THE SUPREME COURT AND INTERNATIONAL RELATIONS THEORY

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I. INTRODUCTION

> [W]hat could be more exciting for an academic, practitioner, or judge, than the "global" legal enterprise that is now upon us? Wordworth's words, written about the French Revolution, will, I hope, still ring true: "Bliss was it in that dawn to be alive/ But to be young was very heaven."
>
> *United States Supreme Court Justice Stephen Breyer*[1]

It is a commonplace amongst historians of the United States Supreme Court that, when it is considered over the long term, constitutional doctrine has been shaped in important ways by non-doctrinal currents of political and social thought. The Marshall Court, for instance, was suffused with the nationalist vision that characterized the Chief Justice's Federalist Party, of which he was a leading light.[2] During his tenure, Marshall's successor, Roger Taney, struck key Jacksonian themes.[3] In both cases, the outside

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[1] Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., The Supreme Court and the New International Law, Speech at the American Society of International Law 97th Annual Meeting (Apr. 4, 2003), (transcript available at http://www.humanrightsfirst.org/us_law /inthecourts/Supreme_Court_New_Interl_Law_Just_Breyer%20.pdf) [hereinafter Breyer, The New International Law]; Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., Dinner Speech at the International Symposium Co-Sponsored by New York University School of Law and the Law Library of Congress: "Democracy and the Rule of Law in a Changing World Order" 6 (Mar. 9, 2000) (transcript on file with author) [hereinafter Breyer, Democracy and the Rule of Law].

[2] Samuel R. Olken, *Chief Justice Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 754 (2000) (documenting Marshall's leadership role in the Federalist party); G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 781, 809 (2000) (explaining that the Marshall Court has historically been characterized as "'nationalistic,' 'Federalist,' . . . and 'Chief Justice-dominated'").

[3] Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early*

influences on doctrinal development within the Court reflected the political and constitutional visions of the predominating political parties. But this need not be a matter of partisanship pure and simple. Perhaps the most famous instance of social thought suffusing the jurisprudence of the Court took place in the late nineteenth (and early twentieth) century, when the Court repeatedly sounded Darwininian themes, prompting Justice Holmes's famous protest that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[4]

Since the "Constitutional Revolution" of 1937[5], however, there has been relatively little discussion of the ideological visions that have informed the Court's jurisprudence.[6] This is particularly the case when those visions were broadly consonant with the imperatives of the New Deal/Great Society regime itself, and its attendant notions of progress.[7] While there have been a few scattered exceptions, the discussions of ideology that have given rise to career-making research agendas in the contemporary legal academy have focused on capitialism, racism, sexism, and heteronormativity—they have emerged, that is, from the liberal-left. For liberal legalists, the 1937 transition is understood as the breakthrough that removed the barriers of ideology from constitutional jurisprudence.[8] What came after 1937 was a pragmatic, "living constitutionalism," or a constitutionalism that took into account what, as a practical matter, was necessary, given changing times and circumstances.[9] It was, in

Implementation of and Departures from the Constitutional Plan, 86 COLUM. L. REV. 1515, 1617 (1986) (stating that "[t]he decisions of the Taney Court reflected the politics of their day, which included growing distrust of the strength and independence of the federal courts—a position obviously fueled by the notions of Jacksonian democracy then sweeping the country.").

[4] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[5] The term "Constitutional Revolution" refers to the shift in the Supreme Court's focus from "property rights" to "civil liberties and other personal rights." WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 235 (1995). Beginning in 1937, the Supreme Court consistently upheld New Deal legislation. *Id.* at 216, 220. This legislation has been described as "putt[ing] the United States on the road toward the Welfare State." *Id.* at 214.

[6] KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 6–7, 11 (2004).

[7] *See id.* at 3 (positing that "constitutional thinking for most of the last century was written under the intense gravitational pull of the New Deal revolution"); Theodore J. Lowi, *The State in Political Science: How We Become What We Study*, 86 AM. POL. SCI. REV. 1, 5 (1992) (emphasizing the "failure [of political scientists] to catch or evaluate adequately the ideological sea changes accompanying the changes of regime").

[8] *See* KERSCH, *supra* note 6, at 1–2.

[9] *See id.* at 2 (characterizing "the new constitutional scholarship . . . [as] heavily implicated in the political project of justifying, institutionalizing, and (as conditions worked to decay its

other words, a constitutionalism freed of the ideological fetters of a bygone political era. In many respects, this state of affairs has been a hold-over of the old New Deal liberal regime: liberals and leftists do not have ideologies, they see through them.[10] For this reason, legal scholars, most of whom see the world as partisans of the New Deal/Great Society political regime, as a group, are relatively slow to identify the currents of social and political thought[11]—viewed as social and political thought rather than, simpliciter, contributions to a scholarly literature—that are most likely to have profound effects on the future development of constitutional doctrine. Amongst these is the recent "globalist" turn by the Supreme Court in deciding domestic constitutional cases.[12]

To date, legal academics, whether criticizing or defending it, have treated this trend primarily as a question of interpretive theory.[13]

foundations) defending the New Deal constitutional regime.").

[10] Liberal/left constitutional visions are depicted as "unmasking" ideologies rather than ideologies themselves. Conservative thought, by contrast, is commonly depicted as an "ideology." *But see* RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953–1993, at 102–03, 207 (1994) (tying the jurisprudence of the Warren and Burger Courts to the broader pluralist understanding of politics of contemporary political science); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 9–10 (1996) (arguing that "legal and political liberalism affected the way law professors wrote about the Supreme Court from the 1930's until the 1970's"); KERSCH, *supra* note 6, at 1–2 (charting the relationship between twentieth century constitutional doctrine concerning civil liberties and a succession of reform imperatives); RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 221, 224 (1999) (arguing that Warren era conceptions of rights were forged in reaction to the specific social and political practices of the time); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 11–12, 235–36 (1973) (tracing the effects of the rise of philosophical pragmatism and scientific naturalism on the trajectory of twentieth century American law). *See also* S.M. AMADAE, RATIONALIZING CAPITALIST DEMOCRACY: THE COLD WAR ORIGINS OF RATIONAL CHOICE LIBERALISM 1–4 (2003) (arguing that the development of rational choice approach to the study of law, economics, and politics was motivated by efforts to win the ideological battle of the Cold War); THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 276–83 (2004) (explaining the relationship between the Rehnquist Court's jurisprudence and broader currents of conservative political thought); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937 250–51 (1998) (explaining the Supreme Court's late nineteenth and early twentieth century formalism as a highly ideological effort by an entrenched economic and political elite to preserve their power and privilege); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics*," 33 J. LEGAL EDUC. 274, 281 (1983) (discussing liberal ideology and the notion of "fixed rights").

[11] *See* John O. McGinnis, et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1168, 1190, 1202–03 (2005) (noting the predominance of liberal viewpoints among law professors and arguing in favor of ideological diversity in legal scholarship).

[12] *See* Breyer, The New International Law, *supra* note 1.

[13] *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 641, 644 (2005) (arguing that the "legitimacy of constitutional comparativism should be determined by constitutional theory" and examining the methodology under

"Originalists" like Justice Scalia oppose it because to look abroad in the way that has been done in recent Supreme Court decisions is to look to sources of law (whether binding or not)[14] that are not relevant to ascertaining the original meaning of the constitutional text. On the other hand, most defenders of the practice tend to follow Justice Stephen Breyer (in particular) by focusing on its "pragmatic" value—justices look abroad because, in doing so, they see how judges in other countries have gone about solving similar constitutional "problems."[15]

While a large and growing number of scholars have begun to address questions of international influences on the United States Supreme Court, including its burgeoning enthusiasm for citing foreign practices and precedents in reaching decisions involving traditionally domestic areas of constitutional law (such as federalism, gay rights, affirmative action, and the death penalty—as opposed to international trade and admiralty cases), I will argue here that the focus on recent trends in this area as an issue of interpretive theory, a focus natural to most law professors, has obscured a whole range of "diplomatic" justifications for the practice that are discussed openly, and indeed, garrulously, by the Court's justices themselves.

In this article, I will take the justices at their word as to why they are moving in this direction. Once one does so, it becomes apparent that the new trend is in part motivated and framed by broader understandings of foreign policy which are playing an increasingly prominent role in the broader, non-legal currents of American social and political thought. Over the course of the next half-century, it is quite possible that these foreign policy visions, rooted in theories of international relations in an age of globalization, will come to have effects on the development of American constitutional doctrine that are similar in scope and influence to the effects that the social Darwinist vision had on that doctrine in the late nineteenth and early twentieth centuries.

My goal here is not to "prove" any sort of connection between

originalism, natural law, majoritarianism, and pragmatism).

[14] Of course, as John McGinnis has reminded us in this symposium, even Supreme Court precedents are not binding in this regard. *But see* Richard A. Posner, *The Supreme Court 2004 Term, Foreward: A Political Court*, 119 HARV. L. REV. 31, 85 (2005) (arguing that these sources are being cited as authoritative); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 156 (2005) (likewise arguing that foreign practices are being cited as authoritative).

[15] *See* Breyer, The New International Law, *supra* note 1.

these recent tendencies on the Supreme Court and the foreign policy visions I set out here (such as by finding articles on foreign policy cited in judicial opinions, or clipped and kept in justices' private papers, or, at once remove, in amicus briefs submitted to the justices). It is rather to imagine the ways in which these ideas, if influential, might affect the way a judge understands his or her judicial role. The influence of these ideas will be evident in patterns of thought and behavior, and, as such, are suggestive.

It is not at all necessary that judges influenced by these frameworks either cite them explicitly in their decisions or, ultimately, within their private papers. Indeed, it is not even necessary that they have read them, in the form of books or academic articles or otherwise. The more significant ideas are in social thought, the more they are simply "in the air," and are picked up, often unconsciously, in ways that frame a broad range of discussions. As such, these ideas may be adverted to in simplified or popular form, and they may become influential as they are transformed into a set of instincts or prejudices.

A word on interest is perhaps in order here. Approaching this issue as a matter of ideas inevitably subjects one (at least within political science) to the charge that the ideas are really epiphenomenal. What really matters, the bedrock explanation, is really interest. Some may counter the suggestions I offer here with the assertion that, in citing foreign practices and precedent, judges are not following any broader theory, vision, or understanding of international relations, but rather pursuing their own interests, whether that involves maximizing their institutional power (as judges on courts within the broader framework of domestic government vis-à-vis the domestic legislature, the bureaucracy, and the executive), either as a general matter or with the aim of advancing their own pre-existing policy preferences on particular issues (by looking around the world and "picking out their friends" in cases involving the death penalty, gay rights, and affirmative action). In these ways, the increasing number of allusions to foreign practices, precedents, and opinions in domestic constitutional cases is neither evidence of a new form of judicial motivation, nor of any real significance in altering legal outcomes.

While I am sympathetic to this line of argument in many respects, I do not think this by any means should lead us to the conclusion that ideas (and, especially, the ideas I take up here) are not worth examining. For complicated reasons that others have discussed at

length (and, accordingly, I will not trouble to take up here), it seems obvious to me that ideas and interests work hand-in-hand. Ideas that have no connection to interest, of course, are not likely to be very influential ideas. As I see it, ideas justify interests, and ideas construct interest. Interests, in turn, also spur the construction of ideas. My goal is not to argue that ideas predominate over interests. It is simply to identify the nature and range of ideas that I believe to be currently interacting with the dynamics of institutional and individual interest.

I should also say that the descriptions I provide of the various approaches to international relations here are rudimentary—and even stock—sketches. I am by no means an expert in this area. And I draw those descriptions from a few short, schematic overviews provided for general readers by a few highly-respected international relations theorists. For my limited purposes here, these rudimentary descriptions will do.[16]

My objectives in this brief article are modest. I will first set out for constitutional law scholars concerned with this issue the three main paradigms that inform the way most contemporary scholars understand international relations: realism, liberalism, and constructivism/idealism.[17] I will venture some observations about how the way contemporary justices of the Supreme Court talk about their decision to make greater efforts to look abroad in deciding domestic constitutional cases seems to reflect "diplomatic"

[16] I came to this topic from a very different route than many others. I am a student of Justice Breyer, and I am writing a book in which I aspire to understand his jurisprudential approach and the way he sees the world. His worldview seems very much influenced by the sorts of considerations I discuss here. I come to the topic, that is, from the perspective of a student of contemporary legal and political *thought* (as opposed to theory). *See generally* Ken I. Kersch, *The Synthetic Progressivism of Stephen G. Breyer*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 248–50 (Earl Maltz ed., 2003) (describing Justice Breyer's willingness to look to science, the legislature, and abroad to promote judicial competence); Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 760–61 (2006) [hereinafter Kersch, *Justice Breyer's Mandarin Liberty*] (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (manuscript on file with author)).

[17] Sophisticated scholars of international relations, like my colleague Andrew Moravcsik, are now criticizing the notion that these paradigms are hermetically separate categories. *See* Andrew Moravcsik, *Theory Synthesis in International Relations: Real Not Metaphysical*, 5 INT'L STUD. REV. 131, 131 (2003) (arguing that "theories [in international relations] ought to be treated as instruments to be subjected to empirical testing and theory synthesis"). I stick to the traditional lines of demarcation here primarily for simplicity of exposition, and because these categories remain in widespread use. As someone who has not considered the question at any length, I take no position on the propriety or usefulness of such a synthesis. Those legal scholars whose primary interest is in international law, and not domestic constitutional law, will already be quite familiar with these paradigms.

considerations that are parallel to those offered in these paradigms. (It is important to note that the relationship between the broader paradigms and the behavior of the justices in this regard is much more apparent in their off-the-bench speeches and casual comments than in the actual opinions themselves). I follow the description of each international relations paradigm with a brief illustrative taxonomy of statements by the justices that demonstrates the diverse justifications they have offered for their globalist turn.

II. INTERNATIONAL RELATIONS PARADIGMS

A. Realism

Realists are international relations traditionalists. They believe in the primacy of sovereignty and the centrality of nation-states in the international sphere.[18] Moreover, they look at these states as, at the most basic level, power-seeking and interest-pursuing entities.[19] "At realism's core is the belief that international affairs is a struggle for power among self-interested states."[20] This perspective is a Hobbesian vision.[21] As such, it sees contention, conflict, and struggle as central to the international order.[22] It also sees all three as perpetual—and inevitable.[23]

Traditional foreign policy realism has little or no place for values and normative considerations in its outlook.[24] Most realists treat states as essentially interchangeable, power-seeking entities, all of which play by the same set of rules—rules that apply to *states qua states*.[25] So far as their behavior in the international arena is

[18] JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 17–18 (2001).

[19] *Id.* at 18.

[20] Jack Snyder, *One World, Rival Theories*, FOREIGN POL'Y, Nov.–Dec. 2004, at 52, 55.

[21] *Id.* at 56.

[22] *See, e.g.*, HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 25 (4th ed. 1967) ("International politics . . . is a struggle for power.").

[23] *Id.* at 3–4; MEARSHEIMER, *supra* note 18, at 2. For examples of the realist vision, see HENRY KISSINGER, DIPLOMACY 29–30, 38–39 (1994); MEARSHEIMER, *supra* note 18, at 4–5; MORGENTHAU, *supra* note 22, at 3–4; KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 117 (1979) [hereinafter WALTZ, INTERNATIONAL POLITICS]; KENNETH N. WALTZ, MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS 7, 159, 216 (1959) [hereinafter WALTZ, MAN, THE STATE AND WAR]. *See generally* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 49 (Rex Warner trans., Penguin Books 1972) (1954) (noting that war between the Greek states was bound to occur because of the rise in power of Athens on the international stage).

[24] *See* MORGENTHAU, *supra* note 22, at 10 (noting that moral values divorced from the reality of the world cannot be applied to state action).

[25] *See* MEARSHEIMER, *supra* note 18, at 17–18 (finding that realists view states as the primary actors in international relations, but asserting that the international behavior of a

concerned, international relations realists do not draw any significant distinctions between democratic and non-democratic states.[26]

This does not mean that all thinkers who begin within the realist framework find values to be irrelevant. Foreign policy realism in certain incarnations (that is, in its less pure forms) can have a prescriptive, normative dimension. For realists, it is perfectly legitimate for states to pursue the interests of their citizens—and sometimes contentiously, in the international arena.[27] It is "legitimate," though, not because it is morally right as a matter of the application, *a priori*, of some moral theory of proper behavior, but because that is all states can do and will do, either because that behavior is inherent in the nature of a state,[28] or because the international system is structured so as to require that they behave that way.[29] We might even say that not only do states behave this way, they *should* behave this way. Working to advance the self-interest of the people of a sovereign state is part of the normal duties of governments, in addition to being part of their ordinary practice. This duty is, of course, all the more justifiable (albeit on non-realist grounds) if it involves democratic states.[30]

Foreign policy realists are believers in realpolitik.[31] They tend to be skeptical about the ability of international law and international institutions to constrain states seeking to advance their own interests. They tend to view both as instruments of powerful, and power-seeking, states. Those states will leverage international law and international institutions as much as possible to yield the maximum benefits for themselves while, at the same time, manipulating them to constrain challenges to their interests from

state is driven by the international environment and not the internal politics of the individual state).

[26] *See id.* (explaining that according to realists "all great powers act according to the same logic regardless of their culture, political system, or who runs the government").

[27] *See generally* MORGENTHAU, *supra* note 22, at 25 (describing the quest for power as the normal behavior of a state in bettering its own interests).

[28] *Id.*

[29] *See* WALTZ, MAN, THE STATE AND WAR, *supra* note 23, at 6–7, 12, 159 (noting that in international conflict a state must sometimes resort to war to address its "grievances and ambitions").

[30] *See* JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 68 (2005) (reasoning that a sovereign state must secure the loyalty of its people by governing in the way the people expect to be governed).

[31] *See* WALTZ, MAN, THE STATE AND WAR, *supra* note 23, at 216 (describing realpolitik in international relations as the necessity of actions to advance "the security of the separate states"—a position foreign policy realists would support).

rival states in the international arena. In this Hobbesian vision, international relations realists tend to view "hard" power—power exercised most importantly by direct or implied military or economic coercion—as, by and large, the real power in international politics.[32]

Courts and judges, who have neither "the sword or the purse . . . but merely judgment,"[33] are not likely to loom large as important actors in a realist foreign policy vision that places its greatest emphasis on hard power rather than on law. Realists are likely to consider arguments about judicial globalization as something of a sideshow. This is especially the case where so-called "values" issues are at stake. Realists will tend to see those issues as implicating rhetoric more than reality. Judges may tend towards jawboning on these matters. In the end, however, that jawboning is likely to be of little concrete effect, at least so far as international relations are concerned.[34]

Foreign policy realists might favor judicial globalization—but only where the lines between some versions of it and liberalism become porous. If one holds to the view that, in the post-War era, an array of "constitutional" international institutions like the International Monetary Fund, Bretton Woods, and the World Bank were created and serve to advance the interests of the era's hegemonic state—the United States—one could conclude that a globalized American judiciary is one way of augmenting American influence throughout the world, and hence American power. From this perspective, a preoccupation by opponents of the citation by American judges of foreign practices and precedents emerging from within the hegemonic state can seem rather narrow-minded, and, indeed, inverted. The cost of these sometimes glancing references in Supreme Court opinions[35] (which few take to be matters of binding law)[36] is relatively minimal. At the same time, the benefits of having American judges working with their counterparts overseas more routinely are clear: such interactions will work to expand

[32] MORGENTHAU, *supra* note 22, at 26–29; JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 5 (2004) (describing "hard power" as "military and economic might" that persuades "others to change their position").

[33] THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[34] *See id.* (noting that an independent judiciary does not have the authority to legislate policy or to engage in military actions).

[35] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing a 1981 European Court of Human Rights decision).

[36] *See, e.g.*, Knight v. Florida, 528 U.S. 990, 997–98 (Breyer, J., dissenting from denial of certiorari) (advocating the "useful[ness]" of foreign precedent while affirming that such precedents are "not binding" on United States courts).

American influence outwards. Put otherwise, realists will see American judges operating globally as agents of American power. To be sure, a realist—who looks at the world through the prism of force—would likely be skeptical about the ability of American judges to persuade judges in other states to adopt policies that advance American interest against the interest of their own countries. Judges, after all, wield "soft" rather than "hard power"—that is, they work by providing information, prestige, and persuasion.[37] That said, while realists might not place any great faith in an increasingly globalized judiciary, they might not view it as any great danger, either.

Of course, realists might just as easily view things from precisely the opposite perspective. Realists are the chief proponents of traditional "balance of power" theory in international relations.[38] As described by Jack Snyder, "[s]tandard realist doctrine predicts that weaker states will ally to protect themselves from stronger ones and thereby form and reform a balance of power."[39] As such, realists could just as likely see efforts to appeal to international law, international institutions, and emerging global standards as means used by weaker and rival powers (such as the European Union) to constrain the United States.[40] The manifestations of such dynamics, however—and they are particularly relevant in the courts—would not fit readily into standard definitions of realism. Snyder writes:

> The United States' strained relations with Europe offer ambiguous evidence [for the descriptive and predictive value of foreign policy realism]: French and German opposition to recent U.S. policies could be seen as classic balancing, but they do not resist U.S. dominance militarily. Instead, these states have tried to undermine U.S. moral legitimacy and constrain the superpower in a web of multilateral institutions and treaty regimes—not what standard realist theory predicts.[41]

In the end it is hard to imagine realists believing that American judges (who are, after all, state actors) would ultimately act in the interest of outside states seeking to challenge and constrain the

[37] *See* NYE, *supra* note 32, at 6, 31 (describing some examples of "soft" power).
[38] Snyder, *supra* note 20, at 56.
[39] *Id.*
[40] *See* ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 4–5 (2003) (observing that Europeans are more likely than Americans to call upon international "commercial and economic ties to bind nations together").
[41] Snyder, *supra* note 20, at 56.

pursuit of American interests, at least in the long term. Federal judges may be relatively independent so far as government actors go.[42] But if they appear to be acting against American interests in the service of foreign powers, pressure will nevertheless be brought to bear on them. The recent enthusiasm on the Supreme Court for citing foreign practices and precedent has sparked both public criticism and, more concretely, suggestions that, were these trends to continue and develop, impeachment might be an option.[43] As this behavior becomes more prominent, political parties will take a position on it in increasingly public ways. If judges come to be perceived as siding with foreign powers (like the Europeans) in balance of power situations, appointees for the Court will be vetted for their views on the matter and questioned about it in their confirmation hearings before the U.S. Senate—just as Chief Justice John Roberts and Associate Justice Samuel Alito were vetted during their confirmation hearings.[44]

One of the conceptual problems here, of course, is determining when a globalized American judge is acting against United States

[42] Unlike any other federal officials, they serve with life tenure on good behavior. *See* U.S. CONST. art II, § 2, cl. 2 (reserving the power to appoint judges to the President); U.S. CONST. art. III, § 1 (providing life tenure to Article III judges "during good Behavior"). For a comparison of judges and other federal administrators as an institutional matter see Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 141 (Kahn & Kersch eds., 2006) (arguing that federal courts should be viewed as analogous to other institutions whose officeholders are appointed rather than elected). For a discussion of courts and judges as instruments of the central state, see KERSCH, *supra* note 6, at 338 (observing that courts in the United States have become a part of the centralized administrative and bureaucratic features of a central state); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17, 20, 24, 26 (1981) (describing the roles of the courts in "administering" state functions and "social control").

[43] *See, e.g.*, H.R. Res. 97, 109th Cong. (2005) (expressing disapproval of the use of foreign precedents by the judiciary); S. Res. 92, 109th Cong. (2005) (same); Carl Hulse & David D. Kirkpatrick, *Delay Says Federal Judiciary Has 'Run Amok,' Adding Congress is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21 (quoting Congressional staff members saying that "mass impeachment" of judges may be in order); Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 11, 2005, at A3 (noting the belief of some conservatives that judges following foreign law should be impeached); Luiza Ch. Savage, *Legal Aliens: A Conservative Movement Says the Supreme Court Is Getting Too Chummy with Foreigners*, BOSTON GLOBE, Mar. 20, 2005, Ideas section (highlighting the criticism that legal scholars have directed at judicial references to foreign authority).

[44] *Nomination of Judge John G. Roberts, Jr., of Maryland, to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 292–93 (2005) (statement of Sen. Tom Coburn, Member, Senate Comm. on the Judiciary) (questioning John Roberts on his views on citing foreign court precedent); Warren Richey, *Cautious Alito Follows Roberts's Script in Quest for Supreme Court Spot*, CHRISTIAN SCI. MONITOR, Jan. 13, 2006, at 3 (noting Alito's stated opposition to the use of foreign legal precedents during his confirmation hearing).

interests by alluding to foreign practices and precedents in domestic constitutional decisions. There is a certain circularity in arriving at the determination. If one starts from the realist presumption that state actors (including judges) will, ultimately, and on balance, act in the state's interest in the international sphere, then whatever a judge does will be viewed, by definition, as in the state's interest.[45] If an American judge like Antonin Scalia rejects global standards, or even global references, for example, in holding the death penalty for juveniles[46] or the mentally retarded to be constitutional,[47] or holding laws restricting hate speech unconstitutional,[48] he can be presumed to be defending the prerogatives of American sovereignty, power, and interest. If that same judge consults foreign practices and precedents, but ultimately rejects their applicability to the case before him (what Anne-Marie Slaughter has called "informed divergence"[49]), he can also be seen to be acting in America's interest. And if the judge follows the foreign practice or precedent, and in the process pleases transnational activists, the officials of international institutions, and diplomats and judges in foreign capitals, he can also be seen as advancing American interests.[50] This is particularly the case for that subset of realists who believe that power can be pressed too far, that part of the strategy behind staying on top as a state involves the judicious forswearing of power, in cases in which that helps to maintain one's dominance.[51]

Foreign policy liberals and foreign policy constructivist/idealists (to be discussed next) have a place in their views for courts and judges, and consider their role in the emerging international order as a significant one. Foreign policy realists do not. Moreover, even

[45] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 167 (2004) (describing how the different "government networks" work to enhance "world order" through their various activities).

[46] Roper v. Simmons, 543 U.S. 551, 608, 624–28 (2005) (Scalia, J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 364, 373, 377, 380 (1989) (considering only national standards in upholding the constitutionality of the juvenile death penalty).

[47] Atkins v. Virginia, 536 U.S. 304, 337, 347–48 354 (2002) (Scalia, J., dissenting).

[48] R.A.V. v. City of St. Paul, 505 U.S. 377, 391, 395–96 (1992) (holding law restricting hate speech to be unconstitutional based on American jurisprudential tradition but failing to reference international standards).

[49] SLAUGHTER, *supra* note 45, at 171–72.

[50] *Id.* at 5 (suggesting that even when "the United States is not dominant, its officials can show that they are in fact willing to listen and to learn from others").

[51] This is a position taken by what John Mearshimer has called "defensive realists." *See* Barry R. Posen, *The Best Defense*, 67 NAT'L INT. 119, 119 (2002) (reviewing JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001) (explaining that "'defensive realists' . . . believe that despite the condition of anarchy, states will stop well short of hegemony if geography or technology or social organization favors the defense")).

to the degree that (what might be a non-traditional) realist vision did take courts and judges and international law and institutions more seriously, it is not clear whether realism would favor judicial globalization or oppose it. Given its general skepticism about those institutions, its defense of sovereignty, and its emphasis on hard power, realists are more likely than not to oppose that globalization. But, for the most part, the bottom line for international relations realists is that courts and judges are likely to be beside the point. The Supreme Court's recent doodlings and gestures in this area are of no real significance—at least so far as the things international relations realists care most about are concerned. They are by no means beside the point, however, for international relations liberals.

B. Liberalism

Liberal theories of international relations hold that international peace and prosperity are advanced to the degree that the world's sovereign states converge on the model of government anchored in the twin commitment to democracy and the rule of law.[52] Liberal "democratic peace" theorists hold that liberal democratic states anchored in rule of law commitments are less aggressive and more transparent than other types of states.[53] When compared with non-liberal states, they are thus much better at cooperating with one another in the international arena.[54] Because they share a market-oriented economic model, moreover, international relations liberals believe that liberal states hewing to the rule of law will become increasingly interdependent economically.[55] As they do so, they will come to share a common set of interests and ideas, which also enhances the likelihood of cooperation.[56] Many foreign policy liberals—sometimes referred to as "liberal internationalists"—emphasize the role that effective multilateral institutions, designed by a club or community of liberal-democratic states, play in facilitating that cooperation and in anchoring a peaceful and

[52] Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 PHIL. & PUB. AFF. 205, 213 (1983) (arguing that international exchanges and mutual respect between liberal democratic states have formed effective and peaceful relationships).

[53] *See id.*

[54] *Id.* at 217; Michael Doyle, Letter to the Editors, *Michael Doyle on the Democratic Peace*, 19 INT'L SECURITY 180, 180 (1995).

[55] Snyder, *supra* note 20, at 56.

[56] *Id.*

prosperous liberal world order.[57]

The liberal foreign policy outlook is moralized, evolutionary, and progressive. Unlike realists, who make no real distinctions between democratic and non-democratic states in their analysis of international affairs, liberals take a clear normative position in favor of democracy and the rule of law.[58] Liberals envisage the spread of liberal democracy around the world, and they seek to advance the world down that path.[59] Part of advancing the cause of liberal peace and prosperity involves encouraging the spread of liberal democratic institutions within nations where they are currently absent or weak.[60] Furthermore, although not all liberals are institutionalists, most liberals believe that effective multilateral institutions play an important role in encouraging those developments.[61] To be sure, problems of inequities in power between stronger and weaker states will exist, inevitably, within a liberal framework.[62] "But international institutions can nonetheless help coordinate outcomes that are in the long-term mutual interest of both the hegemon and the weaker states."[63]

Many foreign policy liberals have emphasized the importance of the judiciary in helping to bring about an increasingly liberal world order. To be sure, the importance of an independent judiciary to the establishment of the rule of law within sovereign states has long been at the core of liberal theory.[64] Foreign policy liberalism, however, commonly emphasizes the role that judicial globalization can play in promoting democratic rule of law values throughout the world.[65] Post-communist and post-colonial developing states

[57] *Id.* at 56–57.

[58] *Id.* at 59.

[59] *Id.*

[60] *See* G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS 36 (2001) (noting that the "sturdiness of basic political institutions . . . determines [a nation's] strength as a constitutional order").

[61] *See, e.g.*, Snyder, *supra* note 20, at 56–59.

[62] *See* Snyder, *supra* note 20, at 58–59.

[63] *Id.* For examples of the liberal foreign policy outlook, see IKENBERRY, *supra* note 60, at 36–37; SLAUGHTER, *supra* note 45, at 5–7. See also the foundational work on liberalism, IMMANUEL KANT, PERPETUAL PEACE 9 (1932) (discussing the "international understanding . . . appreciation . . . [and] cooperation" necessary for "international peace").

[64] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 153, 156 (1960); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 50–51 (Thomas P. Peardon, ed., The Liberal Arts Press 1952) (1690); 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 81, 85, 91 (Thomas Nugent, LL.O trans., Robert Clark & Co., 1873). For some contemporary views, see JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 1 (Peter H. Russell & David M. O'Brien eds., 2001) [hereinafter JUDICIAL INDEPENDENCE]; JENNIFER A. WIDNER, BUILDING THE RULE OF LAW 41 (2001).

[65] SLAUGHTER, *supra* note 45, at 102.

commonly have weak commitments to and little experience with liberal democracy, and with living according to the rule of law, as enforced by a (relatively) apolitical, independent judiciary.[66] In these emerging liberal democracies, judges are often subjected to intense political pressures.[67] International and transnational support can be a life-line for these judges. It can encourage their professionalization, enhance their prestige and reputations, and draw unfavorable attention to efforts to challenge their independence.[68] In some cases, support from foreign and international sources may represent the most important hope that these judges can maintain any sort of institutional power—a power essential to the establishment within the developing sovereign state of a liberal democratic regime, the establishment of which liberal theorists assume to be in the best interests of both that state and the wider world community.[69]

Looked at from this liberal international relations perspective, judicial globalization seems an unalloyed good. To many, it will appear to be an imperative.[70] When judges from well-established, advanced western democracies enter into conversations with their counterparts in emerging liberal democracies, they help enhance the status and prestige of judges from these countries. This is not, from the perspective of either side, an affront to the sovereignty of the developing nation, or to the independence of its judiciary. It is a win-win situation which actually strengthens the authority of the judiciary in the developing state.[71] In doing so, it works to strengthen the authority of the liberal constitutional state itself. Viewed in this way, judicial globalization is a way of strengthening national sovereignty, not limiting it: it is part of a state-building initiative in a broader, liberal international order.[72]

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[66] *See* JUDICIAL INDEPENDENCE, *supra* note 64, at 2 (observing that "'peoples' democracies' or other kinds of authoritarian[] [governments] such as communism and colonial rule face problems in creating judicial independence"); MONTESQUIEU, *supra* note 64, at 83, 88.

[67] JUDICIAL INDEPENDENCE, *supra* note 64, at 1.

[68] *See* SLAUGHTER, *supra* note 45, at 99 (noting the importance of support from the international judicial community to judges in countries where judicial independence is threatened).

[69] *See* WIDNER, *supra* note 64, at 387–88 (describing cooperative efforts between the United States and Tanzania).

[70] *See* JUDICIAL INDEPENDENCE, *supra* note 64, at 1–3 (noting that "[i]n today's world, there is a general trend towards liberal democracy" and describing a need for a universal theory of "judicial independence" to meet this trend).

[71] *See* WIDNER, *supra* note 64, at 387–88 (describing problem-solving techniques acquired from international cooperation).

[72] SLAUGHTER, *supra* note 45, at 99, 101–02.

A liberal foreign policy outlook will look favorably on travel by domestic judges to conferences abroad (and here in the United States) where judges from around the world can meet and talk.[73] It will not view these conferences as "junkets" or pointless "hobnobbing." These meetings may very well encourage judges from around the world to increasingly cite foreign precedent in arriving at their decisions. Judges in emerging democracies will use these foreign precedents to help shore up their domestic status and independence. They will also avail themselves of these precedents to lend authority to basic, liberal rule-of-law values for which, given their relative youth, there is little useful history to appeal to within their domestic constitutional systems. Judges in established democracies, on the other hand, can do their part to enhance the status and authority of independent judiciaries in these emerging liberal democratic states by showing, in their own rulings, that they read and respect the rulings of these fledgling foreign judges and their courts (even if they do not follow those rulings as binding precedent).[74] They can do so by according these judges and courts some form of co-equal status in transnational "court to court" conversations.[75]

It is worth noting that mainstream liberal international relations scholars are increasingly referring to the liberal democratic international order (both as it is moving today, and indeed, as read backward to the post-War order embodied in the international institutions and arrangements of NATO, Bretton Woods, the International Monetary Fund, the World Bank, and others) as a "constitutional order," and, in some cases, as a "world constitution."[76] No less a figure than Justice Breyer—in a classic articulation of a liberal foreign policy vision—has suggested that one of the primary questions for American judges in the future will involve precisely the question of how to integrate the domestic constitutional order with the emerging international one.[77]

If they look at judicial globalization from within a liberal foreign

[73] *See id.* at 96.

[74] *See id.* at 99, 101.

[75] Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 708 (1998).

[76] *See* IKENBERRY, *supra* note 60, at 29, 36–37; SLAUGHTER, *supra* note 45, at 95 (discussing international efforts to improve global banking); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) (discussing the development of "world constitutionalism"); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 2, 33 (2005) (describing the influence of international law on the application of constitutional law).

[77] *See* Ken I. Kersch, *Multilateralism Comes to the Courts*, 154 PUB. INT. 3, 13, 18 (2004).

policy framework (whether or not they have read any actual academic articles on liberal theories of foreign policy), criticisms of "foreign influences" on these judges, and of their "globe-trotting" will fall on deaf ears. They will be heard as empty ranting by those who don't really understand the role of the judge in the post-1989 world. These judges will not understand themselves to be undermining American sovereignty domestically by alluding to foreign practices and precedents. And they will not understand themselves as (in other than a relatively small-time and benign way) as undermining the sovereignty of other nations. They will see the pay-off-to-benefit ratio of simply talking to other judges across borders, and to citing and alluding to foreign preferences (when appropriate, and in non-binding ways) as high. They will, moreover, see themselves as making a small and modest contribution to progress around the world, with progress defined in a way that is thoroughly consistent with the core commitments of American values and American constitutionalism. And they will be spurred on by a sense that the progress they are witnessing (and, they hope, participating in) will prove of epochal historical significance. Even if they are criticized for it in the short-term, these liberal internationalist judges will have a vision of the future which suggests that, ultimately, their actions will be vindicated by history. The liberal foreign policy outlook will thus fortify them against contemporary criticism.

As both John Baker and Mark Tushnet have observed in this symposium, as they fan out across the world and receive foreign visitors here at home, the justices may frequently understand themselves as diplomats, representing American values and explaining American practices to what is often an ignorant, misinformed, or hostile world.[78] If judges understand their ventures in this light, of course, they will understand the vehement attacks on them as being "infected" by their increasing interaction with foreign judges (and other foreign audiences) as seriously misguided. It will seem to them very clear that they are doing the country—and the broader liberal international order—an unambiguous service.

Recent statements by Justice Kennedy suggest that his inclination towards looking abroad in recent decisions is motivated

[78] In his remarks in this symposium, Professor Baker ventured that Chief Justice Rehnquist was aiming primarily at a foreign audience, and not a domestic one, in deciding to allow a radio telecast of oral arguments in the Guantanomo cases.

less by a particular interpretive theory than by what are basically liberal foreign policy inclinations. A recent profile of Kennedy in *The New Yorker* magazine by Jeffrey Toobin—which was based in part on a series of conversations with the Justice—noted that "Kennedy's first sustained encounter with foreign law came when he began to advise emerging democracies—including Czechoslovakia and Russia—on their constitutions and the rule of law."[79] Indeed, the Salzberg Seminar, at which Kennedy teaches comparative constitutionalism every summer,[80] was founded in 1947,[81] and was known colloquially as "the 'Marshall Plan of the Mind.'"[82] That is, it was aimed at setting up the sort of cultural and intellectual exchanges that would spread American liberal rule of law values throughout western Europe in the aftermath of the Second World War, and the dawn of the Cold War.[83] Justice Kennedy has stated that a willingness by Supreme Court justices to look abroad sends an implicit—and implicitly helpful—message to the rest of world that we share their values.[84] As such, Justice Kennedy clearly understands himself to be simultaneously both advancing American interests and the interest of a broader liberal international order: he seems most interested in dialogue with judges (and students) from other countries to serve those broader liberal purposes.

While Justice Kennedy's liberal internationalism tends to focus on what has traditionally been called "comparative law" (reading, that is, the domestic legal opinions of judges in other countries involving the application of their own laws), Justice Ruth Bader Ginsburg's foreign policy liberalism has placed more emphasis than the Supreme Court's other "comparativists" on the crucial "international law" texts of the post-War liberal order.[85] In a series of speeches and law review articles, Ginsburg has repeatedly averted to the fact that "[n]ational, multinational, and international human rights charters and courts today play a prominent part in our world." To be sure, Ginsburg is also a comparativist in the sense that Kennedy is, having argued that "[t]he U.S. judicial

[79] Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 47.

[80] *Id.* at 44.

[81] *Id.* at 47.

[82] *Id.* at 48.

[83] *Id.* at 47–48.

[84] *Id.* at 48.

[85] The degree to which these texts embody some sort of "binding" international law is a subject of increasingly intense dispute. *See supra* note 14 and accompanying text.

system will be the poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."[86] But she seems more likely than either Kennedy or Breyer to specifically cite these international law texts (both those that the United States has ratified, and those it has not) and institutions in her opinions.

Although in his debate with Antonin Scalia on the topic, Justice Stephen Breyer most prominently defended his willingness to look abroad as a natural outgrowth of an interpretive theory anchored in pragmatism (as opposed to Scalia's textually-oriented originalism), it is very clear from some of his statements there (and, even more extensively, in other settings) that his turn in that direction is also animated by a robustly liberal foreign policy vision. In his debate with Justice Scalia at American University's Washington College of Law, Breyer, for instance, noted that:

> [F]or years people all over the world have cited the Supreme Court, [so] why don't we cite them occasionally? They will then go to some of their legislators and others and say, "See, the Supreme Court of the United States cites us." That might give them a leg up, even if we just say it's an interesting example.[87]

Breyer has stated in a speech at New York University's School of Law that:

> The job before us—as nations increasingly emphasize the rule of law and the role of the judge—is to try to transfer knowledge from one nation to another, so that, despite cultural, historical, or institutional barriers, we can create fairer, more effective judicial systems, including safeguards of institutional integrity where they are now lacking.[88]

In one of the clearest articulations yet of what he sees as the Court's role in consolidating a liberal world order, Justice Breyer stated on ABC's *This Week* with George Stephanopoulos that:

> [t]he world . . . is growing together, that through commerce

[86] *See* Ruth Bader Ginsburg, Remarks to Am. Soc'y of Int'l Law, *"A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, (Apr. 1, 2005) (transcript available at http://www.asil.org/events/AM05/ginsburg050401.html); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 21 CARDOZO L. REV. 253, 281–82 (1999).

[87] Stephen Breyer & Antonin Scalia, Assoc. Justices, Supreme Court of the U.S., Debate at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript on file with author) [hereinafter Breyer-Scalia Debate].

[88] Breyer, Democracy and the Rule of Law, *supra* note 1.

> and globalization, through the spread of democratic institutions, through immigration to America, it's becoming more and more one world of many different kinds of people. And how they're going to live together across the world will be the challenge and whether our Constitution and how it fits into the governing documents of other nations I think will be a challenge for the next generation.[89]

Thus, while they tend to emphasize different considerations, all of these justices are plainly advancing arguments that arise not only out of interpretive considerations involving the contending claims of pragmatism and originalism, but out of a prominent, liberal, foreign policy vision.

C. Constructivism/Idealism

Constructivism, the most influential recent incarnation of what has traditionally been known as "idealism,"[90] is distinguishable, but not necessarily wholly separate, from liberalism.[91] It emphasizes the importance of a consensus around foundational ethical values as a foundation for any stable (and normatively desirable) international order.[92] Crucially, those values are, in significant part, reflected in law. Constructivists argue that the process of debating and deliberating about those values, with the aim of reaching consensus on them, should be a central concern of foreign affairs.[93]

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[89] Interview by George Stephanopoulous with U.S. Supreme Court Justices Sandra Day O'Connor & Stephen Breyer, on *This Week with George Stephanopoulos* (ABC television broadcast July 6, 2003) (transcript on file with author).

[90] Snyder, *supra* note 20, at 60.

[91] *Id.*

[92] *Id.*

[93] For examples of constructivist/idealist international relations theory, see MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 141 (1996) (indicating that "normative claims" are key in resolving "lower-level" international disputes); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 3–4 (1998) (explaining how activist networks affect international political change through "constructivist[]" and "social movement" theories); AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID 8–9 (1995) (describing the role race equality norms played in international relations with South Africa); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 2 (1999) (describing the difficulties constructivist theory has in explaining the international system); Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391 (2001) (detailing various constructivist studies in international relations and international organizations); Ronald L. Jepperson et al., *Norms, Identity, and Culture in National Security*, *in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 45–46 (1996)

Constructivists are not agnostic about the relationship between ideas and interests. Whereas more positivistic political scientists commonly look at ideas as justifications (or masks) for interest, constructivists look at it precisely the opposite way. They agree with non-constructivists that actors in the international arena, be they states or individuals, routinely engage in goal-directed, purposive action. But, for constructivists, ideas that are shared by many actors "intersubjectively" will construct both the interests and identities of those figures acting purposively in that arena.

Constructivists see their approach as, in many respects, "deeper" than the liberal and realist approaches to international relations.[94] Both liberalism and realism assume, to a significant extent, that preferences are givens. Constructivists, on the other hand, focus on the ways in which preferences are constructed in international and transnational forums. For constructivists "social reality is created through debate about values."[95] Constructivist scholarship, accordingly, focuses on the ways in which "ideologies, identities, persuasion, and transnational networks" of activists and "intellectual entrepreneurs" construct a set of global understandings.[96] These understandings, in turn, affect the conduct of states and individuals, both domestically and internationally.[97] Many constructivist studies focus on transnational human rights norms.[98] They emphasize that "international change results from the work of intellectual entrepreneurs who proselytize new ideas and 'name and shame' actors whose behavior deviates from accepted standards."[99]

Supreme Court watchers will see that the sorts of figures and processes that loom large in constructivist theory are looming increasingly large in the processes of the Court. Transnational "intellectual entrepreneurs" now routinely file amicus briefs in domestic constitutional cases, such as those involving gay rights and the death penalty, in which they take a position on these issues. In doing so, in many of these cases they are endeavoring to "name and shame" the justices into ruling in a way that they hold to be correct, and move the United States away from positions deviating

(identifying the role sovereignty plays in "public international law").

[94] Snyder, *supra* note 20, at 60.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

from what they commonly describe as an emerging global consensus.[100] Today the Court is receiving a growing number of amicus briefs from both foreign and domestic actors that make strident appeals to an emerging international consensus.

International relations constructivists understand a growing array of transnational actors as being involved in a process that seeks to transform—and, in some cases, revolutionize—the "role identities" of domestic judges. This involves an effort to have those judges understand their task in increasingly transnational (as opposed to purely domestic) terms.[101] A constructivist agenda for the American judiciary would involve both appeals to particular global norms (such as, for example, on the death penalty or affirmative action) and an effort to encourage a judicial role redefinition process more generally, through which domestic judges would come to see themselves as both domestic actors and part of a globalized, transnational community of intersubjective actors committed to the progressive realization of an emergent set of global norms.

These efforts seem to have already born fruit. In certain contexts, the United States Supreme Court has appeared to be particularly cognizant of the "name and shame" dynamic that is at the core of much of the leading work of international relations constructivism. This is most apparent when issues or cases are successfully conceptualized as raising "human rights" issues—with the human rights framing emphasizing the universality of the principle. Death penalty cases are the most obvious in this regard. But, given the ambition and scope of the post-War international human rights agreements (including those that the United States has not ratified), many of which set out elaborate lists of rights extending

[100] Critics of the increasing interest on the Supreme Court in international precedents (including, on the Court itself, Justice Scalia and Chief Justice Roberts in his confirmation hearings) have noted the tendency of the Court's globalist judges to cite foreign precedent selectively, "looking out over a crowd and picking out your friends." *See* Ann Althouse, *Innocence Abroad*, N.Y. TIMES, Sept. 19, 2005, at A25. Justices who are either influenced by constructivist thinking or who see things in ways that are consistent with that framework, however, will not perceive what they are doing as involving a cynical effort to find the friendly precedents and ignore the unfriendly ones. Rather, they will view the international order in progressive, constructivist terms. That is, they will see a world in which an ever-growing list of activists, groups, and nations are moving towards convergence and consensus on fundamental ethical and legal norms. They will understand that there are still outliers to these ethics and norms, and that well-intentioned people are working around the world to bring these outliers into the emerging global ethical consensus. When they appeal to their "friends" they are appealing to an emerging consensus, and not (yet) an actual one.

[101] *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192–93 (2003).

well beyond those enumerated in the United States Constitution, litigants can tie almost any claim to a universal human rights statement that has been articulated somewhere by somebody.[102]

D. Some Traditional Diplomatic Considerations

It is entirely possible—and indeed likely—that to the extent that American judges are acting increasingly in line with international relations theory they are doing so, not because they have followed any sophisticated "theory" of international relations, but because they find some popularized version of it so important and convincing that they are led to try to incorporate the insights they take from it into relevant aspects of their job and their role as judges. The liberal foreign policy vision will appear in the guise of a new found concern by judges for the health of a broader "multilateralist"—as opposed to a "unilateralist"—foreign policy. In an era in which the United States (particularly in the aftermath of the second Iraq War) is criticized for not giving due respect to international institutions and international law—which are central to the liberal foreign policy vision—and to the extent that this is seen as hobbling rather than advancing American interests, American judges citing foreign precedent and practices (both when they follow those and when they reject them) will see themselves as doing their part. They will understand themselves as engaging in a process aimed at the desirable objective of bringing liberal rule of law values (that is, American values) to formerly non-liberal non-democratic states.

Justices influenced by constructivism/idealism are, of course, not

[102] *See* Ginsburg, *supra* note 86 ("'The basic concept underlying the . . . [Eighth] Amendment . . . is nothing less than the dignity of man.' Therefore, the constitutional text 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)). In that regard, the plurality in *Trop* observed, "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Trop*, 356 U.S. at 102; *see also* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (noting the similar action taken by the international community in protecting the "right of homosexual adults to engage in intimate, consensual conduct"); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) ("The Court's observation that race-conscious programs 'must have a logical end point' accords with international understanding of the office of affirmative action."); Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("A growing number of courts outside the United States . . . have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.").

likely to have read much of a dense literature concerning the social construction of identity and preferences. But, from the activities of governments and non-governmental organizations who are informed by those understandings, they will be very much aware that many people understand the world as moving in an increasingly progressive direction. Following the views of these groups, which are commonly reflected in the elite popular press (like the *New York Times*), they will see the United States as something of a moral laggard in many of these areas, and as falling embarrassingly behind the curve in the sweep of history. Here too the justices will want to do their part as cases involving the relevant issue areas come before the Court. They will not view this as siding with, for example, the European Union or Amnesty International against the United States and its interests. Rather, they will view their efforts as helping, in their own small way, maintain and advance the position of the United States as a global leader and not a global follower.

Statements from Supreme Court justices reflect these considerations as well. Unsurprisingly, Justice Ruth Bader Ginsburg—the justice most inclined to the constructivist/idealist vision in looking abroad (though, as noted, she commonly makes liberal and pragmatic arguments as well)—has been especially likely to make such statements. In a speech to the American Society for International Law, for instance, she observed that:

> [T]he United States is subject to the scrutiny of 'a candid World.' What the United States does, for good or for ill, continues to be watched by the international community, in particular, by organizations concerned with the advancement of the 'rule of law' and respect for human dignity. . . .
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> . . . .
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> . . . I . . . believe we will continue to accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over.[103]

Similarly, although judges might not be aware of the growing constructivist literature setting out an agenda concerning judicial role re-definition, they may be enticed by the notion that, in

[103] Ginsburg, *supra* note 86.

addition to serving as domestic judges, they can augment their service and their status by joining—as their counterparts abroad are doing—a "global community of courts."[104] As such, just as constructivists would advocate, they would come to see their job as increasingly characterized by both a domestic and a foreign policy dimension.

E. Legal Pragmatism as an Influence: A Separate Category?

At the outset of this article, I drew a distinction between justifications for a more globalized jurisprudence arising out of interpretive theory (originalism and pragmatism) and those arising out of visions of the nature of the world order (realism, liberalism, and constructivism/idealism, plus traditional diplomatic considerations). But I want to note that, particularly in the case of Justice Breyer, these two categories may not be altogether distinctive. Influential liberal international relations theorists like Anne-Marie Slaughter have argued that the world is moving toward a liberal order which will increasingly entail "governance" by problem-focused, transnational policy networks. Slaughter specifically considers domestic judges to be part of one such emerging transnational network.[105] Justice Breyer's pragmatic, problem-solving interpretive stance fits seamlessly into this understanding of the world and the place it accords for an increasingly globalized judiciary.[106] As such, at least in his case, interpretive theory and international relations theory are, in many respects, one.

It is clear that, for Justice Breyer, his comparativist turn is, in some respects, a natural outgrowth of his broader theory about what law is and how judges should approach and decide cases. In his debate with Justice Scalia at American University about the Court's recent citations to foreign practices and precedents, he protested that, "I was taken rather by surprise, frankly, at the controversy that this matter has generated, because I thought it so obvious. . . . [W]hat's cited is what the lawyers tend to think is useful."[107] And lawyers think certain information is useful when

[104] Slaughter, *supra* note 101, at 192.

[105] *Id.* at 215–16, 218–19.

[106] *See generally* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 234 (2003) (theorizing that Supreme Court Justices will "look[] more frequently to the decisions of other Constitutional courts").

[107] Breyer-Scalia Debate, *supra* note 87.

they believe the judges they are arguing before will see it as useful. All of this information feeds into a single process, from which law ultimately emerges. As Justice Breyer described it in his debate at American University:

> [L]aw is not really handed down from on high, even from the Supreme Court. Rather, it emerges. And we're part of it, the clerks are part of it, but only part. And what really survives every time is the result, I tend to think of a conversation. I think that's the right word, conversation among judges, among professors, among law students, among members of the bar, because you need people to put things together, you need people to decide cases, you need people to tell you how it works out in practice. And out of this giant, messy, unbelievably messy conversation emerges law.[108]

There is absolutely no reason for problem-solving judges in one country to insulate themselves from problem-solving judges in another country who might be facing similar questions. As Breyer explained, "If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something."[109] "If they have a way of working out a problem that's relevant to us," he added in an interview with Tim Russert, "it's worth reading it, even if only to disagree with it."[110] Justice Breyer's vision—which is shared in significant respects by Justice Ginsburg—thus dovetails with some of the suppositions of the (liberal) "global governance" outlook, which sees the world moving towards a system where key decisions are made by global networks of expert problem-solvers, operating within and across borders.[111]

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[108] *Id.*

[109] *Id.*

[110] Stephen Breyer, Remarks at the Constitutional Conversation Hosted by the National Constitution Center, the National Archives, and the Aspen Institute, hosted by Tim Russert (Apr. 22, 2005).

[111] For the most definitive statement of a networked community of global governance (which includes judicial networks), see Slaughter, *supra* note 101, at 193–94. *See, e.g.*, Ginsburg, *supra* note 86 (alluding to the value of "sharing with and learning from others," and stating that "[f]oreign opinions are not authoritative . . . . [b]ut they can add to the store of knowledge relevant to the solution of trying questions"). Justice Ginsburg is more likely than Breyer to cite international human rights agreements as key parts of the "problemsolving" conversation amongst judges across borders. "If U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights." *Id.* See also Judge Guido Calabresi's liberally inflected statement on this issue—that "[w]ise parents do not hesitate to learn from their children." United States v. Then, 56 F.3d 464, 469 (2d Cir.

F. The Domestic Politics of Judicial Globalization

A word on the domestic politics of liberal foreign policy outlook as adopted by judges is especially significant in this regard. It is of considerable significance that the liberal foreign policy outlook, viewed generally, transcends contemporary partisan cleavages. Significant (and indeed predominant) elements in both the Democratic and Republican parties are committed, as a matter of bedrock policy and principle, to the cause of the spread of liberal democracy worldwide, both for reasons of values and for reasons of international security and stability. There are, to be sure, relatively strong cleavages within the Republican Party about the role of international institutions in promoting a worldwide liberal democratic order, a cleavage that will, inevitably, have effects on the views of certain Republicans on the importance of an increasingly globalized judiciary to advancing that order.[112] But so long as the fundamentals of this commitment transcend the political parties, judges in both parties will feel it is legitimate to participate in the judicial globalization process (that is, they will not see themselves as "betraying" their party, but as reinforcing its broader political vision). This means that it is easy enough to imagine not only Justices Breyer and Ginsburg as partisans of judicial globalization, but also Justices Kennedy and O'Connor.[113] To be sure, over time, the partisan politics of these questions can change (as it did, for example, with abortion, which, at an earlier stage of its life as a political and constitutional issue, did not track the Democratic-Republican partisan divide).[114] If anything, though, some elements of the Republican Party have become increasingly assertive about the importance of international institutions and multilateral consultation in realizing a progressively more liberal and democratic world—a view many believe has been vindicated by

1995) (Calabresi, J., concurring). *See generally* Kersch, *Justice Breyer's Mandarin Liberty*, *supra* note 16.

[112] *See* Snyder, *supra* note 20, at 58.

[113] *See, e.g.*, Sandra Day O'Connor, Remarks at the Southern Center for International Studies 1–2 (Oct. 28, 2003), *available at* http://www.southerncenter.org/OConnor_transcript.pdf ("The impressions we create in this world are important and can leave their mark . . . . I suspect that with time, we will rely increasingly on international and foreign law in resolving . . . domestic issues . . . . [This] may not only enrich our own country's decisions; it will create that all-important good impression."); Toobin, *supra* note 79, at 44 ("The debate over foreign law and the Constitution thrusts the Supreme Court into the perennial struggle in American politics between internationalists and isolationists.").

[114] *See* Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 723–24 (1997).

the mounting sense of the United States' failure in Iraq. While the cross-cutting appeal of this globalist turn may be undercut to the degree it becomes too closely identified with liberal Democratic Party policy positions on key substantive political issues, this can only serve to provide additional support for Republican justices who seek to participate in judicial globalization.[115]

III. CONCLUSION

Most of the discussions about the motivations behind an apparently internationalist turn by certain Supreme Court justices in cases involving the death penalty, gay rights, the right to die, federalism, and affirmative action, amongst others, have traced that turn to a newly cosmopolitan commitment on the part of these justices to "learning" from their fellow judges abroad, who, they have increasingly recognized, are working in parallel ways to solve similar constitutional "problems." An abundance of statements made by these justices off the bench, however, suggest that their motivations are more varied. In this article, I have suggested that certain theories about international relations that are currently in the air—chiefly liberal internationalism and constructivism/ idealism—have served as prisms through which these justices see the world and, in notable respects, motivate what they are doing. I have provided a taxonomy of these theories, suggested where a domestic judge deciding domestic constitutional cases might fit into the ideological framework, and adduced statements made by those justices which suggest that they envisage their globalist turn through the lens of those theories. My objective in this article has been mainly descriptive. I have criticized the Court's globalist turn elsewhere, as have others (including contributors to this symposium).[116] I have found, however, that frequently supporters and critics of the Court and of this recent trend have talked past each other. This is because discussion of the issue tends to move on separate tracks. One track—the one most familiar to law professors who are not specialists in international law—is that of interpretive

[115] *See* Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 382–83 (2005). Of course, for some of these Republican justices, matters of interpretive theory will predominate, and they will resist this turn on originalist grounds. For others, however, international relations concerns might trump the interpretive considerations, at least in certain contexts.

[116] KERSCH, *supra* note 6; Kersch, *supra* note 77; Kersch, *supra* note 115; Kersch, *The 'Globalized Judiciary' and the Rule of Law*, 13 GOOD SOC'Y 17, 21 (2004).

theory, which pits originalism against pragmatism. The other, however, is what we might call the "diplomatic" track, which involves a set of often unstated theoretical and ideological assumptions concerning the nature of the international order—and the best way to improve it. This diplomatic track is actually quite familiar to international law professors,[117] and other internationally-focused scholars. It is also increasingly influential, in a popularized form, amongst the justices themselves. My hope here was, by considering both of these tracks as part of the same phenomenon, to provide a fuller picture of what is happening. Only by explicitly talking about both the interpretive theories *and* the broader ideological visions behind the trends can the issue at the center of this symposium be fully and effectively addressed.

[117] Indeed, many law professors now encouraging a comparativist turn by the Court are heavily influenced by the international relations theory I have described here. Harold Koh, for example, appears to be heavily influenced by constructivist international relations theory. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347 (1991); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 624–25 (1998). Liberal internationalism has also been very widespread amongst law professors writing about this issue.