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# The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet

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# THE NEXT GENERATION OF TRANSNATIONAL/DOMESTIC CONSTITUTIONAL LAW SCHOLARSHIP: A REPLY TO PROFESSOR TUSHNET

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## I. INTRODUCTION

Mark Tushnet is one of the new breed of American public law scholars. He has written widely and notably on a range of American domestic law subjects, from the civil rights movement[1] to constitutional theory.[2] He has also written on a range of topics related to comparative constitutional law,[3] and he has consistently integrated what he has learned[4] from writing about other countries into his writings on the American constitutional condition.[5]

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1. *E.g.*, MARK V. TUSHNET, NAACP'S LEGAL STRATEGY AGAINST SEGREGATION, 1925–1950 (1987); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1987).

2. *E.g.*, MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

3. *E.g.*, VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS (1999); Mark V. Tushnet, *Alternate Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003); Mark V. Tushnet, *Globalization and Federalism in a Post-*Printz *World*, 36 TULSA L. J. 11 (2000); Mark V. Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004) [hereinafter Tushnet, *Cautionary Notes*]; Mark V. Tushnet, Marbury v. Madison *Around the World*, 71 TENN. L. REV. 251 (2004); Mark V. Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004); Mark V. Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002); Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999) [hereinafter Tushnet, *Possibilities*].

4. *See generally* Tushnet, *Cautionary Notes*, *supra* note 3 (identifying reasons for caution about the use of transnational law in interpreting domestic constitutions); Tushnet, *Possibilities*, *supra* note 3 (analyzing three distinct ways that comparing the constitutional experiences of other nations may assist with our interpretations of the U.S. Constitution). Tushnet is not the only major contemporary scholar who uses this "integrated" approach to scholarship, fusing the domestic and the foreign. His colleague Vicki C. Jackson is another example of someone who writes "integrated" scholarship. For examples of her writings on domestic subjects, see, for instance, Vicki C. Jackson, Cook v. Gralike: *Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 229; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Baker *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001); Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. REV. 495 (1997). For examples of her writings using the integrated approach, see, for instance, JACKSON & TUSHNET, *supra* note 3; Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity:*

Perhaps because he has so seamlessly integrated the transnational and domestic, Professor Tushnet understates many of the serious objections to this integrative approach in his essay, *Transnational/Domestic Constitutional Law*.[6] At the same time, while Professor Tushnet understates many of the legitimate objections to integrating transnational law into our law, these

*States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J.L. & FEMINISM 377 (2002); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265 (2003); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001); Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003); Vicki C. Jackson, *Yes Please, I'd Love to Talk With You*, LEGAL AFFAIRS, July/Aug. 2004, at 43 [hereinafter Jackson, *Yes Please*].

Bruce Ackerman is another example of a scholar who uses this integrated approach. He has written many notable pieces on domestic constitutional law. *E.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). Ackerman has also written on comparative and international matters, most recently in the context of the lessons we may gleam from the experiences of other countries with states of emergency. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029–62 (2004) (looking to the experiences of Canada, Germany, India, Poland, Rome, Russia, and South Africa regarding states of emergency).

5. Indeed, we may wonder whether this "new breed" of integrated scholars are simply picking up where scholars generations ago left off, but where their successors failed to follow. For instance, consider that Roscoe Pound was a prolific scholar of comparative law. The first year that he taught law, at the University of Nebraska in 1899, Pound taught Roman Law, Comparative Law, and History of English Law. *See* PAUL SAYRE, THE LIFE OF ROSCOE POUND 143 (1948). Four years later, Pound was writing that jurisprudence "might be called: the comparative anatomy of developed systems of law." 1 ROSCOE POUND, JURISPRUDENCE, at iv (1959). In the 1950s, Pound was the president of the Académie Internationale de Droit Comparé. His landmark book on jurisprudence focused substantially on foreign law. Roscoe Pound, *Comparative Law in the Formation of American Common Law*, *in* 1 ACTORUM ACADEMIAE UNIVERSIALIS IURISPRUDENTIAE COMPARATIVAE 183, 197 (Elmer Balogh ed. 1928); *see also* Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 168 (1934) (discussing how to integrate comparative law studies into the law school curriculum). *See generally* David Fontana, The Pervasive Method in American Law Schools, Law Firms and Law Courts (unpublished manuscript, on file with author) (arguing for a revitalization of Pound's approach).

6. *See* Mark Tushnet, *Transnational/Domestic Constitutional Law,* 37 LOY. L.A. L. REV. 239 (2003).

objections should not be considered fatal to the "integrative approach" (integrating domestic and transnational[7] constitutional law). The best approach, as this Reply will briefly discuss, is to consider the arguments against the integrative approach neither to be superfluous, nor determinative. Rather, the new generation of integrative scholarship should recognize that these criticisms have their merits, but also that integrative activities are here to stay. We need to move beyond "all or nothing" scholarship on this topic and find a way to create a principled system of integrative activities. Consequently, the best way forward is to begin considering how to create a world where the domestic and foreign *are* integrated, but integrated in the optimal manner.

This Reply discusses this potential new generation of integrative scholarship in the context of the two areas that Professor Tushnet discusses: Transnational law as merely persuasive authority that courts may choose to follow when they engage in constitutional interpretation, and transnational law as binding authority that American courts[8] must follow.[9] In his discussion of transnational law as persuasive authority, Professor Tushnet overstates the importance of the current moment, but understates the serious concerns that many may have with using transnational law as persuasive authority and the distinctiveness of these concerns from general debates about constitutional interpretation.[10] In his discussion of transnational law as binding authority, Professor Tushnet too easily dismisses the valid federalism and sovereignty concerns that integration skeptics have presented.[11]

7. For the purposes of this Reply, "transnational law" refers to comparative law (i.e. the domestic law of foreign countries) and international law (the law among nation-states).

8. Tushnet has been one of the leading pioneers of studying the Constitution outside of the courts. *E.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003). Given that fact, it is curious that he does not examine transnational law outside of the courts, and whether the arguments he makes are solely limited to the intersection of the domestic and the transnational in the courts.

9. This Reply discusses these two areas in the contexts of the arguments that Tushnet makes, but also extends slightly beyond Tushnet's arguments to address some general issues raised by these two areas of integrative activity.

10. Tushnet, *supra* note 6, at 239–46.

11. *Id.*

## II. TRANSNATIONAL LAW AS PERSUASIVE AUTHORITY

Tushnet first discusses the role of transnational law as persuasive authority.[12] Persuasive authority is authority that courts need not follow, but may consult if they feel it will be helpful.[13] As Patrick Glenn defined it, persuasive authority is "authority which attracts adherence as opposed to obliging it."[14] Tushnet focuses on the use of transnational law as persuasive authority by focusing on "recent references in U.S. Supreme Court opinions to constitutional developments in other jurisdictions, and the critiques of those references from within the Court."[15] Tushnet makes two central claims about the role of transnational law as persuasive authority. First, Tushnet seems to argue[16] that the developments of the past several years mark some sort of "transnational constitutional moment,"[17] bringing the idea of transnational law as persuasive

12. *Id.* at 241.

13. BLACK'S LAW DICTIONARY 143 (8th ed. 1999).

14. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987). For my earlier discussion of persuasive authority in the context of transnational law, see David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 557–59 (2001).

15. Tushnet, *supra* note 6, at 240.

16. Tushnet's argument about the use of transnational law as persuasive authority is a little less stark and explicit than his argument about the use of transnational law as binding authority, but his piece does include some text that makes this seem like a particularly important moment for transnational law as persuasive authority. *See id.* at 241 ("Prior to *Lawrence v. Texas*, no recent Supreme Court decision relied on non-U.S. constitutional or para-constitutional law to support a proposition that was material to the majority's analysis." (footnote omitted)); *id.* at 244 ("The current Court's first use of non-U.S. law to support a position relevant to its disposition came in *Lawrence v. Texas* . . . ."); Hon. J. Harvie Wilkinson III., *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y. 423, 424 (2004) ("As Professor Mark Tushnet has recognized, never before in our history has the Court relied so directly on foreign precedents to support a position material to the Court's holding." (citing Tushnet, *supra*, note 6)). *But see* Tushnet, *supra* note 6, at 245 ("It is important not to exaggerate the degree of controversy manifested on the Supreme Court.").

17. This phrase is obviously a reformulation of Bruce Ackerman's discussion of "constitutional moments," or moments when there were significant changes in the domestic constitutional order. 1 ACKERMAN, *supra* note 4, *passim*; 2 ACKERMAN, *supra* note 4, *passim*. It is also a reformulation of Anne-Marie Slaughter's use of the phrase "international constitutional moment[s]" to describe moments when there are major changes in the international constitutional regime. Anne-Marie Slaughter & William Burke-

authority to the center of public and scholarly attention for the first time.[18] Second, Tushnet argues that this debate about the integrative approach is not really about transnational law, but is instead about larger questions of constitutional interpretation, with the appropriate role of transnational law simply being the particular application of these larger debates.

### *A. A Transnational Law Constitutional Moment?*

Tushnet seems to argue[19] that this is a major moment for the use of transnational law as persuasive authority. In *Lawrence v. Texas*,[20] decided two years ago, Justice Anthony Kennedy wrote an opinion for the Court invalidating a Texas law criminalizing same-sex sodomy law as violating substantive due process.[21] Justice Kennedy's opinion cited to earlier European statements on homosexuality to disprove a statement in an earlier Supreme Court opinion that condemnation of homosexual conduct was universal.[22] Justice Kennedy also discussed transnational law as a means of assessing the gravity of the liberty interest involved, and of determining whether the statute at issue furthered any permissible state goals.[23] Tushnet argues that "[p]rior to *Lawrence v. Texas*, no recent Supreme Court decision relied on non-U.S. constitutional or para-constitutional law to support a proposition that was material to the majority's analysis"[24] and later asserts that "[t]he current Court's first use of non-U.S. law to support a position relevant to its disposition came in *Lawrence v. Texas*."[25]

White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 (2002).

18. Tushnet, *supra* note 6, at 241.

19. *See supra* notes 16–17 and accompanying text.

20. 539 U.S. 558 (2003).

21. *Id.* at 578.

22. *Id.* at 571 (citing to Chief Justice Burger's statement in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards").

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

24. Tushnet, *supra* note 6, at 241.

25. *Id.* at 244.

In many ways, Tushnet is right to note how important *Lawrence* was for transnational law. *Lawrence* involved constitutional questions surrounding a politically controversial issue, homosexuality, so it was sure to gain attention, thereby ensuring that its discussion of transnational law was also sure to gain much attention. The Court also issued the *Lawrence* opinion on the last day that the Court was releasing opinions from its 2002 Term,[26] so a great amount of public attention was already focused on the Court. Coupled with the use of transnational law in Justice Ruth Bader Ginsburg's concurrence in *Grutter v. Bollinger*[27]—another case involving politically controversial issues and issued during the last week of the 2002 Term[28]—perhaps the Court was self-consciously trying to draw attention to its use of transnational law. Not surprisingly, then, these uses of transnational law received wide attention in the popular press,[29] and eventually even led the House of Representatives to consider impeaching federal judges for referencing transnational law.[30] In terms of the life of the

26. *See* 539 U.S. at 558 (decided June 26, 2003); *see*, Supreme Court Calendar October Term 2002, *at* http://supreme.lp.findlaw.com/supreme_court/calendar/calendar.2002.html.

27. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing to international conventions as reflecting "the international understanding of the office of affirmative action").

28. *See id.* at 306 (decided June 23, 2003).

29. *See, e.g.*, Tony H. Mauro, *Court Shows Interest in International Law*, N.Y. L.J., July 14, 2003, at 1; H. Rubenstein, *International Law's New Importance In The U.S.*, NAT'L L.J., Sept. 15, 2003, at 16; Quin Hillyer, *Constitutional Irrelevance,* NAT'L REV., July 7, 2003, http://www.nationalreview.com/comment/comment-hillyer070703.asp; David A. Keene, *Justices: When in Rome, Do as the Romans Do*, HILL, Jul. 15, 2003; Jacob Levy, *Foreign Invasion*, NEW REPUBLIC ONLINE (Nov. 12, 2003), *at* https://ssl.tnr.com/p/docsub.mhtml?i=scholar&s=levy111203.

30. Representative Tom Feeney, a Republican from Florida, proposed a resolution in the House of Representatives that "judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions." Amendment in the Nature of a Substitute to H. Res. 568, *at* http://www.house.gov/feeney/downloads/reaffirm/feeney008.pdf (May 7, 2004). Representative Feeney indicated in an interview that:

> This resolution advises the courts that it is improper for them to substitute foreign law for American law or the American Constitution. . . . To the extent they deliberately ignore Congress' admonishment, they are no longer engaging in 'good behavior' in the

Constitution outside of the courts for persuasive authority, this was a transnational law constitutional moment.

As a doctrinal matter, though, I question Professor Tushnet's claim that *Lawrence*'s use of transnational law was revolutionary. Tushnet argues that this was the first time that a "recent Supreme Court decision"[31] or "[t]he current Court[]"[32] used transnational law as a part of the majority opinion. However, in *Atkins v. Virginia*,[33] the 2002 case invalidating executions of mentally retarded criminals for violating the Eighth Amendment, Justice John Paul Stevens incorporated transnational law into part of the majority opinion.[34] Justice Stevens examined various sources and determined that there was a consensus against the permissibility of such executions, and that such executions therefore violated the Eighth Amendment.[35] One of these sources was transnational law:

> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have

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meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.

Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, *at* http://www.msnbc.com/id/4506232 (March 11, 2004) (statement of Rep. Tom Feeney).

31. Tushnet, *supra* note 6, at 241.

32. *Id.* at 244. Notice that these two statements are different (not inconsistent, but different): Tushnet first remarks that "no *recent* . . . decision" has used transnational law as part of the analysis of the majority. *Id.* at 241 (emphasis added). Tushnet later states that this is the first time that the "*current* Court" has done this. *Id.* at 244 (emphasis added). If recent means the ten years since Justice Stephen Breyer joined the Court to make it "this" Court, then these two statements mean exactly the same thing, but it is not entirely clear that this is what Tushnet intends his statements to mean.

33. 536 U.S. 304 (2002).

34. *Id.* at 316 n.21.

35. *Id.* at 307 (referencing "[t]he consensus reflected in . . . deliberations" among a variety of institutions and sources as the reason for holding that executing mentally retarded individuals violates "the Eighth Amendment to the Federal Constitution").

> filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified."
>
> *Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as* Amicus Curiae 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. *Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.*[36]

Granted, this language appears only in a footnote, but this footnote is still part of the majority opinion, a majority opinion joined by five other members of the Court in its entirety. Even Justice Scalia writing in dissent took this language seriously, arguing with "*the Court's* . . . [e]ffort to fabricate 'national consensus' [by looking to] members of the so-called 'world community.'"[37]

Depending on what Tushnet means by "recent," we can also find many other examples of "recent" Supreme Court decisions referencing transnational law in majority opinions.[38] In this past term, in *Schriro v. Summerlin*,[39] Justice Scalia referenced the experience of foreign countries with judge trials as part of his argument about the relative differences of judge versus jury trials,[40] and this reference was part of the majority opinion about the importance of *Ring v. Arizona*[41] for future parties.[42] In the majority opinion in *Raines v. Byrd*,[43] the Court noted that other countries used a standing system similar to one the Court was considering, making

36. *Id.* at 316 n.21 (emphasis added) (except as noted, citations omitted).
37. *Id.* at 347 (Scalia, J., dissenting) (emphasis added).
38. *See* Schriro v. Summerlin, 124 S. Ct. 2519, 2525 (2004); Raines v. Byrd, 521 U.S. 811, 828 (1997).
39. 124 S. Ct. 2519 (2004).
40. *Id.* at 2525.
41. 536 U.S. 584 (2002).
42. *Summerlin*, 124 S. Ct. at 2525.
43. 521 U.S. 811 (1997).

such a system not totally irrational.[44] Transnational law has also been referenced in less central parts of the U.S. Supreme Court opinions.[45]

Another reason why, as a doctrinal matter, *Lawrence* was not revolutionary: If we look beyond *recent* times, we can find numerous examples of references to transnational law,[46] often as part

44. *Id*. at 828.

45. *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (discussing "international views on [the] detention of refugees"); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (discussing the jurisprudence regarding freedom of speech in the European Court of Human Rights and the Canadian Supreme Court); Knight v. Florida, 528 U.S. 990, 995–98 (1999) (Breyer, J., dissenting from denial of certiorari) (mentioning decisions of the Privy Council, the Supreme Court of India, the Supreme Court of Zimbabwe, the European Court of Human Rights, the Canadian Supreme Court, and the U.N. Human Rights Committee instructive); Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (looking to the treatment of federalism issues in Switzerland, Germany, and the European Union); Washington v. Glucksberg, 521 U.S. 702, 785–87 (1997) (Souter, J., concurring in the judgment) (examining the Dutch experience with euthanasia); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (discussing Australian, Canadian, and English legal regulations of campaign speech); Holder v. Hall, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring in the judgment) (examining the relevant experiences of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe).

46. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (mentioning judicial decisions discussing the right to life by the West German Constitutional Court and the Canadian Supreme Court); Florida v. Bostick, 501 U.S. 429, 443 (1991) (Marshall, J., dissenting) (making reference to a state court opinion referring to suspicionless searches as techniques used by "Hitler's Berlin"); California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (studying the experiences of other countries with "totalitarian regimes"); Metro Broad., Inc. v. FCC, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (examining race-conscious regimes in Nazi Germany and South Africa); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) (plurality opinion) (looking to the capital punishment practices of "nations that share our Anglo-American heritage, and [of] the leading members of the Western European community"); United States v. Stanley, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (discussing the Nuremberg Tribunals); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (White, J., plurality opinion) (noting that "[i]t is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue"); Karlan v. City of Cincinnati, 416 U.S. 924, 926–27 (1974) (Douglas, J., dissenting) (arguing that American constitutional protections for freedom of speech differentiate this country from totalitarian countries); Columbia Broad. Sys., Inc. v. Nat'l Comm., 412 U.S.

of majority opinions issued by earlier Supreme Courts,[47] even

94, 158 n.9 (1973) (Douglas, J., concurring) (describing Brazil's "present regime of censorship"); United States v. White, 401 U.S. 745, 764–65 (1971) (Douglas, J., dissenting) (comparing the doctrinal approach of the majority that used by the "totalitarian countries"); Rudolph v. Alabama, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting from denial of certiorari) (looking to doctrinal trends "throughout the world"); Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (looking at "common understanding[s] throughout the English-speaking world" regarding privacy); Irvin v. Dowd, 359 U.S. 394, 408 (1959) (Frankfurter, J., dissenting) (comparing American judicial review with judicial review in other federal systems around the world); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 361 (1959) (granting federal maritime jurisdiction while noting that "[s]uch a system is not an inherent requirement of a federal government"); Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (discussing a "poignant" argument for academic freedom in South Africa); Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (analyzing the role of freedom of speech in the constitutional order in other democracies); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 189 (1951) (Reed, J., dissenting) (studying the actions taken by other democracies to "control disloyalty among government employees"); Tenney v. Brandhove, 341 U.S. 367, 380–81 (1951) (Black, J., concurring) (noting the use in Argentina of congressional investigations to attack dissident newspapers); Adamson v. California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring) (examining the standards of decency "in a civilized society"); Malinski v. New York, 324 U.S. 401, 413–14 (1945) (Frankfurter, J., concurring) (arguing that "[t]he safeguards of 'due process of law' and the 'equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people"); United States v. Allegheny County, 322 U.S. 174, 198 (1944) (Frankfurter, J., dissenting) (discussing elements of Canadian federalism); Williams v. North Carolina, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring) (upholding the ability of states to regulate certain family law issues, despite different practices in foreign systems); Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring) (observing that the intergovernmental tax immunity case before the Court raises the "same legal issues" as in Australia and Canada under provisions of their constitutional acts).

47. *See, e.g.,* Holland v. Illinois, 493 U.S. 474, 507–08 n.6 (1990) ("[The] courts might find guidance in . . . the opinions of South African tribunals, and in the precedents of Nazi Germany.") (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 191–92 (1989)); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("[T]he totalitarian state[s] in our own times . . . have censored musical compositions to serve the needs of the state."); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982) (discussing the experiences of England, India, Canada, and a "number of other Commonwealth countries"); Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (stating that "[t]he right of personal security is . . . 'enshrined in the

sometimes opinions from more than half a century ago,[48] and several times as part of majority opinions in landmark cases. Consider two wonderful examples. In *Miranda v. Arizona,*[49] the Court devoted several pages of the majority opinion to the analysis of lessons from overseas regarding the warnings to be provided to potential criminal

history and the basic constitutional documents of English-speaking peoples'") (quoting Wolf v. Colorado, 338 U.S. 25, 27–28 (1949)); Elrod v. Burns, 427 U.S. 347, 353 (1976) (noting that the patronage system was associated with the rise to power of the Nazi regime); Rose v. Locke, 423 U.S. 48, 50 (1975) (finding that the phrase "crimes against nature" has been in use among "English-speaking people" for many centuries); Trop v. Dulles, 356 U.S. 86, 103 (1958) (noting that only two of eighty-four countries surveyed used "denationalization as a penalty for desertion"); Quinn v. United States, 349 U.S. 155, 167 (1955) (noting that prosecution rules regarding contempt of Congress in the United States are "supported by long-standing tradition here and in other English-speaking nations"); Brown v. Allen, 344 U.S. 443, 512 (1953) (Frankfruter, J., concurring) (claiming that the availability of the writ of habeas corpus is "one of the decisively differentiating factors between our democracy and totalitarian governments").

48. Wolf v. Colorado, 338 U.S. 25, 30 (1949) (noting the views "[o]f 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."); New York v. United States, 326 U.S. 572, 583 n.5 (1946) (noting the barrenness of the proprietary and governmental distinction in other federal systems for purposes of intergovernmental tax immunity); Williams v. North Carolina, 325 U.S. 226, 234 (1945) (holding that domicile for constitutional purposes should be treated as "an historic notion common to all English-speaking courts"); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("[The u]ltimate futility of such attempts to compel coherence [of sentiment] is the lesson of every such effort from the Roman drive to stamp out Christianity . . . , the Inquisition . . . , the Siberian exiles . . . , down to the fast failing efforts of our present totalitarian enemies."); O'Malley v. Woodrough, 307 U.S. 277, 281 nn.6 & 8, 282 n.9 (1939) (examining the experience of other countries in determining that the imposition of an income tax on judges' salaries was constitutional); Rast v. Van Deman & Lewis Co., 240 U.S. 342, 366 (1916) (concluding that the Constitution embodies "'only relatively fundamental rules of right, as generally understood by all English-speaking communities'" (quoting Otis v. Parker, 187 U.S. 606, 609 (1903))); Harriman v. Interstate Commerce Comm'n, 211 U.S. 407, 419 (1908) (stating that the power to require testimony is usually limited "in English-speaking countries"); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) ("The decisions of the Courts of every country . . . will be received, not as authority, but with respect.").

49. 384 U.S. 436 (1966).

suspects.[50] In *Roe v. Wade*,[51] Justice Blackmun looked to the regulations of other countries regarding abortion.[52]

It is not so clear, then, that *Lawrence* was revolutionary, and indeed it is not absolutely clear that Tushnet is right when he says that "references to non-U.S. constitutional law have become more frequent in recent years than they had been in decades from 1960 to 1990."[53] Instead, it would be more accurate to say we have had a Court that has paid at least some attention to transnational law for a long time, and many people are just now noticing.[54]

### *B. Constitutional Interpretation and Transnational Law*

As part of his general argument that the controversies about the intersection of domestic and transnational law are not terribly important, Tushnet claims that there is no unique debate about using transnational law. Instead, he believes that:

> [T]he real disagreement . . . [is] not about the relevance of non-U.S. law to constitutional interpretation in general . . . but [is] rather about the proper approach to interpreting the U.S. Constitution . . . .[55]

I have two concerns with this argument: First, I do not think there are fundamental disagreements anymore about the relevance of transnational law, so the core debate about its relevance that Tushnet references simply does not exist.[56] Second, Justice Scalia and others

50. *Id.* at 436–40.

51. 410 U.S. 113 (1973).

52. *Id.* at 129–30.

53. Tushnet, *supra* note 6, at 245.

54. This does not mean that the Court has cited to transnational law as much as one might like, but it still means that transnational law has been a part of the Court's agenda for some time, even though no one has noticed. *See id.* at 239 ("[A]t least in the past, the U.S. Supreme Court paid attention to at least some aspects of foreign constitutional law . . . .").

55. *Id.* at 241–42.

56. To be fair, this statement is based to a good degree on several cases decided after Tushnet finished writing his article. When Tushnet wrote his piece, the language from Justice Scalia about transnational law, found in his opinion in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004), was not yet available, nor had Justice Scalia yet given his speech on transnational law to the American Society of International Law. Justice Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address to the American Society of International Law, (Apr. 2, 2004) *in* 98 AM. SOC. INT'L L. PROC. 305 (2004).

have raised legitimate concerns—independent of general debates about constitutional interpretation—about *how precisely* to use transnational law.[57] Although these concerns have been presented as if they defeat the entire enterprise of using transnational law as an interpretive tool, in reality we should read them as setting up the debate about how exactly we are going to use transnational law.

First, everyone seems to agree that transnational law should be used by American courts interpreting constitutional text,[58] so Tushnet is wrong in assuming that there is a debate about first principles at all.[59] Those generally considered to be "conservative[]" have been identified as the most resistant to the use of transnational law.[60] Conservative academics, although they testified in favor of the Feeney Resolution when the House of Representatives considered it,[61] have conceded that transnational law can be used in many situations.[62] Even Judge Richard Posner,[63] for instance, has argued in favor of the use of transnational law:

57. Tushnet, *supra* note 6, at 241–42.

58. *See infra* notes 64–110 and accompanying text.

59. *See* Tushnet, *supra* note 6, at 245.

60. *See, e.g.*, *id*. (identifying Chief Justice Rehnquist and Justices Scalia and Thomas as those who oppose the use of transnational law); *see also* Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) (arguing that if "there [were] any [tradition or precedent] in our own jurisprudence, it would be unnecessary" to look to transnational law); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

61. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 9 (2004) (statement of Prof. John O. McGinnis, Professor of Law, Northwestern Univ.) [hereinafter McGinnis testimony], *available at* http://www.house.gov/judiciary/mcginnis032504.pdf.; *id*. (statement of Prof. Jeremy Rabkin, Professor of Law, Cornell Univ.) [hereinafter Rabkin testimony], *available at* http://www.house.gov/judiciary/rabkin032504.htm; *id.* (statement of Prof. Michael D. Ramsey, Professor of Law, Univ. of San Diego Law School) [hereinafter Ramsey testimony] (noting that *Lawrence* did not cite to countries that did criminalize homosexual sodomy), *available at* http://www.house.gov/judiciary/ramsey032504.pdf.

62. McGinnis testimony, *supra* note 61, at 5 ("[F]oreign law could be relevant to prove a fact about the world which is relevant to the law."); Ramsey testimony, *supra* note 61, at 1 ("Foreign materials are relevant to the interpretation of U.S. law in numerous circumstances."). *But see* Rabkin testimony, *supra* note 61 (noting strong objections to using transnational law);

> It was not irrelevant, from a pragmatic standpoint, to the outcome of Brown v. Board of Education that official racial segregation had been abolished outside the South and bore a disturbing resemblance to Nazi racial laws . . . . If I were writing an opinion invalidating the life sentence in my hypothetical marijuana case I would look at the punishments for this conduct in other states and in the foreign countries, such as England and France, that we consider in some sense our peers. If a law could be said to be contrary to world public opinion I would consider this a reason, not compelling but not negligible either, for regarding a state law as unconstitutional even if the Constitution's text had to be stretched a bit to cover it. The study of other laws, or of world public opinion as crystallized in foreign law and practices, is a more profitable inquiry than trying to find some bit of eighteenth-century evidence that maybe the framers of the Constitution wanted courts to make sure punishments prescribed by statute were proportional to the gravity, or difficulty of apprehension, or profitability, or some other relevant characteristic of the crime. If I found such evidence I would think it a valuable bone to toss to a positivist or formalist colleague but I would not be embarrassed by its absence because I would not think myself duty-bound to maintain consistency with past decisions.[64]

More recently, Judge Posner has stated that "we already have our own laws" and therefore do not need to examine transnational law.[65]

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Wilkinson, *supra* note 16, at 425 ("In some areas, foreign and international law is made relevant by our Constitution, by statute or treaty, by the well-developed principles of common law, by overwhelming considerations of comity, or simply by private commercial agreement of the parties. But when judges, on their own motion and without any direction by Congress or the Constitution decide to make such precedents relevant, we are dealing with an entirely different question.").

63. I recognize that there are some problems with calling Judge Posner "conservative," but I think it is fair to say that on most issues he is a conservative, legally or politically.

64. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13–14 (1996) (footnotes omitted).

65. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July/Aug. 2004, at 40.

However, a closer reading of his argument indicates that Judge Posner believes transnational law should be examined,[66] even though he believes it should not be considered any sort of "authority."[67]

Tushnet argues that four current Justices have used transnational law in their opinions,[68] and three have expressly criticized its usage.[69] In fact, the Court is much more favorably inclined to use transnational law than Tushnet recognizes. Justice Breyer is clearly the leading proponent of using transnational law on the Court, and he has referenced transnational law in many opinions,[70] speeches,[71] and

66. *Id.* at 42 ("I do not suggest that our judges should ignore what people in other nations think and do. Just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can learn.").

67. *Id.* at 41 ("A decision by a higher court in the same judicial system . . . is controlling. . . . No one supposes that foreign decisions have that kind of authority. . . . It is quite something else to cite a decision by a foreign or international court not as a precedent but merely because it contains persuasive reasoning (a source or informational citation), just as one might cite a treatise or a law review article because it was persuasive, not because it was considered to have any force as precedent or any authority."). *But see* David Fontana, *Are We the World?*, LEGAL AFFAIRS, Nov./Dec. 2004 (noting the relationship between Judge Posner's writings on this issue).

68. Tushnet, *supra* note 6, at 245 ("Four Justices—Stevens, Kennedy, Ginsburg, and Breyer—have adverted to non-U.S. law in their opinions."); *see also* Jackson, *Yes Please*, *supra* note 4, at 43 ("Of the current nine justices, at least six—Chief Justice Rehnquist, and Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer—have done so since 1992."). *But see id.* ("It is important not to exaggerate the degree of controversy manifested on the Supreme Court.").

69. Tushnet, *supra* note 6, at 245.

70. *E.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (citing freedom of speech decisions issued by the European Court of Human Rights and the Canadian Supreme Court); Knight v. Florida, 528 U.S. 990, 995–98 (1999) (Breyer, J., dissenting from denial of certiorari) (analyzing decisions of the Privy Council, the Supreme Court of India, the Supreme Court of Zimbabwe, the European Court of Human Rights, the Canadian Supreme Court, and the U.N. Human Rights Committee); Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (looking to doctrinal rules surrounding federalism in Switzerland, Germany, and the European Union).

71. *E.g.*, Stephen Breyer, Keynote Address to the American Society of International Law (Apr. 2–5, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003); Associate Justice Stephen J. Breyer, Liberty, Security and the Courts, Remarks at the Association of the Bar of New York (April 14, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html.

articles.[72] Justice Ginsburg not only referenced transnational law in *Grutter*,[73] but also has done so in her speeches[74] and articles.[75] Justice O'Connor has referenced transnational law in at least one of her opinions,[76] and recently has given a lecture[77] and written articles advocating reference to transnational law.[78] Justice Stevens, the author of the majority opinion that relied on transnational law in *Atkins*,[79] has used transnational law in other opinions as well.[80] Likewise, Justice Kennedy, the author of the majority opinion that relied on transnational law in *Lawrence*,[81] has also referenced

72. *See, e.g.*, Stephen Breyer, *Changing Relationships Among Europe's Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1060 (2000)

73. Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting the "international understanding of the office of affirmative action").

74. *E.g.*, Associate Justice Ruth Bader Ginsburg, Looking Beyond the Borders: The Value of a Comparative Perspective in Constitutional Adjudication, Remarks to the American Constitution Society (Aug. 2, 2003), *available at* http://www.acslaw.org/video/conventionvideo.shtml.

75. *See* Associate Justice Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281–82 (1999); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004).

76. *E.g.*, United States v. Stanley, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (discussing the experiences of the Nuremberg Tribunals).

77. Associate Justice Sandra Day O'Connor, Remarks to the Southern Center for International Studies (Oct. 28, 2003), *at* http://www.southerncenter.org/OConnor_transcript.pdf. Right before this Reply was to go to print, Justice O'Connor delivered a lecture on this subject at the Georgetown University Law Center. *See O'Connor Extols Role of International Law* (Oct. 27, 2004), *at* http://www.cnn.com/2004/LAW/10/27/scotus.oconnor.ap.

78. *See* Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20 ("I think that American judges and lawyers can benefit from broadening our horizons . . . . [We] will find ourselves looking more frequently to the decisions of other constitutional courts."); Elizabeth Greathouse, *Justices See Joint Issues with the E.U.*, WASH. POST, July 9, 1998, at A24 (quoting Justice O'Connor after meeting with ECJ Justices calling for more examination of transnational law).

79. 536 U.S. 304, 316–17 n.21 (2002).

80. California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (looking to foreign experiences "in totalitarian regimes").

81. 539 U.S. 558, 572–73 (2003).

transnational law in some of his other opinions.[82] Justice Souter has also referenced transnational law in several of his opinions.[83]

What about the three Justices that Tushnet believes to be critics of the use of transnational law?[84] Chief Justice Rehnquist has noted his strong approval of using transnational law,[85] arguing that "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[86] He hardly sounds like a complete cynic.

What about Justice Scalia? Justice Scalia has been critical of the use of transnational law in some of his opinions.[87] In a speech in April of 2004 to the American Society of International Law, Justice Scalia maintained a generally hostile tone to the use of transnational

82. *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (discussing the "international views on detention of refugees").

83. *E.g.*, Washington v. Glucksberg, 521 U.S. 702, 785–87 (1997) (Souter, J., concurring in the judgment) (examining Dutch euthanasia law).

84. Tushnet, *supra* note 6, at 241–45.

85. As Vicki Jackson recounts:

> Chief Justice William Rehnquist introduced a conference on comparative constitutional law in 1999 by telling the story of how, a decade before, the justices of Canada's Supreme Court said to him, "We cite your Constitution; why don't you cite ours?" The chief justice explained that at the time of that question, the Canadian Charter of Rights and Freedoms was only seven years old. But time had passed, he said, and by 1999 it was "less defensible to say that we're not familiar with it." "It's time," he wrote, that "the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process."

Jackson, *Yes Please*, *supra* note 4, at 43.

86. William Rehnquist, *Constitutional Courts-Comparative Remarks* (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE; A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing decisions regarding the constitutional status of right to life by the West German constitutional court and the Canadian Supreme Court).

87. Atkins v. Virginia, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting) ("But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community.'"); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

law.[88] Still, while Justice Scalia does argue that transnational legal materials are "*hardly ever* [relevant],"[89] he has also argued that such transnational materials may be helpful in determining if "a particular holding will be disastrous."[90] Consequently, Justice Scalia believes that this usage of transnational law does not mean that such materials are to be used to determine the "*meaning* of" constitutional provisions.[91]

How does Justice Scalia's actual practice on the bench compare with this jurisprudential position? Well, it seems that Justice Scalia uses transnational materials far more than his speech has indicated. In his dissenting opinion in *Thompson v. Oklahoma*,[92] Justice Scalia did note that transnational law could be relevant. In *Thompson*, the Court decided that "because [the defendant] was only 15 years old at the time of his offense,"[93] the Eighth Amendment prevented his execution because strong sentiments gleaned from various sources indicated that such an execution would be impermissible.[94] Writing in dissent, Justice Scalia argued that:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well.[95]

In other words, Justice Scalia viewed transnational law as relevant, but relevant only in assessing whether a particular liberty interest fits within *any* concept of what constitutes a fundamental right.

Furthermore, Justice Scalia wrote a dissent in *McIntyre v. Ohio Election Commission*,[96] a case in which the Court decided whether

88. *See* Scalia, *supra* note 56.
89. *Id.* at 307.
90. *Id*. Although it is beyond the scope of this Reply, it is hard to see how—once he admits that pragmatic consequences can sometimes be relevant—Justice Scalia is able to say that pragmatic consequences can be ignored the rest of the time.
91. *Id*.
92. 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).
93. *Id.* at 819.
94. *Id.* at 822–38.
95. *Id.* at 868 n.4 (Scalia, J., dissenting).
96. 514 U.S. 334 (1995).

an Ohio state law prohibiting anonymous campaigning was constitutional. As part of his analysis in the dissenting opinion, Justice Scalia noted that the Court had to examine whether this prohibition actually improved democratic elections.[97] Justice Scalia argued that:

> We might also add to the list [of countries that have similar restrictions] on the other side [from the majority] the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. How is it, one must wonder, that all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?[98]

Two opinions from the 2002 Term further accentuate the point that Justice Scalia does not believe that transnational law can never be used. In *Schriro v. Summerlin*,[99] the Court had to decide whether the rule announced in *Ring v. Arizona*,[100] requiring jury determination of certain factors necessary for the death penalty,[101] applied "retroactively to cases already final on direct review."[102] Part of that determination involved examining whether the rule announced by *Ring* was a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[103]

As part of his analysis in his *majority* opinion,[104] Justice Scalia noted that:

97. *Id.* at 381 (Scalia, J., dissenting).
98. *Id.* at 381–82 (Scalia, J., dissenting) (internal citations omitted).
99. *See* 124 S. Ct. 2519 (2004).
100. 536 U.S. 584 (2002).
101. *See id.* at 603–09.
102. *Schriro*, 124 S. Ct. at 2521.
103. *Id.* at 2524 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).
104. One could therefore also argue that the use of transnational law by Justice Scalia was another example of the use of transnational law as part of the holding of a majority opinion by the Supreme Court, just as Tushnet argues was the case for the use of transnational law in *Lawrence*. Tushnet, *supra* note 6, at 241, 244.

> [T]he mixed reception that the right to jury trial has been given in other countries . . . though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial factfinding so "*seriously* diminishes" accuracy as to produce an "impermissibly large risk" of injustice. When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy.[105]

105. *Shriro*, 124 S. Ct. at 2525. Also examine Justice Scalia's remarks during oral arguments in *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which Justice Ginsburg posed a transnational law question, and Justice Scalia seemed to consider transnational law relevant:

> QUESTION (Justice Ginsburg): General—we're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. Do we—they have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?
>
> GENERAL OLSON: I submit, Justice Ginsburg that none of those countries has our history, none of those countries has the Fourteenth Amendment, none of those histories has the history of the statements by this Court which has examined the question over and over again that the ultimate damage that is done by racial preferences is such that if there ever is a situation in which such factors must be used that they must be—race neutral means must be used to accomplish those objective, narrow tailoring must be applied, and this—this—these programs fail all of those tests.
>
> QUESTION (Justice Scalia): General Olson, do you know whether any of those countries that Justice Ginsburg referred to that have gone down the road of racial preferences, racial entitlements, have ever gotten rid of racial preferences or racial entitlements?
>
> GENERAL OLSON: There—
>
> QUESTION (Justice Scalia): Has it been the road to ultimately a color blind society or has it been the road to a society that has percentage entitlements for the various races?
>
> GENERAL OLSON: Sadly, I believe that this is correct.

*Gratz*, Record *available at* 2003 U.S. Trans LEXIS 27, at *23 (April 1, 2003); *see also* Tushnet, *supra* note 6, at 260 n.104 (quoting this exchange as well).

Justice Scalia also referenced foreign law in his dissent in *Locke v. Davey*[106] as a way of noting the parade of horribles that might follow if the logic of the majority opinion was taken to its extreme.[107] In *Lawrence*, he cited the Canadian experience with same-sex marriage in his dissent.[108] While these may be examples of the "disastrous consequences" exception to the bar against the use of transnational law that Justice Scalia referenced in his speech, the other examples just discussed, apart from *Locke* and *Lawrence*, are clearly not.

What do we make of these many arguments against the use of transnational law by Chief Justice Rehnquist and Justice Scalia then, given their strong opposition to the use of transnational law in other situations? It seems fair to say that Justice Scalia and other conservatives are not quite the critics of transnational law that Tushnet assumes, although Justice Clarence Thomas may very well be.[109] There are two other related explanations, one principled and one unprincipled. The unprincipled explanation, of course, is that Justice Scalia in *McIntyre, Summerlin* and *Locke* simply used transnational law because it helped his argument, and that there is no principled reason why he disagreed with the use of transnational law in *Printz* and *Atkins*. As Justice Scalia himself notes in a previous essay that he wrote, "the trick is to look over the heads of the crowd and pick out your friends."[110]

106. 124 S. Ct. 1307 (2004).

107. *Id.* at 1320 (Scalia, J., dissenting) ("Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? . . . [R]ecall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today.").

108. 539 U.S. 558, 604 (2003) ("One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal).").

109. *But see* Holder v. Hall, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring in the judgment) (examining the experiences of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe).

110. ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (1997) (quoting Judge Harold Leventhal).

A more interesting and perhaps more plausible explanation is that Justice Scalia supports the use of transnational law but simply has some concerns about how it may be used in specific contexts. He may support the kind of analysis I mentioned in the introduction—the next generation analysis that seeks to devise rules and a system for using transnational law and the integrative approach—rather than considering its usage entirely unproblematic or problematic. Although this Reply is not the place to fully develop these concerns voiced by Justice Scalia and his compatriots,[111] they are not entirely unreasonable concerns about the use of transnational law in particular, nor are they, as Tushnet suggests, just debates about constitutional interpretation in general.

For one thing, as Justice Scalia noted in *Thompson*, transnational law should not be used *before* domestic law is examined.[112] In *Thompson*, Justice Scalia admitted the potential relevance of transnational law, but was also partly critical of its usage.[113] Justice Scalia's mixed feelings about the use of transnational law in Thompson stemmed from the fact that he seemed to believe that, for a liberty interest to be very important, it needed to be generally accepted by the American people *first*. Only then could one examine whether it was somehow essential to any notion of liberty in the abstract , which is the context in which transnational law would be used.[114] This is a debate about the usages of transnational law as an interpretive tool in particular—how important transnational law is and where it fits within the hierarchy of interpretive sources.

Also, those who have occasionally indicated some hesitation about the use of transnational law are concerned that transnational law itself be used in a principled fashion. In his speech to the American Society for International Law, Justice Scalia noted his concerns about when the Court used transnational law, and which

111. I have elsewhere addressed (and I hope rebutted) at least some of these concerns. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

112. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting).

113. *Id.* (Scalia, J., dissenting).

114. *See id.* (Scalia, J., dissenting) (arguing that there must first be "a settled consensus among our own people" before "the views of other nations" may be imposed).

countries and courts it referred to when citing such law.[115] As Judge Posner has argued, "the judicial systems of the rest of the world are immensely varied and most of their decisions inaccessible, as a practical matter, to our monolingual judges and law clerks."[116] This same concern was also voiced during the congressional hearings about the Feeney resolution[117] and in Justice Scalia's speech to the American Society of International Law.[118]

Again, this is not the debate that Tushnet is referencing: Tushnet references a debate about the propriety of transnational law ever being used, and a debate that is really just a charade, when the real debate is about originalism. In contrast to this argument that the debate is all about originalism,[119] this argument about selective use of transnational materials is valid, serious, and independent of concerns about originalism. It is also a debate more about how using transnational law would work in practical operation.[120]

115. Scalia, *supra* note 56, at 309.

116. Posner, *supra* note 65, at 41.

117. Ramsey testimony, *supra* note 61, at 1–3.

118. Scalia, *supra* note 56, at 309 (noting problems with selectivity of Court decisions as to when they use transnational law at all and what transnational law they use).

119. This is not to deny that the debate about originalism is a central part of the debate about transnational law. *See generally id*. There is just more to this debate than traditional debates about constitutional interpretation.

120. Critics of the use of transnational law have made other objections that seem to be determinative (i.e. not next generation debates), but these objections are not ones that many take seriously. Judge Posner, for example, recently commented:

> This brings me to the third problem, which is the undemocratic character of citing foreign decisions. Even decisions rendered by judges in democratic countries, or by judges from those countries who sit on international courts, are outside the U.S. democratic orbit. This point is obscured because we think of our courts as "undemocratic" institutions. But that is imprecise. Not only are most state judges elected, but federal judges are appointed and confirmed by elected officials, the president, and the members of the Senate. So our judges have a certain democratic legitimacy. But the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here. The votes of foreign electorates are not events in our democracy.

Posner, *supra* note 65, at 42. I address this argument in a work in progress, but suffice it to say, it is hard to say how these concerns are fully valid.

## III. TRANSNATIONAL LAW AS BINDING LAW

Tushnet next turns his attention to situations in which American courts *must* use transnational law. Tushnet believes that objections to these situations generally amount to a "tempest in a teapot."[121] He does not address whether these objections are doctrinally valid, but rather whether they are *important* as a matter of legal policy. Tushnet first addresses federalism concerns, which he considers to be unconvincing because he does not see any fundamental difference between a system of litigation where transnational law is addressed on the federal level and a system where it is addressed at other levels.[122] Tushnet argues that these federalism concerns are really "conceal[ing]" more legitimate objections.[123]

Tushnet then turns to sovereignty-based concerns, which he considers unimportant because he believes that any transnational norms that are integrated into American law are integrated by *American* decision makers.[124] This Part briefly addresses these points, and shows how, on both points, Tushnet understates the existence of valid concerns, but how there might be ways to address those concerns and remain in the integrated system I referenced earlier. While he does consider other issues that some may have with the integrative project to be valid and therefore gives them serious attention,[125] he does not consider the federalism and sovereignty-based issues to be valid and consequently fails to give them sufficient attention.

121. Tushnet, *supra* note 6, at 248.
122. *Id.*
123. *Id.*
124. *Id.* at 249.
125. *Id.* at 241 ("The important analytical concerns are not about sovereignty but are rather about the substance of domestic constitutional law, and about the separation of powers question of who gets to determine that substance."); *id.* at 257 (noting "a concern that making non-U.S. law a rule of decision would generate bad law"). I found his discussion of both of these points to be quite convincing, but I disagree with his contention that these are the more—or only—legitimate objections to the integrative approach.

### *A. Federalism*

Tushnet discusses federalism concerns by first addressing the debate about the Alien Tort Claims Act ("ATCA").[126] That statute states that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[127] Some courts have interpreted the ATCA to create a cause of action for individuals to bring suit for actions that violate international law.[128] Led by Curtis Bradley and Jack Goldsmith, some have argued that the ATCA was intended to create a cause of action for a very small range of problematic conduct,[129] and for other cases the ATCA simply provides for jurisdiction, leaving the cause of action to be found elsewhere, most likely in state law.[130]

Tushnet does not address whether these arguments are doctrinally valid. Rather, he questions whether it makes any difference if international law is understood as federal or state law. As he sees it, in the instance of the ATCA, "any federal court inclined to impose liability under the ATCA would find that the state courts would do so as well."[131] In other words, whether under state or federal law, the same set of legal actions would proceed. Tushnet

126. 28 U.S.C. § 1350 (2000); *see* Tushnet, *supra* note 6, at 246–48. Tushnet does not see the difference between calling the statute the Alien Tort Claims Act or the Alien Tort Act:

> I have discovered that there is a bizarre—and to me totally pointless—controversy over how to refer to this statute. Apparently, human rights advocates call it the Alien Tort Claims Act, while their opponents call it the Alien Tort Act. That people actually think anything turns on the label shows how odd these discussions are.

*Id*., at 246 n.38. In fact, though, calling the statute the Alien Tort Claims Act makes it sound like the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680 (2000), a statute that clearly does create a cause of action. So, the difference in phrasing is at least rhetorically—if not really doctrinally or prudentially—important.

127. 28 U.S.C. § 1350.

128. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 238, 246 (2d Cir. 1995); Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996).

129. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

130. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997).

131. Tushnet, *supra* note 6, at 248.

views the only significant difference to be that "Congress can displace the cause of action"[132] if the cause of action is supplied by federal law, "while under the alternative[,] state legislatures could."[133]

At a very general level, it is difficult to imagine that state legislatures and Congress (or elected state judges and Article III federal judges) would treat international law in precisely the same way as one another. We know of some examples of state activity related to foreign affairs, such as the many city and state provisions restricting interactions with apartheid South Africa,[134] the anti-Burma law from Massachusetts that the Court recently considered,[135] and the Holocaust law from California that the Court addressed last term.[136] A state may pass a law protecting one particular industry of great importance to it and may hold parties liable for ATCA suits, for instance, while Congress would be less likely to pass such a law.[137]

At a practical level, this concern about whether the cause of action comes from federal or state law has a variety of important implications. For instance, some circuit courts have attributed a ten-year statute of limitations to non-state-law claims brought under the ATCA by analogizing it to a similar federal statute.[138] If ATCA cases were litigated pursuant to state law, however, then state statutes of limitations would apply,[139] and these would be much shorter than

132. *Id.*

133. *Id.*

134. Peter Fitzgerald, *Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 CORNELL INT'L L.J. 1, 7 (2001).

135. MASS. GEN. LAWS ch. 7, §§ 22G–22M (1997), *held unconstitutional*, by Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

136. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

137. Of course, the federal government sometimes passes laws that protect a narrow industry as well.

138. Torture Victim Protection Act of 1991 (TVPA), Pub. L. 102-256, § 2(c), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350). For judicial decisions applying the TVPA statute of limitations to ATCA cases, see *Papa v. United States*, 281 F.3d 1004, 1011–13 (9th Cir. 2002) and *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *61–*62 (S.D.N.Y. Feb. 22, 2002).

139. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *63.

under the current ATCA rule.[140] There would also be differences in the amount and nature of damages available and applicable rules related to the exhaustion of remedies.[141] So, in addition to possibly different instances under which cases would go forward if the federalism-based concerns were taken seriously, the particular nature of these actions would differ as well.

Tushnet then turns to the argument that customary international law should not be considered part of the "Laws of the United States" mentioned in Article VI of the Constitution,[142] but instead that "[c]ustomary international law is the law of New York, Iowa, and Texas."[143] As Tushnet sees it, this question only makes a difference when three conditions are met:

> (1) the judge (probably a federal judge, acting under the alienage, diversity, or federal question jurisdiction) would not find the conduct at issue to violate purely domestic law; (2) the judge *would* find the conduct to violate customary international law; and (3) if customary international law is federal law, Congress would not displace the judge's holding whereas some state legislatures would.[144]

It is plausible that state law might not apply in some instances where federal law might, such as when the conduct at issue relates to actions that took place overseas. Once again, in such cases state legislatures and Congress would certainly act differently with respect to international law, so Tushnet's third condition might be met often, despite his assurance that "[t]he real-world cases satisfying these [three] conditions appear to be a nearly empty set."[145]

140. *Id.* at *61 (discussing the significant hardships for plaintiffs in the "[a]pplication of the shorter statutes of limitations available under [state] laws").

141. The ATCA, for example, has a provision for damages and exhaustion of remedies that may very well differ from state law provisions governing like claims. 28 U.S.C. § 1350(2)(a)(2) (b).

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

143. Tushnet, *supra* note 6, at 249. Tushnet argues that "treaties are supreme under the Supremacy Clause," and that since "[i]nternational law does not distinguish between customary international law and treaty-based law," then domestic law should not either. *Id* at 248. But this is a major logical leap, one that requires more elaboration than Tushnet provides.

144. *Id.* at 250 (internal citations omitted).

145. *Id.*

At a broader level, Tushnet does not seem to recognize the important role that states play in enforcing transnational law, and therefore why it is important to ensure that they not be entirely displaced. We want to make sure that states play an active role in transnational law for reasons that Tushnet ignores. We have benefited substantially from the active role that states have played in implementing many private international law conventions[146] and international trade agreements.[147] Each state has been able to enforce these international rules in the best manner possible given local conditions, while still maintaining a degree of uniformity. In the context of the World Trade Organization ("WTO") and the North American Free Trade Agreement ("NAFTA"), for instance, innovative state regulatory schemes regarding government procurement have been entirely displaced by new international regimes.[148] It is this concern that caused the North Dakota Attorney General to remark that "'NAFTA and other trade agreements present the greatest challenge to state sovereignty that we have."[149] Because states are closer to citizens than is the federal government, they are also able to enforce norms of international law in a more democratically legitimate manner. Tushnet ignores these virtues when he argues that it is unimportant how transnational litigation should proceed.

146. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 601–03 (1995) (describing structure and purpose of the National Conference of Commissioners on Uniform State Laws).

147. *See* Uruguay Round Trade Agreements Act, 19 U.S.C. § 3512(b)(2)(A) (2000) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H. R. Doc. No. 103-316, at 675–77, 1043–44 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4054–56, 4327.

148. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *adopted* Dec. 15, 1993, pt. II, Annex 4(b): Agreement on Government Procurement, 31 LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND 25, 679–705 (1994).

149. Evelyn Iritani, *Trade Pacts Accused of Subverting U.S. Policies*, L.A. TIMES, Feb. 28, 1999, at A1 (quoting Heidi Heitkamp, Attorney General, North Dakota).

It is also important that we make sure that some uniformity exists in how the United States interacts with other countries.[150] As it stands now, true international law litigation has been so infrequent[151]—and limited mostly to very severe cases[152]—that it has infringed on the prerogatives of states in only a very limited manner. Still, we want to devise a system that balances the need for uniformity with the need for maintaining a vital role for states, and this division should now be our focus. Perhaps we might want to expand the role of state governments in national litigation involving the meaning of international law, much as the German Länder have a major role in the interactions between their national government and the European Union.[153] Perhaps some formulations of how norms of international law apply to states should be given a "margin of appreciation," so that each state can determine—within a range—how to apply a particular norm.[154] There are many ways we can address federalism concerns and still benefit from international law litigation in our courts; the important point is that we should start trying now.

### *B. Sovereignty*

Tushnet also turns to the concerns that others have that the integration of transnational law into domestic law may infringe on

150. *See generally* THE FEDERALIST No. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the importance of uniformity in implementing national laws).

151. *See* David J. Bederman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475, 480 n.17 (2001) ("In an admittedly imperfect empirical exercise, I calculate that since 1980 there have been approximately ninety-five reported decisions involving a substantial issue implicating the ATS.").

152. *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (allowing Argentine citizens residing in the United States to bring an action against a former Argentine general for torture, murder, and prolonged arbitrary detention).

153. *See* Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213, 242–43 (Kalypso Nicolaidis & Robert Howse eds., 2001).

154. Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1871–72 (2003).

American sovereignty.[155] As Tushnet sees it, these concerns are not as significant as others claim because:

> [D]omestic law-making institutions retain the power to override nearly all international obligations. They can withdraw from a treaty, violate a treaty for purposes of domestic law while accepting the consequences of the violation on the international level, and—most relevant to customary international law but applicable as well to treaty obligations—can enact a statute inconsistent with international law that, prior to the statute, was domestically applicable, thereby displacing the international rule with a domestic one under the "last in time" principle.[156]

In other words, since American institutions are the institutions that give practical effect to international rules, there are no serious sovereignty concerns.[157]

Tushnet illustrates his argument with reference to several specific examples. First, he notes that in the case of the application of customary international law in American federal or state courts, "domestic law-making institutions retain the power to override nearly all international obligations."[158] Tushnet also references the WTO and the dispute resolution procedure that it uses to determine whether the laws of a particular nation-state violate international law.[159] Tushnet argues that "[f]ormally speaking, the dispute resolution mechanism does not in itself make the WTO's treaty interpretations controlling in domestic disputes."[160] Tushnet also makes this argument in the context of NAFTA, which provides the basis for free trade violation lawsuits against the United States.[161] Tushnet argues that, although a finding of a NAFTA violation "is

155. Tushnet, *supra* note 6, at 257, 260–67.
156. *Id.* at 249–50.
157. *Id*. at 253 ("It is harder than one might think to formulate the precise constitutional [sovereignty] objection . . . ."); *id*. at 255 (discussing how sovereignty arguments "seem to be even weaker than the federalism-based objections"); *id*. at 256 ("[T]he objections are constitutionally creative. It is not that they are frivolous in some strong sense. Instead, they are at odds with rather long-standing understandings of constitutional law and working them out in detail can create some pretty peculiar doctrinal structures.").
158. *Id.* at 249.
159. *Id.* at 252.
160. *Id.*
161. *Id.* at 252–54.

*very likely* to generate a response by Congress preempting the state [or federal] law,"[162] Congress or the relevant state legislature itself makes the final decision and is not obligated to enforce the decision issued pursuant to a finding of a NAFTA violation.[163]

Several issues arise from the notion that there are no problems with the integrative approach because American institutions retain ultimate control. First of all, domestic institutions *must* follow an increasing number of transnational legal rules regardless of whether they have consented to implement such obligations. These rules—often called *jus cogens* or peremptory norms—are said to be binding regardless of what a state does.[164] Thus, if a state indicates through its institutions that it disagrees with these transnational norms, it breaks the law, rather than indicating its decision to opt out of this law.[165]

In reality, these peremptory norms still apply only to a very small range of conduct, and it would be practically impossible for an American individual to be subjected to these norms in the absence of actions of an American institution. Still, these norms have had some impact, such as in the movement to prosecute Henry Kissinger for crimes against humanity.[166] Kissinger fled Paris to avoid being forced to address a warrant commanding his testimony in a French case.[167] He did the same to avoid French and Chilean judges in England.[168] No act of Congress, no executive order, and no federal regulation had functionally implemented the peremptory norms that

162. *Id.* (emphasis added).

163. *Id.*

164. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331, 334, 347, 8 I.L.M. 679, 698–99, 703; Siderman v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k & reporters' note 6 (1987).

165. *Siderman*, 965 F.2d at 717; Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980).

166. *See* CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (2001); Christopher Hitchens, *The Case Against Henry Kissinger*, HARPER'S MAG., Feb. 2001, http://www.icai-online.org/files/hitchens_harpers_kissinger.pdf.

167. Christopher Hitchens, *The Latest Kissinger Outrage*, SLATE (Nov. 27, 2002), *at* http://slate.msn.com/?id=2074678.

168. Jonathan Franklin & Duncan Campbell, *Kissinger May Face Extradition to Chile*, GUARDIAN, June 12, 2002, http:// www.guardian.co.uk/international/story/0,3604,735723,00.html.

caused the lawsuits in these countries, yet Kissinger still had cause to be concerned.

Of course, in most instances a domestic institution will be required to act to effectuate transnational law on American soil. Surprisingly, Tushnet, though one of the most influential anti-formalists of the past generation, argues that the technical, formal control that domestic institutions maintain in creating and bringing into effect transnational law is sufficient to alleviate any potential concerns.[169] However, delegating authority to transnational institutions might be a cause for concern in the same way that delegating authority to administrative institutions might. Both acts of delegation encourage directly accountable branches of government to avoid meaningful accountability by enacting vague statutes that enable other (domestic or international) institutions to act. While American branches of government still maintain technical control over the implementation of international rules, allowing them to delegate great amounts of authority allows them to play a very minimal role.

Tushnet considers the constitutional merits of this form of argument to be dubious,[170] but surely that is an overstatement. The Constitution does seem to encourage—if not require—elected officials to take responsibility for public policy. The Appointments Clause requires the president to take responsibility for the execution of laws.[171] The decision to grant Congress the sole power to legislate makes Congress accountable for legislative action.[172] When American institutions grant transnational institutions significant powers, usually done through an enabling act, the American institutions proceed to act quite infrequently and in a perfunctory

169. *See* Tushnet, *supra* note 6, at 249, 253–57, 263.

170. *Id*. at 253–54.

171. THE FEDERALIST NO. 77, at 517 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For a discussion of this Clause in the context of international delegations, see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1563 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 107–10 (2000); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 120–29 (1998).

172. U.S. CONST. art. I.

manner to oversee and implement the actions of these transnational institutions.

Any initial enabling act that provides for the relevance of transnational law—which Tushnet considers to be so central—can often be in many ways a small and meaningless legislative activity. In the United States, the executive branch normally must receive congressional assent before it can begin trade discussions, and then any product that results from these discussions must be submitted to Congress for its approval.[173] However, Congress may waive its power to amend the submitted proposal and its power to use supermajority voting in the Senate.[174] In the context of the WTO, Tushnet's example of a harmless delegation, the United States negotiated and then consented to the WTO solely using the fast track procedure.[175] Congress can either vote yes or no on a trade agreement using this procedure, but cannot negotiate any details of the agreement or even seriously debate the agreement.[176]

How does the WTO work in practice? In 1994, the Uruguay Round Agreements created a standing Appellate Body to review the work of the WTO.[177] The General Council of WTO members can overrule this Appellate Body, but only by a supermajority vote or consensus,[178] and thus a decision by the Appellate Body usually results in a final decision by the WTO. In 1993, the Environmental Protection Agency ("EPA"), acting pursuant to authority granted by the Clean Air Act, issued a regulation defining how dirty gasoline was permitted to be.[179] This regulation required the domestic refineries only to ensure that their gasoline did not fall below the

173. Joseph G. Block & Andrew R. Herrup, *Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L L. 221, 229 (1995).

174. Id.

175. *See* Harold Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 163 (1992).

176. *Id.* at 161 n.47.

177. Final Act Embodying the Results of the Uraguay Round of Multilateral Trade Negotiations, *adopted* Dec. 15, 1993, pt. II, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, para. 17.1, 33 I.L.M. 112, 123 [hereinafter Dispute Settlement Understanding].

178. *Id.*

179. *See* Regulation of Fuels and Fuel Additives—Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80 (1998) (promulgated pursuant to 42 U.S.C. § 7545(k)(8) (1994)).

lowest of three firm- or industry-specific baselines.[180] By contrast, the regulation required importers of foreign gasoline to follow a more demanding standard.[181] Venezuela objected to the EPA standard, and used the WTO dispute resolution procedure to challenge this standard.[182] The WTO Appellate Body agreed with Venezuela that the EPA regulation was not justifiable under Article XX of the General Agreement on Tariffs and Trade.[183]

Following Tushnet's theory, there should be no policy concerns with this WTO ruling because an American institution would have to decide whether to enforce this WTO ruling; otherwise, it would just be words on paper, with no practical significance. However, the WTO gained its initial authority to decide the Venezuela case because the American government had consented to an agreement prohibiting the very vague act of "unjustifiable discrimination."[184] This is hardly an example of a directly accountable democratic branch deliberating and clearly deciding upon the proper course of policy and legal standard.

Furthermore, American institutions did have to consider the WTO ruling in order to make it effective, and this particular WTO decision generated as much rhetoric as almost any decision by a non-American tribunal. The discussion of this issue, however, was comparatively brief, and many of the technical and other details were settled by the WTO decision. The American government acted, but with background facts already established. As Justice White noted in his dissent in *Immigration & Naturalization Service v. Chadha*,[185] administrative agencies make the overwhelming amount of federal administrative law, and when Congress acts with respect to an administrative activity, it acts with many of the facts and context

180. *Id*. § 80.91(a).

181. *Id*. § 80.91(b)(4).

182. WORLD TRADE ORG., UNITED STATES—STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE: REPORT OF THE PANEL, NO. WT/DS2R (1996).

183. WORLD TRADE ORG., UNITED STATES—STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE: REPORT OF THE APPELLATE BODY, NO. AB-1996-1, AT 29 (1996), *reprinted in* 35 I.L.M. 603, 633.

184. General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XX, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

185. 462 U.S. 919 (1983).

already established by the administrative agencies.[186] Of course, administrative agencies can often act with direct effects on American citizens, while international institutions cannot, but in both cases if Congress does act, it only need act in a very brief and incomplete fashion.

What should we make of these transnational institutions to which Tushnet has no problems granting power? We might have less of a problem with their authority if they were themselves democratic, but, in fact, international bodies tend to make rules according to the wishes of the *executive branches* of member states. International institutions are at least as likely as domestic regulatory institutions to be subject to regulatory capture by a few powerful interests. Domestic regulatory agencies also exercise substantial authority and, as an empirical matter, cause popularly elected branches of government to make fewer important decisions. Besides the fact that they are still more likely to be democratically accountable via the Appointments Power or mere geographical and social proximity to democratic interests, though, there are cultural differences between the two situations. Individuals exercising authority in transnational institutions come from different backgrounds, and have a different set of cultural norms and assumptions, for example, than do American officials. So, to go back to a debate that Professor Tushnet himself quotes in his piece,[187] someone from Chile will have a different cultural frame of reference than someone from Alabama. In a world in which, as a practical matter, that individual from Chile will be exercising a substantial degree of daily power even if an American institution has the ultimate, formal power over that individual, this might be of concern.

Still, despite the fact that these sovereignty concerns have substantial validity, this does not mean that it is time to abandon the integrative project. Delegating some authority to international institutions can reduce the costs of making decisions because these

186. *Id.* at 985–86.

187. Tushnet, *supra* note 6, at 267 n.130 (quoting an e-mail from me stating that "a New Yorker might have problems with someone from Connecticut telling them or her what to do, but would have more difficulty with someone from Alabama doing so, and even more difficulty with someone from Chile doing so.")

institutions have some institutional advantages over American legislatures. Not surprisingly, then, the open markets created by institutions like the WTO have been responsible for substantial amounts of economic growth. The human rights litigation that has gone forward because of the recognition of certain fundamental norms has been at least partly responsible for disposing brutal leaders such as Slobodan Milosevic and Charles Taylor.[188] There are clear benefits to recognizing strong rules of international law that states generally cannot avoid.

However, if we are going to follow this system, it is time to focus on how to make these transnational institutions more democratically accountable to American and other citizenries—both internally and externally—so as to avoid any concerns that these institutions might go forward with very little consent from domestic populations. Perhaps we should seriously reconsider rules that force Congress to lay down stronger "intelligible principle[s]"[189] when it makes international agreements, or that force Congress to seriously and soberly consider a transnational ruling before it gives such a ruling domestic effect.[190]

Perhaps Congress should exercise some version of its Appointment Power when important officials are being considered for high-level positions in international organizations. As an example, consider the variation in the procedure used to select adjudicative panels in WTO disputes versus NAFTA disputes. In the WTO, panelists are chosen by the WTO itself, and no member state can oppose their selection except for "compelling reasons."[191] For

188. *See generally* Aryeh Neier, *Accountability for State Crimes: The Past Twenty Years and the Next Twenty Years*, 35 CASE W. RES. J. INT'L L. 351 (2003).

189. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (setting an "intelligible principle" as the litmus test for a congressional delegation's constitutionality). *But see* Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (representing one of the two instances in which the Court has found the "intelligible principle" lacking) (internal citation omitted); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (representing the other instance).

190. *See, e.g.*, S. 16, 104th Cong. (1995). Senator Dole proposed the creation of a domestic appellate body that would consider WTO rulings before they could become domestically effective.

191. Dispute Settlement Understanding, *supra* note 177, art. 8.6, 33 I.L.M. at 119.

NAFTA adjudications, however, the parties themselves select the panelists, and if they cannot agree on such panelists they choose panel members by lottery.[192]

We might also begin to consider means of opening up international institutions to participation by American citizens. Right now, dispute settlement proceedings in the WTO are closed to the public,[193] information about the members of the adjudicatory panels are secret,[194] and NGOs and other institutions and individuals may not observe sessions of the legislative body of the WTO.[195] Again, changing these rules might be a way of opening up these international institutions to public input, which would be a way of remedying any sovereignty concerns.

## IV. CONCLUSION

The globalization of American law is an inevitable by-product of the way our world is changing. In Canada, for instance, in nearly half of all cases decided between 1984 and 1995, judges cited to a foreign case, and in one out of three cases, judges cited to an American case.[196] Closer to home, our judges regularly use their summer vacations to meet with foreign judges and discuss shared legal issues, and during the year they meet at law schools such as Yale and New York University.[197] It seems that it is just a matter of time before our law becomes significantly more globalized.

192. North American Free Trade Agreement, Dec. 17, 1992, art. 2011.1, 107 Stat. 2057, 32 I.L.M. 289.

193. *See* Dispute Settlement Understanding, *supra* note 177, art. 14, 33 I.L.M. at 122.

194. Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L. ECON. L. 331, 333 n.15 (1996) ("Unfortunately, the biographies of trade dispute panelists . . . are unavailable.").

195. *See id.* at 334.

196. C.L. Ostberg et al., *Attitudes, Precedents and Cultural Change: Explaining the Citations of Foreign Precedents by the Supreme Court of Canada*, 34 CANADIAN J. POL. SCI. 377, 386 (2001).

197. For a recent example of the books that Yale Global Constitutionalism Seminar for Judges creates, see PAUL GEWIRTZ, GLOBAL CONSTITUTIONALISM: TERRORISM: DETENTION, JUDICIAL RESPONSIBILITIES; FREEDOM OF EXPRESSION; COMMERCIAL SPEECH, INTERNET JURISDICTION; THE PROPOSED EUROPEAN CONSTITUTION (2003).

This is certainly a good thing. As we learn more about how other countries handle situations, it will expand the range of possibilities we consider in our law. It will increase our understanding of these countries and hence improve our relationships with them. Moreover, entering into joint agreements with these countries has proven to increase cooperation, comity, and as a result, economic growth and protection of human rights.

Despite these virtues and Tushnet's defense of parts of the system that have led to these virtues, we should not delude ourselves into thinking that these arrangements do not have their own unique and substantial problems. The solution is not to give up on the globalization project; rather, it is time for us to stop debating the merits of this project and to think about how to make it work best. Now is the time to start with this project.