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# To Compare or Not to Compare? Reading Justice Breyer

RUSSELL MILLER\*

Justice Breyer's new book *The Court and the World* presents a number of productive challenges.<sup>1</sup> First, it provides an opportunity to reflect generally on extra-judicial scholarly activities. Second, it is a major and important — but also troubling — contribution to debates about comparative law broadly, and the opening of domestic constitutional regimes to external law and legal phenomena more specifically.

I want to begin by suggesting a critique of the first of these points. These are merely some thoughts on the implications of extra-judicial scholarship. The greater portion of this essay, however, is devoted to a reading of Justice Breyer's book, which is a compelling manifesto supporting comparative law and, at the same time, a frustrating example of the problems plaguing our project.

## THOUGHTS ON EXTRA-JUDICIAL SCHOLARSHIP

There is a long tradition of judicial scholarship in the United States, most famously including Justice Joseph Story (1779-1845) and his "magisterial" commentaries on the United States Constitution.<sup>2</sup> This practice is not unknown in Germany, the foreign jurisdiction that is the focus of much of my research. For example, at least one prominent commentary on the Basic Law bears the name of a former justice of the Federal Constitutional Court.<sup>3</sup> Scores of former and current justices have written portions of prominent constitutional law commentaries.<sup>4</sup> In the United States extra-judicial scholarship is smiled upon for the contribution it is supposed to make to the public's understanding of the law and the edification of the judges who produce it.<sup>5</sup> Extra-judicial scholarship is permitted by

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<sup>1</sup> Stephen Breyer, *The Court and the World* (New York, Alfred Knopf, 2015).

<sup>2</sup> See Jeffrey M. Shaman, "Judges and Non-Judicial Functions in the United States", in H. P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011), p. 519. See also Joseph Story, *Commentaries on the Constitution of the United States* (1833).

<sup>3</sup> See Gerhard Leibholz, et al., *Grundgesetz für die Bundesrepublik Deutschland. Kommentar; Rechtsprechung des Bundesverfassungsgerichts* (69th ed.; 2015).

<sup>4</sup> Peter Huber (a member of the Federal Constitutional Court Second Senate) has contributed, for example, to the Michael Sachs commentary on the Basic Law. See, for example, Peter M. Huber, *Präambel*, in Michael Sachs (ed.), *Grundgesetz Kommentar* (7th ed. 2014), p. 21.

<sup>5</sup> Shaman, note 2 above, p. 520. See also Jonathan Lippman, "The Judge and Extrajudicial Conduct", 33 *Cardozo Law Review*, XXXIII (2012), pp. 1384-1386; Kenneth F. Ripple, "The Role of the Law Review in the Tradition of Judicial Scholarship", *New York University Annual Survey of American Law*, LVII (2000), p. 444; Kenneth F. Ripple, "Judges on Judging", *Ohio State Law Journal*, L (1989), p. 1241.

the Code of Conduct for United States Judges and,<sup>6</sup> in any case, is regarded as a form of speech protected by the First Amendment to the United States Constitution.<sup>7</sup> Judges' scholarly activity allows them to enrich legal and political discourse from the deep well of their professional – and particularly their judicial – expertise and experience.<sup>8</sup> Jonathan Lippman, a long-serving member of the New York Court of Appeals, urged a presumption in favor of such extra-judicial activities, as long as care is taken not to create the perception that the judge-scholar is prejudging a legal issue.<sup>9</sup> America's most productive and well-known contemporary judge-scholar may be Richard A. Posner of the United States Court of Appeals for the Seventh Circuit. Judge Posner has written nearly thirty books and scores of articles. He is a founding figure in the influential "law and economics" movement, a status he earned with such foundational works as *Economic Analysis of Law* (1973), *The Economics of Justice* (1981), and *The Economic Structure of Intellectual Property Law* (2003). Judge Posner has acknowledged that his extra-judicial scholarly activity is part of a deep tradition. He seems to hope that his writing belongs to the better part of that tradition, which involves work that is focused on judicial philosophy.<sup>10</sup> Judge Posner believes the more redeemable efforts at extra-judicial scholarship, which he distinguishes from "academic" commentary, can supplement academic literature in valuable ways.<sup>11</sup> Indeed, he cites the extra-judicial commentary of Justice Stephen Breyer as an example of this commendable practice.<sup>12</sup> But Judge Posner has serious doubts about much extra-judicial writing. He dismisses it as "propagandistic" because it seeks – in his view – to assure the public that judges are hard-working, conscientious, and apolitical.<sup>13</sup> Judge Posner's critique implies that he has reservations about these claims with respect to his fellow judges.

Curiously, extra-judicial scholarship has attracted more attention in the British Commonwealth. These commentators share the typical concern that extra-judicial writing can erode the perceived neutrality of the courts.<sup>14</sup> One set of scholars concluded that "extrajudicial writing amounts to prejudging and is bad".<sup>15</sup> But the literature identifies other problems. First, extra-judicial writing gives judges an inappropriate second chance to re-explain or clarify their judicial writings.<sup>16</sup> This is inappropriate because not all judges involved in a decision will take advantage of the opportunity to (re)publish their views in this way.<sup>17</sup> Moreover, scholarship produced by judges will necessarily attract more attention and will be regarded as more authoritative, simply because it has been written by

<sup>6</sup> Canon 4(a)(1) provides that a "A judge may engage in extrajudicial activities, including ... Speaking, Writing, and Teaching. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice".

<sup>7</sup> See, for example, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

<sup>8</sup> See Lippman, note 5 above.

<sup>9</sup> *Ibid.*

<sup>10</sup> Richard A. Posner, *Reflections on Judging* (2013), pp. 10-12.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> See Jasmin Moran, "Courting Controversy: The Problems Caused by Extrajudicial Speech and Writing", *Victoria University Wellington Law Review*, XLVI (2015), p. 453.

<sup>15</sup> See Susan Bartie and John Gava, "Some Problems with Extrajudicial Writing", *Sydney Law Review*, XXXIV (2012), p. 639.

<sup>16</sup> See Russell Smyth, "Judges and Academic Scholarship", *Queensland University of Technology Law and Justice Journal*, II (2002), pp. 200-201.

<sup>17</sup> *Ibid.*

judges.<sup>18</sup> These factors led one Canadian commentator to conclude that judges' efforts to explain their decisions in extra-judicial scholarship "should be avoided like the plague".<sup>19</sup> Second, the critics note that the acceptance of extra-judicial scholarship depends on highly positivistic and formalistic understandings of the judicial function that have long-ago been rejected.<sup>20</sup> Finally, the critics worry about the effect that extra-judicial writing has on scholarly discourse, especially in light of evidence that suggests that "it is easier for judges to publish their views than individuals who are not judges".<sup>21</sup>

There is evidence of these problems in Justice Breyer's new book, which is largely devoted to accessible treatments of major Supreme Court cases, many of which he helped to decide. Justice Breyer dissented from the majority judgment in many of these cases, and he uses the book to offer a restatement of the views he expressed in his formal dissenting opinions, sometimes accompanied by a narrative endorsement of his position or a critique of the views of other opinion writers involved in the decision. In these moments Justice Breyer willingly concedes the priority owed to the majority conclusions while nonetheless taking the opportunity to explain or clarify his dissent. For example, when discussing the Supreme Court's decision in *Zivotofsky v. Clinton* (2012),<sup>22</sup> Justice Breyer explains that the Court reached the merits of the case despite the lower court's conclusion that the case involved an unreviewable "political question".<sup>23</sup> The Court was unanimous on this point, except for a single dissenter. "I was the one", Justice Breyer dryly notes in a parenthetical.<sup>24</sup> But he gives the eight-justice majority's decision only two sentences.<sup>25</sup> Justice Breyer's solitary dissent, in which he articulated how he "saw the case differently", merits a long justificatory paragraph.<sup>26</sup> When discussing the Supreme Court decision in the *Sanchez-Llamas* case,<sup>27</sup> Justice Breyer offers an even-handed summary of the majority's reasoning.<sup>28</sup> It is clear from a latent tone of disapproval – perhaps fostered by the book's general argument – that Justice Breyer disagreed with the outcome. This suspicion is confirmed when he admits that he dissented in the case. That admission is followed by a recapitulation of his dissenting arguments.<sup>29</sup> This is not a veiled or subtle re-engagement with the Court's majority. Justice Breyer concludes this section of the book by accusing the majority of reading the controlling texts "too literally".<sup>30</sup> In a similar vein, Justice Breyer opens his treatment of the Court's *Medellin* case with a discussion of the dissenting opinion,<sup>31</sup> which he ultimately acknowledges as his work, with the qualification that "naturally, since I wrote [it], I am persuaded by its reasoning".<sup>32</sup> Justice Breyer only reluctantly concludes,

<sup>18</sup> *Ibid.*

<sup>19</sup> Peter Russell, "Judicial Free Speech: Justifiable Limits", *University of New Brunswick Law Journal*, XLV (1996), p. 159.

<sup>20</sup> Bartie and Gava, note 15 above, p. 640.

<sup>21</sup> Smyth, note 16 above, p. 201.

<sup>22</sup> *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).

<sup>23</sup> Breyer, note 1 above, p. 23.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* pp. 23-24.

<sup>27</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

<sup>28</sup> Breyer, note 1 above, pp. 205-210.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>32</sup> Breyer, note 1 above, p. 215.

however, that it would be more important “to consider the significance of [the majority] opinion”.<sup>33</sup> Elsewhere in the book Justice Breyer re-examines his concurring opinion in the *Kiobel* case.<sup>34</sup>

The fact that Justice Breyer uses the book to reconsider and explain the cases in which he was involved – including the repackaging of his dissenting opinions – leads to the question about motive that was posed by Bartie and Gava in their commentary on extra-judicial scholarship. “Why”, they ask, “should judges want to publicly communicate their position on points of law outside of judgements”?<sup>35</sup> This is a fair question. Justice Breyer does not address it in the book. The issue merits greater attention from scholars and critics.

## THE BOOK: TO COMPARE OR NOT TO COMPARE?

### Background

Justice Breyer has emerged as an advocate for a pragmatic and flexible interpretive approach that fits neatly with his vision of a “living” constitution that “actively” secures liberty.<sup>36</sup> This means he has often found himself opposed to the Court’s justices who favor more formalistic – Justice Breyer might call it “categorical” – interpretive approaches and who have a more static constitutional vision.<sup>37</sup> Justice Breyer is associated with the “progressive” or “liberal” block of justices on the Court by those who like to reduce the complexities of judicial reasoning to such banal dichotomies.<sup>38</sup> His best-known opinions have been dissents in cases such as *Bush v. Gore* (2000) (settling the contested 2000 presidential election in favor of George Bush);<sup>39</sup> *Ashcroft v. ACLU* (2002) (upholding an injunction against the implementation of a law criminalizing Internet child pornography);<sup>40</sup> and *D.C. v. Heller* (2008) (finding that the Second Amendment provides an individual right to own and possess firearms for self-defense).<sup>41</sup> Justice Breyer wrote the majority opinion in *Stenberg v. Carhart* (2000) (finding Nebraska’s restrictive abortion law unconstitutional)<sup>42</sup> and in *U.S. v. Comstock* (2010) (upholding a federal law providing for post-incarceration civil commitments of sexual offenders).<sup>43</sup>

Justice Breyer’s opinion in *Comstock* is representative of his interpretive approach and constitutional vision.<sup>44</sup> He might have reached the same result in the case by relying on the

<sup>33</sup> Ibid.

<sup>34</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). See Breyer, note 1 above, pp. 157-160.

<sup>35</sup> Bartie and Gava, note 14 above, pp. 641-642.

<sup>36</sup> See, for example, Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2006); Stephen Breyer, *Making Our Democracy Work: A Judge’s View* (2010).

<sup>37</sup> See, for example, Breyer, note 1 above, p. 259.

<sup>38</sup> See, for example, Sarah Almukhtar, “Why Obama Nominated Merrick Garland for the Supreme Court”, *New York Times*, 16 March 2016 (referring to a study that places Justice Breyer in the cluster of “liberal” justices on the Court, albeit as the least liberal of the cluster). See also Hannah Fairfield and Adam Liptak, “A More Nuanced Breakdown of the Supreme Court”, *New York Times*, 26 June 2014.

<sup>39</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>40</sup> *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

<sup>41</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>42</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>43</sup> *United States v. Comstock*, 560 U.S. 126 (2010).

<sup>44</sup> See Breyer, note 36 above. See also Garrett Epps, *American Justice 2014: Nine Clashing Visions on the Supreme Court* (2014); Richard J. Price, Jr., “Justice Breyer: Intentionalist, Pragmatist, and Empiricist”, *Administrative Law Journal of the American University*, VIII (1994-1995), p. 747.

traditional but formalistic interpretation of the Necessary and Proper Clause (which gives Congress the “necessary and proper” power to enact law in the fields of its enumerated competences).<sup>45</sup> Instead, Justice Breyer applied a more flexible, multi-part test to uphold the civil commitment statute.<sup>46</sup> The newly-crafted test is conscious of the pragmatic consequences (for a number of stakeholders) of the decision it is meant to produce.<sup>47</sup> And it involves the Court in an effort to fairly balance those consequences against the challenged law’s aims.<sup>48</sup> It is an approach that signals the strong impression that proportionality analysis has made on Justice Breyer, a point he raises in his new book.<sup>49</sup>

The fact that Breyer is also widely regarded as the most cosmopolitan justice on the Supreme Court makes this book meaningful for comparative lawyers. Alongside his degrees from Stanford (B.A.) and Harvard (LL.B.), he earned an Oxford B.A. as a Marshall Scholar. He has profound personal ties abroad. And he is reputedly fluent in French. But his decisions as a justice at the Supreme Court provide the more compelling evidence of his strong interest in what he refers to as the “transnational or multinational judicial enterprise” that is part of the Court’s new reality.<sup>50</sup> Justice Breyer authored or joined many opinions of the last decade that made comparative references to non-United States legal sources.<sup>51</sup> He did so most prominently in a dissenting opinion in *Printz v. U.S.* (1997) (finding that a federal law requiring administrative action from state law enforcement officers to be a violation of the Constitution’s federalism provisions).<sup>52</sup> Justice Breyer referred to European and German administrative federalism as evidence that the challenged law envisioned a workable and not-objectionable scheme.<sup>53</sup> This interpretive maneuver attracted a stinging rebuke in a footnote to the majority’s opinion, in which Justice Scalia cautioned: “We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one”.<sup>54</sup>

This skirmish – “to compare or not to compare” – became the dominant narrative in American comparative constitutional law over the last decades. It seeped into other decisions and into the public commentary of both justices.<sup>55</sup> It is the clear – but strangely unspoken – background to Justice Breyer’s new book.

<sup>45</sup> See, for example, *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>46</sup> *United States v. Comstock*, 560 U.S. 126 (2010).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Breyer, note 1 above, pp. 254-262.

<sup>50</sup> *Ibid.*, p. 6.

<sup>51</sup> See, for example, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>52</sup> *Printz v. United States*, 521 U.S. 898 (1997) (Breyer, J., dissenting).

<sup>53</sup> *Ibid.* See Daniel Halberstam, “Comparative Federalism and the Issue of Commandeering”, in Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001), p. 213.

<sup>54</sup> *Printz v. United States*, 521 U.S. 898, n. 11 (1997).

<sup>55</sup> See, for example, Justices Antonin Scalia, Assoc. Justice, U.S. Supreme Court, & Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (13 January 2005), <http://domino.american.edu/AU/media/mediarel>; “The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer”, *International Journal of Constitutional Law*, III (2005), p. 519; Cornel Marian, “Learning from Others: The Scalia-Breyer Debate and the Benefits of Foreign Sources of Law to U.S. Constitutional Interpretation of Counter-Terrorism Initiatives”, *Vienna Online Journal on International Constitutional Law*, IV (2010), p. 5. See also Stephen Breyer, “After September 11 - National and International Legal Tasks”, *Experience*, XX (2010), p. 29.

## The Book's Agenda

Justice Breyer wants to empirically document the fact that “as a matter of unavoidable reality, the Court is engaged with the world”.<sup>56</sup> To this end, the book presents cases from the Court’s docket that required the justices to interact with representatives of foreign governments, to interact with foreign lawyers, and to interact with and be conscious of the effects their decisions would have on non-Americans. This is not a new phenomenon.<sup>57</sup> But Justice Breyer is convinced that it is now more frequent and intense as a by-product of our “ever more interdependent world—a world of instant communications and commerce, and shared problems ..., all of which ever more pervasively link individuals without regard to national boundaries”.<sup>58</sup> He arranges the cases, which he offers as proof of this development, into three broad categories: national security issues, statutory interpretation, and treaty interpretation.

For most readers – living in our globalized world – the notion will almost seem self-evident. Why would Justice Breyer feel the need to document the obvious trend towards globalization at the Court? He has two normative claims that motivate this descriptive project, both of which engage with the exceptionalist tradition in American constitutional law that has presented such significant barriers to comparatism and cosmopolitanism at the Court specifically and in American jurisprudence generally. This is well-documented and intensely-debated story that does not need to be told again here.<sup>59</sup> Indeed, Justice Breyer also does not map the entrenched battle-lines for his readers. He can take it for granted that everyone understands that his normative claims in the book are part of that controversy.

The first normative position, which Justice Breyer develops more fully in the book, is the pragmatic point that the Court’s new globalized reality will require the justices to become competent comparative lawyers. This, he explains, will facilitate their “understanding of, and working relationships with, foreign courts and legal institutions”.<sup>60</sup> It will permit them to “understand and appropriately apply international and foreign law”.<sup>61</sup> This would be controversial enough in America. To soften the expected exceptionalist-rejoinder Justice Breyer frames this less as a choice than as a necessary consequence of the undeniably globalized jurisprudential reality that he describes in the book. Comparative law scholars will welcome this effort. But there are pangs of regret. His resort to a strictly practical justification detracts from our discipline’s other promises, including the ways in which comparative law promotes justice, social understanding, and cultural sensitivity.

<sup>56</sup> Breyer, note 1 above, p. 6.

<sup>57</sup> See, for example, *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>58</sup> Breyer, note 1 above, p. 4.

<sup>59</sup> See, for example, Harold Hongju Koh, “On American Exceptionalism”, *Stanford Law Review*, LV (2002-2003), p. 1479; Oscar G. Chase, “American Exceptionalism and Comparative Procedure”, *American Journal of Comparative Law*, L (2002), p. 277; M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (2005); Miguel Schor, “Judicial Review and American Constitutional Exceptionalism”, *Osgoode Hall Law Journal*, XLVI (2008), p. 535; Peter S. Onuf, “American Exceptionalism and National Identity”, *American Political Thought*, I (2012), p. 77; Mila Versteeg and Emily Zacklin, “American Constitutional Exceptionalism Revisited”, *University of Chicago Law Review*, LXXXI (2014), p. 1641.

<sup>60</sup> Breyer, note 1 above, p. 7.

<sup>61</sup> *Ibid.*

The second normative position, with which Justice Breyer less-comprehensively engages, is the narrower question of the propriety of the Supreme Court's use of "cross-references" to foreign law. This should be Justice Breyer's thoughtful response to the long-running debate over comparative cross-references at the Court, and it impresses as the book's most sensational possibility. Justice Breyer acknowledges this, noting that the Court's rare and modest references to the decisions of foreign courts has occupied "the foreground in political discussions about the role of foreign law" in the United States.<sup>62</sup> As I noted above, this modest practice has been the epicenter of the debate over foreign law in judicial and jurisprudential discussions in America. But even while the book cannot be anything other than Justice Breyer's contribution to that debate, he wants to argue that the attention given to this issue is out of proportion to its significance. It has minimal relevance and its significance is receding relative to the Court's expanding and deepening pragmatic encounters with the world, which Justice Breyer documents in the book. "The critics' concerns about judicial references to foreign law", he concludes, "are beside the point".<sup>63</sup> Curiously, all that Justice Breyer can manage with respect to this fundamental issue is to urge – or offer a defense of – the practice at a few points throughout the book and in a ten page "postscript" that concludes the book.<sup>64</sup>

The ambivalence with which Justice Breyer engages this big – omnipresent – issue is what left me thinking of *Hamlet*. Opposition to comparative references in the Court's jurisprudence stalks and haunts the project like the ghost of King Hamlet in Shakespeare's play (a metaphor made sadly more poignant by Justice Scalia's death). The whole affair, then, should be about where Justice Breyer stands on the question, and this book is his chance to articulate a clear manifesto in support of the practice. But he does not take that path.

I have never been happy that comparative law, in its broader reception in America, was reduced to this narrow and questionable role in Supreme Court interpretive practice. Comparative law is more than a modest "empirical" or "positive" side glance in a handful of the Court's most controversial decisions.<sup>65</sup> Particularly troubling is the poor quality of the comparative endeavor as practiced in this mode.<sup>66</sup> The methodological deficiencies of the Court's comparative law fairly justify some of the criticism this has attracted and should, at least, counsel caution in the use of that kind of comparative law. Justice Breyer even acknowledges the merit of some of the "not entirely unfounded" arguments against the practice.<sup>67</sup> For these reasons it is pleasing to see that Justice Breyer seeks to draw attention away from this marginal and problematic iteration of the discipline – largely by neglecting it – despite its predominance in scholarly debate and in the public consciousness.

Or does he? It is, after all, the unspoken controversy that justifies the book. And, although he mostly avoids the issue, Justice Breyer nonetheless advocates for the practice of comparative cross-references in the book's short "postscript". But much like Prince

<sup>62</sup> *Ibid.*, p. 236.

<sup>63</sup> *Ibid.*, p. 244.

<sup>64</sup> *Ibid.*, pp. 80-87, 236-246.

<sup>65</sup> See Ruth Bader Ginsburg, "Introduction", *American Journal of Comparative Law*, XX (1972), p. 585; *id.*, "A Decent Respect to the Opinions of Humankind: The Value of Comparative Perspective in Constitutional Adjudication", *American Society of International Law Proceedings*, XCIX (2005), p. 351.

<sup>66</sup> See Halberstam, note 53, above.

<sup>67</sup> Breyer, note 1 above, p. 239.



Hamlet, Justice Breyer equivocates. He denies the importance of the debate while offering a dithering defense of the practice. He almost wants to say that the entire book – especially its empirical project – is an argument for the unavoidable necessity of that kind of comparative law. But he does not say this. And in any case, necessity is not an affirmative theoretical frame for comparative law. Justice Breyer merely concludes that comparative references “can be of help in understanding the commands of American” law.<sup>68</sup> Why would such insight have that effect? He does not say. Methodologically, Justice Breyer merely embraces comparative law’s functionalism,<sup>69</sup> arguing that Americans and foreign jurists have much in common: “They confront *similar* problems. They perform the *same* kinds of judicial tasks following *similar* charters offering *similar* protections to democratic government and to individual human rights. American and foreign judges furthermore have the *same* desire – as well as requisite experience – to advance the rule of law even as the world threatens to become more turbulent”.<sup>70</sup> I disapprove of this entrenched approach to comparative law, not the least because its superficiality plays so effectively into the hands of the discipline’s skeptics. It is disappointing that, considering all that is at stake in this controversy and the prominence of his contributions to it, that Justice Breyer did not articulate a more comprehensive theory and method of comparative law, especially as it might be practiced by courts.

To compare or not to compare? And, how or when to compare? Those were incontestably the questions animating the book. But Justice Breyer does not want to answer them.

### The Book’s Content

Instead Justice Breyer throws himself into the first of his two normative projects, which is to document the increasing “foreign” or “international” demands on the Supreme Court. Justice Breyer surveys the Court’s work in a handful of areas, including national security law, statutory interpretation, and treaty interpretation. In each of these areas he effectively demonstrates the ways in which the Court’s cases now bring it into contact with the wider world. It is not obvious, however, that these global encounters (at least partially attributed to America’s role as a preeminent military and economic power) require increased comparative or international law competence from the Court. Most of the cases he describes can be resolved exclusively by reference to the law of the United States or do not require greater transnationalism from the Court’s justices than they already exhibit.

This seems particularly true with respect to Justice Breyer’s discussion of national security law, which only provides evidence of “interdependence” with respect to the facts involved in the cases. The cases he discusses, including old and new classics in the area that Americans sometimes refer to as the “foreign relations law of the United States”,<sup>71</sup>

<sup>68</sup> *Ibid.*, p. 240.

<sup>69</sup> See, for example, Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, transl. Tony Weir (3d ed.; 1998).

<sup>70</sup> Breyer, note 1 above, p. 249 (emphasis added).

<sup>71</sup> See, for example, Michael Traynor, “The Future of Foreign Relations Law of the United States”, *Southwestern Journal of International Law*, XVIII (2011), p. 5; Jack L. Goldsmith, “The New Formalism in United States Foreign Relations Law”, *University of Colorado Law Review*, LXX (1999), p. 1395; Richard A. Falk, “Law, Lawyers, and the Conduct of American Foreign Relations”, *Yale Law Journal*, LXXVIII (1968-1969), p. 919; Louis Henkin, “Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations”, *University of Pennsylvania Law Review*, CVII (1958-1959), p. 903.

demonstrate the many “ways – both good and bad – in which foreign actors and activity enter into our national life and create problems we share with other nations”.<sup>72</sup> But the cases to which Justice Breyer refers are resolved, almost exclusively, by reference to American law – usually as a matter of the checks-and-balances that uniquely distinguish the American doctrine of separation of powers. The structural components of constitutional law are sometimes regarded as the least susceptible to comparative influence. In fact, Justice Breyer engages at length with some issues that are distinctive to the constitutional law of the United States, such as the political question doctrine.<sup>73</sup> The comparative law dimension of these domestic law questions, Justice Breyer tells us in the chapter’s last few pages, is the possible “constructive examples” other systems can provide from their judicial confrontations with the “same” problems.<sup>74</sup> Justice Breyer briefly mentions the United Kingdom, Israel, and Spain as potential points of reference that suggest solutions to the problems America faces.<sup>75</sup> He tells us that these countries have detention policies from which America might learn as it confronts the threats that led to the establishment of the Guantanamo Bay detention camp.<sup>76</sup> But he does not explain why these countries would provide useful insight. Worse than that, Justice Breyer overlooks profound differences that might confound their comparative value for thinking about the power of the President of the United States. All three are parliamentary regimes, for example. Two of them (the United Kingdom and Israel) do not have written constitutions. Two are subject to the robust European Convention on Human Rights and the jurisdiction of that regime’s active court. None contributes to the maintenance of the global order as the United States does. These are points his functionalist approach to comparative law allows him to ignore or elide, but they are relevant, not least because they are the kinds of distinctions his opponents will assert when questioning the integrity of his case selection for his comparative references. Ultimately, Justice Breyer fails to establish that familiarity with international and foreign law is increasingly necessary for resolving American constitutional law questions about the President’s executive and war-time powers.

In the area of statutory interpretation Justice Breyer identifies a distinct transnational problem across a number of legislative regimes: the geographical scope of American statutes within the broadly-interconnected legal web in which we now find ourselves. Justice Breyer claims to have identified an emerging trend, across several fields, that suggests the Supreme Court’s deepening globalism.<sup>77</sup> We are witnessing a revival of the venerable doctrine of comity. Justice Breyer explains that “our Court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives”.<sup>78</sup> Yet

<sup>72</sup> Breyer, note 1 above, p. 81.

<sup>73</sup> See, for example, Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3<sup>rd</sup> ed.; 2012), p. 68 (“Alexander Bickel maintained that the U.S. Supreme Court is often at its best when it declines to exercise jurisdiction it clearly has. These evasive strategies, which he calls ‘passive virtues,’ include rules on standing, case and controversy requirements, the political question doctrine, and other prudential techniques for avoiding constitutional controversies. There are no exact equivalents to these rules in Germany”).

<sup>74</sup> Breyer, note 1 above, pp. 80-87.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Including antitrust law, securities law, intellectual property law, and human rights law.

<sup>78</sup> Breyer, note 1 above, p. 92.

it goes too far to characterize the Court's passivity and restraint as an affirmative and active effort to globally "harmonize" law. But it does show the Court's sensitivity towards what Justice Breyer refers to as the world's fragile cooperative legal infrastructure. Justice Breyer demonstrates in the antitrust context, as well as in his discussion of the Alien Tort Statute, that the doctrinal basis for the Court's restraint is the well-established presumption against extraterritoriality, which obliges the Court to avoid interpretations of the law that would lead to unreasonable interference with the sovereign authority of others.<sup>79</sup> Thus, in the *Empagran* case the Court refused to extend the Sherman Antitrust Act to injuries occurring in foreign commerce and when the adverse effects of collusive activity appear only in foreign contexts.<sup>80</sup> Similarly, Justice Breyer sees the Court's recent, restrictive interpretation of the Alien Tort Statute, also involving the presumption against extraterritoriality, as evidence of the Court's desire to avoid international discord and show respect for other countries' efforts at protecting human rights.<sup>81</sup> The Court's strategic and subtle restraint in these cases, Justice Breyer argues, is proof that it takes into account the international consequences of its decisions and that it must be familiar with foreign law and practices.<sup>82</sup> To the degree that the latter is true, however, the Court's engagement with foreign law and practices serves mainly to prompt the Court to interpret American statutes in a way that allows it to avoid conflict with foreign law. These passive encounters are not the same thing as a robust transnational jurisprudence because they do not require the Court to consider foreign law for the formal resolution of these cases, which are still strictly decided under the terms of American law.

At last we get a taste of a more substantive form of legal interdependence in the chapter on the Court's interpretation of international agreements. Here Justice Breyer can show the Court engaging directly with non-domestic law as the rule of decision in its cases, including the Court's interpretation of the Hague Convention on the Civil Aspects of International Child Abduction, bilateral investment treaties, the Vienna Convention on Consular Relations, and the Chemical Weapons Convention. In the case of the Hague Convention, Justice Breyer scores twice because he notes that the Convention reduces everything to "custody", which, in turn, "will depend on the laws and practices of a foreign country".<sup>83</sup> This is international law requiring the Court to engage with foreign law. This material seems best-suited to supporting the book's normative agenda. But Justice Breyer moves even more cautiously here than he does elsewhere in the book. For example, he merely predicts the increasing relevance for the Court of investment treaty arbitration cases.<sup>84</sup> With respect to the direct effect of international agreements (and any accompanying international court decisions) he embraces piecemeal Congressional action – not judicial decision-making (and the Court's practice of comparative law) – as a way of incorporating the agreements into American law.<sup>85</sup> Concerning delegations of law-making authority to international authorities, Justice Breyer concedes that the Court has said little and that the hard work on the issue is yet to be done.<sup>86</sup> He sees all of these emerging developments as

<sup>79</sup> *Ibid.*, pp. 96, 102, 121-122, 132, 157-159.

<sup>80</sup> *F. Hoffman-LaRoche, Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004).

<sup>81</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Koibel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>82</sup> Breyer, note 1 above, p. 132.

<sup>83</sup> *Ibid.*, p. 175.

<sup>84</sup> *Ibid.*, p. 195.

<sup>85</sup> *Ibid.*, p. 217.

<sup>86</sup> *Ibid.*, pp. 234-35.

further proof that the Court and the legal profession will have “to understand legal and practical realities elsewhere in the world”.<sup>87</sup> But the most that can be said on the evidence he presents is that we will have to wait and see.

## CONCLUSION

Justice Breyer’s book definitively disposes of an extreme isolationist fantasy about American constitutional law and the jurisdiction of the Supreme Court. But this was never the point of the critics of transnationalism at the Court. Even Justice Scalia would not shrink from treaty interpretation when the law of the case required it of him.<sup>88</sup> And the Supreme Court has always been conscious of the foreign implications – both direct and indirect – of its work.<sup>89</sup> The harder question posed by American exceptionalism for comparative constitutional law is the extent to which decisions of the Supreme Court should be resolved in the light of foreign or international law when it would otherwise be possible to rely exclusively on American precedent. Justice Breyer mostly dodges this burning issue, except for some brief remarks in the book’s postscript in which he takes a page from Anne Marie Slaughter’s network thesis to suggest that the practice is now unavoidable because the justices of the world’s apex courts are increasingly in contact with one another and with a global cohort of legal scholars and law students.<sup>90</sup> Justice Breyer offers his dawning appreciation for European-style proportionality analysis as an example of the way these encounters have influenced his thinking (is this what he was up to in *Comstock?*).<sup>91</sup> He hopes, in any case, that the Supreme Court’s embrace of comparative law will allow it to contribute to the global spread of the principle of the rule of law.<sup>92</sup>

The book may miss Justice Breyer’s more modest normative agenda. But it is certain that he does not tackle the main theme that seems to animate the book and which preoccupies the comparative law discipline. Justice Breyer’s avoidance – except for a few summary points – of the big question stalking the book will neither satisfy the critics (for whom the real concerns are excessive judicial power and discretion) nor boost the comparatists (who are still looking for the strong, theoretical defense of comparative cross-references by the Court). On the one hand, the book does not offer a clear answer to the critics’ concerns about an expansion of the Court’s interpretive repertoire to include undisciplined empirical insights from foreign law.<sup>93</sup> On the other hand, the book’s brief treatment of the big question will not quiet concerns about the elitist, unaccountable cosmopolitanism that lurks behind some parts of the comparative law project.

The book that authoritatively grapples with the question of the Supreme Court’s resort to comparative side-glances when deciding its cases still needs to be written. Justice Breyer is the obvious person to write it. As wise old Lord Polonius might have said: “Lights, lights, get us some lights!”<sup>94</sup>

<sup>87</sup> *Ibid.*

<sup>88</sup> See, for example, *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (Scalia, J., dissenting).

<sup>89</sup> See, for example, Aryeh Neier, “Brown v. Board of Ed: Key Cold War Weapon”, *Reuters Online*, 14 May 2014, available at <http://blogs.reuters.com/great-debate/2014/05/14/brown-v-board-of-ed-key-cold-war-weapon/>.

<sup>90</sup> Breyer, note 1 above, pp. 249-251.

<sup>91</sup> *Ibid.*, pp. 255-262.

<sup>92</sup> *Ibid.*, pp. 271-280.

<sup>93</sup> See Ginsburg, note 65 above.

<sup>94</sup> William Shakespeare, *Hamlet*, act 3, scene 2.