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# Who's Afraid of International and Foreign Law?

Jenny S. Martinez\*

Justice Stephen Breyer's new book, *The Court and the World: American Law and the New Global Realities*,<sup>1</sup> is a timely contribution to the literature on the effects of globalization on the U.S. judicial system.<sup>2</sup> In his book, Justice Breyer goes beyond the now-familiar debate about the use of comparative and international law in interpreting the U.S. Constitution<sup>3</sup> and examines some less glamorous but actually more important ways that the world outside our borders inevitably affects the resolution of many types of legal disputes.<sup>4</sup> The impact of foreign and international legal systems on American judicial proceedings is not brand new, of course. Indeed, foreign and international law were fixtures of the Supreme Court's early docket.<sup>5</sup> But it is also true that Justice Breyer's tenure

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1. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

2. See generally Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012) (discussing the leading role of second-generation tribunals in monitoring international trade, finance, and investment); Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59 (positing that increasing U.S. involvement in global regimes prompts an overlap between issues considered by U.S. courts and international institutions); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 490 (2003) (arguing that, in their interactions with international bodies, U.S. courts should favor doctrines that foster dialogue and cooperation between globally diverse stakeholders); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67 (2009) (arguing that U.S. courts affect global governance by adjudicating the rights of transnational actors).

3. See, e.g., Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

4. See BREYER, *supra* note 1, *passim*.

5. See John Fabian Witt, *Stephen Breyer's The Court and the World*, N.Y. TIMES (Sept. 14, 2015), <http://www.nytimes.com/2015/09/20/books/review/stephen-breyers-the-court-and-the-world.html> [<https://perma.cc/9WXK-VRLA>] ("A longer view would reveal that engagement with the world has been an institutional reality at the court for nearly all of its existence. . . . [In] the first century and a half of the Republic, justices routinely took up questions of foreign and international law and international affairs.").

on the Supreme Court has coincided with an era of renewed globalization. The book is very much a product of our times.

Globalization is not a recent phenomenon, nor has the world moved solely in the direction of greater integration; rather, developments in law and society with regard to globalization have ebbed and flowed over time. In economic terms, the early nineteenth century has been called the first age of globalization.<sup>6</sup> Improvements in transportation technology—notably steam power—coupled with industrialization of manufacturing to yield dramatic increases in global trade.<sup>7</sup> Steamships and railroads carried goods long distances to new markets. The telegraph and then telephone changed communication in ways that created markets where none had existed before. By 1913, world trade had reached a peak that it would not match again until the 1960s. But the system was fragile. With the onset of World War I, trade collapsed. Global trade stumbled through the Great Depression and World War II, and only began to rise again in the post-war era.<sup>8</sup> But while trade increased in this time period, the Cold War put a damper on international legal cooperation.

Justice Breyer arrived on the Supreme Court in 1994, just after the world emerged from the long shadow of the Cold War and began to grapple with the aspirations and dangers of a world no longer framed by two opposing superpowers. On the aspirational side, new international legal institutions designed to facilitate and govern trade emerged. The World Trade Organization (WTO) was founded on January 1, 1995, superseding its less ambitious predecessor, the General Agreement on Tariffs and Trade (GATT). With the WTO came a new system for resolving disagreements—the Dispute Settlement Understanding—a quasi-judicial process of adjudication through dispute panels and review by the Appellate Body resulting in decisions with mandatory and binding authority.<sup>9</sup> In the years following, tariffs fell and global trade increased.<sup>10</sup> As one WTO report explained, “[T]he value of world merchandise exports rose from US\$ 2.03 trillion in 1980 to US\$ 18.26 trillion in 2011, which is equivalent to 7.3 per cent growth per year on average in current dollar terms.”<sup>11</sup> Meanwhile, the Internet and cell phones came into common use during this time period.

Along with an acceleration in trade and the birth of new communications and information infrastructure, Justice Breyer’s early years on the Supreme Court coincided with other international legal developments. New democracies,

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6. See G. John Ikenberry, *Don’t Panic: How Secure Is Globalization’s Future?*, 79 FOREIGN AFF. 145 (2000); see also WORLD TRADE ORG., WORLD TRADE REPORT 2013, at 46, [https://www.wto.org/english/res\\_e/booksp\\_e/wtr13-2b\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf) [<https://perma.cc/DVT9-6W3H>].

7. See WORLD TRADE ORG., *supra* note 6, at 46–47.

8. See *id.* at 51–53.

9. See Born, *supra* note 2, at 850–52 (describing WTO dispute settlement system).

10. See, e.g., WORLD TRADE ORG., *supra* note 6, at 55–57.

11. *Id.* at 55.

like South Africa and the former Soviet states of Eastern Europe, enacted constitutions and their constitutional courts began issuing judgments that seemed worth reading.<sup>12</sup> International human rights law also began to flourish; the European Court of Human Rights, for example, received 8,400 cases in 1999 and 61,300 in 2010.<sup>13</sup>

The end of the Cold War created a variety of opportunities for international legal cooperation. New international courts were born, like the International Criminal Court (created by a treaty drafted in 1998),<sup>14</sup> and existing courts like the International Court of Justice (ICJ) sprang to life after long quiescence. The ICJ is the principal judicial organ of the United Nations, but a mere eighty-two cases were filed with it between 1947 and 1989—an average of fewer than two per year. Between 1990 and 2000, some thirty-eight new matters were opened at the ICJ, almost doubling its pace of activity.

Before long, these developments found their way to the hallowed chambers of the U.S. Supreme Court. Beginning in the late 1990s, a series of cases concerning foreign inmates on death row came before both the U.S. Supreme Court and the International Court of Justice. The inmates claimed that their rights under the Vienna Convention on Consular Relations had been violated because they did not receive notice of their right to seek assistance from their consulate following arrest in the United States. When U.S. courts rejected the inmates' claims, their respective home governments sued the United States in the ICJ.<sup>15</sup> The Supreme Court had to grapple with the question of its relationship to the ICJ, and what weight should be given to the international court's decisions about the scope of U.S. treaty obligations. In a series of decisions, a shifting majority of the Supreme Court ultimately decided that it was not required to follow<sup>16</sup> (or even wait for)<sup>17</sup> the decisions of the ICJ and, moreover, that the President could not order states to comply with the ICJ's decision in the absence of congressional legislation implementing the

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12. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing European Court of Human Rights decision and noting that “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct”).

13. See Polly Curtis, *What's Wrong with the European Court of Human Rights?*, *GUARDIAN* (Jan. 25, 2012), <http://www.theguardian.com/politics/reality-check-with-polly-curtis/2012/jan/25/european-court-of-human-rights> [<https://perma.cc/PW28-3A63>].

14. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9; 37 ILM 1002; 2187 UNTS 90 (July 17, 1998).

15. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Breard v. Greene*, 523 U.S. 371 (1998); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27).

16. See *Medellin*, 552 U.S. at 506 (“[W]e conclude that the *Avena* judgment is not automatically binding domestic law.”).

17. See *Fed. Republic of Ger. v. United States*, 526 U.S. 111 (1999) (denying Germany's request for injunction against imminent state execution of German nationals based on ICJ's provisional measures order asking the United States to delay execution until ICJ could issue decision on merits).

relevant treaties.<sup>18</sup> Justice Breyer, joined by other justices, dissented on various issues in the series of cases, both recommending more respectful consideration of the ICJ's opinions and reaching an interpretation of the treaty obligations that differed from that of the majority.<sup>19</sup>

Also during the past few decades, civil lawsuits brought under the Alien Tort Statute (ATS) began to appear in U.S. courts in increasing numbers. This development was both spurred by, and in turn contributed to, a cycle of renewed attention to human rights and a drive at both the international and domestic level for holding those responsible for atrocities accountable.<sup>20</sup> The new wave of litigation began in 1980 with *Filártiga v. Peña-Irala*, a case brought against a former Paraguayan police official then living in the United States by relatives of a seventeen-year-old boy who had been tortured and killed by the police in retaliation for his father's political activism.<sup>21</sup> The Second Circuit allowed the case to proceed, ruling that the ATS, a 1789 statute allowing federal courts jurisdiction over torts in violation of the law of nations, encompassed human rights violations prohibited by modern international law. In that case the court concluded, "[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."<sup>22</sup> A number of similar cases followed in other lower courts, eventually prompting a backlash against the lawsuits that ultimately reached the Supreme Court in 2004. That year, in *Sosa v. Alvarez-Machain*, the Court expressed caution about the phenomenon of international human rights litigation in U.S. courts, but agreed to leave the door open for ATS lawsuits raising claims based on current norms "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>23</sup> The controversy was not over, however. A number of the ATS lawsuits brought in the decade since *Sosa* have focused not only on individual foreign perpetrators (like the defendant in *Filártiga*) but also on multinational corporations' complicity in human rights abuses.<sup>24</sup> While the circuit courts have split on the susceptibility of corporations to suit under the ATS, the Court ultimately declined to resolve the question of corporate liability in *Kiobel*, ruling instead that the ATS's jurisdictional reach only extends to cases concerning conduct in foreign states

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18. See *Medellin*, 552 U.S. at 498–99.

19. See *id.* at 538 (Breyer, J., dissenting) (joined by Souter, J., and Ginsburg, J.); *Breard*, 523 U.S. at 380 (Breyer, J., dissenting); *Fed. Republic of Ger.*, 526 U.S. at 112–13 (Breyer, J., dissenting) (joined by Stevens, J.).

20. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See generally Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645 (2014) (describing trends in ATS litigation from the 1980s to present).

21. 630 F.2d 876 (2d Cir. 1980).

22. *Id.* at 890.

23. *Sosa*, 542 U.S. at 725.

24. See *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013).

that touches and concerns the United States with sufficient force to displace the presumption against extraterritoriality in U.S. law.<sup>25</sup>

At the same time, it also became clear that the new multipolar world faced new dangers from non-state actors and new ideologies, including fundamentalist religious ideologies like those of Al-Qaeda and now the Islamic State. In the aftermath of the September 11, 2001 terrorist attacks, a number of controversial counterterrorism policies generated litigation that eventually reached the Court, including cases involving detention and trial of persons accused of being “enemy combatants,”<sup>26</sup> alleged discrimination against Muslims in immigration detention,<sup>27</sup> and expansive surveillance programs.<sup>28</sup>

International economic issues also reached the Court in new forms. The tremendous proliferation of bilateral-investment treaties in the past fifteen years spilled onto the Court’s docket as issues arose concerning enforcement of investment arbitration judgments.<sup>29</sup> Likewise, the Court had to resolve questions about personal jurisdiction in tort lawsuits<sup>30</sup> and extraterritorial application of securities laws. And while Justice Breyer’s book understandably focuses on the Supreme Court’s encounters with foreign law, lower federal courts and state courts have often applied foreign law as well. Conflict-of-laws doctrine routinely demands the application of foreign law in many kinds of commonplace disputes, such as contracts and torts.<sup>31</sup>

In short, as Justice Breyer’s book rightly points out, the Court has been called upon to address a range of internationally significant matters, including national security-related litigation, commercial cases involving extraterritorial application of securities statutes, human rights cases against corporations, investor-state arbitrations against foreign governments, and even child custody. The book succeeds at its main task: informing interested readers about the myriad ways that international affairs impact U.S. law. Indeed, as a professor of international law pushing to convince students and colleagues of the imperative of paying attention to the field, I feel that it is almost as if he has written the book just for me. What better brief to submit to the faculty meeting to argue that some sort of transnational coursework ought to be required of law students going out into the world today?

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25. *See id.* at 1669.

26. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

27. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

28. *See Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

29. *See BG Grp. PLC v. Argentina*, 134 S. Ct. 1198 (2014).

30. *See J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

31. *See generally* VED P. NANDA & DAVID K. PANSIUS, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 7 (2d ed. 2007–2016) (section of multivolume treatise discussing choice of law in international disputes); VED P. NANDA & DAVID K. PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 18 (2d ed. 2007–2016) (section of multivolume treatise discussing proof of foreign law in U.S. legal proceedings in which that law must be applied).

*The Court and the World* is also a terrific teaching tool. It discusses all the key transnational Supreme Court cases from the past two decades and closely tracks the syllabus for some of my classes, not to mention many important themes in my own academic writing.<sup>32</sup> The book is also accessible to nonlawyers, thanks to Justice Breyer's usual clear, lucid prose (he is known for writing in plain English and without cumbersome asides in footnotes), though the lay reader would need to be very interested in the topic to wade through some of the more technical discussions.

But if the book falls short in any respect, it is in underestimating the depth of opposition to globalization in the United States today. At the outset, Justice Breyer explains that he "seeks to make known the new challenges imposed by an ever more interdependent world" and notes that "even in ordinary matters, judicial awareness can no longer stop at the border."<sup>33</sup> The book goes on to make a compelling argument for the importance of "the rule of law generally" and the need for legal solutions to "problems of security, environment, health, [and] trade" that cross borders.<sup>34</sup> It explains how showing that "law can offer effective solutions to the problems of our times" can in turn discourage "resort to extralegal methods, which are often arbitrary or autocratic."<sup>35</sup> And the book argues that by listening to "many voices," the Court is more likely to reach decisions that harmonize regulatory frameworks through careful limits on extraterritoriality and attention to the intent behind multilateral agreements.<sup>36</sup> Among lawyers who regularly encounter transnational legal issues in their ordinary practice, little of this is actually controversial. Even the late Justice Antonin Scalia, who argued so vociferously against the use of foreign law in interpreting the U.S. Constitution, agreed that consideration of foreign sources was relevant to the interpretation of multilateral treaties and to conflict-of-law questions.<sup>37</sup>

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32. This is perhaps not accidental. My own interest in international and comparative law crystallized while I was clerking for Justice Breyer in October Term 1998, spurred by the cases before the Court that term and Justice Breyer's interest in the topic.

33. BREYER, *supra* note 1, at 4.

34. *Id.* at 6.

35. *Id.* at 6–7.

36. *Id.* at 7 (internal quotation marks omitted).

37. See *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) ("When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.' . . . True to that canon, our previous Warsaw Convention opinions have carefully considered foreign case law. . . . Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us. . . . Within the past year, appellate courts in both England and Australia have rendered decisions squarely at odds with today's holding. Because the Court offers no convincing explanation why these cases should not be followed, I respectfully dissent."); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting in part) ("[I]f the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: '[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.' This canon is 'wholly independent' of the presumption against extraterritoriality. . . . It is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes

There is a way in which the book seems to be whistling past the graveyard. A strain of isolationism runs deep in U.S. politics, and that strain resists engagement with the world outside our borders in ways both mundane and frightening. At this very moment, segments of American society would build walls, both literal and metaphorical, to shut us off from the rest of the world.<sup>38</sup>

At times in the past, isolationism dominated U.S. policies for decades at a time, with dire results. Following World War I, the United States refused to join the League of Nations, and imposed high tariffs that posed barriers to trade and likely worsened the Great Depression. As Hitler began to rise to power in the 1930s, many Americans wanted the United States to simply stay out of European affairs. Ultimately, World War II jolted the country into engagement with and leadership in the world, but isolationism has never gone away, and today is resurgent again.

To be sure, the country is less parochial than it once was. More than sixty-eight million Americans traveled abroad in 2014, only half of whom stayed in North America. Today, more than a third of Americans have passports, an all-time high and a dramatic increase from even recent decades.<sup>39</sup> Still, with a landmass territory that stretches from the Atlantic to the Pacific, Americans have less reason to travel abroad than others in many smaller countries in close proximity to one another. By comparison, more than sixty percent of Canadians<sup>40</sup> and seventy-five percent of U.K. citizens have passports.<sup>41</sup>

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limitations on a nation's exercise of its jurisdiction to prescribe. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.” (quoting *Murray v. Schooner Charming Betsy*, 62 U.S. (1804) (Marshall, C.J.) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–16 (1987)).

38. See, e.g., David Lawder & Roberta Rampton, *Trump's Tariff Plan Could Boomerang, Spark Trade Wars with China, Mexico*, REUTERS (Mar. 24, 2016), <http://www.reuters.com/article/us-usa-election-trump-trade-idUSKCNOWQOWG> [<https://perma.cc/ZB8U-V7TK>] (discussing the presidential candidate's plan to impose trade barriers); Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?*, N.Y. TIMES (May 19, 2016), <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html> [<https://perma.cc/A4AD-CT8J>] (discussing the presidential candidate's plan to build a wall on U.S.-Mexico border).

39. See U.S. State Dep't, *Passport Statistics*, U.S. PASSPORTS & INT'L TRAVEL, <https://travel.state.gov/content/passports/en/passports/statistics.html> [<https://perma.cc/QY65-57ML>] (last visited Aug. 28, 2016) (noting that in 2015, under valid passports in circulation, there were 125,907,176 passports in circulation as compared to 7,2611,711 in 1989); U.S. CENSUS BUREAU, *Census Bureau Projects U.S. and World Populations on New Year's Day* (Dec. 29, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-tps90.html> [<https://perma.cc/2NAB-3R3Z>] (predicting U.S. population on January 1, 2015 at 320,090,857).

40. See PASSPORT CANADA, ANNUAL REPORT 2012–2013, at 11, [http://www.cic.gc.ca/english/resources/publications/passport-ar/documents/PDF/ar\\_12\\_eng.pdf](http://www.cic.gc.ca/english/resources/publications/passport-ar/documents/PDF/ar_12_eng.pdf) [<https://perma.cc/VWE5-ZY52>] (last visited Aug. 28, 2016).

41. See OFFICE FOR NAT'L STATISTICS, DETAILED COUNTRY OF BIRTH AND NATIONALITY ANALYSIS FROM THE 2011 CENSUS OF ENGLAND AND WALES (May 16, 2013), [http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776\\_310441.pdf](http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776_310441.pdf)

But isolationism is resurgent, and not just here in the United States. The United Kingdom voted in favor of withdrawal from the European Union this June, signaling a growing disillusionment with the international institutions constructed in past decades.<sup>42</sup> Nationalist parties are resurgent in many European countries.<sup>43</sup> Economic instability has led many to question the orthodoxy of free trade, and negotiations for new trade agreements are stumbling.<sup>44</sup>

Here in the United States, the isolationist trend extends to the legal realm, and has the potential to affect the sorts of mundane transnationalism that Justice Breyer's book views as inevitable. There have been repeated failed attempts to pass federal legislation prohibiting federal judges from relying on foreign law.<sup>45</sup> More significantly, in recent years, many state legislatures have considered or adopted measures that would ban state judges from referring to foreign or international law.<sup>46</sup> As of 2013, "lawmakers in 32 states have introduced and debated these types of bills. Foreign law bans have already been enacted in Oklahoma, Kansas, Louisiana, Tennessee, and Arizona, while a related ban on the enforcement of 'any religious code' has been enacted in South Dakota."<sup>47</sup>

While the federal statutes emerged in response to the Supreme Court's citation of foreign law in constitutional cases concerning the death penalty and gay rights,<sup>48</sup> the state trend grew out of anti-Islamic movements. Indeed, initial

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[<https://perma.cc/RL9M-XQE3>]. Interestingly, the rate of passport holders varies quite dramatically in the United States by state. Some 50 to 60 percent of Californians have them, and New Jersey holds the record at 68 percent, but only 19.86 percent of those living in Mississippi have a passport. See *U.S. Passport Holders by State*, HUFFINGTON POST (Mar. 9, 2011), [http://www.huffingtonpost.com/2011/03/09/post\\_662\\_n\\_833399.html](http://www.huffingtonpost.com/2011/03/09/post_662_n_833399.html) [<https://perma.cc/BX7C-72QT>].

42. See Steven Erlanger, 'Brexit': Explaining Britain's Vote on European Union Membership, N.Y. TIMES (June 21, 2016), <http://www.nytimes.com/interactive/2016/world/europe/britain-european-union-brexit.html> [<http://perma.cc/DS8A-RSLN>].

43. See *Nationalism Is Back*, ECONOMIST (Nov. 20, 2014), <http://www.economist.com/news/21631966-bad-news-international-co-operation-nationalism-back> [<https://perma.cc/RHV8-BJJK>].

44. See Binyamin Appelbaum, *Simmering for Decades, Anger About Trade Boils Over in '16 Election*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/business/economy/trade-donald-trump-bernie-sanders.html> [<http://perma.cc/9GD8-LM3D>]; Roger Cohen, Opinion, *If the Trans-Pacific Partnership Crumbles, China Wins*, N.Y. TIMES (June 2, 2016), <http://www.nytimes.com/2016/06/03/opinion/the-right-asian-deal-trans-pacific-partnership.html> [<https://perma.cc/2TRX-73K9>].

45. See H.R. 973, 112th Cong. (introduced Mar. 9, 2011 by Rep. Sandy Adams), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.00973> [<https://perma.cc/6VE4-8M3A>]; see also David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 656–57 nn.16 & 17 (2005) (describing various legislative proposals to prohibit Justices from using foreign law); *Foreign Law Bill Irks Ginsburg*, CONN. L. TRIB., Oct. 3, 2005, at 11; Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21 (describing calls for impeachment of federal judges for referring to foreign law).

46. See FAIZA PATEL ET AL., CTR. FOR AM. PROGRESS, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 8 (2013).

47. *Id.* at 1.

48. See Law, *supra* note 45, at 656–57.

state statutes focused on the use of Sharia or Islamic law.<sup>49</sup> In policy terms, this was an odd legislative priority given the paucity of precedent applying such religious law. The rare cases raising these issues have been generated by, for example, contractual terms in prenuptial agreements referencing religious law. Such cases are both rare and generally dealt with by state courts in sensible ways consistent with normal American legal standards.<sup>50</sup>

Nevertheless, in 2010 Oklahoma voters enacted by referendum (with seventy percent in favor) a law providing that “[t]he courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.”<sup>51</sup> When a federal court struck down Oklahoma’s law on First Amendment Establishment Clause grounds,<sup>52</sup> campaigners broadened the language to attempt to impose a more generic ban on foreign and international law, though their campaign rhetoric has still focused on anti-Islamic sentiment. A Kansas law that was enacted uses language common to many of the proposals:

Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.<sup>53</sup>

Existing conflict-of-laws doctrines in the United States routinely examine particular foreign rules for compatibility with the U.S. legal system. A U.S. court, for example, would not enforce a foreign libel law that violates the First Amendment. But as other commentators have noted, these new laws go well beyond the traditional conflict-of-laws analysis and provide for “wholesale evaluations of foreign legal systems,” rather than the particular rule sought to be applied in a particular case.<sup>54</sup> These laws are likely to create problems in contract and commercial cases, family law cases, and others where agreement by the parties or ordinary choice-of-law rules would point to foreign law. For example, to the extent a statute prohibits reliance upon a foreign “legal code or system,” a court might be prohibited from applying foreign law to an ordinary

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49. See PATEL ET AL., *supra* note 46, at 5–8.

50. See *id.* at 5–7.

51. See *Awad v. Ziriax*, 670 F.3d 1111, 1118 (10th Cir. 2012) (quoting House Joint Resolution 1056 ballot proposal).

52. See *Awad v. Ziriax*, 966 F. Supp. 2d. 1198, 1200 (W.D. Okla. 2013) (finding Oklahoma amendment violated Establishment Clause of the First Amendment).

53. See PATEL ET AL., *supra* note 46, at 16 (quoting proposal).

54. *Id.* at 3.

commercial contract where the parties may well have contemplated and relied upon the application of that law in the course of their business dealings.<sup>55</sup> Courts dealing with child custody cases under the Hague Convention on Civil Aspects of International Child Abduction involving one parent in the United States and another in Mexico would be prohibited from considering Mexican law.<sup>56</sup> These laws would significantly alter the current choice-of-law practices of U.S. courts, without regard to the impact on many types of routine cases.

This overt hostility to the legal world outside our borders is not without cost to the United States's influence internationally. Scholars have examined the rate at which other countries model their constitutions on the U.S. Constitution, and have found fewer recent documents modeled on it than on others, such as the Canadian constitution.<sup>57</sup> While other scholars take issue with these empirical findings,<sup>58</sup> writing by some foreign judges supports the story of waning U.S. influence. Aharon Barak, then the Chief Justice of the Supreme Court of Israel, wrote in the *Harvard Law Review* in 2002 that when U.S. judges turn a blind eye to comparative law, “[t]hey fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.”<sup>59</sup> Partly as a consequence, Chief Justice Barak wrote, the U.S. Supreme Court “is losing the central role it once had among courts in modern democracies.”<sup>60</sup>

*The Court and the World* invokes Justice Barak's argument. It calls for greater engagement by the Court with the legal world outside the United States. It embraces the kind of transnationalism embodied in the annual Yale Global Constitutionalism workshop, a forum in which Justice Breyer and Justice Barak have met, and which Justice Breyer noted had influenced his thinking about the issues discussed in the book. But the academic halls and carpeted courtrooms where these arguments flourish seem so very far removed from the streets in which people call for walls to keep foreigners out, for trade barriers to stop the flow of goods, and for withdrawal from international institutions.

Justice Breyer's book does not grapple with the groundswell of isolationist sentiment that has led to statutes banning use of foreign law as well as opposition to trade and immigration laws as they now stand. In this respect,

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55. See, e.g., *Mulcahy v. Farmers Ins. Co. of Washington*, 95 P.3d 313, 317 (2004) (“We conclude that Canadian law applies.”).

56. See, e.g., *In re J.J.L.-P.*, 256 S.W.3d 363, 373 (Tex. Ct. App. 2008) (“Having established that Mexico is J.J.L.-P.'s country of habitual residence, we must now examine whether the Cruzes' retention of J.J.L.-P. breached Jurado-Galaz's rights of custody under Mexican law.”).

57. See, e.g., David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

58. See Zachary Elkins et al., Response, *Comments on Law and Versteeg's The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 2088 (2012).

59. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2002).

60. *Id.* at 27.

his book assumes that readers, once they hear the facts, will be persuaded that “there is an ever-growing need for American courts to develop an understanding of, and working relationships with, foreign courts and legal institutions”<sup>61</sup> based upon the demands of, as he puts it, “an ever more interdependent world—a world of instant communications and commerce, and shared problems of (for example) security, the environment, health, and trade, all of which ever more pervasively link individuals without regard to national boundaries.”<sup>62</sup> But what if a significant portion of the population longs for a world with less interdependence—with less trade, less migration, and fewer shared efforts on the environment, health and trade?

Isolationism does not stem only from ignorance, although that has sometimes historically contributed to it and surely undergirds the most extreme examples today. The isolationism that is resurgent today in the United States and elsewhere reflects deep and genuinely held concerns as well as xenophobia. Many Americans harbor fears about economic insecurity and growing wealth disparities, and have a sense that globalization and free trade have not benefited all segments of society in equal ways. Many fear non-state actors whose acts of terror reflect their ideological hostility to the very existence of the open, secular, and multicultural societies of higher-income nations. And they yearn for a politics that better reconciles the free market with human well-being. These are not, for the most part, questions for judges. They are, in the colloquial rather than the legal sense, fundamentally political questions. So perhaps it would be too much to ask that a book about the role of a very rarified court grapple with these anxieties. Nevertheless, the tone of today’s national debate suggests that the task of persuading the as-yet-unpersuaded Americans that we should engage with the world—whether through laws, commerce, or other methods of influence—is harder than the book assumes. In that sense, it is a welcome beginning to a conversation about the globalization of the American legal system, though certainly not the end of that conversation.

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61. BREYER, *supra* note 1, at 7.

62. *Id.* at 4.

