democratic response at the next intervening election; if taking this step proves wildly unpopular, the voters will vent their spleen with Congress and the president. Voters lack any similar ability to constrain legal policymaking by Article III judges.<sup>28</sup>

There is an additional serious objection: the United Kingdom, Israel, and Spain all have parliamentary systems of government that lack a formal separation of executive and legislative powers; these powers are fused, not separated. The United Kingdom, in fact, lacks a written constitution and its domestic courts do not possess the power of judicial review.<sup>29</sup> Any legal rules developed by judges in the United Kingdom are subject to plenary review—and reversal—by Parliament.<sup>30</sup> These structural features probably play some role in the development and content of legal rules;<sup>31</sup> and it would be unwise to attempt to understand a legal rule shorn of its institutional context.<sup>32</sup>

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27. See Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 163 (2005) (“[I]mporting foreign law into the domestic legal system through constitutional interpretation circumvents the institutional mechanisms by which the political branches ordinarily control the interaction between the domestic and the foreign.”).

28. Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 703–12 (2005) (arguing that no plausible theory of constitutional interpretation provides a sufficient justification, or warrant, for incorporating foreign legal precedents into domestic constitutional law and questioning the legitimacy of federal judges borrowing foreign law without some sort of constitutional or statutory authority for doing so); see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press 2d ed. 1986) (1962).

29. RONALD J. KROTOSZYNSKI, JR., *PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE* 115–20 (2016) (discussing the United Kingdom's lack of judicial review, embrace of a “balance” rather than a “separation” of powers, and strong commitment to the doctrine of parliamentary sovereignty).

30. *Id.* at 118–20.

31. *Id.* at 132–42 (discussing the relevance of parliamentary sovereignty to the development of privacy rights in the United Kingdom).

32. See Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071, 1084 (2008) (arguing that structural considerations, in addition to important substantive differences in constitutional texts, make it illegitimate for U.S. courts to “borrow” foreign constitutional rules and precedents); Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L.

A strong constitutional court, expressly vested with a power of judicial review and charged with enforcing a written constitution, is more likely to aggressively check unreasonable assertions of executive authority than a constitutional court that lacks these attributes. If judges attempt to borrow rules without understanding the institutional context and constraints that gave rise to a particular legal rule, mistakes are bound to occur. As the saying goes, “a little knowledge can be a dangerous thing.”<sup>33</sup>

Perhaps Justice Breyer’s most persuasive argument involves the question of when and how to apply U.S. domestic law to people living outside the United States and to events that take place abroad—or that produce direct effects in the United States.<sup>34</sup> His specific examples involve the application of U.S. antitrust law to activities that produce domestic effects (pp. 97–107), commercial trade disputes (pp. 107–14), regulation of publicly traded securities (pp. 114–24), and copyright law (pp. 124–31). Justice Breyer also argues, convincingly, that the Alien Tort Statute<sup>35</sup> forces U.S. domestic courts to consider events and practices from abroad—including the identification and punishment of universal crimes.<sup>36</sup>

Commercial activity has become increasingly globalized, and globalized commerce gives rise to disputes between merchants with significant transnational elements. As Justice Breyer observes, “Commercial cases are more complex, with ambiguous jurisdictional boundaries to be determined, and their outcome can have a significant impact upon international commerce overall” (p. 96). Moreover, domestic courts have to determine when and whether to apply U.S. law to activities that take place abroad but produce substantial effects here at home. Justice Breyer posits that, when answering these questions, “the Court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web” (p. 91). He also argues, with some persuasive force, that “[a] more

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REV. 649, 662 (2004) (questioning the theoretical basis for transnational judicial borrowing and suggesting that too much comparative constitutional law scholarship focuses on issues of substantive rights rather than institutional structure); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307–09 (1999) [hereinafter Tushnet, *Possibilities*] (providing a candid assessment of both the promise and the perils associated with national courts attempting to engage each other in formal judicial decisions and positing that sound comparative legal analysis requires attention to both substantive rules and institutional structure).

33. 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 Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1325, 1349–50 (2006) (arguing that judges often lack the ability to fully understand the scope and meaning of a legal precedent from another constitutional court and providing some relevant examples of how inaccurate assumptions about how a legal rule works in its socio-legal context lead to serious misunderstandings of the legal rule).

34. See pp. 91–164.

35. 28 U.S.C. § 1350 (2012). For a discussion of the Alien Tort Statute, see, for example, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

36. See chapter 6.

harmonizing understanding and application of American law to foreign activities is not the same as American courts deciding cases on the basis of foreign law” (p. 93).

Harmonizing the regulation of commercial activity in contexts such as copyright, antitrust, securities regulation, and taxation across national borders requires domestic courts to understand foreign law.<sup>37</sup> Justice Breyer observes that “where the Court might previously have found a rough understanding of foreign statutes sufficient to decide a case, it now finds it necessary also to try to understand foreign legal practices, and often foreign and international business practices, in greater detail” (p. 97). Thus, “in order to interpret American statutes, the Court must be reasonably familiar with foreign legal and commercial practices” (p. 132).

In addition, duplicative and potentially conflicting regulations of commerce could severely burden or even eliminate trade.<sup>38</sup> Justice Breyer reasonably asks whether “the laws of different nations work together in harmony—a matter of ever greater importance in an ever more interdependent world?” (p. 155). In this context, then, U.S. domestic courts simply have no choice but to consider foreign law in order to advance global trade (an ultimate goal that, prior to the Trump Administration, Congress and the president have indicated that U.S. law and policy seek to advance).<sup>39</sup>

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37. See, e.g., pp. 132–33.

38. See generally Jeffery Atik & David A. Wirth, *Science and International Trade—Third Generation Scholarship*, 26 B.C. INT’L & COMP. L. REV. 171, 172 (2003) (observing that “[t]he fact of inconsistent standards operates to create non-tariff barriers,” and positing that “[t]he imperatives of free trade are to sweep away inconsistent national standards,” with the goal of using “[h]armonization and global standards” as the “means of eliminating conflicts between standards” in order “to reduce regulatory conflict”); Bernard Hoekman, *Adding Value*, 50 FIN. & DEV., Dec. 2013, at 24 (discussing the problems and costs of conflicting national regulatory policies, noting that “regulations and overlapping requirements from different agencies that do not communicate with each other” result in increased production costs as well as production delays and positing that “[i]nternational cooperation is needed to reduce the trade-impeding effects of duplicative regulatory policies”).

39. See, e.g., OECD, *REGULATORY REFORM IN THE UNITED STATES* 6–8 (1999), <http://www.oecd.org/gov/regulatory-policy/2478900.pdf> [<https://perma.cc/YWT7-ZP5Z>] (discussing the federal government’s policy of encouraging foreign direct investment in the United States and promoting U.S. exports abroad); Chantal Thomas, Essay, *Challenges for Democracy and Trade: The Case of the United States*, 41 HARV. J. ON LEGIS. 1, 7–11 (2004) (describing the shift in congressional policy over time from protectionism to global free trade and observing that “[b]ecause prevailing trade ideology has moved away from protectionism in the years since World War II, contemporary legislators may be more likely to vote in line with free trade ideology than to seek to protect particular interests”). But cf. Anne Applebaum, *Is America Still the Leader of the Free World?*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/opinions/global-opinions/under-president-trump-america-may-no-longer-lead-the-free-world/2016/11/09/921bbbbe-a67b-11e6-ba59-a7d93165c6d4\\_story.html?utm\\_term=.3ce79883622c](https://www.washingtonpost.com/opinions/global-opinions/under-president-trump-america-may-no-longer-lead-the-free-world/2016/11/09/921bbbbe-a67b-11e6-ba59-a7d93165c6d4_story.html?utm_term=.3ce79883622c) [<https://perma.cc/ALE6-AQ55>] (arguing that “[p]rotectionism, not free trade, has just won this election,” and positing that “[w]e have to expect that transatlantic trade and transpacific trade treaties are not going to be passed”); Josh Barro, *The Case for Trump as a Moderate Republican*, N.Y. TIMES, Aug. 18, 2015, at A3 (“While most Republicans favor free trade, Mr. Trump has called for much higher tariffs on imported goods to protect American industries from competition.”); Noah Bierman, *Here are the Places Where Trump and the Republican Party Disagree*, L.A. TIMES (July 20, 2016 10:15 AM),

Treaties and international agreements present another context in which the federal courts cannot avoid engaging with transnational sources of law (pp. 167–235). Justice Breyer explains that “[t]reaty interpretation will often include consideration of decisions of foreign courts interpreting the same treaty language, and the importance of looking to foreign interpretations is well settled” (p. 169). Accordingly, “judges who would hesitate to consider decisions of foreign courts when interpreting the American Constitution do not hesitate to consult such decisions when treaties are in question” (p. 169). As both a normative and a policy matter, many treaties require consistent application across national borders in order to fully achieve their objectives. To provide one example, a treaty on child custody must enjoy a consistent interpretation across jurisdictions in order to work effectively (pp. 169–78). Accordingly, domestic courts, in the United States and abroad, should seek to achieve “uniformity of result across borders” (p. 195).

Treaties also involve the creation of transnational juridical entities. The World Trade Organization, for example, has the power to write and enforce regulations governing international trade practices (pp. 227–29). Justice Breyer worries that if “we delegate too much rule-making authority to unsupervised international bodies, what becomes of the assurances of fairness that the Constitution provides or, for that matter, of the ‘legislative’ power that the Constitution grants to Congress?” (p. 235). At the same time, however, even if we wish to jealously guard our power to establish our own policies at the domestic level, “[w]e cannot simply withdraw from international efforts to resolve the commercial, environmental, and security problems of an increasingly interdependent world” (p. 235).

Less persuasive, however, are Justice Breyer’s defenses of transnational judicial dialogue and efforts to harmonize constitutional reasoning and rights across borders. He suggests that transnational borrowing is an unobjectionable, organic, and entirely benign interpretative methodology: “[I]f someone with a job roughly like my own, facing a legal problem roughly like the one confronting me, interpreting a document that resembles the one I

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pol-trump-gop-positions-20160720-snap-htmlstory.html [https://perma.cc/N722-9PYG] (noting that Donald Trump “has been the most anti-globalist presidential candidate in a generation” whereas the Republican Party “has long considered itself the party of free trade, arguing that international commerce helps American consumers pay less for products and benefits U.S. companies and workers who are able to sell more goods and services overseas”); James B. Stewart, *The Business Elite Is Feeling Betrayed*, N.Y. TIMES, July 15, 2016, at B1 (reporting that Trump has promised to “‘rip up’ existing free trade agreements, including the North American Free Trade Agreement” and “impose a wide array of ‘taxes and tariffs’ to protect American workers”). Of course, one could object that facilitating global trade and investment is a policy objective most suitable for Congress to address—rather than the federal courts. This potential objection has some force, if Justice Breyer means to suggest that the federal courts should seek unilaterally to harmonize U.S. domestic law with the domestic law of our principal trading partners around the world. His suggestion, however, could be read more narrowly, and charitably, to mean simply that as commerce becomes increasingly globalized and businesses in the United States form interdependent links with businesses abroad, these relationships will give rise to legal disputes that require U.S. judges to consider carefully the implications of applying U.S. law, or foreign law, to a particular legal dispute. “Harmony” might simply mean “functionally” rather than “identically.”

look to, has written a legal opinion about a similar matter, why not read what that judge has said?" (p. 240). Justice Breyer observes that "I might learn from it, whether or not I end up agreeing with it" (p. 240).

One can argue, as Justice Breyer does, that "[t]o learn from foreign opinions or to consider their reasoning is to find in them something of use in interpreting *American*, not foreign, law" (p. 240). He claims that foreign experience, and by implication foreign law, "can be of help in understanding the commands of American sovereigns, whether federal or state, that have enacted the particular legal phrase in question" (p. 240). This might well be so, but it does not address the legitimacy of considering foreign law with neither a warrant in domestic law for doing so nor any decisional necessity for recourse to such materials.<sup>40</sup>

In Justice Breyer's other examples of legal globalization, involving application of domestic laws transnationally and with respect to international law, the Constitution and domestic laws provide a sound basis, or warrant, for the judicial behavior at issue.<sup>41</sup> Congress has enacted a statute and the question of the law's extraterritorial effect must be resolved by a federal or state court; the president and Senate have ratified a treaty, which becomes "the supreme Law of the Land" under the Supremacy Clause.<sup>42</sup> Courts, in turn, must enforce the treaty's provisions, which will entail consideration of foreign and transnational legal sources (p. 245). These examples clearly involve federal courts following the marching orders of the elected branches—rather than striking out boldly on their own course.

But Justice Breyer argues for a broader use of foreign and international law to resolve purely domestic legal questions.<sup>43</sup> He posits that "the nature of the world itself" demands a greater "cosmopolitanism" on the part of U.S. judges (p. 245). Justice Breyer squarely rejects critics who claim that considering foreign and international law will undermine local legal rules and institutional arrangements (pp. 244–45). He argues instead that considering those materials will actually *reinforce* our domestic legal rules and institutions (pp. 245–46). Thus, even though skeptics may "worry that an increased foreign say in interpreting our Constitution and statutes threatens to corrupt what has long been a great American treasure—a legal system that, over the course of two hundred years, has secured America's democracy and freedom" (p. 244), Justice Breyer characterizes these objections as baseless

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40. Compare Alford, *supra* note 28, at 698 (presenting normative and policy-based objections to the proposition that the world is a single legal community and cautioning against judicial citation to foreign decisions which are "outside the U.S. democratic orbit."), with David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 558 (2001) (arguing that federal and state courts should not hesitate to actively engage foreign and international law when doing so would be helpful in deciding close cases that lack a clear answer based solely on domestic legal sources).

41. See p. 245.

42. U.S. CONST. art. VI, cl. 2.

43. See chapter 10.

and unpersuasive (pp. 244–45). As I will explain in the next section, however, there is a better case for “cosmopolitanism” in some contexts more than others.<sup>44</sup>

Finally, Justice Breyer makes an important and sustained argument for transnational judicial dialogue outside the courtroom among and between jurists on national and transnational courts.<sup>45</sup> He posits that “even outside the context of specific litigation, federal judges are increasingly thinking about and discussing foreign and international law” (p. 249). These interactions take place “through encounters with members of foreign judiciaries, which are occurring ever more frequently out of a common wish to share professional experiences” (p. 249).

It seems difficult to argue with the proposition that U.S. judges could benefit from greater levels of interaction and professional engagement. As I have argued previously, “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.”<sup>46</sup> Thus, “[i]n 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.”<sup>47</sup> At the end of the day, however, “even if a judge finds inspiration in a foreign legal text, persuasive reasons for the judgment must exist in domestic legal sources.”<sup>48</sup>

To the extent that interpersonal transnational judicial engagement involves nothing more than “an exchange of information and ideas” or “an open invitation for each judge to consider his or her own system in light of others,” in order to achieve a “broadening of vision,” there is nothing objectionable about it (p. 270). But advocacy of voluntary judicial efforts to harmonize constitutional law rules and principles is simply not the same thing as a generalized academic discussion in which there is “no winner and no loser; no effort to convince; and there is no vote.”<sup>49</sup> Unfortunately, however, Justice Breyer elides the obvious differences between merely talking about matters of mutual professional interest with foreign jurists to actually incorporating foreign legal practices into domestic law;<sup>50</sup> he makes this substantial

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44. See *infra* notes 74–87 and accompanying text.

45. See chapters 11–12.

46. Krotoszynski, *supra* note 33, at 1357.

47. *Id.*

48. *Id.*

49. P. 270. To be clear, in some contexts, such as informational privacy—see, for example, *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977)—transnational cooperation might be necessary to effectively secure a right at the domestic level. See KROTOSZYNSKI, *supra* note 29, at xv–xviii, 1–3, 8–12, 37, 183–87 (discussing how and why a more global system of informational privacy regulation would better secure such privacy rights domestically).

50. To provide one concrete example, Justice Breyer specifically argues that U.S. constitutional analysis would be improved by incorporating proportionality analysis. Pp. 254–62. See generally Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015) (providing an excellent and comprehensive overview of the proportionality doctrine



and substantive leap without ever acknowledging that the former practice does not raise serious issues of institutional legitimacy and accountability—whereas the latter most certainly does.<sup>51</sup>

Judicial diplomacy could involve nothing more than informal professional engagement; in this guise, such engagement is not meaningfully different than the interactions that routinely occur between lawyers and judges at ABA or ALI annual meetings. And, as Justice Breyer argues, these conversations can help advance “the sustained struggle against [government] arbitrariness” (p. 280). He posits that “perhaps the most pertinent reason for attempting to address today’s transnational problems through law” is that “any success in that effort helps to advance the rule of law itself” (p. 283). Nevertheless, one must distinguish between general discussions related to professional activity and affirmative efforts to harmonize domestic constitutional law with the law of other nations or international law.

The crux of Justice Breyer’s argument in favor of “judicial diplomacy” is that the United States benefits when rule-of-law values prevail not only at home, but also abroad. He explains that “[l]ike democracy and human rights, the rule of law is something more than an ideological commitment for Americans; it is a sine qua non for our system, and where it does not exist, our interests cannot be secure” (p. 283). It is difficult to argue seriously with this reasoning; U.S. political, economic, and social interests are more secure to the extent that rule-of-law values prevail globally. And the reverse is also true. If weak forms of transnational judicial engagement can help secure rule-of-law values worldwide, then U.S. judges have good cause to pursue these interactions. But, again, this kind of weak form of transnational judicial engagement does not—or at least should not—involve the importation of “foreign [legal] moods, fads, or fashions.”<sup>52</sup>

## II. ASSESSING THE CASE FOR LEGAL GLOBALIZATION: TOWARD A WORKABLE TAXONOMY

*The Court and the World* posits four general categories of cases that require domestic courts to consider nondomestic sources of law: (1) cases involving the geographic scope of domestic law (whether constitutional or

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and its central importance in many constitutional democracies featuring entrenched human rights enforced by independent courts vested with the power of judicial review). Justice Breyer suggests that “[a]t the least, to consider proportionality brings to the surface and makes explicit the judicial balancing that is frequently called for when there are important interests on both sides of a legal question.” P. 260. Justice Breyer proposes “adding the judge-made concept of proportionality as a guide in deciding First Amendment cases.” P. 257. Incorporating proportionality analysis into First Amendment jurisprudence would involve making significant changes to existing constitutional jurisprudence and would go far beyond more mundane forms of transnational judicial engagement—such as attending international conferences or speaking at foreign law schools. *Cf.* pp. 249–51, 271–73, 280.

51. See chapters 11–12.

52. *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari) (arguing that the Supreme Court “should not impose foreign moods, fads, or fashions on Americans”).

statutory) (pp. 5–6), (2) cases involving transactions or events that implicate more than one national legal system (pp. 91–97), (3) cases involving international law (pp. 167–71), and (4) cases involving domestic law that might benefit if the resolution of the question were considered in light of how other nations have addressed and resolved the same issue (pp. 281–84). The first two categories of cases implicate, broadly speaking, conflict-of-laws principles. Justice Breyer is certainly correct to posit that, in a globalized economy, disputes raising conflict-of-laws questions will force courts to engage regularly with foreign law (pp. 95–97). In this sense, then, it is not possible to completely avoid having U.S. courts consider questions that implicate foreign law.

As it happens, Professor Vicki C. Jackson has made a very similar argument.<sup>53</sup> Jackson posits three general approaches that domestic courts may adopt with respect to foreign and international law—resistance, convergence, and engagement.<sup>54</sup> She observes that “[i]t is much harder today than in the past for constitutional courts to avoid taking positions on the role of international or foreign law.”<sup>55</sup> Consistent with this view, Jackson argues persuasively that postures of absolute resistance to foreign law will fail.<sup>56</sup> Perhaps surprisingly, however, Jackson also argues that national courts will find it equally impossible to pursue postures of maximal convergence.<sup>57</sup> Thus, engagement is the only realistic option.

Justice Breyer’s arguments about “comity” and conflicts principles resonate on the same frequencies as Jackson’s arguments in favor of transnational judicial engagement.<sup>58</sup> Both Jackson and Justice Breyer agree that the U.S. domestic courts cannot sustain a posture of complete and total resistance to foreign and international law; such a position is neither realistic nor desirable.<sup>59</sup>

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53. VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

54. *Id.* at 8–9.

55. *Id.* at 5.

56. *See id.* at 18–38 (discussing “resistance” to transnational law and suggesting that in an increasingly globalized world, domestic courts cannot successfully disengage completely from foreign and international law). In this regard, Jackson posits that “[t]he idea of a constitution is itself one that may seem to invite resistance or indifference to foreign or international law.” *Id.* at 18.

57. *See id.* at 39–69 (discussing “convergence” and arguing that even for jurisdictions like South Africa, which generally seeks to harmonize domestic constitutional principles with international and foreign human rights legal norms, local concerns will inevitably prevent the complete incorporation of international and foreign legal rules into domestic law). Jackson explains that “the Constitution and constitutional law express or help constitute a national identity, which is understood, in part, in comparison with that of other nations.” *Id.* at 108.

58. *See* pp. 91–93; JACKSON, *supra* note 53, at 82–86.

59. *See, e.g.,* *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 496–98, 513–14 (2008) (considering foreign law on the awarding of punitive damages to determine whether such damages are permissible under U.S. law and holding that punitive damages in maritime cases may not exceed a 1:1 ratio). Professor Sarah Cleveland explains that “[t]he admiralty cases are particularly interesting in that they explicitly reject the proposition that constitutional admiralty jurisdiction should be tied to English law at the time the Constitution was adopted, in favor of

So too, cases involving international law, whether in the form of a treaty or *jus cogens*, also force U.S. courts to consider nondomestic sources of law. Because the Supremacy Clause of the U.S. Constitution makes ratified treaties “the supreme Law of the Land,”<sup>60</sup> there cannot be much objection to Justice Breyer’s argument that federal courts must consider foreign law in order to implement treaties. His main point seems to be that the principles of comity that inform conflict-of-laws analysis should also inform treaty interpretation at the domestic level. Yet, in cases like *Medellin*,<sup>61</sup> Justice Breyer believes that the Supreme Court has been insufficiently sensitive to the transnational nature of international law rules—and too willing to translate universally applicable rules into a set of only domestically applicable rules (pp. 210–18).

In discussing legal globalization, however, it seems essential to carefully disentangle globalization born of necessity from entirely voluntary judicial efforts to harmonize domestic legal rules with foreign and international legal rules. The globalized economy regularly gives rise to legal disputes that cross national borders; this, in turn, forces local courts to consider which nation’s law should govern a particular dispute (at least, in the absence of a choice-of-law clause governing the dispute—even then, of course, the validity of the choice-of-law clause itself might depend on which jurisdiction’s law applies). *The Court and the World* offers many examples of legal globalization arising by necessity.

But deciding whether to apply U.S. or European antitrust law to a particular dispute (pp. 97–107), or considering Chilean family law in order to apply an international treaty governing child custody (pp. 171–76), is quite far removed from using German constitutional law to decide whether the Due Process Clauses of the Fifth and Fourteenth Amendments secure to women a right of access to nontherapeutic abortions.<sup>62</sup> It is also difficult to

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asserting the role of the U.S. courts, in dialogue with other nations, as participants in the recognition and development of an evolving general transnational jurisprudence of admiralty.” Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 27–28 (2006). Even Justice Scalia, who generally decried the use of foreign law in interpreting the Constitution, conceded that English legal precedents from the time of the Constitution’s drafting could be relevant to understanding correctly the original intent of the framers. See *Crawford v. Washington*, 541 U.S. 36, 43–47, 54 n.5 (2004); *Loving v. United States*, 517 U.S. 748, 775–76 (1996) (Scalia, J., concurring).

60. U.S. CONST. art. VI, cl. 2.

61. *Medellin v. Texas*, 552 U.S. 491, 512–13, 517–19, 522–23 (2008) (citing *Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 13 (Mar. 31)) (declining to follow the ICJ’s decision in *Avena*, which resolved the precise question before the Supreme Court, because “while the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions”). But cf. *id.* at 554–56 (Breyer, J., dissenting) (arguing that the Supreme Court should defer to the ICJ’s authoritative interpretation of the Vienna Convention because the treaty declares the ICJ’s interpretation to be authoritative and also that as a policy matter, a uniform interpretation of the Vienna Convention is essential to its efficacy).

62. See Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 1 (Ger.) [hereinafter

imagine circumstances in which efforts to harmonize domestic human rights—at least in the absence of a treaty, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>63</sup>—would be unavoidable or inescapable.<sup>64</sup>

Justice Breyer's best examples of existing legal globalization invariably involve choice of law and international law questions rather than entirely voluntary efforts to harmonize local legal rules more generally. Yet his arguments for more general efforts at harmonization, or at least respectful consideration, rest on proofs that establish only that conflicts of law and the enforcement of treaties will require U.S. courts to take foreign and international law into account. The case for judicial-harmonization efforts in the absence of any necessity for considering foreign and international law—for example, in defining the scope and application of fundamental constitutional rights—rests on considerably shakier normative ground.

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*Abortion I*] (invalidating a German federal law liberalizing access to nontherapeutic abortions because Articles 1 and 2 of the Basic Law secure to fetuses rights to dignity, life, and free development of the personality and holding that the state may not openly condone nontherapeutic abortions). For a full translation of *Abortion I*, see Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551, 605–84 (1976). The Federal Constitutional Court, Germany's highest constitutional court, has consistently held that the government has an affirmative obligation to express moral and legal opposition to abortion through statutory law. See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 373–99 (3d ed. 2012) (providing an excellent overview of how the Basic Law, as authoritatively interpreted by the Federal Constitutional Court, precludes the general liberalization of abortion laws to provide for abortion on demand in Germany). Professors Kommers and Miller explain that, in contemporary German constitutional law, the state has an affirmative duty to express moral and legal opposition to abortion and that “the German view [is] that abortion remains *fundamentally* incompatible with human dignity and the right to life.” *Id.* at 394. In other words, abortion is a fundamental right in the United States, whereas in Germany, under the Basic Law a fetus possesses fundamental constitutional rights to dignity, life, and to free development of the personality. See Reva B. Siegel, *The Constitutionalization of Abortion in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* 13, 13–14, 20–29 (Rebecca J. Cook et al. eds., 2014) (discussing and critiquing Germany's approach to abortion access); see also Michael G. Mattern, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L.A. INT'L & COMP. L.J. 643, 651 (1991) (noting that unification of East and West Germany required reconciling East Germany's permissive abortion laws with West Germany's highly restrictive regulations).

63. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

64. But see KROTOSZYNSKI, *supra* note 29, at 187 (“Although the legal authority to protect—or not protect—privacy still rests with individual nation-states, it has become increasingly obvious that effective protections for privacy will need to have a substantial transnational component in order to be effective.”). Thus, some rights, such as informational privacy, may be effectively protected domestically only if an effective global system of regulation can be devised. *Id.* at 10. Other fundamental rights—for example, the freedom of political speech or voting rights—do not require global protection in order to be secured effectively within a single jurisdiction. See *id.* at 9–10 (noting that some rights can be secured locally and effectively, but “for a system of privacy protection of personal data to be effective, some level of global consensus will be necessary”).

The constitutional basis for federal judges engaging foreign and international law without any warrant for doing so in either the Constitution itself or in current statutory law is not self-evident. Justice Breyer's examples of implementing statutes and treaties involve federal judges implementing the will of the political branches; his proposal for judges engaging in efforts at "judicial diplomacy" that would "cross-reference" foreign and international law with domestic legal rules involves a much bolder and broader assertion of unilateral judicial authority. There is no obvious reason for treating these behaviors as materially equivalent. Arguably, in fact, they each constitute a different genus of transnational judicial engagement.

When a legal dispute squarely implicates foreign or international law, a reviewing court has no choice but to decide the matter as best it can. As Chief Justice John Roberts observed in *Zivotofsky*, a case that presented a very complicated, and long-standing, separation-of-powers dispute between the president and Congress over recognition of Jerusalem as the capital of Israel,<sup>65</sup> "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"<sup>66</sup> In other words, the federal courts labor under a duty to decide the cases and controversies that appear at bar, even when doing so requires them to undertake difficult or complicated legal analyses. Applying a duly enacted statute or a ratified treaty falls within the mandatory decisional duties of the federal courts; one would be mistaken to object to a federal judge undertaking such duties in good faith.

To consider foreign law in the absence of any necessity for so doing, however, presents a much different, and much more difficult, question regarding the proper institutional role of the federal courts. For federal judges to seek to import foreign legal materials, perhaps in the hope of advancing a project of "judicial diplomacy," entails federal judges selecting decisional rules that lack any democratic imprimatur.<sup>67</sup> In fact, Justice Breyer acknowledges this objection (pp. 243–44), albeit only to reject it because "the critics' concerns about judicial references to foreign law are beside the point" (p. 244). He argues that these "fears [about democratic legitimacy] don't much resonate when one understands the way in which foreign law and practices are actually considered" (p. 244).

But this is true only because all the specific examples that Justice Breyer invokes to support his argument for the increasing globalization of U.S. law involve *nondiscretionary* recourse to foreign or international law. Moreover, he fails to offer any limiting principles that would cabin voluntary judicial recourse to foreign and international law. The borrowing (or "cross-referencing") that judges do in times of need does not, however, justify turning to foreign and international law whenever a judge simply feels like it. Thus, the globalization of domestic law that Justice Breyer identifies as already existing is easily distinguished from the broader forms of transnational judicial

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65. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

66. *Id.* at 1427 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

67. See Alford, *supra* note 28, at 698, 709–10.

engagement that he so forcefully advocates. In sum, Justice Breyer's offer of proof simply does not adequately support his broadest claim that transnational judicial dialogue, seeking to harmonize domestic constitutional rules across jurisdictions, would improve domestic constitutional law.

Even if "[t]here is little reason to think that the practice [of cross-referencing] will, for better or worse, lead to the emergence of a Kantian universal law—a single rule of law for the whole world" (p. 245), Justice Breyer has not identified any basis for incorporating foreign and international law beyond his own intellectual curiosity. He also immediately undermines his reassurance that borrowing will not lead judges to compromise local values: "At most, cross-referencing will speed the development of 'clusters' or 'pockets' of legally like-minded nations whose judges learn things from one another, either as a general matter or in particular areas of law, such as security, commerce, or the environment" (p. 245).

The creation of "clusters" or "pockets" of countries with harmonized constitutional law rules and practices implies that local interests will give way in order to promote harmonization across domestic legal systems; this is the root of the objection to such efforts. Federal judges have a duty to apply the U.S. Constitution, as well as statutes and regulations duly enacted by the political branches. At present, U.S. law does not contain any mandate—of a constitutional or statutory nature—that authorizes judges to depart from traditional interpretive methods that rely solely on domestic legal materials in favor of an approach that incorporates foreign and international law in order to promote legal globalization.<sup>68</sup> Moreover, the existence of a substantial subset of cases that require consideration of foreign and international law to honor the marching orders provided by Congress and the president does not justify the consideration of foreign and international legal materials in cases that do not require judicial recourse to such material.

Simply put, Justice Breyer is conflating very different justifications for domestic judges considering foreign and international law. Necessity, in the context of a statute or treaty, presents a compelling reason for a U.S. judge to engage foreign and international law. Seeking to create a global system of law by harmonizing constitutional rights across national juridical systems presents a considerably weaker justification for considering foreign and international legal materials. The justifications, which correlate rather directly with the legitimacy of the practice, matter a great deal—and yet, Justice Breyer fails to acknowledge the difference between globalized law born of judicial necessity and globalized law born of mere judicial caprice.

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68. See *id.* at 709–12 (arguing that "[a] comparative theory of constitutionalism has yet to advance a compelling case for its consistency with political democracy" and wryly observing that "[c]onstitutional comparativism is a methodology in search of a theory").

III. THE NORMATIVE AND PRACTICAL DIFFICULTIES OF HARMONIZING  
CONSTITUTIONAL RIGHTS ACROSS NATIONAL BORDERS:  
ON THE LIMITS OF LEGAL GLOBALIZATION

Justice Breyer's enthusiastic advocacy of legal "cross-referencing" suffers from both serious normative and highly practical difficulties. First, the case for borrowing from foreign and international legal sources must be made in terms that advance values that have a domestic law imprimatur.<sup>69</sup> As noted in the previous Part, decisional necessity provides a compelling justification for U.S. judges engaging with foreign and international law. But what persuasive justification, if any, exists for incorporating foreign and international legal materials in the absence of decisional necessity? Even if one could identify a persuasive jurisprudential theory that supports the routine "cross-referencing" that Justice Breyer endorses (ideally, one more convincing than the possibility of discovering "better law"<sup>70</sup>), serious practical difficulties would need to be addressed to make it possible for U.S. courts to regularly cross-reference foreign and international law. This Part describes and discusses both of these problems.

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69. The ideal domestic law imprimatur would be a constitutional mandate to consider foreign and international legal materials when interpreting the U.S. Constitution. The Constitution of the Republic of South Africa, for example, contains a provision directing that country's Constitutional Court to consider international law and also authorizing it to consider foreign law when interpreting and applying the Bill of Rights. S. AFR. CONST., 1996, § 39(1)(b)–(c). The U.S. Constitution, of course, does not contain a similar provision authorizing the federal courts to routinely consider, or cross-reference, foreign and international law. Nor has Congress enacted legislation creating such an interpretative obligation. See *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1–2 (2005) (Statement of Rep. Steve Chabot); *id.* at 11–15 (statement of M. Edward Whelan, President, Ethics and Public Policy Center); cf. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 517 (2005) ("In some cases, domestic constitutions authorize or even mandate judicial consideration of foreign and international sources, thus encouraging courts in those countries to participate actively in judicial dialogue on a range of issues."). In fact, the House of Representatives has enacted resolutions calling on federal courts *not* to consider foreign law when interpreting the U.S. Constitution, see, e.g., H.R. Res. 372, 110th Cong. (2007), and many states have enacted similar resolutions. See Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1 (2011) (listing and discussing such enactments at the federal and state level). Thus, the situation really could not be less promising: current federal law lacks any kind of general warrant or license for federal judges to consider foreign law when deciding questions of domestic law and Congress and several state legislatures have enacted resolutions expressly rejecting consideration of such materials.

70. See Tushnet, *Possibilities*, *supra* note 32, at 1307 (arguing that "[c]omparative experience is legally irrelevant unless it can connect to arguments already available within the domestic legal system"); Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 BYU L. REV. 1879, 1881–89 (describing and critiquing the "better solutions" justification for domestic courts relying on foreign law to resolve domestic legal questions).

### A. *The Normative Difficulties of Globalizing Constitutional Rights*

A serious effort to integrate U.S. law with foreign and international law would require a much broader, and stronger, consensus that harmonizing U.S. law with global sources of law would be legitimate and would also improve the content and meaning of domestic law. Justice Breyer's proofs of the new reality of globalized law all involve issues related to transnational business disputes, which are a far cry from considering foreign law in determining the scope and meaning of reproductive rights under the Due Process Clauses.<sup>71</sup> In any major constitutional case where the Supreme Court's institutional legitimacy in removing a particular question from the political process might be open to serious question, as in cases involving highly contested matters of social policy and personal morality, reliance on foreign legal sources arguably would tend to diminish the persuasive force of the Court's decision.

Nevertheless, Justice Breyer seems to believe that domestic judges have an obligation to attempt to harmonize legal rules across national borders.<sup>72</sup> For example, he asks how the Supreme Court might "interpret our national laws and treaties with an eye toward permitting the kind of cooperation necessary to further the resolution of concrete problems (say, of the environment, commerce, and security) that transcend national borders?" (p. 6). These efforts are part of a larger project to "help to advance acceptance of the rule of law itself" (p. 6). He characterizes these issues as "general" and observes that "[t]his book can do no more than to raise them while encouraging others to find better and more specific responses" (p. 6).

Justice Breyer mounts a practical argument in favor of borrowing, arguing that "[t]he growing complexity of problems, taken together with the need to produce a judgment in a few weeks or months at most, adds value to the experience of other judges [in foreign countries] who have faced comparable problems" (p. 240). He also observes that "there is a well-established

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71. See KOMMERS & MILLER, *supra* note 62, at 393–94, 398–99 (discussing Germany's highly restrictive approach to regulating access to abortion because of the Federal Constitutional Court's holdings that a fetus enjoys formal legal protection under the Basic Law's guarantees of dignity, life, and free development of the personality). The Basic Law creates a mandatory, affirmative duty on the part of the German federal government to maintain laws and policies that express moral and legal opposition to abortion. See Donald P. Kommers, *Abortion and the Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 267–75 (1977); Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1 (1994). It seems reasonable to wonder whether Justice Breyer's enthusiasm for "cross-referencing" foreign constitutional precedents would extend to incorporating Germany's restrictive approach to abortion with the more permissive U.S. approach under *Casey*. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (failing to cite or "cross-reference" foreign legal judgments regarding reproductive rights in a majority opinion by Justice Breyer); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853, 860–61 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (reaffirming the "central holding" of *Roe v. Wade*—that the Due Process Clauses of the Fifth and Fourteenth Amendments secure a right of access to nontherapeutic abortions).

72. See pp. 236–46.



American legal tradition of learning from foreign sources, consisting predominately but not entirely of common law materials” (p. 241).

It is understandable that judges would wish to avoid reinventing the wheel,<sup>73</sup> but the Supreme Court almost always enjoys the benefit of multiple lower court opinions to consider before granting review of a particular legal question—to say nothing of its own prior precedents. Why look abroad if, after looking at home, one finds relevant answers to the question under review? It is also quite true that members of the Supreme Court most opposed to constitutional borrowing, such as, until recently, the late Justice Scalia, readily embraced what we might call genealogical comparativism.<sup>74</sup> Given that the U.S. legal system was an offshoot of the British legal system, it is entirely appropriate to look to English legal antecedents to understand the origins of both common law and public law rules.<sup>75</sup>

These are perhaps the weakest arguments in an otherwise very thoughtful and generally well-argued book. It is far from self-evident that domestic courts should incorporate foreign law without a clear need for doing so. The most convincing examples that Justice Breyer offers, which involve the application of U.S. statutes and treaties ratified by the Senate, necessarily include a direct political warrant from Congress and the president to engage foreign law in order to implement our domestic law. The federal courts are simply performing their duty to “say what the law is” under *Marbury*<sup>76</sup> when they decide how to apply the Copyright Act to the reimportation of copyrighted materials from abroad (pp. 124–31). The same is true when the federal courts are called to interpret and apply ratified treaties (pp. 177–78). The federal courts possess a clear warrant from the political branches to implement federal laws and treaties ratified by the United States—even when doing so requires recourse to foreign or international law (or both).

Choice-of-law questions are easily distinguishable from an interpretive approach that embraces what Justice Breyer styles “cross-referencing” (p. 236). In cases involving difficult choice-of-law questions, a federal court’s

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73. See p. 240.

74. See Fontana, *supra* note 40, at 547, 550–51 (“In a system of genealogical comparativism, a court indicates that it looks to comparative constitutional law because some relationship exists between the lender country—the country supplying the idea or fact the American court is considering borrowing—and the United States.”) (emphasis omitted).

75. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 559–62 (2004) (Scalia, J., dissenting) (using English law to interpret the Suspension Clause and explaining that “[t]he Founders inherited” these English antecedents and relied on them when drafting the Suspension Clause); *Thornton v. United States*, 541 U.S. 615, 629–31, 631 n.2 (2004) (Scalia, J., concurring in the judgment) (using nineteenth-century English cases to interpret the Fourth Amendment’s warrant requirement); *Crawford v. Washington*, 541 U.S. 36, 43–47, 54 n.5 (2004) (relying on English cases to interpret the Confrontation Clause because “[t]he founding generation’s immediate source of the concept . . . was the [English] common law”). For Justice Scalia, English common law precedents and statutes were potentially relevant guides to correctly ascertaining the original intent of the Framers.

76. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

consideration of foreign law and its interface with domestic law are completely unavoidable. Accordingly, in cases presenting conflict-of-laws questions that implicate foreign jurisdictions, U.S. domestic courts will have to engage with foreign law, and they will do so with greater frequency going forward because of the increasingly globalized nature of commerce. But choice of law does not necessarily imply a larger project of harmonizing legal rules across national legal systems—particularly with respect to fundamental human rights. To the extent that Justice Breyer makes a broader claim that in the future the Supreme Court will find it impossible to ignore foreign law when deciding important domestic constitutional questions (pp. 245–46), decisions like *Obergefell*<sup>77</sup> provide a telling, and important, counter-argument.<sup>78</sup>

Foreign legal decisions, such as *Google Spain*,<sup>79</sup> demonstrate with convincing clarity that choice-of-law rules now operate in a fully globalized context, and courts will have to deal with this reality—whether they want to think about, or discuss, “foreign law” or not.<sup>80</sup> But these efforts to apply domestic laws on an extraterritorial basis do not generally involve efforts to harmonize divergent legal rules—and particularly constitutional rules—across national legal systems. To the extent that Justice Breyer believes that we could improve U.S. law by more regularly considering how other industrial democracies have considered common legal questions—for example, with respect to the scope of presidential war powers (pp. 80–87)—his proofs do not really seem to correspond very well with his claims.

It also bears noting that Justice Breyer’s colleagues on the Supreme Court do not seem to share his enthusiasm for engaging foreign and international law in cases that require the Supreme Court to interpret and apply the Constitution. For example, the landmark *Obergefell* decision presented an ideal opportunity for using comparative constitutional law to help establish the constitutional proposition that denying same-sex couples access to civil marriage is fundamentally unjust.<sup>81</sup> Many constitutional courts in both

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77. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

78. See *infra* notes 83–89 and accompanying text.

79. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065> [<http://perma.cc/U6T8-844B>].

80. See Alistair Barr & Sam Schechner, *Alphabet Bends on EU Privacy Rule*, WALL ST. J., Feb. 12, 2016, at B5, <https://www.wsj.com/articles/google-bends-to-european-pressure-on-right-to-be-forgotten-rule-1455231966> (on file with *Michigan Law Review*) (noting that “Google will remove links from all of its global search sites when a user in a European Union country searches for information about a person from the same country who has exercised the right to be forgotten,” which essentially gives global transnational effect, with respect to EU citizens, to the *Google Spain* decision). EU privacy regulators insisted that Google could not comply with *Google Spain* solely by removing content from search results generated on sites such as Google.de and Google.fr. *Id.* European privacy regulators plainly would prefer that Google delete content covered by the right to be forgotten globally—including in the United States, where no such right to be forgotten exists and the First Amendment would presumably prevent creation of such a legal right. See *id.*

81. 135 S. Ct. at 2585.

hemispheres had considered and decided this precise question prior to the U.S. Supreme Court.<sup>82</sup> Yet, Justice Kennedy's majority opinion in *Obergefell* fastidiously resisted engaging with the work of these constitutional courts in democratic polities. To be sure, Justice Kennedy's opinion, although unclear on the precise source of the right to marriage equality (some unexplained combination of the Due Process and Equal Protection Clauses),<sup>83</sup> instead placed substantial reliance on the dozens of state and lower federal court rulings that read *United States v. Windsor*<sup>84</sup> to require recognition of same-sex marriage.<sup>85</sup>

I do not mean to imply that Justice Kennedy was wrong to hang his jurisprudential hat exclusively on domestic legal hooks. After all, if domestic legal sources of authority yield a dispositive outcome on the question at bar, there is really no need to canvass foreign law to reach the correct decision. Yet, if we truly are entering a new era in which the Supreme Court is supposed to play a meaningful role in the creation of a more globalized system of human rights law, *Obergefell* clearly constitutes an important missed opportunity. Nor did Justice Breyer follow his own advice in *Obergefell*—he simply joined Justice Kennedy's majority opinion and did not author a concurring opinion that canvassed the right to same-sex marriage in the jurisprudence of foreign constitutional courts.<sup>86</sup>

Moreover, it seems highly unlikely that Justice Kennedy's failure to cite or engage with foreign law was merely accidental. His overt reliance on foreign law in *Lawrence v. Texas*<sup>87</sup> created a firestorm of political controversy, and he avoided this specific criticism in *Obergefell* precisely by *not* invoking foreign law.<sup>88</sup> In the contemporary United States, defining fundamental

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82. For example, Brazil, Canada, Israel, Mexico, the Netherlands, Slovenia, and South Africa had already decided the question. Brief for Foreign & Comparative Law Experts Harold Hongju Koh et al. as Amici Curiae in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022707 (identifying previous foreign judicial decisions and legislation on same-sex marriage).

83. See *Obergefell*, 135 S. Ct. at 2604–05 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

84. 133 S. Ct. 2675 (2013).

85. *Obergefell*, 135 S. Ct. at 2608–11 (providing an appendix that lists federal and state court opinions finding that same-sex couples have a right to marry and also listing legislation and referenda that produced the same result). It bears noting that, had Justice Kennedy wished to include foreign legal decisions and legislation in this appendix, it would have been quite easy to do so—this omission is a telling one.

86. *Id.* at 2591.

87. 539 U.S. 558, 572–73, 576–77 (2003) (noting decisions made by the British Parliament and the European Court of Human Rights that repealed laws punishing homosexual conduct).

88. See, e.g., Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005).

rights using foreign legal materials lacks political and, arguably, jurisprudential legitimacy, and it also risks undermining, rather than enhancing, the persuasive force of a judicial opinion.<sup>89</sup>

Finally, even if we were to reach a political and jurisprudential consensus that overt reliance on foreign law would be a good thing—whether because it would improve the quality of judicial reasoning here at home or help to solidify universal respect for human rights abroad—there are some important, and difficult, structural issues that would need to be addressed (starting with the fact that most U.S. lawyers lack much, if any, comparative law competence). As explained below, however, solving these problems is easier said than done.

B. *The Practical Difficulties of Routinely Considering Foreign Law in Domestic Litigation*

More broadly, the institutional capacity of lower courts to consider foreign law when deciding domestic legal questions is quite limited. One can start with rather basic and obvious limitations, such as lack of foreign language skills.<sup>90</sup> But the absence of foreign language skills—and hence the ability to read and engage with primary foreign law sources—is only the tip of the iceberg.<sup>91</sup> In addition, “most U.S. law schools make little, if any, effort to inculcate the skill sets that would be needed for U.S. lawyers to use foreign and international law as a standard part of their professional toolkit.”<sup>92</sup>

U.S. law schools do not invest serious instructional resources in comparative and international law because legal employers do not particularly value such legal knowledge. This, in turn, relates back to the lack of interest most federal and state judges express in hearing arguments premised on foreign and international law in routine cases presenting domestic law questions; law schools would enhance their comparative and international law curricula if doing so would better prepare their graduates to be more persuasive legal advocates.<sup>93</sup> Notwithstanding Justice Breyer’s enthusiasm for

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89. See Alford, *supra* note 28, at 709–10.

90. Ronald J. Krotoszynski, Jr., *The Heisenberg Uncertainty Principle and the Challenge of Resisting—or Engaging—Transnational Constitutional Law*, 66 ALA. L. REV. 105, 134–35 (2014) (“In the United States, monolingualism is the norm, rather than the exception.”). Moreover, “if most U.S. lawyers were multilingual, this would enhance the prospects for successful projects of transnational judicial engagement.” *Id.* at 134.

91. See *id.* at 129–36 (arguing that U.S. law schools invest very few resources in preparing their graduates to fashion legal arguments premised on comparative and international legal materials and noting that the general paucity of foreign language skills in the United States also seriously limits the ability of many U.S. lawyers to access foreign legal materials).

92. *Id.* at 130.

93. *Id.* at 132.

“cross-referencing” foreign constitutional law,<sup>94</sup> the U.S. system of legal education does almost nothing to prepare lawyers to research and brief arguments premised on foreign and international law.<sup>95</sup>

In fairness to Justice Breyer, one suspects that he would readily grant this point. But he would argue that this systematic failure to make significant investments in comparative and international legal competence is deeply problematic because U.S. federal and state courts are increasingly confronted with questions that implicate foreign and international law.<sup>96</sup> One could read *The Court and the World* as an extended argument for why these educational opportunities should be enhanced and as an indictment of the (inadequate) status quo in legal education. The problem, however, is that Justice Breyer’s point of view is not widely shared—either on the Supreme Court itself or within the federal and state courts more generally.<sup>97</sup> So long as Justice Breyer’s advocacy of devoting greater time and attention to foreign and international law is not embraced by his colleagues—on either the Supreme Court or the lower courts—law schools will not invest greater pedagogical resources into comparative and international law offerings.

It is also true that, from time to time, lawyers, particularly at the Supreme Court level, make arguments based on foreign and international law.<sup>98</sup> But without the ability to undertake original research into foreign legal systems—including more than a passing knowledge of the structure and operational realities of a foreign nation’s domestic courts—a judge risks professional embarrassment by relying on such arguments.<sup>99</sup> Simply put, considering foreign legal materials without any knowledge of the context in which a particular statute or legal precedent operates is fraught with peril.<sup>100</sup>

Justice Breyer’s arguments do not adequately address the capacity of U.S. judges to understand foreign law correctly—particularly in the lower

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94. See pp. 236–40.

95. Krotoszynski, *supra* note 90, at 129–32.

96. See pp. 236–37, 239–40.

97. See David S. Law, *Constitutional Convergence and Comparative Competency: A Reply to Professors Jackson and Krotoszynski*, 66 ALA. L. REV. 145, 150–54 (2014); see Law, *supra* note 12, at 1015–20 (discussing the role of legal education in facilitating comparative law competence, noting the structural difficulties that would be associated with greater reliance on comparative and international law by U.S. judges, and observing that the absence of a clear and consistent market signal from judges and clients that such competencies matter make serious reforms very unlikely).

98. See Krotoszynski, *supra* note 90, at 134–35.

99. Krotoszynski, *supra* note 33, at 1325 (“[H]ow 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?”). It follows, accordingly, that “reading a text as nothing more than a text risks grave misunderstandings that could prove embarrassing to the borrowing court.” *Id.*

100. *Id.* at 1340–42 (noting that even well-traveled, highly cosmopolitan jurists often lack important information about the structure and operation of foreign courts and arguing that “lack of familiarity with the means of selection, composition, rules of procedure, institutional duties, and institutional character of [foreign courts] raises some serious problems for the project of international judicial dialogue”).

federal courts and state courts.<sup>101</sup> To be sure, judges on the lower federal courts must muddle through when cases appear at bar that require consideration of foreign law. And, again, Justice Breyer mounts a highly persuasive argument that such cases arise with increasing frequency in contemporary federal courts (pp. 3–4).

Justice Breyer does observe in passing that comparative capacity problems exist and would need to be addressed in order for U.S. courts to engage in “cross-referencing” foreign law more frequently (p. 6). He asks, “How, for example, is the Court to obtain the information about foreign law, legal practices, and circumstances that will allow it to reach sound legal decisions?” (p. 6). This constitutes a crucial preliminary question that goes to the capacity of the federal and state courts to understand foreign law with sufficient clarity for it to be a reliable aspect of the decisionmaking process.<sup>102</sup>

Indeed, there are countries, like South Africa, South Korea, and Taiwan, where the national judiciary invests significant institutional resources in developing comparative law competence and expertise.<sup>103</sup> Professor David Law has written lucidly about “judicial diplomacy” as practiced in some of these polities.<sup>104</sup> Essentially, in order to engage with foreign law, one has to develop and maintain institutional capacities for engaging in comparative law research at a high level. In the United States, of course, such investments are, at best, quite meager. Law school curricula generally give scant attention to foreign and comparative law. The meager investment in comparative law research continues with the resources that lawyers invest in developing comparative law arguments on behalf of their clients and the resources available to federal and state judges to research and understand foreign law.<sup>105</sup>

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101. See Mark Tushnet, Essay, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1294–99 (2006) (discussing an incomplete, and arguably erroneous, description of Germany’s system of federalism in Justice Breyer’s dissenting opinion in *Printz v. United States*, 521 U.S. 898 (1997), and the larger problems associated with judges misunderstanding or misinterpreting foreign law).

102. *Id.* at 1296–99 (noting that “[m]istakes . . . are obviously bad” and positing that they may well be unavoidable because of the natural tendency to seek out and find “the commonality of legal problems between countries” even where it does not really exist).

103. See Law, *supra* note 12, at 945–49, 958–62 (discussing Japan’s efforts to develop comparative legal proficiency); *id.* at 1025 (discussing the global influence of the South African Constitutional Court); *id.* at 964–76 (discussing South Korea’s approach); *id.* at 978, 980–85 (discussing Taiwan’s approach); see also David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 523–25, 559–63 (2011) (discussing the substantial institutional investments that the Taiwanese Constitutional Court makes in order to consider foreign and international law effectively when interpreting Taiwan’s constitution, including hiring foreign law clerks, promoting foreign legal studies by Taiwanese jurists, and maintaining an active and engaged judicial research institute that brings foreign legal experts to Taipei).

104. Law, *supra* note 12, at 1003–09.

105. Krotoszynski, *supra* note 90, at 129–39.

Moreover, federal law currently prohibits Article III judges from using public funds to hire noncitizens as law clerks.<sup>106</sup> Accordingly, and as Professor Law has observed, “in a country where it has become illegal for any federal court to hire foreign law clerks, the prospect of adopting such mechanisms seems rather dim.”<sup>107</sup> Even if a federal judge sought to enhance the comparative law competence of her chambers by hiring a foreign law clerk who was trained abroad, Congress has prohibited this means of obtaining greater comparative law competence in chambers. That Congress has taken this step also demonstrates, if not outright hostility to enhanced comparative law resources for the federal courts, then at least very strong indifference to it.

As a structural matter, no procedures or advocacy infrastructures exist to support a more deliberate and systematic turn toward comparative law in U.S. domestic law (whether at the constitutional or subconstitutional levels). Although Justice Breyer frankly and forthrightly acknowledges the problems of understanding foreign law correctly (p. 6), he fails to offer any realistic solutions. In sum, even if one could mount a persuasive normative case for U.S. domestic courts engaging foreign and international law in all cases, rather than only in cases specially calling for consideration of such materials, a serious practical difficulty would remain.

#### CONCLUSION

Linnaean taxonomy brought order and predictability to the study of the natural world; a more carefully theorized and operationalized approach to determining when U.S. domestic courts should consider foreign and international law likewise would bring needed clarity and consistency to judicial practices regarding this important question. *The Court and the World* demonstrates the critical necessity of undertaking this project. For better or for worse, and as Justice Breyer persuasively argues, legal globalization is an existing, real-world phenomenon and not merely an academic or theoretical question.

On the other hand, however, one should not draw overly broad conclusions from existing examples of domestic courts considering foreign and international legal materials. As Aristotle observed, “[O]ne swallow does not

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106. See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 704, 123 Stat. 3034, 3205–06 (2009) (providing that “no part of any appropriation . . . shall be used to pay the compensation of any officer or employee of the Government of the United States” who is not a citizen, a permanent resident “seeking citizenship,” a refugee who plans to pursue citizenship, or “a person who owes allegiance to the United States”).

107. Law, *supra* note 97, at 150. Hiring foreign law clerks would be one easy and obvious way of obtaining relevant comparative law expertise and constitutes a method used by some constitutional courts that routinely seek to cross-reference foreign law when deciding domestic constitutional questions. See Law, *supra* note 12, at 939–42. But cf. *id.* at 1016 (noting that “[t]he United States does not boast an enormous pool of scholars who specialize in comparative constitutional law or attorneys with training in foreign constitutional law” and observing “[n]or is it easy to import the necessary expertise, as Congress has by statute barred the hiring of foreign lawyers as law clerks”).

make a summer.”<sup>108</sup> Accordingly, the fact that domestic courts consider foreign and international legal sources out of necessity, in discrete subsets of cases involving the territorial scope of domestic statutes<sup>109</sup> and the application of international law,<sup>110</sup> simply does not support a generalized claim that U.S. judges should routinely consider these materials in *all* cases—much less seek to harmonize U.S. constitutional rights with foreign human rights regimes.<sup>111</sup>

Because consideration of foreign law is necessary in some instances, a critical need arises to disentangle conflict-of-laws problems, as well as questions rooted in international law, from more general claims about a globalized system of law. We need a system of descriptive rules—a taxonomy—that accurately and reliably identifies cases that require consideration of foreign and international law and those that do not. A new taxonomy of transnational judicial engagement could help to separate legal disputes that require domestic courts to have recourse to foreign and international law from those that do not. Arguing about recourse to foreign or international law when such recourse is required as a practical matter—and enjoys the imprimatur of the political branches in any event—is a fool’s errand. Judges, lawyers, and legal academics should instead work constructively toward creating a taxonomy of transnational judicial engagement—the comparative and international law equivalent of the Linnaean system of binomial nomenclature.<sup>112</sup>

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108. See ARISTOTLE, NICOMACHEAN ETHICS 12 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000) (c. 350 B.C.E.) (“For one swallow does not make a summer, nor one day. Neither does one day or a short time make someone blessed and happy.”). Aristotle’s point is that one should take care not to place too much weight on specific phenomena which, although accurate when viewed individually, do not necessarily support broader, generalized conclusions. In the specific context of domestic courts considering foreign and international legal materials, this means that recourse to such materials in cases that demand their consideration does not necessarily also support considering such materials in cases that do not.

109. See pp. 95–133.

110. See pp. 167–235.

111. *But cf.* pp. 236–40 (advocating U.S. courts “cross-referencing” foreign and international law materials when deciding legal questions arising under the Constitution and laws because “[f]oreign as well as domestic experience can be of help in understanding the commands of American sovereigns, whether federal or state, that have enacted the particular legal phrase in question”). Justice Breyer also posits that “[c]ross-referencing is more likely to advance [U.S. constitutional] values than to undermine them.” P. 246.

112. See generally Miller, *supra* note 4, at 1–2, 9–13 (discussing Linnaean taxonomy and its use in comparative legal scholarship). Plainly, cross-referencing borne of necessity versus cross-referencing borne of judicial curiosity represents one possible line of demarcation. I would not, however, want to foreclose the possibility of others; there might well be other circumstances in which a U.S. court could be justified in considering foreign or international law. For example, Professor David Fontana suggests that domestic courts should consider comparative and international legal materials in cases that present close questions using solely domestic legal materials. See Fontana, *supra* note 40, at 556 (“A judge should consider using comparative constitutional law when the American sources do not provide a clear answer to a question the judge must answer (whether factual or legal).”). Of course, Fontana’s approach stops just short of an argument for using comparative legal analysis when it is unavoidable. Limiting comparative legal analysis to “close cases” presents a much narrower proposal than



Finally, it is difficult to fault the logic of Justice Breyer's advocacy of transnational judicial engagement to advance rule-of-law values globally—a practice that he characterizes as “judicial exchange.”<sup>113</sup> After all, “[i]t is above all the need to maintain a rule of law that should spur us on, jurists and citizens, at home and abroad, to understand these challenges and to work at meeting them together” (p. 284). As economic and social globalization advance at an ever-quicken pace, U.S. national interests will clearly benefit from the diffusion of rule-of-law values across national borders.

Thus, even if our domestic approach to safeguarding fundamental human rights, such as freedom of speech and reproductive rights, should rely primarily, perhaps even exclusively, on the traditions, practices, and beliefs of the American people, efforts to work cooperatively across cultures and jurisdictional lines to advance universal rule-of-law values constitute a game worth the candle. In this important context, *The Court and the World* mounts a highly persuasive argument that our national interests, as well as our core legal values as a nation and a people, point strongly in the direction of transnational engagement rather than ill-conceived efforts to maintain a posture of splendid isolation.<sup>114</sup> And, once again, a better taxonomy for legal globalization can and would help to distinguish entirely appropriate efforts by U.S. judges to advance rule-of-law values through dialogue with judicial colleagues abroad from politically fraught, and institutionally questionable, efforts to engraft foreign legal norms and procedures into U.S. constitutional law.

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Justice Breyer's more open-ended calls for “cross-referencing” (pp. 239–41, 245–46) and “harmony” (p. 155). Attempting to identify other plausible circumstances in which cross-referencing might be justified lies beyond the scope of this work; however, the fact that I have not identified multiple circumstances justifying consideration of foreign and international law does not mean that such circumstances do not exist.

113. See pp. 247–51, 280.

114. Of course, one might reasonably wonder whether the business of exporting rule-of-law values and a strong commitment to human rights is a task best undertaken by federal judges or, in the alternative, by the elected political branches of the federal government. In fact, many of the examples of judicial diplomacy that Justice Breyer invokes took place “[w]ith the active help of the State Department.” P. 249. On the other hand, however, “organized exchanges with members of [foreign] supreme courts,” p. 250, seem best organized and directed by the federal judiciary itself. The case for transnational interjudicial engagement seems considerably stronger than the case for judges serving more generally as roving international advocates for U.S. legal values and principles in “the sustained struggle against [government] arbitrariness.” P. 280.