

# A Global Community of Courts

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## I. INTRODUCTION

This Focus section examines emerging fora of transnational litigation, encompassing both international tribunals and domestic courts. The very label “transnational litigation,” as applied to many of the dispute resolution processes that are discussed in this section—the World Trade Organization (WTO), North American Free Trade Agreement (NAFTA), the Law of the Sea Tribunal—reflects a deep conceptual shift. These arbitral tribunals and international courts were once addressed in courses on “international dispute resolution,” beginning with the International Court of Justice, then moving to various regional courts such as the Inter-American Court and the European Court of Human Rights (ECHR), and finally covering a series of more specialized processes such as the General Agreement on Tariffs and Trade (GATT), the International Centre for Settlement of Investor Disputes (ICSID), and ad hoc claims tribunals.<sup>1</sup> “Transnational litigation,” by contrast, generally referred to litigation in domestic courts, typically between private parties across borders but also, as sovereign immunity rules loosened, between private parties and states.<sup>2</sup>

The differences between international dispute resolution and transnational litigation were once significant. International disputes were disputes between states, which were relatively rare. Typically these were carefully considered instances in which a state was willing to bring a claim against a fellow state under international law, itself defined as governing the relations between states. These cases and the process of their resolution took place on a distinct conceptual plane from domestic courts and cases as part of the international system.

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1. See, e.g., J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (3d ed. 1998); JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* (1999).

2. See, e.g., RICHARD H. KREINDLER, *TRANSNATIONAL LITIGATION: A BASIC PRIMER* (1998); *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* (Craig Scott, ed., 2001). *But see* HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* (4th ed. 1994).

Transnational litigation as defined here, however, encompasses domestic and international tribunals. It includes cases between states (with individuals typically in the wings), between individuals and states, and between individuals across borders. Suits that once could be brought only in domestic courts can now be brought before a multiplicity of international arbitral or judicial tribunals, and sometimes before both sequentially. Joel Trachtman's paper evaluates the circumstances in which we should allow private parties into the preserve once reserved for states alone, as opposed to the individuals litigating by proxy through national trade representatives or ministers. Barton Legum reminds us that litigation by individuals against states has more precedent than we are often willing to recognize, particularly in claims settlements (e.g., the U.S.-Iranian Claims Tribunal). At the same time, however, he acknowledges the novelty of NAFTA Chapter 11 litigation, in which states have agreed to accept a reciprocal risk of prospective litigation by individuals against them before arbitral tribunals constituted on an ad hoc basis.<sup>3</sup> The substance of this litigation is typical commercial litigation—the type of dispute that clogs domestic courts—except that a state is involved.

The underlying conceptual shift is from two systems—international and domestic—to one; from international and national judges to judges applying international law, national law, or a mixture of both.<sup>4</sup> In other words, the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a global community of courts.

This community of courts is constituted above all by the self-awareness of the national and international judges who play a part.<sup>5</sup> They are coming together in all sorts of ways. Literally, they meet much more frequently in a variety of settings, from seminars to training sessions and judicial organizations. Figuratively, they read and cite each other's opinions, which are now available in these various meetings, on the Internet, through clerks, and through the medium of international tribunals that draw on domestic case law and then cross-fertilize to other national courts.

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3. Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L. L.J. 531 (2002).

4. For these purposes, I include international arbitral tribunals within my definition of courts, notwithstanding significant differences between them.

5. For a discussion of an "international judiciary" that is similarly self-aware, although more limited than the community of courts discussed here, see Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 553 (2001) (discussing the "powerful new international judiciary . . . [that] has taken on a life of its own and has already, in many instances, shown itself unwilling to defer to traditional conceptions of sovereignty and state power").

The result is that participating judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders. They face common substantive and institutional problems; they learn from one another's experience and reasoning; and they cooperate directly to resolve specific disputes. Increasingly, they conceive of themselves as capable of independent action in both international and domestic realms. Over time, whether they sit on a national supreme or constitutional court or on an international court or tribunal, they are increasingly coming to recognize each other as participants in a common judicial enterprise.

This Essay describes and documents two phenomena that reflect this emerging global community of courts, as both symptom and cause. The first is constitutional cross-fertilization. Constitutional courts are citing each other's precedents on issues ranging from free speech to privacy rights to the death penalty. A Canadian constitutional court justice, noting this phenomenon, observes that unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue.<sup>6</sup> They cite each other not as precedent, but as persuasive authority. They may also distinguish their views from the views of other courts that have considered similar problems. The result, at least in some areas such as the death penalty and privacy rights, is an emerging global jurisprudence.

The second phenomenon is a combination of both active cooperation and vigorous conflict among national courts involved in transnational litigation between private parties across borders. These courts have always had to take account of the potential involvement of foreign courts in the dispute before them, whenever the dispute itself crossed borders. In the common law system, courts have long applied specialized doctrines to determine where a case should be heard, based in part on an assessment of the "adequacy" of the foreign forum. Courts have also been able to ask each other for assistance in gathering evidence or producing documents through the rather formal device of "letters rogatory."

Today, however, the sheer volume of transnational disputes generated by a globalizing economy has brought national judges into contact with one another as never before, marking a difference not only in the degree, but also in the nature of their interactions. In a bankruptcy dispute, for instance, a U.S. and a British court concluded a "mini-treaty" regarding each side's role in resolving the dispute, an agreement then memorialized in an Order and Protocol. At the same time, increased familiarity breeds not contempt but rather more vigorous conflict. Judges who are beginning to think of one another as participants in the same dispute resolution system are often less

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6. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *TULSA L.J.* 15, 16 (1998).

willing to defer to one another out of the comity of nations and more willing to examine how well the system actually works, and to act accordingly.

The result, paradoxically, is more dialogue and less deference. Over the longer term, a distinct doctrine of "judicial comity" will emerge: a set of principles designed to guide courts in giving deference to foreign courts as a matter of respect owed judges by judges, rather than in terms of the more general national interest as balanced against the foreign nation's interest. At the same time, judges are willing to judge the performance and quality of fellow judges in judicial systems that do not measure up to minimum standards of international justice.

In exploring these phenomena below, it will become apparent that the global community of courts does not yet include all courts from all countries, or even all international courts and tribunals. It is a partial, emerging community. Yet if the supreme court or the constitutional court of a particular country cites a foreign or an international decision, that sends a signal to all lower court judges and to the lawyers who argue before them. If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation that melds the once distinct planes of national and international law.

More generally, the vision of a global community of courts may seem a bit starry-eyed, projecting too much too quickly from too little. The language and conception is ambitious, but the reality is there. The judges themselves who are meeting, reading, and citing their foreign and international counterparts are the first to acknowledge a change in their own consciousness. They remain very much national or international judges, charged with a specific jurisdiction and grounded in a particular body of law, but they are also increasingly part of a larger transnational system.

To become an actual community of courts, however, judges will have to take a further step and acknowledge, either explicitly or implicitly, a set of common principles that define their mutual relations. These relations include not only horizontal relationships between national courts, but also vertical relations between national courts and their supranational counterparts, such as the national courts in E.U. member states and the European Court of Justice (ECJ). In all of these relations, judges should recognize the principles of checks and balances, positive conflict, pluralism, legitimate difference, and the value of persuasive authority. Common principles and an awareness of a common enterprise will help make simple participation in transnational litigation into an engine of common identity and community.

## II. CONSTITUTIONAL CROSS-FERTILIZATION

Consider the following statement by the Chief Justice of the Norwegian Supreme Court: "[t]he Supreme Court has to an increasing degree taken part in international collaboration among the highest courts. It is a natural obli-

gation that, in so far as we have the capacity, we should take part in European and international debate and mutual interaction.”<sup>7</sup> More generally, he notes, “[i]t is the duty of national courts—and especially of the highest court in a small country—to introduce new legal ideas from the outside world into national judicial decisions.”<sup>8</sup>

This would be quite a controversial statement for Chief Justice Rehnquist to make, although as discussed below, several of his associate justices are beginning to sound precisely this theme. Yet high court judges around the world—judges with constitutional jurisdiction, whether or not they serve on courts limited to constitutional cases—are engaging in a growing dialogue on the issues that arise before them. In the words of Justice Claire L’Heureux-Dubé of the Canadian Supreme Court, “[m]ore and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues.”<sup>9</sup>

Judges conduct this dialogue through mutual citation, as well as through increasingly direct interactions, both face to face and electronic. In the process, as the Norwegian Chief Justice suggests, these interactions both contribute to a nascent global jurisprudence on particular issues and improve the quality of particular national decisions, sometimes by importing ideas and sometimes by insisting on an idiosyncratic national approach for specific cultural, historical, or political reasons. Further, they are remarkably self-conscious about what they are doing, engaging in open debates about the uses and abuses of “persuasive authority” from fellow courts within other national legal systems. The results are striking. To take only one prominent example, in a landmark decision on the death penalty, the South African Constitutional Court cited decisions of its fellow constitutional courts around the world: the U.S. Supreme Court, the Supreme Court of Canada, the German Constitutional Court, the Supreme Court of India, Supreme Court of Hungary, and the Tanzanian Court of Appeal.<sup>10</sup>

#### A. *What's New?*

Is such cross-fertilization really new? It is a well recognized phenomenon among imperial powers and their colonies.<sup>11</sup> It is well established in the

7. Carsten Smith, *The Supreme Court in Present-day Society*, in *THE SUPREME COURT OF NORWAY* 96, 134–35 (Stephan Tschudi-Madsen ed., 1998). Smith also writes, “[w]e should especially contribute to the ongoing debate on the courts’ position and on international human rights.” *Id.*

8. *Id.* at 135.

9. L’Heureux-Dubé, *supra* note 6, at 16. She continues to write: “[d]eciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere.” *Id.*

10. *The State v. T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995).

11. To take the most obvious example, the architects of the U.S. Constitution were steeped in the principles of the common law and in the political theories of the Age of Enlightenment. The legal ideas expounded in the Constitution in turn influenced the framing of the French Declaration of the Rights of Man and of the Citizen, and in turn spread to other continents through imperial rule. See Anthony Lester,

Commonwealth.<sup>12</sup> As lawyers will remember from their first-year courses, plenty of evidence of borrowing from English law can be also found in nineteenth-century U.S. and federal reports. In this century, the traffic has largely flowed in the other direction; since 1945 recent constitutional courts around the world, frequently established either by the United States or on the model of the U.S. Supreme Court, have borrowed heavily from U.S. Supreme Court jurisprudence.<sup>13</sup> Thus, it is difficult to demonstrate from existing data that the use of comparative materials in constitutional adjudication has in fact increased.<sup>14</sup>

On the other hand, many participating judges and a number of observers think the contemporary phenomenon of constitutional cross-fertilization worthy of note.<sup>15</sup> They point to a number of distinctive features: the identity of the participants, the interactive dimension of the process, the motives for transnational borrowings, and the self-conscious construction of a global judicial community. For Justice L'Heureux-Dubé, the most important break with the past is that "the process of international influences has changed from *reception* to *dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction."<sup>16</sup> Instead, appellate judges around the world are engaging in "cross-pollination and dialogue,"<sup>17</sup> building on each other's opinions in a manner that fosters "mutual respect and dialogue . . . among appellate courts."<sup>18</sup>

*The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988). On the reception and internalization of foreign law generally, see H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 296 (1987).

12. David McClean, *A Common Inheritance? An Examination of the Private International Law Tradition of the Commonwealth*, in RECUEIL DES COURS 1996: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9–98 (Académie de Droit International ed., 1997).

13. This phenomenon is well documented. See Lester, *supra* note 11, at 541; Helmut Coing, *Europaisierung der Rechtswissenschaft*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 937–41 (1990); Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD, (Louis Henkin & Albert J. Rosenthal eds., 1989); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 158 (1991).

14. On the general phenomenon of legal transplantation (i.e., the transfer of precedents and rules from one legal system to another), see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (Edinburgh: Scottish Academic Press, 1974); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1121–46 (1983); T.B. Smith, *Legal Imperialism and Legal Parochialism*, 10 JURID. REV. (n.s.) 39 (1965). The phenomenon described here, however, concerns an interactive exchange of views through reciprocal cross-citation.

15. In addition to L'Heureux-Dubé, *supra* note 6, see VICKI C. JACKSON AND MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 153–89 (Foundation Press 1999) (devoting section to "Comparing Legal Decisions and the Concept of Borrowings"). See also Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 253, 292 (Joseph S. Nye & John D. Donahue eds., 2000). Note that this most recent burst of scholarship contrasts with scholarship at the end of the 1980s that focused more on "one-way" traffic from the United States outwards. See *supra* notes 11, 13.

16. L'Heureux-Dubé, *supra* note 6, at 17.

17. *Id.*

18. *Id.*

Another major shift is in the willingness of judges to look beyond their borders when they already have domestic law on point. It is one thing when a court borrows to fill a gap or even to build a foundation, as courts in fledgling states or newly decolonized countries have long had to do. It is quite another when judges from an elaborate domestic legal system with ample law available to decide the case in question nevertheless seek to find out how other judges have responded when faced with a comparable issue. The aim is less to borrow than to seek the benefit of comparative deliberation, a difference that is currently in contention among justices of the U.S. Supreme Court. In *Knight v. Florida*,<sup>19</sup> a recent decision denying certiorari in which Justice Breyer reviews a number of foreign precedents in dissent, Justice Thomas observes tartly: "were there any support [for the defendant's argument] in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."<sup>20</sup> For his part, Justice Breyer retorts that although the foreign authorities are not binding, the "[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'"<sup>21</sup>

Three years later, dissenting from a denial of certiorari on the same issue, Justice Breyer again crosses swords with Justice Thomas. In addition to citing the foreign precedents he relied on in *U.S. v. Knight*, Justice Breyer invokes a decision by the Supreme Court of Canada holding that a lengthy delay before execution was a "relevant consideration" in deciding whether "extradition to the United States violated principles of 'fundamental justice.'"<sup>22</sup> Justice Thomas, for his part, observes: "Justice Breyer has only added another foreign court to his list while still failing to ground support for his theory in any decision by an American court."<sup>23</sup> He continues: "[w]hile Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."<sup>24</sup> This debate will only grow more vigorous among the Justices, and likely among appellate courts as well.

The causes adduced for the present upsurge in constitutional cross-fertilization reflect a distinction between need and desire. Many commentators note the impact of the end of the Cold War and the resulting emergence of many fledgling democracies with new constitutional courts seeking to emulate their more established counterparts. A flood of foundation and gov-

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19. *Knight v. Florida*, 528 U.S. 990 (1999).

20. *Id.* at 990.

21. *Id.* at 997 (Breyer, J., dissenting).

22. *Foster v. Florida*, 123 S. Ct. 470, 472 (2002) (quoting *U.S. v. Burns*, [2001] 1 S.C.R. 283, 353, ¶ 123).

23. *Id.* at 470.

24. *Id.*

ernment funding for judicial seminars, training programs, and educational materials under the banner of "rule of law" programs helped provide personal contacts and intellectual opportunities for these new judges.<sup>25</sup> However, Frederick Schauer points out that in countries seeking to cast off an imperialist past, be it colonial or communist, it is likely to be particularly important to establish an indigenous constitution, including a set of human rights protections.<sup>26</sup> Borrowing constitutional ideas is likely to be politically more problematic than borrowing, for example, a bankruptcy code.<sup>27</sup> Thus, individual courts are often quite particular about when they borrow and from whom. Further, their choices are more likely to be shaped by political and symbolic factors than by the intrinsic merit of the legal ideas that they are borrowing.<sup>28</sup>

The identity of the most influential "lender" or "donor" courts also suggests a departure from traditional transplantation. The South African and the Canadian constitutional courts have both been highly influential, apparently more so in recent decades than the U.S. Supreme Court and other older and more established constitutional courts.<sup>29</sup> In part, their influence may spring from the simple fact that they are *not* American, thus rendering their reasoning more politically palatable to domestic audiences in an era of extraordinary U.S. military, political, economic and cultural power.<sup>30</sup> But equally if not more important is the ability of these courts themselves to capture and crystallize the work of their fellow constitutional judges around the world. Schauer argues that the "ideas and constitutionalists of Canada have been disproportionately influential" in part because "Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier."<sup>31</sup>

In sum, the *awareness* of constitutional cross-fertilization—an awareness of who is citing whom among the judges themselves, and a concomitant pride in a cosmopolitan judicial outlook—creates an incentive to both lender and borrower be, leading to dialogue rather than monologue, and deliberation rather than gap-filling. This momentum may result in unprecedented judicial jockeying, in which outlier courts deliberately seek to reestablish their place in a global judicial community. Equally important to this cross-fertilization, however, is a transjudicial debate about the uses and abuses of

25. See, e.g., Jacques de Lisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999); George P. Fletcher, *Searching for the Rule of Law in the Wake of Communism*, B.Y.U. L. REV. 145 (1992).

26. Schauer, *supra* note 15, at 253–54.

27. *Id.* at 257.

28. *Id.* at 254. Schauer presents this claim only as a hypothesis, but adduces enough evidence for it to warrant further research.

29. *Id.* at 254. Schauer also notes that "the phenomenon appears to be strong not only in countries with a British Commonwealth background but also in countries as culturally removed from the British Commonwealth as Vietnam." *Id.* at 258.

30. Schauer makes a similar suggestion. *Id.* at 258.

31. *Id.*



persuasive authority, in which individual courts seek to draw a line between the requirements of their own legal systems and the resources of others.

### B. *The Rise of Persuasive Authority*

Perhaps the most unusual dimension of the current round of constitutional cross-fertilization, at least from an American perspective, is that U.S. judges are beginning to take part. The U.S. Supreme Court is used to being the *source* of decisions imported into other legal systems. Indeed, as recently as the late 1980s commentators were pointing to a one-way traffic in constitutional ideas from the United States outwards.<sup>32</sup> Now, however, the Court is beginning to borrow as well as to lend.

Three Supreme Court Justices and a number of prominent appellate and state court judges have emphasized the value of drawing on foreign decisions. Justice Sandra Day O'Connor has led the way, exhorting U.S. lawyers from around the country to pay more attention to foreign law.<sup>33</sup> Following a day-long exchange of views with members of the ECJ and a hearing, both Justice O'Connor and Justice Breyer noted their willingness to consult ECJ decisions "and perhaps use them and cite them in future decisions."<sup>34</sup> Justice O'Connor has been equally vocal on the need for U.S. judges to look beyond their own jurisdictions to both foreign and international law, not only for comparative purposes but also to facilitate the flow of international commerce. At the 41st Congress of the Union Internationale des Advocates in September 1997, she lamented the fact that lawyers and judges in America and elsewhere tend to forget that other legal systems exist.<sup>35</sup> She has subsequently chaired the Judicial Outreach Program at the American Society of International Law, aimed at educating American federal judges at the district and circuit court levels about important issues of international law.

Justice Ruth Bader Ginsburg, writing about the motives behind and deficiencies in U.S. affirmative action programs, notes India's experience with affirmative action, including a decision by the Supreme Court of India imposing a ceiling on the number of positions that can be reserved for disadvantaged citizens. "In the area of human rights," she observes, "experience in one nation or region may inspire or inform other nations or regions."<sup>36</sup>

32. See sources cited *supra* notes 11, 13.

33. See Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45-SEP FED. LAW. 20 (1998).

34. *Justices See Joint Issues with the E.U.*, WASH. POST, July 9, 1998, at A24 (quoting Justice O'Connor). Justice Breyer added the following comment: "Lawyers in America may cite an E.U. ruling to our court to further a point, and this increases the cross-fertilization of U.S.-E.U. legal ideas." *Id.* at A24.

The U.S. Supreme Court delegation was also scheduled to meet with judges on the European Court of Human Rights and members of both the German Constitutional Court and various French courts. Other members of the delegation included Justice Anthony Kennedy, Chief Judge Richard Arnold of the Eighth Circuit, and Texas Chief Justice Tom Phillips. Press Briefing, *U.S. Justices Compare U.S., E.U. Judicial Systems* (July 8, 1998), <http://www.useu.be/archive/justic708.html>.

35. O'Connor, *supra* note 33.

36. Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue*, BROOKINGS

She noted that the Supreme Court of India has considered U.S. precedents, but that the "same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve."<sup>37</sup> Finally, Judge Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court, has written about the "increasingly worldly role state judges might play as we approach the new millennium."<sup>38</sup>

These attitudes are changing. The exchanges between Justice Thomas and Justice Breyer quoted above are part of a decade-long debate. Justice Scalia took a strong stand on this issue in 1988. When confronted with evidence of how other countries view the death penalty, he wrote: "[w]e must never forget that it is the Constitution for the United States that we are expounding."<sup>39</sup> Justice Breyer disputed this position in 1997. He agreed that "we are interpreting our own Constitution, not those of other nations and there may be relevant political and structural differences" between foreign legal systems and that of the United States. Nonetheless, Breyer observed that the experience of other courts may "cast an empirical light on the consequences of different solutions to a common legal problem."<sup>40</sup> Unconvinced, Justice Scalia reaffirmed his position, insisting that "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."<sup>41</sup>

The deep issue at stake is the proper use of persuasive, as opposed to precedential, authority. Judges around the world are publicly reflecting on this question. Thus, Justice Breyer observes, "[i]n these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their view[s] [sic] are useful even though not binding."<sup>42</sup> Compare Justice Albie Sachs of the South African Constitutional Court:

I draw on statements by certain United States Supreme Court Justices . . . not because I treat their decisions as precedents to be applied in our Courts, but because their *dicta* articulate in an elegant and helpful manner [church-state related] problems which face any modern court. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.<sup>43</sup>

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REV., Winter 2000, at 2, 3.

37. *Id.*

38. Abrahamson & Fischer, *supra* note 15, at 273.

39. *Thompson v. Oklahoma*, 487 U.S. 815, 869 (1988).

40. *Printz v. U.S.*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

41. *Id.* at 921.

42. *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting).

43. *S. v. Lawrence*, 1997 (4) S.A. 1176, 1223 (CC) (Sachs, J.).

Justice Ginsburg offers yet another formulation of the same rationale, noting that just as the problems of "irrational prejudice and rank discrimination" are global, all societies can usefully learn from one another about various solutions.<sup>44</sup>

For these judges, looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign authority is persuasive because it teaches them something they did not know or helps them see an issue in a different and more tractable light.<sup>45</sup> It provides a broader range of ideas and experience that makes for better, more reflective opinions. This is the most frequent rationale advanced by judges regarding the virtues of looking abroad. Indeed, Justice Abrahamson points out that U.S. state court judges automatically canvass the case law of sister states for ideas and perspectives on the issues before them, yet shrink automatically from looking at case law even from so near a geographic and cultural neighbor as Canada.<sup>46</sup> After examining in some detail case law from courts around the world on a particular issue that had come before the Wisconsin Supreme Court (the standard for informed consent in physician-patient relations) she concludes "that when courts from around the world have written well-reasoned and provocative opinions in support of a position at odds with our familiar American views, we would do well to read carefully and take notes."<sup>47</sup>

Evidence of like-minded foreign decisions could enhance the legitimacy of a particular opinion depending on the domestic constituency that a particular court seeks to persuade. Whether persuasive authority from abroad is in fact persuasive at home will vary sharply from country to country. More generally, some judges may find that the most persuasive aspect of such authority is the manifest evidence of the company one keeps. Schauer argues that governments that want to demonstrate their membership in a particular political, legal, and cultural community are likely to encourage borrowing from members of that community.<sup>48</sup>

These last rationales for citing foreign decisions are more familiar and time-tested. It is the simple desire to look around the world for good ideas, rather than regarding some judges as "givers" and others as "receivers" of

44. Ginsburg, *supra* note 36.

45. *See* United States v. Then, 56 F3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (arguing that U.S. courts should follow the lead of the German and the Italian constitutional courts in finding ways to signal the legislature that a particular statute is "heading toward unconstitutionality," rather than striking it down immediately or declaring it constitutional). Judge Calabresi observed that the United States no longer holds a "monopoly on constitutional judicial review," having helped spawn a new generation of constitutional courts around the world. *Id.* at 469. "Wise parents," he added, "do not hesitate to learn from their children." *Id.*

46. Abrahamson & Fischer, *supra* note 15, at 276. "We are already comparatists," Abrahamson writes. "We just don't think of ourselves that way." *Id.* at 285.

47. *Id.* at 284.

48. Schauer, *supra* note 15, at 259. In this context it is less remarkable that the post-apartheid and hence post-pariah status South African constitution instructs South African courts to canvass the decisions of their brethren around the world. *Id.*

law,<sup>49</sup> that is new and striking. The practice of citing foreign decisions reflects a spirit of genuine transjudicial deliberation within a newly self-conscious transnational community.

### C. An Emerging Global Jurisprudence

Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to a visible international consensus on various issues—a consensus that, in turn, carries compelling weight. Thus, for instance, Justice Smith of Norway notes the need “to weigh the advantages of international legal unity in various legal areas against the need to protect the legal foundation of national and local cultures.”<sup>50</sup> More broadly, in hypothesizing the reasons for specific patterns of legal transplantation, Schauer argues that “ideas that are seen as close to an emerging international consensus are likely to be more influential internationally.”<sup>51</sup>

Justice Abrahamson illustrates how such a consensus has emerged on the question of the definition of informed consent to a medical procedure. She notes that “courts . . . around the world have struggled to balance the values integral to the doctrine: individual autonomy vs. efficient administration of justice and health care systems.”<sup>52</sup> The United States has established a particular standard for informed consent, resting on the conception of the “prudent patient.”<sup>53</sup> Outside the United States, however, the German Constitutional Court, an Australian appellate court, and Canadian appellate courts have all concluded, after considering the U.S. Supreme Court’s views, that the prudent patient standard does not go far enough. Instead, they adopted a subjective standard that inquires precisely into whether an individual patient understood the risks of the specific medical procedure he or she was being asked to undergo.<sup>54</sup> Justice Breyer’s dissent in *Knight v Florida* applies a similar approach to Justice Abrahamson’s on a different issue. The cases he cites in support of his opinion in *Knight* all cite each other in coming to roughly the same result—that it is impermissible to execute a convicted criminal after extraordinary delay.<sup>55</sup>

49. L’Heureux-Dubé, *supra* note 6, at 17.

50. Smith, *supra* note 7, at 135.

51. Schauer, *supra* note 15, at 258–59. See also L’Heureux-Dubé, *supra* note 6, at 16.

52. Abrahamson & Fischer, *supra* note 15, at 280.

53. *Id.* at 282. See *Canterbury v. Spence*, 464 F.2d 772, 791 (D.C. Cir. 1972) (adopting objective “prudent person” standard for determining whether patient would make different decision regarding medical procedure if more facts were disclosed).

54. *Id.* at 283–84.

55. See, e.g., *Pratt v. Attorney General of Jamaica* (1994) 2 A.C. 1; *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465; *Catholic Comm’n for Justice and Peace in Zimbabwe v. Attorney General* (1993) 1 Zimb. L.R. 239 (S); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) 439 (1989); *Kindler v. Minister of Justice* (1991) 2 S.C.R. 779 (Canada); *Barett v. Jamaica* (Nos. 270/1988), U.N. Human Rights Committee.

In many cases, however, judges are more likely to reach consensus on which cases (from courts around the world) are relevant and should be consulted regarding a particular issue, rather than on whether a particular answer or position is correct. As Judge Smith notes, although individual judges may value international uniformity, they must also take into account a range of specifically national considerations that are as likely to lead them to deviate from the decisions of their fellow judges as to conform. In this sense, the emergence of a global jurisprudence refers more to the existence of active dialogue among the world's judges in the language of a common set of precedents on any particular issue. No one answer is the right one; the principles of pluralism and legitimate difference again prevail. Nevertheless, failure to participate in this dialogue—to listen as well as to speak—can sharply diminish the influence of any individual national court.<sup>56</sup>

Does this dialogue make a difference? According to former Justice of the Massachusetts Supreme Judicial Court Charles Fried, it could change the course of American law. Fried writes thoughtfully on the difference between scholarship and adjudication, noting that rejection of comparative analysis on the part of scholars “would seem philistine indeed,” but is not necessarily so on the part of judges.<sup>57</sup> Judges must issue decisions while constrained by a set of sources. Thus, Fried writes, referring to the debate between Justice Breyer and Justice Scalia in the *Printz* case:

Justice Breyer's remarks on comparative constitutional law, if they had appeared in a law review article, would have been quite unremarkable . . . . As part of a judicial opinion, they were altogether remarkable. Why should that be? The reason is that if Justice Breyer's insertion into the case of comparative constitutional law materials had gone unchallenged, it would have been a step towards legitimizing their use as points of departure in constitutional argumentation . . . .<sup>58</sup>

If Breyer had succeeded, Fried continues, his recommendation would have been “something more than just a proposal or a good idea. It would have introduced a whole new range of materials to the texts, precedents, and doctrines from which the Herculean task of constructing judgments in particular cases proceeds.”<sup>59</sup>

Justice Breyer is continuing his quest, joined by Justices O'Connor and Ginsburg. And if they do succeed in making citation of foreign and international decisions accepted or even common practice in U.S. case law, they will indeed introduce “a whole new range of materials to the texts, precedents, and doctrines” to the advocates and deliberators who must present and de-

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56. L'Heureux-Dubé, *supra* note 6, at 37.

57. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 818 n.3 (2000).

58. *Id.*

59. *Id.* at 820–21.

cide disputes in American courts under American law.<sup>60</sup> They will have undermined neither their own role nor that of Congress, but they will have broadened their own constitutional vision, thereby fully joining the global community of courts.

### III. JUDICIAL COOPERATION AND CONFLICT IN TRANSNATIONAL LITIGATION

The global economy creates global litigation. When products can have their components manufactured in three different countries, be assembled in a fourth, and be marketed and distributed in five or six others, the number of potential fora for resolving disputes multiplies rapidly, leading litigants to battle as fiercely over jurisdiction and choice of forum as over the merits of a particular case. Such battles have long been the subject of private international law, and have also fueled the growth of international commercial arbitration.

Today, however, the question facing judges around the world, in the words of Judge, now Justice, Breyer, is how to "help the world's legal systems work together, in harmony, rather than at cross purposes."<sup>61</sup> Even more boldly, Judge Calabresi of the Second Circuit Court of Appeals interpreted a U.S. discovery statute as "contemplat[ing] international cooperation, and such cooperation pre-supposes an on-going dialogue between the adjudicative bodies of the world community."<sup>62</sup> This vision of cooperation is truly extraordinary. A "[d]ialogue between the adjudicative bodies of the world community" would not be composed of U.S., French, German, Japanese courts and international tribunals but simply of adjudicative entities engaging in resolving disputes, interpreting and applying the law as best they can. It is a vision of a global legal system, established not by the World Court in The Hague, but by national courts working together around the world.

Transjudicial relations within this system are not always harmonious. On the contrary, judges are engaging one another more directly, in ways that can create opportunities for cooperation and conflict alike. This combination of active collaboration and vigorous conflict marks a move from comity among the "world's legal systems,"<sup>63</sup> in which judges view one another as operating in equal but distinct legal spheres, to the presumption of an integrated system. This presumption, in turn, rests on a conception of a single global economy, in which borders are increasingly irrelevant, and an accompanying legal system, in which litigants can choose from among multiple fora to resolve a dispute, even when each of those fora has an equal interest in seeing the dispute resolved. Whereas a presumption of a world of separate sover-

60. *Id.* at 820.

61. *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991).

62. *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995).

63. *Howe*, 946 F.2d at 950.

eigns mandates transjudicial relations marked by courtesy and periodic deference, the presumption of an integrated system takes mutual respect for granted and focuses instead on how well the system works. It is a shift that is likely to result in more dialogue but less deference.

Illustrations of these points fall into three broad categories. First, courts are adapting the general notion of international comity, or the comity of nations, to fit their specific needs, resulting in the emergence of a narrower doctrine of judicial comity. Second, often as a concomitant of this process, judges are evaluating the independence and quality of their foreign counterparts. Third, judges are actually negotiating with one another to determine which national court should take control over which part of multinational lawsuits.

#### A. *Judicial Cooperation and Conflict: The Emergence of "Judicial Comity"*

The "comity of nations" is a venerable concept with a long legal and political pedigree. In its best known judicial formulation, it means the respect owed to the laws and acts of other nations by virtue of common membership in the international system—a presumption of recognition that is something more than courtesy but less than obligation.<sup>64</sup> Courts have invoked it in many different contexts and with many different meanings, to justify everything from deference to the executive branch in decisions touching on foreign relations to the enforcement of foreign judgments.<sup>65</sup> It arises regularly in the growing number of suits in which courts must decide whether a particular suit should be heard at home or in a foreign court. As courts grapple with issues such as forum selection clauses, *forum non conveniens* motions, and parallel suits, they are developing a more nuanced conception of judicial comity.<sup>66</sup>

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64. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws").

65. For an extensive overview of the history and multiple meanings of comity, see Joel Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

66. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (distinguishing "judicial comity" from "legislative" or "prescriptive comity," which is "the respect sovereign nations afford each other by limiting the reach of their laws"). As authority for this distinction, Justice Scalia turned back to Joseph Story's *Commentaries on the Conflict of Laws. Id.* Story distinguished between "the comity of the courts" and "the comity of nation," emphasizing that courts defer to foreign law not as a matter of judicial courtesy, but rather due to an interpretive principle requiring them to read legislative silence regarding the effect of foreign law as tacit adoption of such law unless repugnant to fundamental public policy. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* § 38 (Arno Press 1972) (1834). Taken in context, however, Story does not appear to be distinguishing between different types of comity so much as he is insisting that the principle of comity is not a judicial creation but a corollary of a general legal principle embedded in international and U.S. law.

Other commentators have distinguished "political" and "judicial" comity. They refer to the former term as encompassing political considerations inherent in maintaining good relations between nations. They refer to the latter as encompassing judicial concerns in developing and maintaining a system in which national courts safeguard the national interest in making and enforcing national laws on a recipro-

Judicial comity provides the framework and the ground-rules for a global dialogue among judges in the context of specific cases. It has four distinct strands. First, judicial comity is marked by a respect for foreign courts *qua* courts and hence for their ability to resolve disputes and interpret and apply the law honestly and competently, rather than simply as the face of a foreign government.<sup>67</sup> Second, it recognizes that courts in different nations are entitled to adjudicate their fair share of disputes—both as co-equals in the global task of judging and as the instruments of a strong “local interest in having localized controversies decided at home.”<sup>68</sup> Third, it places a distinctive emphasis on individual rights and the judicial role in protecting them.<sup>69</sup> Fourth, in a seeming paradox, it is marked by a greater willingness to clash with other courts when necessary, as an inherent part of engaging as equals in a common judicial enterprise.

To illustrate the ways in which the general idea of the comity of nations translates into a more specific judicial context, it is helpful to examine how U.S. courts are handling situations when a defendant before them suddenly turns around and brings essentially the same suit in reverse in a foreign court. Should both cases be allowed to go forward, on the same facts but before different judges and within different legal systems? Or should the litigants be compelled to proceed in only one forum?

The Fifth Circuit Court of Appeals recently addressed this issue, in a case in which an American manufacturer of athletic shoes sued its Japanese distributor in U.S. court for breach of contract on the basis of a forum selection clause in the distributorship agreement.<sup>70</sup> The two sides proceeded with the litigation, engaging in extensive discovery. After six months, the Japanese company suddenly brought a parallel suit in a Japanese court, accusing the American company of breach of contract.<sup>71</sup> The American company then

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cal basis. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283 (1982). I seek less to distinguish between “political” and “legal” than to distinguish between the concerns of the state as an aggregated whole versus the specific concerns of courts. For a more detailed discussion this version of judicial comity than space allows here, see Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998).

67. *Roby v. Corp. of Lloyds*, 996 F.2d 1353, 1363 (2d Cir. 1993) (“[I]nternational comity dictates that American courts enforce [forum selection clauses] out of respect for the integrity and competence of foreign tribunals.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985))).

68. *Piper Aircraft v. Reyno*, 454 U.S. 235, 241 (1981) (dismissing a case brought in the United States in favor of a Scottish forum) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (applying the *forum non conveniens* doctrine to dismiss a New York case in favor of a Virginia forum)).

69. In the *Laker Airways* litigation, a complex series of cases involving parallel proceedings between the United States and Great Britain and efforts by litigants on both side to block the suit in the other forum, Lord Scarman argued that individuals have a right to pursue causes of action under foreign law because they have a right to pursue “the process of justice.” *British Airways Board Respondents v. Laker Airways, Ltd.*, [1985] A.C. 58, 95.

70. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 625 (5th Cir. 1996).

71. *Id.* at 626.



asked the U.S. court to issue an antisuit injunction, to bar the Japanese company from proceeding with the suit in the Japanese court.<sup>72</sup>

Applying a liberal standard of comity, the Fifth Circuit concluded that the Japanese suit would be “an absurd duplication of effort,” and that it was undertaken primarily to harass the U.S. litigant and delay resolution of the suit.<sup>73</sup> As for comity, the court held that comity concerns were satisfied absent a demonstration that the antisuit injunction would pose an actual threat to relations between the United States and Japan. Unless specific evidence of such a threat could be produced, the court declined “to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.”<sup>74</sup> What is at stake here, underneath the legal jargon, is a decision: should the court begin from a presumption of deference, assuming that blocking a suit from proceeding in a foreign legal system is an affront to the nation as a whole? Or should the court presume a fundamental identity of transnational judicial interests in resolving suits as quickly and efficiently as possible? If the goal is to resolve suits as quickly as possible, then the Japanese court should not be offended by interference with its jurisdiction through the issuance of an antisuit injunction by a U.S. court; it should instead share the same desire to eliminate duplication of effort and harassment of individual litigants (in this case, the U.S. plaintiff).

The Seventh Circuit Court of Appeals has gone the furthest in breaking down the barriers between foreign and domestic legal systems in this area of the law. Judge Posner argues that the emergence of what is “increasingly . . . one world” suggests that domestic rules for “limiting duplicative litigation” should also apply abroad.<sup>75</sup> He thus insists that instead of deferring to an abstract notion of comity, courts should require “some empirical flesh on the theoretical skeleton” and insist on actual evidence of harm to bilateral relations.<sup>76</sup> Without an explicit indication of such harm from the State Department or the Foreign Ministry of the foreign state, the court should be free to proceed according to its determination of the best interests of justice.<sup>77</sup>

Many observers, both in this country and abroad, will hear this claim as a power play—an assertion that foreign courts should receive as little deference as state courts, and that U.S. federal courts are free to insist on exclusive jurisdiction over all transnational cases with a link to the United States.

72. *Id.*

73. *Id.* (quoting *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 430–31 (7th Cir. 1993)). In focusing on the burden imposed on the U.S. litigant by the concurrent foreign suit, the court applied a liberal standard of comity; under a more restrictive standard, the foreign litigation would be permitted to proceed unless it undermined U.S. jurisdiction or policy. *Id.*

74. *Id.*

75. *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993).

76. *Allendale*, 10 F.3d at 431.

77. *Id.* See also *Philips*, 8 F.3d at 605 (stating that because neither the State Department nor the Argentine Foreign Ministry had complained to the court, it was unlikely that relations between the two nations had been put at risk).

Indeed, the majority of commentators on judicial comity have argued that comity, on reciprocity grounds, requires more deference rather than less.<sup>78</sup> This reasoning suggests that the same U.S. courts that are willing to block foreign litigation would not be willing to let foreign courts take over cases that could equally have been brought in the United States.

It is certainly true that U.S. judges have not shied away from conflict with their foreign brethren. In the same case in which Judge Calabresi wrote so glowingly of judicial dialogue, the dissenting member of the panel accused him of blatant interference with the French legal system.<sup>79</sup> In another example, Judge Owen of the Southern District of New York squarely engaged a Hong Kong judge concerning jurisdiction over an insider trading case. In refusing to defer to the Hong Kong court, Judge Owen declared, "I'm an American judge and this is an American agency and I will keep jurisdiction and I will direct payment into court."<sup>80</sup> For his part, Judge Cruden in Hong Kong observed, "[t]his court will always take whatever effective steps are legally available to it under Hong Kong law, to deal with illegal or morally reprehensible commercial conduct . . . . Where a conflict of laws situation does arise . . . the dispute should be approached in a spirit of judicial comity rather than judicial competitiveness."<sup>81</sup> Similarly, Judge Posner overrode a protest from the French Insurance Commission, which denounced as "insulting" a U.S. district court's characterization of a French commercial court as unable to handle the complexities of the case.<sup>82</sup>

Paradoxical as it may seem, however, the willingness to weather conflict reflects a certainty of ongoing interaction. The proof is an equal readiness on the part of U.S. courts espousing the liberal standard of comity to enjoin U.S. proceedings in favor of foreign proceedings where the balance of equities tips toward the foreign court.<sup>83</sup> Thus, the clear message of the Fifth Circuit's reasoning in *Kaepa* is that if the Japanese litigant had sued first in Ja-

78. See, e.g., Stephen R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity And Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 35-36; Arif S. Haq, Note, *Kaepa, Inc. v. Achilles Corp.: Comity in International Judicial Relations*, 22 N.C. J. INT'L L. & COM. REG. 365, 382 (1996).

79. See *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1104-05 (2d Cir. 1995) (Jacobs, C.J., dissenting) (accusing majority of "interfere[ing] with French discovery practice and clog[ing] the French appeals court with the random harvest of the American discovery").

80. *Naumus Asia Co. v. Standard Charter Bank*, 1 H.K.L.R. 396 (H.K. High Court 1990), at 407-08. The defendant in the New York case was arguing for litigating in Hong Kong on the ground that, in Judge Owen's paraphrase, "out here in Hong Kong they practically give you a medal for doing this kind of thing." *Id.* at 407.

81. *Id.* at 420.

82. *Allendale*, 10 F.3d at 431. For greater analysis of this case, see *infra* text accompanying notes 92-97.

83. See, e.g., *Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542, 545 (7th Cir. 1960) (reversing a district court decision enjoining litigation in a German court, on the grounds that the litigation in Germany involved a trademark registered in Germany and a cause of action under German law, and therefore could not be held "vexatious" to the defendant); *Ingersoll Mill. Mach. Co. v. Granger*, 833 F.2d 680, 687 (7th Cir. 1987) (affirming a district court decision staying further proceedings in U.S. court until a judgment is rendered in a Belgian appeals court on the same case where the Belgian court had granted the appellant a full and fair opportunity to present its claims).

pan and the case had proceeded there, the U.S. litigant would have been guilty of imposing an undue burden on both the courts and the Japanese litigant if it had subsequently sued in the United States.<sup>84</sup> Staying litigation in such cases in favor of a foreign court is a natural extension of the U.S. Supreme Court's decision in 1972 that U.S. litigants could no longer expect a guarantee of being able to sue in the United States if they were engaged in transnational business and had contracted to have disputes heard in a foreign forum.<sup>85</sup> It explicitly rejected the "parochial concept that all disputes must be resolved under our laws and in our courts."<sup>86</sup>

Judges elsewhere in the world are perhaps less assertive than their U.S. brethren, but many are beginning to recognize their obligations to a community of litigants beyond the borders of their home jurisdiction. In the words of Canadian Supreme Court Justice Gérard La Forest: "[t]he court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."<sup>87</sup> As choice of law principles converge, the particular forum in which a dispute is heard will become increasingly irrelevant. For example, in tort law, courts in the United States, Australia, Japan, Switzerland, and Quebec are all moving toward a position that the substantive law of the place of an accident should be applied (with some exceptions when litigants can show they have a closer connection to another forum).<sup>88</sup> In a related development, British courts have moved strikingly over the past two decades from the position that all plaintiffs should be entitled to litigate in British court as of right, regardless of links between the parties, the litigation, and a foreign forum,<sup>89</sup> to the view that a stay should be granted in favor of a foreign forum if the defendant can show that the foreign forum is more suitable "for the interests of all the parties and the ends of justice."<sup>90</sup>

84. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 631–32.

85. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

86. *Id.* at 9.

87. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 1070 (holding that foreign, rather than forum, law should apply).

88. See William Tetley, *New Development in Private International Law: Tolofson v. Jensen and Gagnon v. Lucas*, 44 AM. J. COMP. L. 647, 659–66 (1996).

89. See *St. Pierre v. South American Stores*, [1936] K.B. 382, 387 (C.A. 1935).

90. *Spiliada Maririme Corp. v. Cansulex Ltd.* [1987] A.C. 460, 476. For an discussion of this line of cases, see Robert Sze-Kwok Wai, *Internationalism Ascending: Commerce, Cooperation and Cosmopolitanism as Public Policy Goals in Private International Law (2000)* (unpublished S.J.D. Thesis, Harvard Law School) (on file with the Harvard International Law Journal).

The situation in Japan is complicated. Traditionally, although a Japanese court would automatically defer to another Japanese court already seized of jurisdiction in the same case, it would not extend the same courtesy to a foreign court. The Japanese Supreme Court has also identified jurisdiction as part of judicial sovereignty, which is deemed co-extensive with national sovereignty. Judgment of Oct. 16, 1981 *Malaysia Airline System Berhad v. Goto*, 35 MINSHU 1224 (Sup. Ct., Oct. 16, 1981), translated in 26 JAP. ANN. INT'L L. 122 (1983). More recently, however, at least one court has held that it would be possible to dismiss a suit brought by a Japanese plaintiff who had already been sued in the same case abroad if it is clear that the foreign court will reach a final and irrevocable judgment first and that Japanese courts will

In sum, there has been a distinct shift toward the recognition, on a case by case basis, of a "natural" or "most appropriate" forum among the courts of the world. According to "the natural forum" approach "a plaintiff ought to be encouraged to sue in the natural forum of the specific dispute despite the fact that several forums are available to him."<sup>91</sup> However, cooperation in finding "the natural forum" for each case must rest on a recognition by all the courts involved that jurisdiction by multiple fora is possible. Such a recognition depends upon the rejection of the territorial theory of jurisdiction based on sovereignty over the litigants or the cause of action. Further, it assumes that these fora are roughly equivalent and that the appropriate forum can be identified on the basis of judicial, rather than conventional, national interests, such as the "interests of all the parties;" a recognition of the needs of individual litigants; and the "end of justice," the special province of judges.

### B. Judges Judging Judges

Thus far, this Essay has demonstrated that the emerging conception of an integrated global legal system has two characteristics. First, litigants move relatively freely across borders, carrying their disputes with them and choosing a particular national forum subject to judicial review of their choice. Second, judicial deference to foreign courts is based on efficiency, fairness, and the "ends of justice" rather than on sovereign prerogatives. These traits lead to "judges judging judges." That is, in the interest of seeking out the best forum, judges not only assess the relative interests of the parties but also the "fitness" of the forum, including its jurists, to hear the case. For example, in *Allendale*, Judge Posner upheld a stay of litigation before a French tribunal, and ultimately concluded that the Commercial Court of Lille, "[a]lthough called a 'court,' . . . is actually a panel of arbitrators, composed of businessmen who devote part time to arbitrating."<sup>92</sup> After reviewing an affidavit from a French legal expert, credited by the district court, Posner concluded that this tribunal could not handle the documentary burden of massive insurance litigation and would not be able to hear live witnesses.<sup>93</sup>

Judge Posner was aware of the apparent offensiveness of his conclusions, admitting that "at first glance the action of an American judge in enjoining what is practically an arm of the French state . . . from litigating a suit on a

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be able to recognize that judgment. *Miyakoshi Kiko K.K. v. Gould, Inc.*, 1348 HANREI JIHO 91, 94-95 (Tokyo District Ct., May 30, 1989) (interim judgment). See also Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States And Japan*, 5 PAC. RIM L. & POL'Y J. 1 (1995).

91. Israel Leshem, *Forum Non Conveniens and Beyond: Judicial Intervention in the Choice of Forum in Multinational Litigation* 275-76 (1985) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the Harvard International Law Journal).

92. *Allendale*, 10 F.3d at 429.

93. *Id.* at 430-31.

French insurance policy in a French court may seem an extraordinary breach of international comity.<sup>94</sup> Nevertheless, and even in the face of expostulations from the French insurance commission, Posner insisted that the U.S. courts were not questioning the competence of their French counterparts, only their "capacity relative to a U.S. district court to resolve this particular dispute."<sup>95</sup>

To prove his point, Posner was quite willing to entertain the possibility of a reverse situation, in which the French courts would be better equipped to adjudicate than the relevant U.S. tribunal. He noted that the United States has arbitral bodies overseeing cases such as railroad cases where the "French have courts staffed by professional judges."<sup>96</sup> Thus, he continued, "[w]e can imagine a mirror-image case in which a French court was asked to enjoin an American firm from proceeding in the National Railroad Adjustment Board because that board was not equipped to do justice between the parties in the particular circumstances of the dispute."<sup>97</sup> Again, what is most striking is Posner's willingness to equate French government entities with their U.S. counterparts simply as official institutions with a job to do, which resulted in *less* deference rather than more.

Posner's evaluation of the French commercial court is a particularly bold example of adequate forum analysis. Inquiry into the adequacy of the foreign forum is a standard component of judicial analysis in cases involving parallel litigation, but also in any case in which a litigant seeks either the transfer of a case to a foreign forum or the enforcement of a foreign judgment. The opposing litigant in turn will often argue that the foreign forum is inadequate on grounds ranging from corruption to diminished discovery opportunities. Even a brief review of adequate forum decisions in U.S. courts reveals patterns of larger significance: the recognition of a minimum standard of international justice and a willingness to evaluate foreign tribunals on the same criteria as domestic tribunals. Although these two trends sometimes point in opposite directions, they are both relevant in the context of the construction of a global community of law.

Consider the following determinations. U.S. courts have found that a Chilean court was an inadequate forum due to lack of judicial independence under the military junta;<sup>98</sup> that an Iranian court was an inadequate forum due to presumed bias against Americans;<sup>99</sup> and that a Romanian judgment was unenforceable because it was not achieved "under a system of jurispru-

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94. *Id.* at 428.

95. *Id.* at 432.

96. *Id.* at 430.

97. *Id.* at 430. See also *Glass, Molders, Pottery, Plastics and Allied Workers Intl. Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995).

98. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 1274 (2d Cir. 1984).

99. See, e.g., *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 345 (8th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).

dence likely to secure an impartial administration of justice."<sup>100</sup> On the other hand, U.S. courts have quickly rejected assertions that the Israeli or the French judicial systems were inadequate, holding that it would be completely inappropriate for a U.S. judge to speculate "that his Israeli colleagues would violate their oaths of office,"<sup>101</sup> and that "principles of comity as well as common knowledge preclude our characterizing the French judicial system as any less fair than our own."<sup>102</sup> Similarly, in *M/S Bremen v. Zapata Off-Shore Co.*, the Supreme Court readily assured itself that "the courts of England meet the standards of neutrality and long experience in admiralty litigation."<sup>103</sup>

Contrary to appearances, however, adequate forum determinations do not depend on first world versus third world status. Determinations of outright bias or other corruption are relatively rare.<sup>104</sup> The most difficult questions involve foreign legal systems that function less efficiently than the U.S. system, or that feature a very different procedural system. Some of these cases involve foreign plaintiffs seeking to take advantage of the plaintiff-friendly features of the U.S. legal system when suing U.S.-based multinational corporations, leaving the U.S. defendant in the awkward position of arguing that a U.S. court is not a convenient forum and therefore the case should be transferred back to the plaintiff's country.<sup>105</sup> In these cases the real issue is whether a foreign plaintiff should benefit politically from the U.S. tort system and the ethics of global corporate accountability rather than whether the foreign forum is adequate.<sup>106</sup> Other cases involve claims that the foreign legal system permits less discovery than the U.S. system,<sup>107</sup> does not allow contingency fees,<sup>108</sup> lacks a jury system,<sup>109</sup> denies the recovery of punitive damages,<sup>110</sup> or caps damage recoveries altogether.<sup>111</sup> Whether the foreign forum will be found adequate varies by case and depends on the court's as-

100. *Allstate Ins. Co. v. Administratia Asigurarilor de Stat*, 962 F. Supp. 420, 424 (S.D.N.Y. 1997).

101. *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1078 (S.D.N.Y. 1992).

102. *Murty v. Aga Khan*, 92 F.R.D. 478, 482 (E.D.N.Y. 1981).

103. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

104. GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 353 (3d ed. 1996).

105. See *In Re Union Carbide Corp.*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987); *Sequihua v. Texaco*, 847 F. Supp. 61 (S.D. Tex. 1994); *Dow Chemical v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990).

106. In the most celebrated of these cases, a suit brought by Indian citizens killed or injured by a deadly chemical at the Union Carbide factory in India, the court considered arguments regarding the Indian court's ability "to deal effectively and expeditiously" with the case and found that the Indian court was adequate. *In re Union Carbide*, 634 F. Supp. at 848. See also *Torres v. Southern Peru Copper Corporation*, 965 F. Supp. 899 (1996), *aff'd* 113 F.3d 540 (5th Cir. 1997) (finding that Peru was an adequate forum for resolving the dispute and dismissing the case based on comity).

107. See, e.g., *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir. 1966); *Peabody Holding Co. v. Costain Group PLC*, 808 F. Supp. 1425, 1442 (E.D. Mo. 1992).

108. *Fiorenza v. U.S. Steel Int'l*, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969).

109. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991).

110. *Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982).

111. *Wolf v. Boeing Co.*, 810 P.2d 943 (Wash. Ct. App. 1991).

assessment of the legitimate expectations of the individual litigant rather than the quality of the foreign legal system as a whole.

Overall, these cases reflect the same deep paradox identified above. Where courts begin from a presumption of difference, an abstract insistence on "separate but equal" embedded in formal notions of sovereignty, only big differences matter. Procedural variations, such as differences in discovery, the presence or absence of contingency fees, or differences in the role of the judge, are part of the normal variation across legal systems that litigants must expect when they try to resolve disputes across national borders. Only if a foreign legal system violates a minimum standard of transnational justice, such as through overt bias, systemic corruption, or denial of basic due process, will a U.S. court allow a litigant to escape the bonds of contract or place and choose a U.S. court instead.

By contrast, if courts begin from a presumption of identity, in which they view foreign courts not as separate and entitled to sovereign deference but as part of an emerging transnational litigation system, then they scrutinize each other according to the same criteria that they would apply to other domestic tribunals. Under this presumption of identity, seemingly small differences can matter a great deal, depending on the configuration of each case. For Posner at least, professional judges must take precedence over lay tribunals of various kinds.

### C. *Judicial Negotiation*

In some cases, transjudicial dialogue becomes inter-judicial negotiation. This practice is highly developed in cases of global bankruptcies, in which judges increasingly communicate directly with one another, with or without an international treaty or guidelines, to ensure a cooperative and efficient distribution of assets. Governments have left these matters up to courts; courts have responded by creating their own regimes. Two commentators describe these court-to-court agreements, which have come to be known as "Cross-Border Insolvency Cooperation Protocols," as "essentially case-specific, private international insolvency treaties."<sup>112</sup> As of the late 1990s, courts had negotiated these protocols in seven major global insolvency proceedings.<sup>113</sup> The first was the bankruptcy of Maxwell Communications Corporation, an English holding company with more than four hundred subsidiaries worldwide. Maxwell filed for Chapter 11 bankruptcy in the Southern District of New York and entered insolvency proceedings in the United

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112. Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 *TEX. INT'L L.J.* 587, 589 (1998). For a discussion of how practitioner input, through the Insolvency and Creditors' Rights Committee of the International Bar Association, have influenced these proceedings by developing a "Concordat" ready to be adopted as a cross-border Protocol in these cases, see Bruce Leonard, *Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies*, 33 *TEX. INT'L L.J.* 543 (1998).

113. Leonard, *supra* note 112. These proceedings involved Maxwell Communications Corporation, Olympia & York, Commodore Business Machines, Everfresh Beverages, Nakash, Solv-Ex., and AIOC.

Kingdom simultaneously.<sup>114</sup> To determine what laws and procedures to apply in the reorganization, judges in both countries appointed administrators, who engaged in extensive discussions and ultimately reached an agreement setting forth procedures and assigning responsibility for the liquidation. This "mini-treaty" was then memorialized by an "Order and Protocol" approved and adopted by the two courts within two weeks of each other.<sup>115</sup>

Bankruptcy courts since *Maxwell* have continued to extend and improve these agreements, often working with practitioners to coordinate insolvency proceedings in multiple jurisdictions as smoothly as possible.<sup>116</sup> The proceedings in the *Nakash* case,<sup>117</sup> involving a U.S. debtor and a defunct Israeli bank, are particularly interesting, as they involved relations between common law and civil law courts.<sup>118</sup> In this context the U.S. and the Israeli courts adopted a protocol which specifically provided for cooperation between the courts as well as between the parties, including a preamble setting forth the goal, inter alia, of "[h]onoring . . . the integrity of the Courts of the United States and the State of Israel."<sup>119</sup> The U.S. judge approving the protocol explicitly mentioned the importance of a "bridge" between courts to enable both sides to understand each other's goals; once a framework for cooperation has been established, "the tensions then become more common tensions and [c]ourts then can with more facility either get in or get out of each other's way but understand exactly what is happening . . ."<sup>120</sup> The Israeli judge concurred, noting that the "representatives of the two courts are meant to cooperate, according to the authority given to each within its territorial boundaries."<sup>121</sup>

Observers of such transjudicial cooperation typically emphasize that it has flourished in the absence of a treaty, as a matter of necessity for courts faced with global assets and no guidance from national and international law.<sup>122</sup> The intense debates among bankruptcy scholars over the virtues of a universal versus a territorial system—whether distribution of assets should be centralized globally or should proceed state by state, wherever assets are located—often reflect a desire to supplant ad hoc judicial agreements with a rationalized global framework established by treaty. However, at least one scholar sees transjudicial cooperation as a system of its own, arguing that "a

114. *In re Maxwell Communications Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

115. Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037 (1997). See also Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991).

116. Flaschen & Silverman, *supra* note 112, at 590.

117. *In re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996).

118. For a detailed description of these proceedings, see Flaschen & Silverman, *supra* note 112, at 594-99.

119. *Id.* at 596 n.71.

120. *Id.* at 599 n.86.

121. *Id.* at 599 n.87.

122. Unt, *supra* note 115, at 1038.



decentralized system of courts applying evolving legal standards on a case-by-case basis is the most workable system for developing legal international insolvency cooperation."<sup>123</sup>

#### IV. CONCLUSION

Communities may gradually emerge, but they often require conscious construction. As demonstrated above, many constitutional court judges around the world are actively engaged in this process. Ordinary courts resolving transnational commercial disputes may be less aware of the larger import of many of their decisions. Here too, however, signs of self-conscious interaction with their foreign brethren are increasingly evident. Added to this mix are relations between national courts and their supranational counterparts, as well as actual personal meetings of judges through seminars, conferences, and judicial organizations. Yet to become a genuine community, the members must ultimately do more than meet and interact. They must share the common values and principles that constitute the normative understandings of a community. Here the global community of courts is unquestionably a work in progress, and its hallmarks may be conflict as much as cooperation. But the outlines of a more genuine community can be discerned.

##### A. *Broadening the Community*

The two phenomena discussed in this Essay are only some of the evidence and elements of a global community of courts. Other important dimensions of this community are vertical relationships between supranational tribunals and national courts, as well as increasing opportunities for judges to meet face to face. These two dimensions can also be interrelated, as international judges on new international tribunals actively seek out opportunities to meet their counterpart national judges.

Three examples of such vertical relationships are the E.U. legal system,<sup>124</sup> the European human rights system,<sup>125</sup> and NAFTA Chapter 11 tribunals as discussed by Barton Legum.<sup>126</sup> The evolution of these vertical relationships

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123. *Id.* at 1038.

124. The ECJ essentially created a new legal order through direct relationships with national courts in E.U. states, both by encouraging national judges to refer cases up to the ECJ and then by paying attention to the needs and sensitivities of those courts in handing ECJ decisions back down.

125. The European Court of Human Rights (ECHR) does not have a direct structural relationship with the national courts of the countries signatory to the European Human Rights Convention, but it often effectively reviews their decisions and must ultimately depend on the willingness of the courts to listen to and enforce its decisions as a matter of international or national law.

126. Legum, *supra* note 3. U.S., Mexican, and Canadian courts may have concurrent jurisdiction with these tribunals. They can hear the same disputes should the plaintiff choose to bring its dispute before these courts. The two systems—NAFTA tribunals and member state national courts—can also sit in judgment of one another. See *Metalclad Corp. v. United Mexican States* (NAFTA Ch. 11 Arb. Trib.) (Aug. 30, 2001); *Loewen Group v. United States* (NAFTA Ch. 11 Arb. Trib.) (Jan. 5, 2001) (pleadings available at <http://www.state.gov/s/l/c3755.htm>). These entities will ultimately have to figure out how to co-exist and interact as members of the same community.

will depend in part on the underlying structural link. The relationship between the supranational judges of the ECJ and the national judges of E.U. states is treaty-based, rooted originally in article 177 of the Treaty of Rome.<sup>127</sup> Vertical relations between NAFTA arbitration panels and U.S. national courts have similar roots in the NAFTA itself; but as in the European Union, the actual shape and strength of these relations will be a function of the actions and interactions of the judges themselves. Similarly, vertical relations between national courts and regional human rights courts—such as the ECHR, the Inter-American Court of Human Rights, and the new African Court of Human Rights—will depend on the deference that national court judges pay to the rulings of regional courts, and regional court judges' assessment of national courts' complicity with global and regional codes of human rights.

Judges are also meeting face to face. Such exchanges occur through delegations led by current justices,<sup>128</sup> institutionalized exchanges,<sup>129</sup> and informal meetings sponsored by various aid agencies, non-governmental organizations,<sup>130</sup> and law schools at schools such as New York University,<sup>131</sup> Harvard,<sup>132</sup> and Yale.<sup>133</sup> The participants in these conferences and seminars ex-

127. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 234 (ex art. 177), O.J. (C 340) 3 (1997).

128. In 1998 Justices O'Connor, Breyer, Ginsburg, and Kennedy went to Luxembourg; they had both private meetings and several public sessions with their European counterparts, and in April 2000 several members of the ECJ came to Washington for a second meeting with U.S. Supreme Court Justices. *The Supreme Court Justices Gathered in the East Conference Room Yesterday to Greet Members of the European Court of Justice*, N.Y. TIMES, Apr. 19, 2000, at 1.

129. Beginning in the early 1980s, judges from the Constitutional Courts in Western European countries began convening three years and publishing their proceedings. See Conference of European Constitutional Courts, <http://www.confcoconsteu.org> (members including 34 European Constitutional Courts) (for an example of a particular published proceeding, see Europeos, Tribunales Constitucionales Europeos y Autonomas Territoriales, VI Conferencia de Tribunales Constitucionales, (1985)).

129. Delegates from Australia, New Zealand, Ireland, India, the United States, Canada, and Great Britain attended the First Worldwide Common Law Judiciary Conference, May 28–June 2, 1995. See *Justices, Judges from Common Law Countries Meet in Williamsburg and Washington*, 1 INT'L JUD. OBSERVER, 1995, at 1. The Second Worldwide Common Law Judiciary Conference was held in May 1997, in Washington, DC, at which representatives of the countries of Israel, Singapore, and South Africa joined the seven countries who participated in the first conference. See *Judges from 10 Common-Law Countries Meet in Washington for Five-Day Conference*, 2 INT'L JUD. OBSERVER, 1997, at 1.

130. The ABA Central and Eastern European Law Initiative (CEELI) periodically sends American judges to various central and eastern European countries to assist with law reform, codification efforts, and judicial training. See *CEELI Update*, ABA INT'L LAW NEWS, Summer 1991, at 7. See also, *European Justices Meet in Washington to Discuss Common Issues, Problems*, 1 INT'L JUD. OBSERVER, 1996, at 2. The Law Association for Asia and the Pacific (LAWASIA), with its Secretariat in Australia, fosters judicial exchange through annual meetings of its Judicial Section. See LAWASIA homepage, <http://www.lawasia.asn.au>.

131. N.Y.U. Law School's Center for International Studies and Institute of Judicial Administration hosted a major conference of judges from both national and international tribunals. Papers from the conference have subsequently been published in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373, 383 (Thomas M. Franck & Gregory H. Fox eds., 1996). See also Thomas M. Franck, *NYU Conference Discusses Impact of International Tribunals*, 1 INT'L JUD. OBSERVER, 1995, at 3.

132. See James G. Apple, *British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns*, 2 INT'L JUD. OBSERVER, 1997, at 1.

133. *Yale Law School Establishes Seminar on Global Constitutional Issues*, 2 INT'L JUD. OBSERVER, 1997, at 2.

change precedents and personal experiences, creating judicial networks that are powerful channels for cross-fertilization.

### *B. Norms and Principles*

In the world of transnational judicial relations as defined in this Focus section, the traditional distinctions between national and international law and the respective jurisdictions of national and international courts do not prevent judges from recognizing the commonalties of their functions. A full-fledged community, however, requires norms and principles that are recognized by its members—shared precepts that bind them as a community, rather than merely as a collective. Here the judges themselves might be hard pressed; each can testify to his or her individual experience but would have difficulty seeing the larger vision. As an academic observer, I would offer the following candidates as precepts of an emerging global community of courts.

First, the community must share a rough conception of checks and balances, both vertical and horizontal. In the most developed vertical network, the E.U. legal system, neither national nor international tribunals hold the definitive upper hand. Horizontally as well, national courts remain acutely conscious of their prerogatives as representatives of independent and interdependent sovereigns. Yet they recognize the need for both cooperation and even deference to one another.

Second, members must share a principle of positive conflict, in which judges are able to engage each other even on fairly acrimonious terms, without fearing a fundamental rupture in their relations. In this regard, judges are moving to a domestic understanding of transjudicial relations rather than a diplomatic one. Conflict in domestic politics is to be expected and even embraced; conflict in traditional unitary state diplomacy is to be avoided or quickly resolved.

Third, the community must embrace a principle of pluralism and legitimate difference, whereby judges acknowledge the validity of different approaches to the same legal problem. This pluralism is not unbounded, however. It operates within a framework of common fundamental values, such as recognition of the necessity of judicial independence and basic due process.

Fourth, and finally, the community must accept the value of persuasive rather than coercive authority. Judges from different legal systems should expressly acknowledge the possibility of learning from one another based on relative experience with a particular set of issues and on the quality of reasoning in specific decisions.

Justice Abrahamson once captured the possibilities that would accompany greater openness to citing foreign and international decisions in U.S. courts. She writes, "foreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspec-

tives, by some of the world's leading legal minds."<sup>134</sup> Similarly, in his most recent round of sparring with Justice Thomas, Justice Breyer states: "[j]ust as 'attention to the judgment of other nations' can help Congress determine 'the justice and propriety of [America's] measures,' The Federalist No. 63, so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment."<sup>135</sup>

### C. A Family Affair?

As discussed above, judges handling transnational commercial disputes are coming gradually to think of themselves as different points on a spectrum of possibilities for litigating the same underlying disputes—disputes that are themselves inevitable byproducts of a globalizing economy. They no longer think of themselves as separate, self-contained spheres entitled to hear all cases arising under their national legal systems.

Here again, the long-term impact is less legal than psychological. Viewed from a traditional perspective of difference, all states are formally equal and functionally identical; each duplicates the same governance functions within a self-contained and largely impenetrable sphere. Each state handles its own affairs with a minimum of interference. Conflict is to be avoided because its consequences are unpredictable. But viewed from a perspective of identity, in which courts in different countries are engaged in the same enterprise of judging and resolving disputes that cross many borders, the focus shifts from the dispute resolvers to the disputes themselves, and to the common values that all judges share in guaranteeing litigant rights and safeguarding an efficient and effective system.

The familiarity generated by regular interaction within this category of disputes does not breed contempt, but rather raises tolerance for conflict. The scope for conflict within a group of familiars, as in a family, differs from that among a group of strangers, characterized by enforced politeness. Thus, the hallmarks of the emergence of a global commercial judicial system are often noisy and even outraged claims and counter-claims about the sacred right to litigate in a particular national jurisdiction.

In closing, recall the phrase of Judge Guido Calabresi of the Second Circuit Court of Appeals, arguing that international cooperation by judges requires "an ongoing dialogue between the adjudicative bodies of the world community."<sup>136</sup> This dialogue, and the emergence of a community of courts, may be as close as it is possible to come to a formal global legal system. It certainly achieves many of the same goals: the cross-fertilization of legal cultures in general, and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence

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134. Abrahamson & Fischer, *supra* note 15, at 287.

135. *Foster v. Florida*, 123 S. Ct. 470, 472 (2002).

136. *Europepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995).

and the rule of law; the awareness of judges in every country that they are engaging in a common judicial enterprise; and the increasing coordination among for a to resolve transnational disputes. The judges themselves are in many ways creating their own version of such a system—a bottom-up version driven by their recognition of the plurality of national, regional, and international legal systems and their own duties of fidelity to such systems. Even when they are interacting with one another within the framework of a treaty or national statutes, their relations are shaped by a deep respect for each other's competences and the ultimate need, in a world of law, to rely on reason rather than force.

How else to build a world under law? The emergence of global judicial relations is rooted in the pluralism of multiple legal systems, but driven by the expression of a deeper common identity. Dialogue is prized over uniformity; debate and reasoned divergence over adherence. So it must be, because global legal authority, except in areas such as cases governed by public international law and specifically committed to the International Court of Justice for resolution, or in more specialized areas such as the law of the sea, does not exist. A global community of courts, animated largely by persuasive authority, personal contacts, and peripatetic litigants, is a more realistic and desirable goal.