

THE HEISENBERG UNCERTAINTY PRINCIPLE AND THE CHALLENGE OF RESISTING – OR ENGAGING – TRANSNATIONAL CONSTITUTIONAL LAW

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ABSTRACT

This Essay considers the desirability and possibility of the U.S. federal and state courts increasing their level of engagement with foreign and international law when deciding domestic law questions. In considering this important issue, I give sustained and careful consideration to Professor Vicki C. Jackson’s masterful work, Constitutional Engagement in a Transnational Era (Oxford University Press 2010), which anyone undertaking serious scholarly work on the question of transnational judicial dialogue will find an essential resource. Professor Jackson proposes a troika of models that national court systems can adopt with respect to incorporating comparative and international law materials into their domestic jurisprudence: resistance, convergence, and engagement. Jackson buttresses her theoretical typology with significant empirical support. Systemic considerations associated with both the legal culture and broader general culture will, however, strongly impact a particular nation’s approach to reconciling foreign and international law with domestic law. For example, the United States seems to poorly equip its judges and lawyers for engagement, given the minimalistic efforts to incorporate comparative law perspectives into the standard J.D. curriculum (to say nothing of the broader problem of a general lack of interest in acquiring foreign language skills). Engagement has much to recommend it, in terms of policy and theory, but to successfully embrace this model, judges, lawyers, and the legal academy must be prepared to devote greater resources to inculcating the skills necessary for this kind of legal research, writing, and advocacy.

INTRODUCTION: THE OBSERVER EFFECT AND TRANSNATIONAL JUDICIAL ENGAGEMENT

In our increasingly globalized world, every national judicial system must have a standard for assessing the relevance—or irrelevance—of foreign and international law. There are three basic approaches to incorporating—or ignoring—international and comparative law when

interpreting and applying domestic legal sources (including, but not limited to, a constitution): resistance, convergence, or engagement.¹ Moreover, as Professor Vicki C. Jackson has observed, “[i]t is much harder today than in the past for constitutional courts to avoid taking positions on the role of international or foreign law.”²

Domestic courts will find it increasingly difficult to simply ignore that which they already know—simply put, legal knowledge does not respect national boundaries; access to comparative law materials is, quite literally, a Google search away. As Professor Jackson argues, “[t]he Internet and its search engines have created enormous accessibility of resources.”³ Foreign constitutional courts have worked to make their decisions available to a larger global community of judges, lawyers, scholars, and law students.⁴ In addition, “[n]ot only is foreign and international law more accessible, but there is simply more of it in the world today—more constitutional law, and more international law, touching on topics historically viewed as belonging to the realm of constitutional law.”⁵

In a modern, globalized society, knowledge is viral, and once caught, cannot be easily shed.⁶ One cannot undo awareness of same-sex marriage in Canada,⁷ state-sanctioned euthanasia in the Netherlands,⁸ or the

1. VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 8–9 (2010).

2. *Id.* at 5; see also David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 525 (2011) (“No aspect of the globalization of constitutional law has thus far attracted more attention or controversy than the use of foreign and international legal materials by constitutional courts.”).

3. JACKSON, *supra* note 1, at 5–6.

4. *Id.* at 6.

5. *Id.*

6. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008) (“For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. . . . Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. . . . And some legal systems not only decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy.”). The *Baker* majority’s invocation of foreign law to determine whether punitive damages should be available in admiralty cases did not provoke a single word of dissent from any member of the Supreme Court; presumably this was so because admiralty law should incorporate and reflect the common practices and usages among nations more than, say, the question of punitive damage awards under the domestic tort law of the states.

7. See *Halpern v. Canada* (Att’y Gen.), [2003] 225 D.L.R. 4th 529, paras. 125, 142 (Can. Ont. C.A.); see also *EGALE Can. Inc. v. Canada* (Att’y Gen.), [2001] 95 B.C.L.R. 3d 122, paras. 158–59 (Can. B.C. Sup. Ct.). For a discussion of these decisions and of the rights of sexual minorities under the Charter more generally, see Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Equality (1985–2005) and Its Limits*, 49 MCGILL L.J. 1143, 1158–72 (2004).

8. See DEREK HUMPHRY & MARY CLEMENT, *FREEDOM TO DIE* 143–48 (1st ed. 1998) (discussing the decriminalization of euthanasia in the Netherlands); Mason L. Allen, Note, *Crossing the Rubicon: The Netherlands’ Steady March Towards Involuntary Euthanasia*, 31 BROOK. J. INT’L L. 535, 539, 546–47 (2006) (discussing adoption of legislation normalizing access to physician-assisted suicide and permitting the use of euthanasia in the Netherlands).

decriminalization of many recreational drugs in Mexico.⁹ Mere knowledge of legal rules at variance with current U.S. baselines must, in some way, affect the way a judge thinks about, and frames, these legal issues.¹⁰ One cannot successfully pretend not to know what, in point of fact, one does know about the way another legal system has attempted to resolve a common legal or policy problem, nor can the effect of this knowledge be compartmentalized and ignored when considering a domestic legal rule.

Heisenberg's Uncertainty Principle applies in this context no less than with respect to subatomic particles; observation changes both the observer and the observed. As Professor Jackson argues, “[k]nowledge once thus acquired does not simply disappear.”¹¹ She is also quite correct in suggesting that “[m]ore generally, ideas have never respected national boundaries, and modern communications technology facilitates the rapid spread of ideas and processes of permeation that can make origins difficult to track.”¹² Thus, “[t]he mere existence in the world of alternative and overlapping systems for declaring and protecting individual rights changes constitutional adjudication.”¹³

Perhaps to state the obvious, however, certain domestic concerns are likely to supersede even the strongest and most pressing national commitment to integrating foreign and international law into a domestic legal system. No nation-state is capable of a universal and unflinching commitment to global legal integration, regardless of the domestic social,

9. See Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Salud, del Código Penal Federal y del Código Federal de Procedimientos Penales [Decree Amending, Supplementing or Repealing Certain Provisions of the General Health Law, the Federal Criminal Code and Federal Code of Criminal Procedure], *Diario Oficial de la Federación* [DO], 20 de Agosto de 2009 (Mex.); Associated Press, *Mexico Legalizes Drug Possession*, N.Y. TIMES, Aug. 21, 2009, at A12; see also Matthew S. Jenner, *International Drug Trafficking: A Global Problem with a Domestic Solution*, 18 IND. J. GLOBAL LEGAL STUD. 901, 916–18 (2011) (discussing the liberalization of Mexico's drug laws).

10. This simply reflects the “observer effect” noted in the sciences, such as physics: in some cases, the act of observing a phenomenon can affect or change it; so too, simply knowing that another polity has reached a different answer to a common question can and will affect how one thinks about the question. See generally Susan Hyde, *The Observer Effect in International Politics: Evidence from a Natural Experiment*, 60 WORLD POL. 37 (2007); D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 13–15, 19, 33–35 (2002). In physics, the Heisenberg Uncertainty Principle relates to the problem of observer effects—the act of attempting to observe a subatomic particle changes or alters it. See WERNER HEISENBERG, *PHYSICS AND BEYOND: ENCOUNTERS AND CONVERSATIONS* 76–81 (Ruth N. Anshen ed., Arnold J. Pomerans trans., Allen and Unwin, 1971). This same problem exists with respect to efforts to isolate a particular legal system from the influence of other domestic legal systems, and also from international law.

11. JACKSON, *supra* note 1, at 126.

12. *Id.*

13. *Id.* at 127.

political, or economic consequences.¹⁴ Jackson suggests that “the Constitution and constitutional law express or help constitute a national identity, which is understood, in part, in comparison with that of other nations.”¹⁵ Thus, a nation might have a relatively robust commitment to global legal norms (e.g., South Africa, Canada, or France), but this commitment should not, and will not, always carry the day.

The choice among resistance, convergence, or engagement¹⁶ will also impact the visibility and importance of that system within the ongoing transnational judicial dialogue that currently takes place between and among judges within both domestic and international juridical bodies. A position of resistance, for example, might well reduce the influence of a jurisdiction within the larger ongoing conversation.¹⁷ Thus, to the extent that U.S. courts fail to engage foreign and international law, the influence of our domestic courts could well be reduced.

Professor Sarah K. Harding has noted that unlike the Supreme Court of Canada, “[t]he U.S. Supreme Court . . . has focused on the formation of a highly autonomous national legal system.”¹⁸ She posits that “the rejection of foreign law by the U.S. Supreme Court is justified, at least partially, by reasons that also help explain its concerns about authority within the

14. For example, despite Germany’s leadership in and support of the European Union, the German Federal Constitutional Court has made clear that, in the event of an irreconcilable conflict between a provision of the Basic Law and an EU Directive, the imperatives of the Basic Law must take precedence. See Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229 (1997). Grimm, a former member of the Federal Constitutional Court, Germany’s highest constitutional tribunal, has explained that:

The German Constitutional Court has ruled that the effective protection of fundamental rights is an essential and inalienable feature of the Basic Law. This entails, according to the Court, not only the necessity of Community law being compatible with national (German) fundamental rights provisions; it also led the Court to assert in *Solange I* its own power to check Community rules against the standards of fundamental rights protection contained in the Basic Law.

Id. at 233. Nor has “the German Constitutional Court . . . relinquished its competence to scrutinize Community legislation. The Court is merely refraining from exercising its – still existing – jurisdiction.” *Id.* at 234.

15. JACKSON, *supra* note 1, at 128.

16. See *id.* at 17–38 (discussing “resistance” to comparative and international law), 39–69 (discussing “convergence” with comparative and international law), 71–102 (discussing “engagement” with comparative and international law).

17. Empirical studies have established that the Supreme Court of the United States is increasingly less influential than other constitutional courts. See David S. Law & Mila Versteeg, *The Declining Influence of the U.S. Constitution*, 87 N.Y.U. L. REV. 762 (2012); see also Adam Liptak, ‘We the People’ Loses Appeal with People Around the World, N.Y. TIMES, Feb. 6, 2012, at A1.

18. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 412 (2003); see also Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

American legal system” and that this approach “can be seen as a response to both local and global influences.”¹⁹

And, yet, it would be mistaken to assume that the United States maintains a successful posture of resistance to *all* foreign and international law influences. In fact, most domestic legal systems take some account of *international* law (if not *comparative* law). The U.S. Constitution expressly provides that

[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made*, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²⁰

Article III also expressly endorses the relevance of treaties to domestic U.S. law by extending the judicial power of the United States to include claims arising under treaties.²¹ Accordingly, to the extent that international law rests on treaties that have been signed by the President and ratified by the Senate, international law comprises an important part of the domestic law of the United States.²² Treaties, however, are part of international law rather than the domestic law of another polity (i.e., comparative law).

The general policy question of whether the domestic federal courts, and the Supreme Court in particular, should consider foreign law has provoked a widespread and fiercely contested debate in the United States.²³ Recent nominees to the Supreme Court of the United States have been asked to explain the relevance, if any, of foreign law to the interpretation and application of our Constitution.²⁴ Indeed, the four most recent nominees to

19. Harding, *supra* note 18, at 412.

20. U.S. CONST. art. VI, cl. 2 (emphasis added).

21. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and *Treaties made, or which shall be made, under their Authority.*” (emphasis added)).

22. See *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) (upholding the extension of congressional regulatory power via ratification of a treaty but cautioning that “[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way” than simply asking whether the treaty power expands the scope of Congress’s powers under Article I, Section 8).

23. See Ruth Bader Ginsburg, Justice, United States Supreme Court, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Address to the International Academy of Comparative Law (July 30, 2010), in 1 *FIU L. REV.* 27 (2010); *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, FREE REPUBLIC (Feb. 27, 2005, 8:44 PM), <http://www.freerepublic.com/focus/news/1352357/posts>; see also Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14.

24. Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 200–01 (2005) (statement of

the Supreme Court,²⁵ to a one, have disclaimed any interest in placing significant precedential reliance on foreign law—whether in the form of statutes, constitutions, or judicial decisions.²⁶ Despite this promise to forebear consideration of such materials, other members of the Supreme Court have taken a different approach, citing as persuasive authority the legal rules and decisions of other national courts and international bodies.²⁷

The question continues to have salience, and the decision to consider foreign law cannot really be answered with a simple “yes” or “no.” What’s more, the Justices ostensibly most hostile to considering foreign law—even as merely persuasive authority—such as Associate Justice Antonin Scalia and former Chief Justice William Rehnquist, have themselves cited contemporary foreign law (albeit negatively). Chief Justice Rehnquist did so in his majority opinion in *Washington v. Glucksberg*,²⁸ and Justice

John G. Roberts, Jr., Supreme Court nominee) (rejecting use of foreign legal materials in U.S. constitutional interpretation); Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 471 (2006) (statement of Samuel A. Alito, Jr., Supreme Court nominee) (same); Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 464–65 (2009) (statement of Sonia Sotomayor, Supreme Court nominee) (agreeing that foreign law lacks precedential value but observing that foreign and international law could help get the “creative juices flowing” and also positing that such authorities could be useful when considering novel legal questions). Justice Elena Kagan also rejected affording formal precedential value to foreign legal decisions, but observed that she was “in favor of good ideas coming from wherever you can get them” and that “there are a number of circumstances” in which considering foreign law as persuasive authority might be appropriate. Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 127 (2010).

25. This group of most-recently appointed Justices includes Chief Justice John G. Roberts Jr. (2005) and Associate Justices Samuel A. Alito (2005), Sonia Sotomayor (2009), and Elena Kagan (2010).

26. See *supra* note 24.

27. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576–78 (2005) (citing the U.N. Convention on the Rights of the Child, unratified in the United States, and the domestic law of the United Kingdom, Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China); *Lawrence v. Texas*, 539 U.S. 558, 572–73, 576–77 (2003) (citing authority from Ireland, the United Kingdom, and the European Court of Human Rights); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing the amicus brief of the European Union and noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”). For a general survey of the Supreme Court’s citation of foreign legal authority in its published decisions, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005). For a more general analysis and discussion, see Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335 (2006) and Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69 (2004).

28. *Washington v. Glucksberg*, 521 U.S. 702, 734 (“This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government’s own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as ‘the deliberate termination of another’s life at his request’), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request.”).

Scalia did so in his dissenting opinion in *Lawrence v. Texas*.²⁹ If foreign legal materials are simply irrelevant to the interpretation of the U.S. Constitution, then even negative references to foreign law ought to be avoided in the pages of *U.S. Reports*.

This Essay proceeds in three main parts. Part I surveys and analyzes Professor Jackson's arguments for, and also against, transnational judicial engagement and its potential cost and benefits; in the end, Jackson is a cautious advocate of transnational engagement as a means of improving the quality of constitutional adjudication in both the United States and elsewhere. Part II considers some of the most important factors that could lead a national court system to adopt—or reject—a posture of engagement; this Part argues that many of these factors will cut against the United States adopting a posture of more active engagement. Part III posits that, absent a stronger commitment to incorporating comparative and international law into the standard J.D. curriculum, the prospects for U.S. courts embracing significantly enhanced levels of judicial engagement will be limited. This Part also argues that effective engagement probably requires a community of judges and lawyers who are trained in the use of comparative and international law materials as law students and who are comfortable relying on such materials in their day-to-day work.

I conclude my argument by positing that, in the absence of meaningful institutional change within courts and law schools, significantly enhanced levels of transnational judicial engagement within the United States will not happen. Even so, Professor Jackson's thoughtful defense of engagement as the best potential approach for advancing U.S. constitutional values, both at home and abroad, possesses significant merit and persuasive force. The difficulty lies in translating her theoretical arguments in favor of engagement into a practical agenda for securing change. Unless and until U.S. judges demonstrate significantly greater interest in hearing arguments premised on comparative and international law, U.S. courts will continue to play only a limited role in the ongoing process of transnational judicial dialogue.

29. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (“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). See *Halpern v. Toronto*, 2003 WL 34950 (Ontario Ct. App.); Cohen, *Dozens in Canada Follow Gay Couple’s Lead*, Washington Post, June 12, 2003, p. A25.”).

I. PROFESSOR JACKSON'S THEORY OF JUDICIAL ENGAGEMENT IN A TRANSNATIONAL ERA

Professor Vicki C. Jackson, the Thurgood Marshall Professor of Constitutional Law at Harvard Law School, has carefully considered the potential relevance of foreign and international law materials to domestic constitutional jurisprudence. In her provocative book, *Constitutional Engagement in a Transnational Era*,³⁰ she argues that the judges in the United States should not underestimate the potential benefits of higher levels of transnational judicial dialogue or, to use Jackson's preferred nomenclature, a project of "transnational judicial engagement."³¹ Jackson is one of the foremost scholars in the field of comparative constitutional law.³²

Unlike many legal scholars working in the field of comparative constitutional law, Professor Jackson is not a categorical advocate, or opponent, of transnational judicial dialogue.³³ Instead, she is a careful

30. See generally JACKSON, *supra* note 1.

31. See *id.* at 9–10, 11–12. Professor Jackson readily acknowledges that "[s]ome scholars refer to these postures of engagement as 'dialogical,' which implies a conversation, a form of reciprocal intellectual give and take." *Id.* at 71. She explains her conscious choice of "engagement," rather than "dialogue," as reflecting her view that "the posture of engagement may or may not imply felt obligations of reciprocity," noting that "[a] court may engage the work of other courts, or the experiences of other polities, or international human rights instruments, without any necessary expectation of response." *Id.* Thus, "[f]or this reason I speak of 'engagement' rather than 'dialogue.'" *Id.* For a discussion of the concept of transnational judicial dialogue and a survey of the arguments advanced by some of its principal proponents, see Ronald J. Krotoszynski, Jr., "I'd Like to Teach the World to Sing (in Perfect Harmony)": *International Judicial Dialogue and the Muses – Reflections on the Perils and Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1322–23, 1327–36 (2006).

32. See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005). Moreover, Jackson is also, with her colleague Mark Tushnet, the co-author of the leading casebook in the field. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2003).

33. Compare David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 566 (2001) (arguing that state and federal courts should actively engage the decisions and precedents of foreign courts when interpreting domestic constitutional texts), Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (arguing that domestic legal systems should seek to harmonize and incorporate transnational and international human rights norms), Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191–92 (2003) (advocating enhanced cooperation and coordination among national judicial systems and positing that such interactions already take place on a growing basis), and Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999) (noting the theoretical difficulties, but also the potential benefits, of national courts attempting to engage each other in formal judicial decisions), with Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071, 1084 (2008) (arguing that consideration of the significant structural and substantive differences in constitutional texts makes cross-national "borrowing" illegitimate), Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 703 (2005) [hereinafter Alford, *Constitutional Comparativism*] (questioning whether any plausible theory of constitutional interpretation provides a sufficient justification for the incorporation of foreign legal precedents into domestic constitutional law), Richard A. Posner, *Foreword: A Political Court*, 119

analyst of the potential costs and benefits of judges engaging both foreign law and international law within domestic legal systems. As she puts it, she seeks to investigate “convergence,” “resistance,” and “engagement.”³⁴ Moreover, Professor Jackson rejects the traditional dichotomies commonly used to establish typologies in this field, such as “monism” and “dualism.”³⁵ In fact, “articulating a single overarching model of the relationship between transnational law and domestic constitutional interpretation is probably not reasonable, since states are situated in quite different relationships to international law and transnational norms.”³⁶

Jackson’s approach to transnational judicial engagement reflects a highly thoughtful approach and ultimately comes to rest at a posture of cautious advocacy of constitutional engagement. Her goal is better judicial decision making. She explains, in the context of equal protection doctrine, that “[l]ooking to well-reasoned judgments of other comparable jurisdictions, as well as to the uses made of these exclusionary categories by other regimes, can provide forms of checking on our own moral and constitutional blindness.”³⁷ For her, “the central idea is to engage, to consider, and not, necessarily, to follow or harmonize with” foreign or international law.³⁸

Jackson’s book constitutes a comprehensive empirical and theoretical study of the practice of integrating foreign and international law materials into a domestic legal system. Importantly, she makes a claim that is, to my knowledge, quite original to Professor Jackson: it is simply not possible for a domestic judicial system completely to disengage from the world (as Justices Scalia and Thomas advocate), but it is equally implausible to attempt total integration of these disparate legal systems (as legal scholars such as Anne-Marie Slaughter and Harold Koh have advocated). The book systematically develops and explains this thesis.³⁹

In light of this reality, Jackson argues that we should look carefully at the costs and benefits of borrowing in specific contexts; she assiduously avoids making any universal claims for or against constitutional

HARV. L. REV. 31, 85–86 (2005) (questioning the legitimacy of transnational judicial dialogue), and Mark V. Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 662 (2004) [hereinafter Tushnet, *Some Cautionary Notes*] (questioning the theoretical basis for transnational judicial borrowing and suggesting that too much comparative constitutional law scholarship focuses on issues of substantive rights, rather than institutional structure).

34. See JACKSON, *supra* note 1, at 8–9.

35. *Id.* at 277–78.

36. *Id.* at 282.

37. *Id.* at 226.

38. *Id.* at 284.

39. See *id.* at 17–102, 273–85.

engagement between and among legal systems.⁴⁰ Her arguments are informed by a remarkably broad set of empirical observations and rest on the actual practices of judges within particular nation-states. To be sure, she also offers both normative and theoretical arguments for and against postures of resistance, convergence, and engagement. Her argument tends to focus carefully on what courts are *actually doing*, rather than what they *should be doing* from a particular theoretical perspective.⁴¹ Or, to state the matter more precisely: her theoretical and normative arguments are grounded in the underlying reality of what actual judges are doing on the ground.

The first three chapters of *Constitutional Engagement in a Transnational Era* consider the problem from the perspective of nations that resist engagement (Chapter 1), that promote convergence (Chapter 2), and that abjure both resistance and convergence, instead embracing a model of “engagement” (Chapter 3). Engagement represents the Aristotelian “virtuous mean” between the unvirtuous extremes. For Aristotle, as for Professor Jackson, virtue inheres in avoiding extreme positions that are not conducive to human flourishing.⁴²

For Jackson, efforts to integrate completely a national constitution with those of other nations and international law are no less implausible than attempting to ignore how other democratic polities and international tribunals have framed and resolved common legal questions.⁴³ On the difficulties of integration, she explains that “[t]he idea of a constitution is itself one that may seem to invite resistance or indifference to foreign or international law”⁴⁴ and adds that “[a]lthough arguments from positivist understandings of constitutional texts turn out to be surprisingly hard to make in justifying a general posture of resistance, the arguments from democracy support resistance to the treatment of transnational norms as binding on constitutional interpretation.”⁴⁵

40. Cf. Koh, *supra* note 33, at 2397 (endorsing “dialogue between domestic and international law-declaring institutions” because such dialogue “moves us closer to a unitary, ‘monist’ legal system, in which domestic and international law are integrated”).

41. See JACKSON, *supra* note 1, at 106–07.

42. See ARISTOTLE, *THE NICOMACHEAN ETHICS* 42–43 (Martin Ostwald trans., 1962). Aristotle explains that

moral virtue is a mean and in what sense it is a mean; . . . that it is a mean between two vices, one of which is marked by excess and the other by deficiency; and . . . that it is a mean in the sense that it aims at the median in the emotions and in actions.

Id. at 49–50. For example, both cowardice and foolhardiness are extremes that tend to lead to bad outcomes; the virtuous mean is courage—i.e., having an appropriate level of bravery, rather than a surfeit or paucity of this quality.

43. See JACKSON, *supra* note 1, at 18–20, 114–18, 129–30.

44. *Id.* at 18.

45. *Id.* at 38.

On the other side of the ledger, however, “engaging with transnational sources of constitution-like law may strengthen both the quality of decisions and the power of reason-giving as a mechanism of accountability for politically independent judges.”⁴⁶ In her view, “[c]omparison today is inevitable.”⁴⁷ In sum, Jackson comprehensively reviews normative and empirical arguments in favor of transnational engagement (Chapter 4), but also gives equally careful consideration to arguments *against* efforts to integrate domestic law with foreign and international law.⁴⁸

The book also uses careful consideration of both substantive and structural issues to demonstrate when and how engagement occurs.⁴⁹ In other words, how do judges and courts work through problems that implicate foreign law, international law, or both? What circumstances make transnational legal engagement more or less likely? How does it happen? In this part of her argument, Jackson’s emphasis relates not to the theoretical arguments for or against engagement; instead, she is deeply interested in considering how real-world courts and judges actually are going about their work on a day-to-day basis.⁵⁰ The reality is that judicial decision making today requires judges in all legal systems both to take cognizance of and interact with international and foreign legal systems.

Jackson sets forth considerations that should generally govern recourse to international and comparative law materials when deciding questions of domestic law. These considerations include the degree of similarity between legal and economic systems, such as whether a particular polity is a “rule of law democracy;”⁵¹ the presence or absence of a constitution that creates entrenched rights that are judicially enforceable;⁵² and more general similarities in overall government structure, such as the use of federalism.⁵³

Jackson argues that,

[o]n a range of issues involving individual rights as well as structure, countries that are large, federal, and heterogeneous may offer more persuasive analogies than countries that are small and

46. *Id.* at 114.

47. *Id.*

48. *Id.* at 133–59.

49. *Id.* at 161–254.

50. It bears noting that both Harold Koh and Anne-Marie Slaughter *claim* to do the same thing—describe judges in action in an entirely empirical manner. However, their accounts seem driven, at least in part, by larger normative goals and, more specifically, creating an integrated global legal order that blurs, if not entirely displaces, the lines currently separating domestic judicial systems and judges. Jackson’s work, by way of contrast, does not collapse an empirical account of transnational judicial dialogue as it presently exists with larger normative claims about how it *ought* to exist in an ideal world.

51. *See* JACKSON, *supra* note 1, at 177–78.

52. *Id.* at 181.

53. *Id.* at 181–82.

homogeneous, and that do not confront to the same extent the diversity of views and backgrounds that the United States embraces.⁵⁴

Jackson's goal is not to present a comprehensive checklist of the relevant factors and considerations, but rather "a start at identifying how courts should decide to consider transnational sources in constitutional adjudication."⁵⁵

In Chapters 7 and 8, Jackson applies her unfailingly objective critique of transnational engagement to a substantive area of law (equality doctrines) and also to a structural question (federalism). Jackson's interest in thinking about comparative constitutional law in structural terms is highly important; much of the scholarly work in this area of comparative public law relates to particular substantive rights and suffers from a results-oriented cast.⁵⁶

Take, for example, the issue of government restrictions on abortion. Jackson posits that a comparative law perspective might help a constitutional court understand the range of regulations deemed consistent with a due respect for the autonomy of women. Thus, "[r]eflective comparisons with the constitutional approaches of other jurisdictions—including those liberal democracies that recognize, as the United States does not, a fetal right to life or a state duty to protect fetal life—may yield useful insights on the difficult questions that arise around abortion regulation."⁵⁷

On the other hand, transnational borrowing in the context of equal protection claims might be less plausible because "[t]oo much time and too many precedents may by now establish the generality of application of the U.S. approach to the equal protection clause for this to be, on the whole, an acceptable interpretive move."⁵⁸ Even in the more domestically-situated context of equal protection, however, "seeing the question through the eyes of another country's constitutional system may provide a new lens on evaluating those optional but compelling interests that may be asserted within U.S. equal protection law."⁵⁹

54. *Id.* at 181.

55. *Id.* at 183.

56. See Posner, *supra* note 33, at 85–86; Tushnet, *Some Cautionary Notes*, *supra* note 33, at 651–59; see also G. Brinton Lucas, Note, *Structural Exceptionalism and Comparative Constitutional Law*, 96 VA. L. REV. 1965, 1965–67 (2010) (arguing that structural separation of powers considerations, in addition to theoretical and practical considerations, augur against efforts to incorporate foreign and international law into domestic constitutional jurisprudence).

57. JACKSON, *supra* note 1, at 217.

58. *Id.* at 225.

59. *Id.*

Similarly, Jackson expresses skepticism about the potential relevance of comparative and international law to questions of federalism: “Because of these variations [in the particular form of federal states], the benefits to courts of looking to comparative constitutional law on specific issues of federalism are likely to be more limited than in some other areas of comparative constitutional law.”⁶⁰

Jackson is careful not to cherry-pick recourse to comparative and international law solely when doing so would support her own substantive policy preferences. Of course, a recurring problem with the use of comparative and international law materials has been, for lack of a better turn of phrase, “strategic use” of such arguments in a highly selective fashion.

For example, advocates of transnational engagement might strongly dislike a domestic legal rule (e.g., use of the death penalty) and look to foreign or international law as a basis for arguing that the domestic legal rule should be rejected in favor of either the foreign norm or the international law standard. Professor Harold Koh’s work on the death penalty is illustrative of this approach. Koh argues forcefully that the United States should bring federal and state law on the death penalty into conformance with international legal norms that oppose the practice categorically;⁶¹ on the other hand, whether he would advocate a global rule on hate speech, or abortion regulation, remain open—and unanswered—questions.

Moreover, relatively little existing comparative public law scholarship engages questions of comparative legal structure and the lessons that might be gleaned from considering how other nations design government

60. *Id.* at 227. *But cf.* *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (using comparative constitutional analysis to argue in favor of the power of the federal government to require state executive officers to implement federal regulations). Justice Breyer noted that:

At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body.

Id.

61. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Harold Hongju Koh, *Paying Decent Respect to International Tribunal Rulings*, 96 AM. SOC’Y INT’L L. PROC. 45, 53 (2002); Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1085–89, 1092–94, 1129 (2002) [hereinafter *World Opinion*]; see also William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998) (“While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal.”). More specifically, Professor Koh posits that “the United States’ administration of the death penalty and international human rights law are on a collision course.” *World Opinion*, *supra*, at 1086.

institutions.⁶² Chapter 8 provides an important lesson: comparative constitutional law should attend to matters of structure no less than to matters of substantive law. It really is not possible to fully or properly understand particular substantive constitutional commitments free and clear of the institutional context—and constraints—in which they operate. Even so, borrowing in the context of structure might be less useful because structure can be particularly local.⁶³

Chapter 9 closes the book and revisits the lessons of the preceding eight chapters, with particular attention to the relationship of domestic and international law. Even in this context, Jackson does not adopt a posture of unbridled advocacy of transnational engagement (or “monism,” the creation and maintenance of a single integrated system of international law within and between nation-states). In this chapter, as in the preceding chapters, Jackson remains unfailingly objective in presenting and critiquing arguments for and against courts reaching outside their domestic legal systems when interpreting domestic law. It is clear, however, that Jackson believes that judges would be more effective if they remained open to the benefits and possibilities of engagement with comparative and international legal norms.⁶⁴ As she puts it, “a posture of engagement seems on the whole best suited to the task of interpreting the U.S. Constitution in the early decades of this twenty-first century.”⁶⁵

Even if, at the end of the day, one remains unconvinced of the potential merits of transnational engagement, Professor Jackson musters powerful and persuasive evidence in support of her central thesis that no nation can really completely isolate itself from the larger world, nor can a domestic legal system achieve perfect integration with the larger global legal community. Instead, discrete questions and contexts will substantially affect the viability and importance of transnational judicial engagement. Neither radical isolation nor radical integration will prove tenable in all times and all places.

In sum, rather than making a categorical, but ultimately unpersuasive claim about transnational judicial engagement, Jackson instead makes a series of limited, well-supported claims about the promise, and limits, of integrating legal systems across national lines. Her “raging moderation” (for lack of a better descriptive turn of phrase) represents a welcome antidote to the robust advocacy scholarship that populates this field. Her conclusion, that both the desirability and feasibility of transnational

62. See Tushnet, *Some Cautionary Notes*, *supra* note 33, at 650–51; see also Lucas, *supra* note 56, at 1996–98, 2001–06.

63. JACKSON, *supra* note 1, at 227–32.

64. *Id.* at 153–54, 158–59, 253–58, 278–85.

65. *Id.* at 159.

borrowing and engagement depend critically on the specific legal question at issue, in tandem with the context in which the issue arises, needs to be addressed by advocates of more polar solutions to these questions.

II. FACTORS LIKELY TO INFLUENCE A NATIONAL JUDICIARY'S CHOICE AMONG POSITIONS OF RESISTANCE, CONVERGENCE, AND ENGAGEMENT

An important initial question, antecedent to considering whether judges in the United States should embrace engagement more fully, involves the conditions that make engagement a more attractive posture (whether normative, jurisprudential, or practical). In other words, what factors might make judges within a national judicial system more open to engagement (as opposed to a posture of resistance)? The presence—or absence—of these factors in the United States could significantly impact whether federal and state court judges could be persuaded to embrace a higher level of engagement with comparative and international law. This part considers practical and jurisprudential reasons that might motivate a national judiciary to pursue engagement.

A. *Self-Interest and Convergence*

In some cases, a national judiciary's choice among the paradigms of resistance, convergence, and engagement might not be entirely voluntary. Geopolitical realities undoubtedly will strongly influence some nations' decisions to commit more fully and completely to engagement, if not convergence, in pursuit of rational self-interest. At the same time, however, support for higher levels of convergence and engagement clearly does not depend on geopolitical necessities—many powerful nations, such as Germany, are advocates of greater efforts to harmonize human rights norms across national boundaries (both in Europe and globally).⁶⁶ It also bears noting that iconic U.S. legal scholars, such as Professors Anne-Marie Slaughter and Harold Koh, have argued aggressively in favor of a general posture of convergence—both in the United States and globally.⁶⁷

Thus, it would be unduly simplistic to posit that postures of convergence or engagement are solely the province of nations that generally lack the power to impose their will directly on their global neighbors. At the same time, however, necessity could be a powerful incentive toward engagement (and perhaps even convergence).

66. See Dieter Kastrup, *From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 1118, 1142 (2008).

67. See Slaughter, *supra* note 33; Koh, *supra* note 33.

Consider the Baltic states of Estonia, Latvia, and Lithuania.⁶⁸ Over the centuries, these polities have faced domination and control by Russia, to the east, or Germany (Prussia), to the west.⁶⁹ From the vantage point of a minor European power in a Europe dominated by the major powers, working to secure greater levels of convergence and cooperation across national boundaries would make perfect sense. In this context, then, advocacy of convergence (or engagement) does not represent a profound moral commitment so much as a strategy for successful national survival.

Professor Jackson posits that necessity, or national self-interest, might in part help to explain Canada's enthusiasm for efforts to integrate legal systems across national boundaries. "Geopolitical factors also account for some differences in orientation between U.S. and Canadian judges."⁷⁰ She adds that "as a smaller power [than the United States], Canada may have greater incentives to be aware of and concerned with what judges in other countries say and think than do those who identify with the power of the United States."⁷¹ She cautions that this argument rests in part on "contestable assumptions," but nevertheless accepts that "there are a number of possible mechanisms by which judges might identify with the power or prestige of their countries, especially insofar as it affects the prestige of their own offices."⁷²

Thus, national self-interest could significantly influence the decision to advocate convergence or engagement, rather than resistance. But this does not mean that the decision will inevitably reflect solely concerns related to the relative power of a particular polity. Necessity can be a sufficient condition to incite a posture favoring convergence or engagement, but it surely is not a necessary or essential condition.

France and Germany, for example, could easily adopt postures of resistance to convergence (or engagement), but instead have both worked assiduously to advance the cause of European unity through the institutions of the European Economic Community (EEC), now styled the European Union (EU). To be sure, France and Germany vie for influence within the EU, but in recent times their national governments consistently have advanced the project of European integration.⁷³

68. See ANDRES KASEKAMP, *A HISTORY OF THE BALTIC STATES*, at viii–xi (2010); ANDREJS PLAKANS, *A CONCISE HISTORY OF THE BALTIC STATES*, at xiii–xiv, 300–329 (2011).

69. KEVIN O'CONNOR, *THE HISTORY OF THE BALTIC STATES* 2–7, 18–19, 26–30, 33–39, 56–63, 107–22 (2003).

70. JACKSON, *supra* note 1, at 240.

71. *Id.*

72. *Id.*

73. See Terence Fokas, *Economic and Monetary Union in Europe: The Legal Framework and Implications for Contractual Obligations*, 36 *TEX. J. BUS. L.* 2, 5, 15 (1999); see also Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 *FORDHAM INT'L L.J.* 1118, 1142 (2008).

The United States, by way of contrast, has never seemed much inclined or interested in advancing transnational legal values. The U.S. Senate famously refused to ratify President Woodrow Wilson's charter for the League of Nations,⁷⁴ the precursor entity to the United Nations. So too, congressional support for the United Nations and its institutions has waxed and waned over time—with a skeptical (hostile?) posture predominating.⁷⁵ To a very large degree, the federal courts simply mirror the larger attitude of the general citizenry toward integrating U.S. law and legal institutions with either the regional or global communities. Deep-seated cultural beliefs and practices inform and support the contemporary hostility toward convergence and engagement;⁷⁶ accordingly, changing the posture of the U.S. federal and state courts will be tremendously difficult.

I do not claim that “borrowing” across jurisdictions is something that U.S. judges simply refuse to do. Indeed, with respect to developing the common law of tort, property, and contract, state supreme courts routinely engage each other's work—directly and above the line. So too, we lack any system of intercircuit precedent within the lower federal courts; the precedent of one U.S. court of appeals does not bind any other courts of appeals.⁷⁷ Yet, when cases arise presenting questions of first impression in one circuit, the practice of federal appellate judges is to cite, discuss, and engage the decisions of sister circuits (whether or not they ultimately agree with the decision or decisions).⁷⁸ In other words, there is nothing particularly foreign to standard U.S. legal advocacy or practice about bringing non-binding, persuasive authority to the attention of a court. In fact, borrowing is commonplace in both the federal and state court systems.⁷⁹

74. See JOHN MILTON COOPER, *BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS* (2001).

75. See, e.g., Lori F. Damrosch, *The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers*, in *DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW* 39, 49 (Charlotte Ku & Harold K. Jacobson eds., 2002) (“The congressional attitude toward UN commitments has been at best skeptical and at worst hostile.”). Congress also has undercut U.N. initiatives “by failing to appropriate funds for assessed obligations and has busied itself with proposals to restrict the president's flexibility in relation to UN military activities.” *Id.*

76. JACKSON, *supra* note 1, at 240–43.

77. See Mary Garvery Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 *TENN. L. REV.* 605, 608–10 (2003); Martha C. Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 *LOY. L. REV.* 535, 536–40 (2010); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 *VAND. L. REV.* 1137, 1143–47 (2012).

78. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) *cert. denied*, 436 U.S. 919 (1980); Algero, *supra* note 77, at 610.

79. See Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 *YALE L.J.* 2096, 2134 (2010).

But, the source of the materials being consulted seems to matter a great deal. Citing the decision of another state supreme court or federal appellate court simply is not the same as citing the work of a juridical body working outside the United States. Foreign courts lack any political accountability (whether to a state government or to the President and Senate);⁸⁰ indeed, most lawyers and judges do not possess any inkling of how judges are appointed in other countries (including our immediate North American neighbors, Canada and Mexico).⁸¹ Moreover, most U.S. lawyers, judges, and legal academics know virtually nothing about the basic organization of judicial systems in other nations.⁸² For example, are judges of the provincial courts in Canada selected by the provincial or national parliaments? And, does Canada maintain a unitary or dual system of courts (i.e., are the provincial courts integrated with, or separate from, the national courts in Canada)?⁸³

Neither a U.S. judge nor lawyer should be eager to cite an opinion from a jurisdiction when she does not have even a rudimentary grasp of the court's function, jurisdiction, and composition. Thus, it might be tremendously useful to consider the opinions of the Alberta Court of Appeals on the question of quantum meruit; yet, for some very sound

80. See Alford, *Constitutional Comparativism*, *supra* note 33, at 698 (“While our judges have a certain democratic legitimacy, foreign and international judges have none.”). Alford explains that although “all domestic judicial decisions have a certain degree of democratic legitimacy, foreign judges have no democratic legitimacy.” *Id.* at 710. He also objects that foreign court and international tribunal jurists are “[i]mmune to the democratically corrective forces of judicial election or executive nomination” with “no democratic check that the United States can impose upon the rulemaking power of foreign courts.” *Id.*

81. See Krotoszynski, *supra* note 31, at 1340–41 (noting that even sophisticated and highly engaged judges appear to suffer from a “lack of familiarity with the means of selection, composition, rules of procedure, institutional duties, and institutional character of the various constitutional courts” in other polities and positing that this fact “raises some serious problems for the project of international judicial dialogue”). In other words, “[i]f you do not know a court’s jurisdiction, its operating rules, or the effect of its precedents, how can you realistically ‘borrow’ its precedents?” *Id.* at 1340.

82. Of course, this lack of institutional knowledge also holds true with respect to the selection of state court judges within state judicial systems, and yet differences in the judicial selection process (election versus direct gubernatorial or legislative appointment), retention methodologies, and terms of office do not seem to impede or discourage borrowing among and between state court systems. Nor do differences in the operating rules of such courts—for example, whether a particular state supreme court may issue advisory opinions in reference cases. Accordingly, the importance of knowing about the structural details and operating rules of a judicial system do not seem to be absolute prerequisites to successfully borrowing exogenous legal rules and reasoning.

83. Professor Jackson provides answers to these questions—although Canada nominally has provincial courts, judges of these courts are appointed by the federal, not provincial, governments. JACKSON, *supra* note 1, at 238. The provinces create the provincial courts “but their judges are appointed by the federal government.” *Id.* I strongly suspect that most U.S. lawyers, judges, and legal academics could not identify the jurisdiction or manner of appointment to the Provincial Courts of Appeals in Canada—or the more general structure and operation of the Canadian judiciary. For a comprehensive discussion of the structure of the Canadian judiciary, see *How the Courts Are Organized*, GOV’T OF CAN., DEPT OF JUSTICE (Aug. 17, 2014), <http://www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html>.

reasons, U.S. judges, on both the federal and state courts, are not likely to be willing to engage Canadian contract law.⁸⁴

Jackson argues, quite cogently, that “[c]onsistent with a posture of engagement” a “graduated approach” should be possible, “one that does not treat foreign or international law as an undifferentiated mass to be either rejected or embraced, that is open to both positive and ‘aversive’ uses of foreign law or experience, and that is sensitive to the varying normative contexts of both the domestic issue and the foreign or international source.”⁸⁵ But, for this approach to work, a nation that does not deem itself dependent on transnational legal cooperation would have to view the upside of engaging in the process as sufficient to invest the substantial time and energy required to understand, critique, and apply or distinguish foreign and international law when deciding important domestic legal questions. These practical problems, in turn, invite careful consideration of the possible rationales for embracing engagement beyond enlightened self-interest or necessity.

B. Possible Substantive Rationales for Embracing Engagement

Even if national self-interest does not push a domestic court system toward either a posture of convergence or engagement, courts might be inclined to look outside their national boundaries when important insights could be obtained by considering relevant foreign and international law materials. Jackson notes, for example, that many constitutional courts use the concept of balancing to reconcile claims arising from fundamental rights with conflicting claims by the community, expressed by a democratically-elected legislature, to set limits on individual autonomy. “Courts or tribunals in Canada, Colombia, Germany, the European Court of Human Rights, the European Court of Justice, India, Ireland, Israel, South Africa, and elsewhere invoke the concept of proportionality to review not only the propriety of sanctions, but also the legality of a wide range of government conduct.”⁸⁶ Only if the rule is “proportionate,” or adequately justified by advancing the government’s interest to the extent that it

84. The example is not entirely arbitrary. As it happens, there might be some benefit in considering the Canadian understanding of quantum meruit in thinking about the concept here in the United States. Although the doctrine in both nations shares common legal roots in English precedents, contemporary Canadian common law tends to treat quantum meruit primarily as a freestanding principle of restitutionary equity neither closely nor necessarily linked to contract law at all. See G.H.L. Fridman, *Quantum Meruit*, 37 ALTA L. REV. 38, 42–46 (1999) (arguing that contemporary Canadian law is primarily rooted in restitutionary principles rather than quasi-contract).

85. JACKSON, *supra* note 1, at 183.

86. *Id.* at 60.

burdens or impedes the underlying substantive right, will the government prevail.⁸⁷

Jackson notes that Canada's landmark case on undertaking proportionality review, *R. v. Oakes*,⁸⁸ has been highly influential in other jurisdictions that use a balancing approach when deciding constitutional claims.⁸⁹ Borrowing from a jurisdiction with common procedural design elements seems both natural and unobjectionable.

Moreover, in some nations, the local constitution itself requires that domestic courts, including the highest constitutional court, take account of international or comparative law relevant to questions arising under local law. South Africa provides perhaps the best example of this approach. The Constitution of the Republic of South Africa expressly provides that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”⁹⁰ Thus, the South African people have elected to pursue a position of convergence on a voluntary basis.

Even in South Africa, however, “[t]he requirement is procedural, not substantive: the courts *must consider* international law, but the constitution does not require conformance.”⁹¹ Although section 39 does not bind the South African Constitutional Court to pursue convergence regardless of the local values at stake, the constitution plainly authorizes the South African justices to interpret South African law in a way that advances the project of more uniform global law. Moreover, some constitutions require that the local constitution be interpreted consistently with international and foreign law.⁹²

Professor Jackson posits that concrete limits will constrain a national judiciary's commitment to pursuing engagement (or convergence). Indeed, she argues that a position of complete convergence simply is not tenable, even if the local constitution authorizes consideration of foreign and international law. She explains that “[c]onvergence, if any, can only be partial, and its dynamic character will require a more complex

87. See AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

88. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.). For an extended discussion and analysis of the *Oakes* decision, see RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 41–48 (2006).

89. JACKSON, *supra* note 1, at 61.

90. S. AFR. CONST., 1996, § 39, cl. 1.

91. See JACKSON, *supra* note 1, at 78; see also *State v. Makwanyane* 1995 (2) SACR 1 (CC) at 27 para. 39 (S. Afr.) (“We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”).

92. See JACKSON, *supra* note 1, at 325 n.45.

interpretative approach than may at first glance appear.”⁹³ Jackson adds that “the dynamic nature of both constitutional law and international law suggests that an end-state of convergence is unachievable and indeed, might be unhealthy for the development of both constitutional law and international law.”⁹⁴ This is so because “[n]ew rights or new understandings of old rights will emerge, new claims will be made, and new social movements will arise, leading to new mobilizations for changes in understandings.”⁹⁵

Even in nations that voluntarily embrace the project of convergence “these postures will in all likelihood function as rebuttable presumptions, in order to allow for national distinctiveness in particular areas.”⁹⁶ Jackson cautions that “there is far more to good constitutional interpretation than simply going along; interpretation must remain rooted in national text, precedents, purposes, ethos, and history.”⁹⁷ Moreover, “[t]he legitimacy of looking to international or foreign law or experience will vary with the domestic issue, depending on the specificity and history of our constitutional text, the degree to which the issue is genuinely unsettled, and the strength of other interpretative sources.”⁹⁸

Thus, it is simply not possible to endorse borrowing in all circumstances or to condemn it in any circumstances; a lighter touch is required.⁹⁹ For Jackson, this lighter touch is best represented by a process of engagement, which implies respectful *consideration*, but not necessarily ultimate *agreement*.

A nation, like Germany, might well voluntarily support a general posture of convergence because it believes it to be the right thing to do as a means of advancing the cause of universal human rights, national self-interest, or perhaps both. It will not, however, do so unfailingly or without careful reflection.¹⁰⁰ And, although in the contemporary United States most judges would shrink from the proposition that they should serve as advocates of an integrated system of global law, times and attitudes might

93. *Id.* at 67.

94. *Id.* at 68.

95. *Id.*; see generally Krotoszynski, *supra* note 31, at 1357 (“In constructing a persuasive argument, it might well benefit a judge to know which reasons a jurist facing a similar problem found persuasive and which she did not. Weak form IJD could awaken a jurist to arguments that are not self-evident to someone within a given legal culture.”).

96. JACKSON, *supra* note 1, at 69.

97. *Id.* at 254.

98. *Id.* at 162.

99. See Fontana, *supra* note 33, at 556–74 (arguing that the federal and state courts should adopt “refined comparativism” as a methodology for integrating comparative law materials into the decisional process in domestic constitutional law cases and positing that doing so would improve the quality of domestic constitutional law).

100. *Id.* at 612–13.

change; at some point, a posture of greater openness to intentionally making U.S. law more consistent with foreign and international law could emerge. In any event, the fact that nations with vibrant economies and robust military forces choose to embrace the project of convergence suggests that advocacy of this posture need not solely arise from necessity.

C. The Presence (or Absence) of Transnational Juridical Bodies and Engagement

One potentially important factor for predicting whether a particular domestic legal system will embrace engagement might be the presence of important transnational juridical entities with whom the domestic national courts will engage in dialogue. For example, for member states of the European Union, it is simply impossible to ignore the relevant decisions of the European Court of Justice, the highest judicial tribunal within the European Union.¹⁰¹ Similarly, for nations that are members of the Council of Europe, the decisions of the European Court of Human Rights (ECHR) will have tremendous local importance. If judges, lawyers, law professors, and law students all routinely access and consider the relationship of transnational judicial decisions to their domestic law, they are more likely to be open to considering the law of other nations as well.

In part, this approach simply reflects the fact that the jurisprudence of the ECHR takes into account and incorporates pan-European human rights values. Although local member states are generally entitled to a “margin of appreciation” in construing and applying European Convention rights,¹⁰² the substantive scope and content of these rights are constructed with reference to the domestic law practices of member states;¹⁰³ practices once commonplace within a particular polity might well have to give way if other nations conclude that a particular practice (e.g., the death penalty)¹⁰⁴

101. See Grimm, *supra* note 14, at 232.

102. See *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, 753–54, paras. 47–49, 54, 56–57 (1976); *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, paras. 207–214 (1978); HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF THE EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 12–24 (1996); *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1–94 (Pieter Van Dijk et al. eds., 4th ed. 2006).

103. See Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GER. L.J. 711, 711 (2007) (“Margin of appreciation is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.”).

104. See Eur. Consult. Ass., *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as Amended by Protocol No. 11*, art. 1, Doc. No. 114 (1983) (“The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.”).

or corporal punishment¹⁰⁵) transgresses a European Convention right. In a polity where domestic law must operate in the shadow of transnational regional law, it might well make less sense to adopt a “go it alone” approach; insofar as the community’s consensus will ultimately bind all individual members, it would behoove domestic judges to articulate with clarity a jurisdiction’s policy preferences and to engage with the work of other juridical bodies when so doing. Simply put, persuasion will be needed if the local legal norm is to endure.

Judges in the United States, for the most part, lack this sort of external audience and therefore operate free and clear of this practical constraint. Indeed, in most cases, the United States “wins” regardless of whether a particular approach to framing a human right enjoys salience beyond the United States; this is so because the United States is not accountable to any transnational juridical entities. Indeed, even in circumstances where an obvious need for uniform interpretation of a transnational legal text exists, as is the case with respect to the Vienna Convention on Consular Relations,¹⁰⁶ the Supreme Court of the United States has made clear that it will read treaties adopted into U.S. law wholly independently of international juridical bodies, such as the International Court of Justice (a United Nations entity).¹⁰⁷

By way of contrast, a German or French judge articulating a human rights norm must bear in mind the possibility that her work could be displaced by transnational courts whose decisions Germany or France must abide (whether they like them or not).¹⁰⁸ Influence in a polycentric judicial

105. Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1 (1978) (holding that corporal punishment constitutes “degrading punishment” prohibited under the European Convention and declining to apply the margin of appreciation to save it from invalidation).

106. See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 59 U.N.T.S. 261; see also *infra* note 124 and accompanying text.

107. See *Medellin v. Texas*, 552 U.S. 491, 522–23 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006); see also Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (discussing the interplay between domestic and international law in the U.S. federal courts).

108. For example, the German Federal Constitutional Court’s attempt to reconcile a right to freedom of speech and press with protection of privacy and personal dignity was rejected by the ECHR. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 50, 57–58. The publication of three sets of photographs was at issue in *Von Hannover*, including photographs of Princess Caroline having lunch at a French restaurant with an actor, riding a horse, with her children, shopping, riding a bicycle, skiing, playing tennis, and at a beach. See *id.* at 48–50. The ECHR found that Germany had failed to provide adequate protection of Princess Caroline’s privacy. See *id.* at 72–73 (“[I]n the Court’s opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant’s private life and she should, in the circumstances of the case, have had a ‘legitimate expectation’ of protection of her private life.”). *Von Hannover* thus involves a positive obligation on the part of Germany to regulate private behavior more effectively to secure privacy interests in contemporary society. The ECHR acknowledged this aspect of the dispute, noting that signatories to the European Convention incur legal obligations that “may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.” *Id.*

environment entails attempting to move the consensus toward your domestic point of view; the fact that particular reasons are sufficiently persuasive to one national court system says precisely nothing about whether other judicial systems will concur. Engagement in this context simply represents a prudent means of ensuring that a particular national judiciary's views contribute to the development of the transnational consensus that all member states within the European Union or the Council of Europe ultimately will have to observe.¹⁰⁹

III. LEGAL EDUCATION AND THE POSSIBILITY OF ENGAGEMENT

As noted in the preceding Part, the ability of judges and lawyers to participate in transnational engagement requires that those staffing the courts and law offices have competence in comparative and international law materials and research. And, given the real-world constraints that judges and practicing lawyers face with respect to their time, these skills would need to be incorporated as part of a standard domestic legal education. To be sure, we have seen some movement in this general direction. For example, several law schools have incorporated a mandatory course in public international law into the first-year curriculum.¹¹⁰ Even so, if comparative and international law remain “boutique” offerings—enhancements to the more general domestic law fare—then graduates of U.S. law schools will not be equipped to pursue the kind of engagement that Jackson posits would enhance and improve the quality of U.S. law and judicial reasoning.

at 68. However, in a recent subsequent case involving the very same petitioner, the ECHR permitted greater freedom to publish pictures of Princess Caroline, notwithstanding her claim that publication of the photographs would violate her Article 8 privacy rights. *See Von Hannover v. Germany (No. 2)*, 2012-I Eur. Ct. H.R. 399, 442–45. Strictly speaking, however, the ECHR did not resile from its legal analysis in *Von Hannover (No. 1)* that even government officials and public figures may invoke the protection of Article 8. Accordingly, the legal rule set forth in *Von Hannover (No. 1)* that privacy rights will trump speech and press rights when necessary to secure personal privacy, and in the absence of a demonstrable connection between the information sought to be disclosed and the process of democratic self-government, remains in force and effect.

109. *See* PIETER VAN DIJK & G.J.H. VAN HOOF, PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3–40, 71–96 (3d ed. 1998) (discussing the interrelationship between the domestic legal systems of members of the Council of Europe and the jurisprudence of the ECHR). In this regard, it also bears noting that the ECHR has held that “[g]enerally speaking, the margin enjoyed by the States [is] broader where there was no European consensus.” *Von Hannover (No. 2)*, 2012-I Eur. Ct. H.R. at 430.

110. *See, e.g., First-Year Course Descriptions*, WASH. & LEE U. SCH. OF LAW, <http://law.wlu.edu/academics/page.asp?pageid=1100> (last visited Oct. 8, 2014). Another common approach is to offer an international or comparative law offering as a first-year elective, usually as one of a small group of 1L elective courses taken in the spring semester. *See, e.g., Curriculum: Degree Requirements*, AM. U. WASH. C. OF LAW, <http://www.wcl.american.edu/admiss/curriculum.cfm> (last visited Oct. 8, 2014).

In fact, in her book Professor Jackson does not much emphasize the importance of legal education to enabling lawyers and judges to adopt a posture of engagement with foreign and international law.¹¹¹ Yet, it seems to me that effective engagement would require a cohort of lawyers and judges who view arguments grounded in foreign and international law as legitimate and who also have the skills necessary to create arguments premised on these sources; lawyers who lack the ability to engage in international or comparative law research are unlikely to proffer arguments premised on these materials.¹¹² Accordingly, if the United States is to adopt a stronger posture of active engagement (as Jackson advocates), U.S. law schools would need to do a better job of inculcating the skill sets necessary to research, write, and argue legal positions premised on foreign and international law. At the same time, however, there is good cause to question whether U.S. law schools will embrace this project with alacrity.

A. *Most U.S. Law Schools Offer Only a Limited Comparative Law Curriculum*

At present, beyond a basic survey course in comparative law—a course that generally surveys the civil law system as implemented on the continent of Europe—most U.S. law schools make little, if any, effort to inculcate the skill sets that would be needed for U.S. lawyers to use foreign and international law as a standard part of their professional toolkit. To be sure, exceptions to this general state of affairs exist. For example, Tulane Law School offers a dual track of legal training in the common law or the civil law tradition.¹¹³ This reflects the unique nature of Louisiana as a primarily civil law jurisdiction (for state law matters) within a larger common law polity;¹¹⁴ simply put, attorneys practicing within the Louisiana state courts

111. Jackson does make a passing reference to the maintenance of bijural legal education in Canada, which includes formal study of both the common law and civil law systems. JACKSON, *supra* note 1, at 242.

112. Cf. Law & Chang, *supra* note 2, at 558–63, 575–77 (explaining in some detail how and why judges of the Taiwanese Constitutional Court consider, in an informal way, foreign and international law when deciding domestic constitutional law claims and noting that these judges and their clerks often have studied foreign law abroad).

113. Vernon Valentine Palmer, *Napoleon Code or Complex?*, 15 TUL. EUR. & CIV. L.F. 95, 95 (2000) (“Since the founding of the Tulane Law School, its deans and professors have consistently extolled the inestimable advantages and opportunities afforded by a dual curriculum that bridges the common law/civil law divide. We have argued that our students, from whatever state they may originate, may absorb a far wider legal culture than their counterparts in other states and that this kind of legal education will be increasingly prized in a global society.”).

114. See 1 KONRAD ZWIEGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 119–21 (Tony Weir trans., Clarendon Press 2d rev. ed. 1987). *But see* VERNON VALENTINE PALMER, THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION (2005) (arguing that, although Louisiana retains significant aspects of a civil law jurisdiction, important common law concepts also exist in contemporary Louisiana law); Kenneth G.C. Reid, *The Idea of Mixed*

must know and understand the civil law tradition. It also seems quite likely that Tulane law students on the common law track have a much greater consciousness of the civil law tradition—and its salient characteristics—than do law students at most U.S. law schools. In this sense, then, law students on both tracks at Tulane would be better able to facilitate the process of dialogue and engagement that Jackson advocates.

But Tulane is, if not unique, then very much close to it in putting substantial institutional resources into a civil law curriculum. Even if one considers other law schools in Louisiana, the number of U.S. law schools investing major resources into a thoroughly comparative curriculum represents a very small percentage of the total number of U.S. law schools.

Moreover, in the current economic environment, resources for new programs are scarce, and many law schools are focused on making substantial reductions to entering class sizes, enhancing skills training to make graduates more practice ready, and improving the operation of career services offices. Some law schools, such as those at Arizona State University¹¹⁵ and George Washington University,¹¹⁶ have even begun to employ a large percentage of their graduating classes in “path to practice” programs meant to help subsidize and also facilitate the transition from law student to practicing lawyer. Law schools face significant resource constraints, and making the case for major new investments in international and comparative law offerings strikes me as a (very) heavy lift. Enhancing such offerings would, of course, be a laudable decision, but as a resource commitment in a time of very tight law school (and university) budgets, an effort of this sort probably would not be at the top of most decanal or faculty priority lists.

Legal Systems, 78 TUL. L. REV. 5, 8 (2003) (positing that Louisiana and Quebec could best be categorized as “mixed” civil law and common law jurisdictions).

115. See Matthew Iglesias, *ASU Launching a Law Firm to Employ Unemployable Law School Graduates*, SLATE MAG., (Mar. 7, 2013, 1:56 PM), http://www.slate.com/blogs/moneybox/2013/03/07/asu_launching_a_law_firm_to_employ_unemployable_law_school_graduates.html (reporting on “a nonprofit law firm that Arizona State is setting up this summer for some of its graduates”). Under the ASU plan, “[o]ver the next few years, 30 graduates will work under seasoned lawyers and be paid for a wide range of services provided at relatively low cost to the people of Phoenix.” *Id.*

116. See Liza Dee & Cory Weinberg, *In Dim Job Market, Law School Pays More Graduates to Work*, GW HATCHET, Feb. 7, 2013, at 1, available at <http://www.gwhatchet.com/2013/02/07/in-dim-job-market-law-school-pays-more-graduates-to-work/> (“More than one-fifth of Class of 2012 [GWU law] graduates are part of the Pathways to Practice program – an initiative that pays alumni \$15 an hour to work 35 hours a week to gain experience.”). The GWU Law program was embroiled in controversy when then-dean Paul Schiff Berman attempted to reduce the hourly rate of pay mid-stream from \$15 per hour to \$10 per hour, ostensibly to encourage participating GWU law graduates to find other, full-time employment—a policy change that he quickly abandoned. See Elie Mystal, *George Washington University Law School Reverses Course, Restores Funding for Unemployed Grads Program*, ABOVE THE LAW, (June 20, 2012, 10:16 AM), <http://abovethelaw.com/2012/06/george-washington-university-law-reverses-course-restore-funding/> (“Last night, after an outcry from students (and some bad press), Dean Berman changed his mind and decided to restore funding to the \$15 per hour level.”).

There is also something of a chicken-and-egg problem at work here. Law schools do not invest major resources in international and comparative law offerings in part because domestic legal employers do not place much value on such training.¹¹⁷ This is true not only of law firms, but also of government agencies, federal and state judges hiring law clerks, and corporate general counsel offices. This lack of interest likely relates to the lack of interest most federal and state judges have demonstrated, at least to date, in hearing arguments premised on these materials. If comparative and international law materials were persuasive and helped advocates to win hard cases for their clients, more legal employers would value these skills, and law schools would, in turn, commit more resources to inculcating these skills in their students.

Professor Jackson notes that, in Canada, “[m]any law students are ‘bijural,’ learning both civil law and common law traditions.”¹¹⁸ Relatedly, she also observes that “[w]hether cause, effect, or both, legal education in Canada is more comparatively and internationally oriented.”¹¹⁹ In other words, the Canadian legal education system facilitates engagement by inculcating the practical skills required to engage in advocacy that incorporates comparative and international perspectives, but Canadian legal education also fosters the theoretical habits of mind that encourage this turn in legal advocacy. The fact that Canadian courts, notably including the Supreme Court of Canada, routinely cite—and even discuss—foreign and international law sources also creates a powerful incentive for advocates to incorporate these materials in their written briefs and oral arguments.¹²⁰

Professor Jackson observes that “[t]he Supreme Court of Canada is more inclined to refer, without apology, to foreign and international legal material, and to discuss these materials at some length, than is its counterpart in the United States.”¹²¹ This constitutes a powerful, indeed compelling, signal to the entire Canadian legal establishment to focus time, attention, and energy on comparative and international law if they wish to be effective lawyers. In the United States, the signals sent by the federal

117. Of course, one could reasonably conclude that the problem relates to the U.S. judiciary’s seeming lack of interest in comparative and international law materials; if domestic courts were to signal that they wished to be briefed on comparative and international law as a matter of course, law schools would respond by providing the requisite training. However, I think U.S. legal education’s relative lack of attention to comparative and international law produces judges who are incurious about such authority. In this sense, then, there *is* a chicken-and-egg problem at work.

118. JACKSON, *supra* note 1, at 69.

119. *Id.*

120. *See id.* As Professor Jackson notes, “[w]hile the Canadian court has its own divisions, a significant number of constitutional opinions look to practices of other free and democratic societies.” *Id.* at 87.

121. *Id.* at 87.

and state courts are, if anything, diametrically opposed to the citation of comparative and international law materials.

Consider the recent *Medellin*¹²² case, in which the Supreme Court of the United States refused to give much credence to the authoritative pronouncement of the International Court of Justice (ICJ) regarding the meaning and requirements of the Vienna Convention on Consular Relations (Vienna Convention).¹²³ Writing for the majority, Chief Justice John Roberts declined to give any interpretative deference to the ICJ's interpretation of the Vienna Convention, even though the Vienna Convention specifies that the ICJ is to enjoy interpretative primacy over its meaning and enforcement and despite the obvious need for uniformity in the rules governing the conduct of international diplomacy.¹²⁴

Invoking language rooted in the role of the federal courts set forth in *Marbury v. Madison*,¹²⁵ the Supreme Court held that although treaties are the "supreme law of the land," their meaning, at least in domestic law terms, should be determined directly and authoritatively by the federal courts.¹²⁶ The *Medellin* Court went on to reject a claim under the Vienna Convention that had been embraced by the ICJ—in a case involving *Medellin*.¹²⁷

This sort of judicial reasoning sends a clear and unequivocal message to lawyers, law professors, and law students: the decisions of international tribunals simply do not matter—or do not matter very much—in construing federal law, including treaties. Professor Jackson certainly acknowledges the existence of this problem and even discusses the precise problem of the Supreme Court refusing to credit either the judgments or reasoning of the ICJ in cases arising under the Vienna Convention.¹²⁸

Discussing an earlier case, *Sanchez-Llamas v. Oregon*,¹²⁹ Jackson observes that "[w]hile the Court acknowledged the need to give 'respectful

122. *Medellin v. Texas*, 552 U.S. 491 (2008).

123. *See id.* at 512–13, 517–19, 522–23; *see also* Vienna Convention on Consular Relations, *supra* note 106. Chief Justice Roberts explained that "[i]n sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Medellin*, 552 U.S. at 522–23.

124. *See Medellin*, 552 U.S. at 554–56 (Breyer, J., dissenting) (arguing that the ICJ's interpretation in the *Avena* case should be deemed binding on the question of mandatory consular access).

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

126. *Medellin*, 552 U.S. at 505.

127. *Id.* The earlier decision, largely ignored by the *Medellin* majority, was *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (March 31) [hereinafter *Avena*].

128. *See JACKSON*, *supra* note 1, at 121, 175–76.

129. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

consideration’ to the International Court of Justice (ICJ) judgment, it engaged with the ICJ’s reasoning about the treaty only to a limited extent.”¹³⁰ Moreover, she concedes, in the context of *Medellin*, that “the Court gave relatively little weight to the ICJ decision itself,” a decision that “involved a defendant whose particular situation had been before the ICJ in the *Avena* case.”¹³¹

The signaling effect of decisions of this sort is profound and constitutes a strong headwind against any serious efforts to remake domestic law school curricula to emphasize the importance and relevance of comparative and international law. For such reforms to secure broad-based support within the legal academy, federal and state courts would need to signal not antipathy toward arguments grounded in these materials, but rather alacrity in receiving them. To date, however, the most charitable adjective that one could fairly use to describe the posture of federal and state judges toward comparative and international law is one of indifference—and a more accurate adjective might be “hostility.”

B. The Relevance of Foreign Language Skills to Judicial Engagement Across Legal Cultures

The problem with teaching comparative law in the domestic law school curriculum relates, at least in part, to the lack of foreign language skills in the United States. In the United States, monolingualism is the norm, rather than the exception.¹³² Obviously, if most U.S. lawyers were multilingual, this would enhance the prospects for successful projects of transnational judicial engagement. To be sure, as Professor Jackson argues, more foreign and international juridical bodies are providing English-language translations of their decisions;¹³³ it is certainly true that “[i]ncreasing numbers of foreign courts provide translations of their decisions into English.”¹³⁴

Other potential fixes to overcoming language barriers exist. For example, “[a]nother approach would rely on court or library personnel to improve justices’ knowledge of foreign laws; some constitutional courts now routinely hire foreign lawyers to work as law clerks.”¹³⁵ Presumably language competencies are one benefit of such hiring practices. However, these strike me as second-best solutions.

130. JACKSON, *supra* note 1, at 121.

131. *Id.* at 176.

132. Michael Erard, *Are We Really Monolingual?*, N.Y. TIMES, Jan. 15, 2012, at SR12.

133. See JACKSON, *supra* note 1, at 6–9.

134. *Id.* at 5–6.

135. *Id.* at 189.

If a polity were truly committed to engaging with the wider world, it would provide the tools necessary for this process as a standard part of its primary and secondary educational programs. Consider, for example, Norway. Norwegian school children are often not merely educated to be bilingual, but rather trilingual: Norwegians, generally, can read and speak Norwegian, English, and either German or French.¹³⁶ The reason for this is simple: the Norwegian people have concluded that having a multilingual populace will enhance their prospects for successfully engaging the larger world. Transnational engagement is hardly limited to the law—indeed, business and commerce seem equally, if not more, promising as candidates for this process because such engagement can lead to direct improvements to national wealth.

Norway is blessed with rich natural resources (North Sea oil, to give a specific example) and could probably adopt a more isolationist stance. Larger historical factors, including successive periods of domination by its Scandinavian neighbors to the east (Sweden) and south (Denmark) undoubtedly have helped to create a socio-legal culture that places a high value on independent relationships with the wider world.¹³⁷ Today, of course, Norway's independence is not seriously threatened. Yet, the general political culture retains its commitment to global engagement and creating a citizenry capable of it—and, even if the root cause for this posture has (thankfully) passed away into the history books, the economic, political, and cultural benefits of being capable of engaging other polities, quite literally in their own language, continues to pay significant dividends to Norway and the Norwegian people.

Historical factors can often explain a relatively robust commitment to bilingualism. Canada, for example, constitutes a federated state that marries a population of Anglophones with a population of Francophones.¹³⁸ Much of contemporary Canadian government structure relates back to the United Kingdom's defeat of France on the Plains of Abraham, outside Quebec

136. See Norwegian Univ. of Sci. & Tech., *The Norwegian Language*, NORWEGIAN ON THE WEB, <http://www.ntnu.edu/now/intro/background-norwegian> (last visited Sept. 26, 2014) (“Today, English is Norway’s most important foreign language for international use, followed by German and French.”).

137. THOMAS K. DERRY, *A HISTORY OF SCANDINAVIA: NORWAY, SWEDEN, DENMARK, FINLAND, AND ICELAND* 31–32, 110, 151–52, 217, 268–72 (1979) (noting political control of Norway by both Denmark and Sweden); NORWEGIAN NATIONAL COUNCIL OF WOMEN, *NORWAY: A FEW FACTS FROM NORWEGIAN HISTORY AND POLITICS* 9–24 (2d ed. 1905) (euphemistically discussing Norway’s “union” with Denmark and then with Sweden and with respect to the latter observing that “a feeling that the union was a misfortune for Norway” began to spread in the late eighteenth century). Denmark was an ally of Napoleon; as part of the terms of his defeat, the Treaty of Kiel (1814) forced Denmark to cede Norway to Sweden as compensation for Sweden’s loss of Finland to Russia. *Id.* at 13. This involuntary annexation by Sweden was not popular with most Norwegians. *See id.* at 14 (“When news of this [the annexation] came to Norway, the Norwegians rose in indignation.”).

138. SCOTT W. SEE, *THE HISTORY OF CANADA* 1–89, 155–58 (2001).

City, on September 13, 1759.¹³⁹ This historical fact probably has some explanatory force with respect to Canada's contemporary commitment to integrating its domestic law with international law, as well as its emphasis on the importance of multiculturalism more generally;¹⁴⁰ as Professor Jackson argues, "[i]n seeking to understand U.S. and Canadian federalisms, and how they affect their respective courts' willingness to consider foreign or international law as relevant in resolving constitutional cases, Canadian commitments to bilingualism and multiculturalism as they affect legal education and political culture should not be neglected."¹⁴¹

C. Taiwan: An Exemplar and Case Study of the Relevance and Importance of Legal Education to the Possibility of Transnational Judicial Engagement

Professors David S. Law and Wen-Chen Chang have undertaken important comparative scholarly work that demonstrates quite persuasively the crucial role and importance of education and language skills in creating a judicial system capable of effective transnational engagement.¹⁴² The judges of the Constitutional Court of Taiwan often have studied law abroad and also hire law clerks with similar educational experiences.¹⁴³ This educational experience—and competency in working with foreign legal material—enables judges of the Taiwanese Constitutional Court to engage foreign law effectively when deciding hard cases.

Law and Chang make an important preliminary point that merits careful consideration: in order to assess whether a particular national judiciary embraces transnational judicial engagement, one must be careful to ask and answer the right questions.¹⁴⁴ As it happens, much of the “dialogue” turns out to be entirely silent: “the concept of ‘global judicial dialogue’ neither describes the actual practice of comparative analysis by judges nor explains the emergence of a global constitutional jurisprudence” and “the frequency with which a court cites foreign law in its opinions is an

139. *Id.* at 51–54.

140. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 27 (U.K.) (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.”); *R. v. Keegstra*, [1990] 3 S.C.R. 697, 769 (Can.) (noting “the importance of diversity and multiculturalism in Canada, the value of equality and the worth and dignity of each human person” within Canadian constitutional thought); *see also* Krotoszynski, *supra* note 88, at 56–57 (discussing the importance of equality, diversity, and multiculturalism in the free speech jurisprudence of the Supreme Court of Canada).

141. JACKSON, *supra* note 1, at 242.

142. Law & Chang, *supra* note 2, at 523–25.

143. *Id.* at 559–62.

144. *Id.* at 525–28.

extremely unreliable measure of the extent to which the court actually makes use of foreign law.”¹⁴⁵ Instead, Professors Law and Chang argue that “[s]cholars who wish to understand or measure a particular court’s usage of foreign law must therefore be prepared to supplement quantitative research methods, such as statistical analysis of citations to foreign law, with qualitative approaches that are capable of probing more deeply, such as interviews with court personnel.”¹⁴⁶ Thus, even though the Constitutional Court of Taiwan seldom cites foreign legal sources in its formal written decisions, “foreign legal research forms a routine and indispensable part of its deliberations.”¹⁴⁷

To be sure, “[t]he published opinions of the TCC give the superficial appearance of a court that makes relatively little use of foreign law”¹⁴⁸ and “[a]ctual citation of foreign law is rare, especially in majority opinions.”¹⁴⁹ Nevertheless, the judges of this court consider foreign law in general, and U.S. law in particular, when deciding hard cases.¹⁵⁰ Thus, the “failure to *cite* foreign law does not denote failure to *consider* foreign law.”¹⁵¹

This brings us to the main point at hand: what makes it possible for Taiwanese constitutional jurists and their law clerks to engage foreign and international law effectively? Or, as Law and Chang put the question, “how exactly do the justices and their clerks acquire their extensive knowledge of foreign law?”¹⁵² They report that “[i]t turns out that, for the most part, they do so in very old-fashioned ways: they study it in school, they conduct research, and they talk to their colleagues.”¹⁵³

Consistent with Jackson’s thesis that staffing decisions can importantly impact the ability of a court to consider foreign and international law,¹⁵⁴ Law and Chang explain that many of the Taiwanese judges and their law clerks have studied foreign law abroad and rely on this formal training to conduct research in chambers.¹⁵⁵ Moreover, and again as Jackson posits,¹⁵⁶ “[w]hat has transformed the way in which Taiwanese justices and clerks

145. *Id.* at 527.

146. *Id.*

147. *Id.* at 528.

148. *Id.* at 557.

149. *Id.*

150. *See id.* at 557–63.

151. *Id.* at 559.

152. *Id.* at 563.

153. *Id.*

154. *See* JACKSON, *supra* note 1, at 5–9, 189.

155. Law & Chang, *supra* note 2, at 563 (“Much of this research concerns legal systems to which the justices and clerks have already been exposed as graduate students: eleven of the fifteen justices hold either an LL.M. or Ph.D. in law from another country.”).

156. *See* JACKSON, *supra* note 1, at 5–6.

learn about foreign law is not an expansion of opportunities to interact with judges in other countries, but rather the increasing availability and utility of electronic research tools.”¹⁵⁷

Thus, Taiwanese judges serving on the Constitutional Court evidently have both the time and the ability to consider, albeit informally, foreign and international law when deciding important questions of domestic constitutional law.¹⁵⁸ In order to operationalize a strong form of international judicial dialogue or engagement, however, judges must be familiar with the sources of foreign law and the institutions charged with creating and enforcing it. Most U.S. lawyers, judges, and law students have not studied law abroad and therefore lack the formal training that Law and Chang report that Taiwanese Constitutional Court judges and law clerks often possess.

By way of contrast, most U.S. lawyers have at least some general idea of how state judiciaries function; the same is obviously true with respect to federal judges regarding the decisions of other federal courts. The condition does not, however, hold true with respect to foreign or international courts—even those of our immediate neighbors Canada and Mexico.

The Taiwanese example supports my central claim that stronger competencies in comparative and international law research would be required in order for state and federal judges in the United States comfortably to engage foreign and international legal materials. But judges facing an overflowing docket are unlikely to have either the time or the ability to study foreign legal systems in any great detail. If judges are to possess these skills, they must have them before they come to the bench. And, the same problems of time and incentive would also impede the ability of most practicing lawyers to engage in unhurried study of foreign legal materials (absent an unusual client need for such work). If these skills are to be acquired and then deployed by U.S. judges and lawyers, they probably would need to be incorporated, on a comprehensive basis, into the standard U.S. law school curriculum.

Absent a revolution in curricular priorities, however, domestic judges, lawyers, and legal academics will almost certainly lack the skill sets required to embrace transnational engagement. However, and for the reasons previously noted, the prospects for a radically enhanced focus on comparative and transnational law in the standard U.S. law school curriculum are rather bleak. Without some sort of strong signal from federal and state court judges that legal advocates should devote greater time and attention to foreign and international law materials in their written

157. Law & Chang, *supra* note 2, at 563.

158. *Id.* at 558–62 (discussing in-chambers consideration of foreign and international law by Taiwanese jurists serving on the Constitutional Court of Taiwan).

briefs and oral arguments, significantly enhanced levels of transnational engagement will not come into being in the United States

*D. Some Preliminary Thoughts on the Potential for Incorporating
Comparative Law Materials and Methodology More Fully into the U.S.
Domestic Law School Curriculum*

Assuming that Professor Jackson is correct to argue that higher mean levels of engagement would lead to improved judicial reasoning and decision making, and further assuming that contemporary legal education does a relatively poor job of equipping lawyers to use foreign and international law materials in fashioning their arguments, what steps might be taken to address this failure? The potential benefits associated with incorporating comparative law and legal perspectives in domestic law school teaching and scholarship do not rest on a purely utilitarian argument, but rather on a normative claim: namely, that considering how another nation, sharing a common set of legal, political, social, and moral commitments, has addressed a common issue or problem can shed important new light on old, seemingly settled legal questions.¹⁵⁹

If one agrees with this claim, or will at least consider its validity *arguendo*, then how would one go about incorporating a comparative legal perspective into both the domestic law school curriculum and also discrete courses within that curriculum if one is not otherwise familiar with comparative law and legal materials? Moreover, and as a preliminary matter, is comparative law a discrete, upper-level elective course, a particular methodology, or both? The answer seems obvious: it is plainly both. Comparative law is both a discrete subject matter and also a methodology, not unlike law and economics, critical race theory, or empirical legal studies.

Clearly, it is simply not plausible to suggest that every U.S. law professor can (or even should) teach either the general survey course in comparative law or even a more specialized comparative law course (such as comparative constitutional law). Nevertheless, it would be quite possible to incorporate comparative law materials and methodologies into one's teaching and scholarship on domestic law subjects; globalizing can occur within the *existing* curriculum.

The question that presents itself, obviously enough, is whether the game is worth the candle? In other words, do comparative law materials or methodologies add something that would be worth pursuing, either in the classroom or in one's scholarship? I would argue that comparative law can

159. See *supra* notes 30–85 and accompanying text.

significantly enhance and improve the quality, content, and scope of pedagogy and scholarship involving domestic legal subjects, just as law and economics, critical race theory, and empirical legal studies can and do yield important insights into old problems and questions.

As Professor Jackson so cogently argues,¹⁶⁰ comparative law opens up new windows and vantage points on old problems; familiarity can make an idiosyncratic answer seem like the inevitable or entirely obvious answer. When the same question or issue is viewed from a global vantage point, however, the “familiar” can become quite contestable and the “obvious” may appear strange or idiosyncratic. Jackson posits that “[f]unctional comparisons can cast light on how to solve emerging constitutional problems and provide empirical information relevant to doctrinal questions that U.S. constitutional law asks, illuminating both more, and less, successful approaches.”¹⁶¹ This is no less true for legal education than it is for deciding the cases and controversies that judges are called upon to resolve.

In the specific context of a law school classroom setting, comparative materials can help students appreciate the viability of different answers to familiar questions.¹⁶² For example, is a jury essential to a fair or just criminal trial? Should constitutional rights apply against the state, or rather inform all social relations as a binding social norm that defines a polity?¹⁶³ Is consideration a necessary element of a valid contract?

With respect to legal scholarship, one can incorporate comparative perspectives in the context of primarily domestic law inquiries; comparative law can help to contextualize scholarly projects that relate to primarily local or domestic legal questions. In either case, comparative law materials can facilitate “thinking outside the box”; a foreign legal system might frame a question in a novel way, adopt a legal test that incorporates values that are not generally taken into account in the United States, or

160. See JACKSON, *supra* note 1, at 110–17.

161. *Id.* at 110.

162. See Fontana, *supra* note 33, at 562–63 (arguing that law schools should invest greater resources in teaching comparative law and methodology in the basic domestic law school curriculum).

163. In the constitutional jurisprudence of Germany, and also of the ECHR, constitutional rights do not, strictly speaking, run only against the state. See *X & Y v. Netherlands*, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 239–42 (1985) (holding that the Netherlands had a duty to secure convention rights against private abridgement and explaining that this duty extends to “the sphere of the relations of individuals between themselves”); Krotoszynski, *supra* note 88, at 98–102 (noting the absence of a state action limit on constitutional rights protected under the German Basic Law). In consequence, it is not sufficient for the state itself to refrain from violating fundamental rights; instead, it has a broader duty to secure these rights within the society. See Dieter Grimm, *Human Rights and Judicial Review in Germany*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 267, 276 (David M. Beatty ed., 1994) (“In their capacity as objectives, human rights penetrate the whole legal and social order.”).

place great emphasis on facts and circumstances that are entirely irrelevant in the governing U.S. legal analysis.

To provide a concrete example, teaching constitutional law or the First Amendment clearly can involve recourse to comparative examples and use of comparative law materials; moreover, incorporating such materials could greatly enhance comprehension and mastery of purely domestic legal rules. For example, contrasting a presidential system with a parliamentary system of government yields important insights into the structure of the federal government and the Framers' obsessive concern with limiting and checking power—even at the price of rendering government radically inefficient.¹⁶⁴ So too, incorporation of materials on hate speech in other polities, such as Canada or Germany, can help to illustrate how and why the U.S. approach, which generally affords hate speech full and complete constitutional protection under the First Amendment, lacks much influence in the wider world.¹⁶⁵

Moreover, the potential utility of comparative law perspectives is hardly limited to constitutional law, or public law, topics—first-year courses in property, tort, contract, criminal law, and civil procedure could all be enhanced and improved by incorporating comparative law materials. Professor Jackson suggests that a comparative approach could prove helpful in myriad contexts, including, but not limited to, health and safety regulation and criminal procedure.¹⁶⁶

However, some cautionary notes are in order. Undertaking comparative law scholarship does present some unique pitfalls, such as language barriers that limit a (monolingual) U.S. legal academic's ability to access and engage primary and secondary sources within the polity serving as a point of departure. Perhaps the biggest problem is simply “not knowing what you do not know”—to paraphrase former Secretary of Defense Donald Rumsfeld.¹⁶⁷ Even in the absence of a language barrier, legal terms of art can and do have different meanings in an English-speaking foreign polity, such as Australia, Canada, New Zealand, or the United Kingdom.

164. See Ronald J. Krotoszynski, Jr., *The Separation of Legislative and Executive Powers*, in HANDBOOK OF RESEARCH ON COMPARATIVE CONSTITUTIONAL LAW 234–53 (Thomas Ginsburg & Rosalind Dixon eds., 2011); Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1 (2010); see also Martin H. Redish & Elizabeth Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450–51 (1991).

165. See Krotoszynski, *supra* note 88, at 45, 53–58, 61–2, 90–92, 135–38.

166. See JACKSON, *supra* note 1, at 111.

167. Donald Rumsfeld, Sec'y, Dep't of Def., DoD News Briefing (Feb. 12, 2002) (transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>) (“But there are also unknown unknowns – the ones we don't know we don't know.”).

Moreover, it is critically important to pay close attention to government structure and to institutional powers and constraints; one cannot assume that legal institutions outside the United States observe the same structural rules and constraints as U.S. governmental entities. This happens to be a point of emphasis for Professor Jackson—she argues that attention to structural details is essential to engaging in a credible comparative law analysis.¹⁶⁸ Of course, difficulties arise whenever a person attempts to master a new field of scholarly inquiry, and learning the structural and substantive rules governing the operation of a foreign legal system clearly constitutes a substantial and difficult undertaking for anyone teaching or writing using comparative law as a methodology.¹⁶⁹

At least to a limited degree, law schools seem to be moving toward a broader embrace of comparative law and comparative law methodologies.¹⁷⁰ In large part, this is a natural and inescapable offshoot of the growth in transnational commerce; it is also a product of a more tightly integrated media environment, in which a story taking place in one place becomes widely known virtually everywhere, and almost instantaneously. This should mean that comparative law materials will be available more readily across the curriculum, both in terms of dedicated instructional material (such as course supplements), but also with respect to inclusion in casebooks for domestic law subjects. Obviously, the more readily accessible the relevant materials, the easier it would be to incorporate comparative law into a domestic law school course.

The scholarship angle is a bit more difficult, primarily because, as noted earlier, incorporating a comparative law perspective entails making a significant investment of time and energy in learning about not just a legal rule or problem in another polity, but also something about the legal, political, and more general social culture of the place, in addition to a working knowledge of the legal and political institutions of the other nation. On the other hand, if one becomes reasonably familiar with an area of law in another nation, and with the relevant legal and political

168. JACKSON, *supra* note 1, at 227–32, 237–41, 252–54.

169. See Fontana, *supra* note 33, at 562–65 (discussing the difficulties of learning and applying foreign law and suggesting several possible solutions, including “the creation of a transnational constitutional law digest, restatements of comparative constitutional law, and more comparative constitutional law casebooks”).

170. See Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053 (1998) (advocating the incorporation of more international and comparative law materials into the standard J.D. curriculum); David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT’L L. 1 (2011) (discussing the emergence and retrenchment of comparative constitutional law in U.S. law schools in the post-WWII era); David Fontana, *Chronicle Review, American Law Schools, Meet the World*, 52 CHRON. HIGHER EDUC., May 26, 2006, at B10 (advocating enhanced attention to comparative law in U.S. law schools).

institutions as well, this comparative law toolkit can be used to facilitate more than one project; thus, it is an investment that can and will pay dividends over time.

I also would submit that it is not absolutely essential to know everything in order to know anything; even relatively thin understandings of foreign law can bring useful insights and change the way that an instructor and her students perceive and understand a domestic legal issue. Thus, the perfect, or the ideal, should not be sought to the complete exclusion of the merely good. At the risk of being labeled either naïve or misguided (or perhaps both), the game seems clearly to be worth the candle.

CONCLUSION: EMBRACING COMPLEXITY AND TRANSNATIONAL CONSTITUTIONAL LAW

An unfortunate tendency exists for legal scholars to be rewarded for taking and defending unjustifiably bold stands. In a field rife with strong advocates of highly polarized positions about the merits of transnational judicial dialogue, Professor Jackson's cautious and highly nuanced approach to the question of incorporating comparative and international law perspectives into domestic constitutional law jurisprudence presents a welcome departure from this pathology. She has made an important contribution and meticulously researched and written a thoughtful, careful, and highly persuasive work that demonstrates that totalizing claims about judicial integration and judicial isolation simply do not bear up to close scrutiny, either as a theoretical or an empirical matter.

Proponents of judicial globalization will not care much for Jackson's normative and practical objections to the practice. They will disagree with her consistent rejection of totalizing claims about the benefits of integrating domestic legal systems with each other and also with international law. Others will protest Jackson's claim that integration of domestic legal systems with each other and international law would advance important human rights values and cannot be successfully resisted in any event. Whether one is a supporter of the new globalism or a skeptic, anyone working in the field of comparative constitutional law will need to take account of Professor Jackson's arguments in order to mount a persuasive case for—or against—the creation of a more globalized system of law.

At the end of the day, Jackson herself is plainly an advocate of informed and careful engagement. She posits that “candid embrace of engagement and commitment to engage in a disciplined and open-minded way should be the hallmarks of enlightened and enduring U.S.

constitutionalism in the 21st century.”¹⁷¹ Jackson suggests that this approach would best advance the durability and relevance of the Constitution of 1787: “For if the U.S. Constitution is still ‘intended to endure for ages to come,’ it must be able to navigate through the twenty-first century’s expanded universe of law.”¹⁷² Moreover, she argues that attainment of our goals and aspirations will be more, not less, likely if we are open to considering old problems through new eyes. Jackson cogently observes that “[t]o hold that judges should not even consider international or foreign laws that may illuminate how our own constitution should be understood – both in its specific relationships with other nations, and in its commitments to (some) relatively universal normative understandings – is to close one’s eyes to an important set of constitutional purposes that would be ill-served by such willful indifference or ignorance.”¹⁷³

At the end of the day, however, a higher level of engagement by U.S. courts would require significant structural changes in both the U.S. system of legal education and also in our practice norms—changes that are not forthcoming absent a stronger signal from the judges staffing the federal and state courts. On the other hand, despite the reality that strong forms of transnational judicial dialogue in the United States are presently both infeasible and improbable, Jackson’s sound arguments for greater openness to more modest efforts to use foreign and international law as a kind of muse¹⁷⁴ possess both merit and persuasive force. Even if we cannot reasonably expect a wholesale revolution in the prominence and importance of comparative and international law in the development of our domestic constitutional law jurisprudence, surely broadly informed judges should avail themselves of wisdom and inspiration wherever they happen to find it.¹⁷⁵

171. JACKSON, *supra* note 1, at 285.

172. *Id.*

173. *Id.* at 154.

174. See Krotoszynski, *supra* note 31, at 1322–23, 1356–59.

175. As Justice Elena Kagan stated the proposition at her Senate confirmation hearing, wise judges should be “in favor of [utilizing] good ideas coming from wherever you can get them,” even if that happens to be from a foreign constitutional court or international tribunal. See *supra* note 24.