Review Section

Edited by Howard S. Erlanger

Howard S. Erlanger is Voss-Bascom Professor of Law and Professor of Sociology at the University of Wisconsin, Madison.

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(Re-)Setting the Scholarly Agenda on Transjudicial Communication

Ryan C. Black and Lee Epstein

BORK, ROBERT H. 2003. *Coercing Virtue: The Worldwide Rule of Judges*. Washington, DC: AEI Press. Pp. x + 161. Cloth $25.00.

SLAUGHTER, ANNE-MARIE. 2004. *A New World Order*. Princeton, NJ: Princeton University Press. Pp. xviii + 341. Cloth $45.00; paper $18.95.

We consider the contributions made by Robert H. Bork's Coercing Virtue *(2003) and Anne-Marie Slaughter's* A New World Order *(2004) to the ongoing debate over the citation of foreign law in United States courts. While empirically minded sociolegal scholars might be tempted to dismiss these books as mere op-eds, that would be a mistake. Taken with the spate of other recent work, they supply the makings of an agenda for rigorous research devoted to understanding the exchange of law among nations.*

INTRODUCTION

Citation to foreign law by U.S. courts is but a single item in a long—and growing—list of "transjudicial communication."[1] Modern U.S. judges attend international conferences, share expertise, and study each other's jurisprudence. But surely it is the use of comparative materials in formal opinions that has captured the attention of sociolegal scholars and, in recent years, generated a surprising degree of controversy at the highest levels of

Ryan C. Black is a PhD student in political science at Washington University in St. Louis.
Lee Epstein is the Beatrice Kuhn Professor of Law and Professor of Political Science at Northwestern University. Please direct correspondence to Lee Epstein at lee-epstein@northwestern.edu. We thank Bob Bennett, Krista Jenkins, and Al Leong for providing useful feedback, and David Zaring for sharing his data.

1. Slaughter (1994) coined and first used the term "transjudicial communication." Since then, it has appeared in over eighty law review articles (Lexis search performed on February 13, 2007).

government.[2] On this dimension, it is hard to imagine two books more at odds than Robert H. Bork's *Coercing Virtue* (2003) and Anne-Marie Slaughter's *A New World Order* (2004b).[3] To Slaughter, transjudicial communication is not just a noticeable development; it is a welcome one. Bork, on the other hand, views constitutional borrowing as both illegitimate and part of a larger trend towards judicial imperialism—to him, a widespread ill now infecting America and other democratic societies.

Perhaps the only point of agreement between the two authors is that the comparative turn has dire consequences for U.S. courts, though naturally enough they disagree on the reasons. For Bork, it is because American judges are active importers of law, and for Slaughter, it is because they are not. In Robert Bork's world, "The insidious appeal of internationalism is illustrated by the fact that some justices of the Supreme Court have begun to look to foreign decisions and even to foreign legislation for guidance in interpreting the Constitution" (2003, 22). In Anne-Marie Slaughter's, "judges around the world are cobbling together a global legal structure—one the United States ignores at its peril" (2004b, 78).

However provocative their arguments, sociolegal scholars—especially the empirically minded among us—are likely to dismiss them. In following what is now a common path for scholarship in this area, Bork and Slaughter loosely combine the empirical and the normative with the goal of shoring up the positive implications of adopting their preferred position. As a result, they are far more likely to provide further ammunition to the precommitted[4] than to persuade the agnostic toward their way of thinking.

To dismiss *Coercing Virtue* and *A New World Order* as mere op-eds, however, would be a mistake. Taken with the spate of other recent work,[5] they supply the makings of an agenda for rigorous theoretical and empirical research devoted to understanding the exchange of law among nations. In what follows, we delve into three items on that agenda, each of which receives some attention from Bork and Slaughter: the origins of borrowing, contemporary

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2. E.g., on March 3, 2005, "The Constitution Restoration Act of 2005" was introduced in both the U.S. House and Senate (H.R. 1070 and S. 520, respectively). The legislation would prohibit all U.S. courts from relying upon foreign precedent or action other than "English constitutional and common law up to the time of the adoption of the Constitution of the United States'" (Title II). In May 2006, Justice Scalia, a critic of constitutional borrowing, rebuked Congress's efforts to regulate the Supreme Court.

Other features of transjudicial communication have come under fire as well—including international judicial "junkets" (see, e.g., Calabresi and Presser (2006) who argue that Supreme Court justices' summer vacations ought to be truncated and replaced with a return to the practice of circuit riding).

3. A précis of her argument can be found in an article she published in *Foreign Policy* (Slaughter 2004a).

4. Think Justice Antonin Scalia versus Justice Stephen Breyer or Mark Tushnet and Vicki Jackson (e.g., 2002) versus Steven Calabresi (forthcoming).

5. Work along these lines is voluminous and growing by the month. For relatively recent reviews, see Fontana (2001) and Calabresi and Zimdahl (2005).

practices and patterns, and the willingness (or reluctance) of judges to import from other societies. By pursuing each, scholars of law and society can bring rigor to what has thus far been a highly ideological and politically charged debate.

THE ORIGINS OF FOREIGN LAW INFLUENCE

Gaining an accurate understanding of the origins and historical practices of importing law is an important goal for reasons both empirical and normative. Because transjudicial communication is but one example of a larger phenomenon—the development of opinion writing and argumentation in courts—we have a natural interest in studying it empirically. From a more normative standpoint, a longstanding tradition of borrowing by U.S. judges, in particular, may weaken some of the arguments against the practice.[6]

For better or worse, though, an examination of the claims made by Bork and Slaughter reveals no shared, single conclusion. On Bork's account, the "insidious appeal" of importing foreign law is a recent development (2003, 22). Slaughter, in contrast, argues that "plenty of evidence" shows that American courts readily borrowed in the nineteenth century (2004b, 71).

Must one be right while the other is wrong? Not necessarily. As with much work in this area, competing definitions likely serve as the basis for the inconsistency. Slaughter's approach is, of course, quite broad: communication can be little more than judges talking across the dinner table at an international conference. Bork, on the other hand, seems more concerned with the citation of foreign materials in formal opinions. But even within this narrower—though far more controversial—subcategory of transjudicial communication, considerable ambiguity arises. As Adler suggests, what is borrowed

> could be any part, large or small, of the constitutional regime: a single sentence in the text of the constitution, a whole article in the constitution, a judicial doctrine interpreting some part of the constitution's text, a set of formal or informal understandings among legislators, the executive branch, or even among the population writ large as to what the constitution requires. (1998, 351)

To this list we could add references by American judges to English practices and law in effect at the Constitution's framing. Such may seem relatively innocuous, even salutary, to staunch opponents of importing—especially

6. Then again, Calabresi (forthcoming), while acknowledging a strong tradition of borrowing, rejects the practice. He argues that the American public believes that its society is fundamentally exceptional from the rest of the world. As such, when the Supreme Court and "lawyerly elite" engage in borrowing, they act contrary to the will of the American people.

Bork.[7] But it too is not without its share of complications. As Helmholz (1990) and many others have told us, English practices hardly arose in a vacuum; continental civil law and other forms of transjudicial communication influenced their development.

The broader point is that Slaughter is right: when it comes to the roots of borrowing, there is much more to understand and explore than simple citation practices. But even if we limit ourselves to this formal type of communication, Slaughter once again has the better case. As judged by the evolving literature in the field, the importation of foreign law is not a new development; rather, it has been a feature of American judging since the founding period.[8]

Evidence for this claim comes from a range of scholars, including, perhaps not so surprisingly, other proponents of borrowing. Jackson (1999), for example, argues that while the U.S. Supreme Court has been hesitant to widely embrace foreign law, the practice has deep historical roots—as do controversies about it. She points out that the majority in *Fong Yue Ting v. United States* (1893, 711) spoke of the "inherent and inalienable right of every sovereign and independent nation [to expel aliens]."[9] However, this argument was not universally accepted. Indeed, Justice Field, who dissented in *Fong* (1893, 756–57), dismissed the idea that deportation practices around the world ultimately have any bearing on the constitutionality of practices in the United States.

Legal historians, some of whom have no horse in this race, also provide support for Slaughter's position. Hoeflich (1997) uses the writings of prominent jurisprudential thinkers to argue convincingly that Roman civil law had a strong intellectual influence on early U.S. jurists (and those abroad as well). By his logic, several factors explain this influence, including the significant societal distinctions between England and the United States (e.g., the differing availability of labor and land), which occasionally limited the direct application of common law to American legal problems. Likewise, Helmholz (1992), who analyzed hundreds of opinions from over a dozen sources between 1790 and 1825, writes of the "ease and ubiquity of reference to civil law" during that period (1682). Far from being issue-bound or limited, Helmholz suggests that "turning to civilian sources was not the resort of a privileged few, and its use was not narrowly restricted in time or extent" (ibid.).

Perhaps the most persuasive support for Slaughter's claim comes from an unexpected source: two opponents of constitutional borrowing. In a long

7. Indeed, the proposed resolution to prohibit judges from importing foreign law mentioned in note 2 contains an exception for English law at the founding.

8. This is not to say that the particular form and style of borrowing has remained stable. Alford (2006, 664–70) argues that both the manner of and motivations behind constitutional borrowing have changed over time.

9. As an aside, note that the majority's words, which do not make reference to a specific nation, highlighting a difficulty in systematically gathering data on foreign law citations.

and detailed article on the subject, Calabresi and Zimdahl (2005) review cases dating back to the 1800s that invoked materials from other societies. Though they ultimately advocate an extremely limited role for foreign law,[10] their effort at mining early opinions shows that borrowing did not originate with the justices of the Rehnquist Court. "References to foreign sources of law have not been aberrational over the past 216 years," write Calabresi and Zimdahl. "Instead, they . . . reflect an old tradition, which can be found in many nineteenth century Supreme Court opinions, including opinions written by such historical titans as Chief Justice Marshall and Justice Story" (907).

The degree of consensus over the roots of borrowing in the United States is encouraging. Less so is the lack of a strong empirical foundation to serve as the basis for this shared consensus. To our knowledge, no scholar has *systematically* delved into the early written record of the U.S. Supreme Court—or any American court for that matter—to explore the inclusion and, crucially, *exclusion* of foreign law sources (see, e.g., Epstein and Knight 2003). Owing to this void, we cannot know whether the handful of (self-selected) decisions repeatedly rehearsed as examples of early borrowing is truly illustrative of a larger and widespread phenomenon. We also cannot know whether a reliance on foreign law was limited to, say, the construction of treaties—a custom supported even by Justice Scalia (2006), no friend of borrowing—or encompassed domestic issues as well—a practice Bork would surely jeer but Slaughter would just as surely applaud.

No doubt, designing and executing a study of the sort we envision poses its fair share of challenges, not the least of which is determining what constitutes transjudicial communication. This is not only a matter of definition—e.g., when American judges cite English practices, is that borrowing?—but it is a matter of degree as well. It may be one thing for, say, a U.S. Supreme Court justice to drop a reference to a foreign court's decision in a long string citation and quite another for that justice to ground the opinion's rationale in practices abroad.

These are just two of the many complications. And while we have not even a rough-and-ready solution to offer, we do believe the problem is well worth the time of sociolegal scholars. More to the point, given the potentially important empirical and normative implications, failure to systematically uncover the historical roots of borrowing (or the lack thereof) comes at a nontrivial cost—the cost of marginalizing our role in consequential legal and policy debates over foreign borrowing.

10. See Calabresi and Zimdahl (2005, 907–09). Calabresi has written on this separately as well (see Calabresi, forthcoming).

CONTEMPORARY PATTERNS AND PRACTICES

When analyzing the contemporary use of foreign law materials, the disagreement between Bork's and Slaughter's arguments decreases. Both agree that this practice, for better or for worse, is on the rise. For Bork it is for the worse; virtually any form of borrowing is evidence of a world—or more pointedly, an America—that no longer delineates judges and legislators. For Slaughter, it is for the good, though not good enough. To her, America risks being left behind if it fails to increase its participation in the transnational dialogue.

While Bork and Slaughter may make compelling normative cases for their preferred positions, the empirical foundation supporting either is, at best, shaky. To buttress their claims about the practice and patterns of contemporary borrowing, both tend to rely on carefully culled examples rather than on systematically developed qualitative or quantitative evidence. Driving Bork's conclusion about the contemporary "insidious appeal of internationalism" (2003, 22) is, as best we can tell, a grand total of five cases—only four of which actually use foreign law in the majority opinion.

In her attempt to document the rise of persuasive international authorities abroad and their sparser use by American judges, Slaughter falls prey to the same practice. She, too, cites a handful of cases, along with some off-the-bench remarks of Justice Ruth Bader Ginsburg (2004b, 75–77). This merely establishes that under some conditions judges will invoke or think about foreign law. What it does not establish, crucially, is the descriptive claim that foreign law is grossly underused in U.S. courts. For Slaughter to make that case, she would need to show, first, that American judges are not citing foreign law and second, that they are systematically missing opportunities to do so—opportunities where borrowing would be either appropriate or desirable.[11]

Lest the reader think we are being unduly harsh on Bork and Slaughter, we should note that these problematic practices are not at all unique to their books. Once again, the hand-selected "exemplary" case(s) approach is widespread in the literature. Analyses of the use of foreign sources in civil law cases (Clark 1994), and, more commonly, the myriad articles advocating a particular approach to importing law (e.g., Fontana 2001) both present what we can only hope are representative examples of cases to support their broader claims.

A related practice endemic to this literature is the single-minded focus on a particular class of recent decisions that are claimed to be—though not demonstrated as—part of a larger trend. Descriptions of death penalty

11. This standard might be a bit stringent; Slaughter is not outlining a general theory of when judges should invoke foreign law. Nonetheless, to argue, as an empirical matter, that judges need to be more cosmopolitan in authoring their opinions, such a standard seems appropriate.

jurisprudence come to mind as one of the greatest "offenders" in this category (e.g., *Harvard Law Review* 2001; Carozza 2003). Some of this is natural. It is no more unreasonable for Bork and Slaughter to use a set of recent (and nonrandom) cases as vehicles to explore larger debates than it is for us to use Bork's and Slaughter's books as hooks to engage the literature on borrowing. But ultimately these examples should give way to more systematic, substantial, and rigorous analyses.

While the extant literature, Bork's and Slaughter's contributions included, may have its share of methodological problems, exceptions exist. A notable one is Zaring's (2006) study, which is one of the few to situate the normative debate over patterns and practices in an explicitly empirical framework.[12] Zaring turns to the "allfed" database in Westlaw to examine every case in which a U.S federal court referenced a foreign court from 1945–2005. His search list included nations throughout the world, as well as the European Court on Human Rights and the European Court of Justice, but, notably, he omitted England.[13]

In Figure 1, we show the relationship between time and citation rate of foreign sources across all federal courts,[14] which seems to support Zaring's conclusion that foreign citation practices in the United States have been largely stable across time.[15] Across all sixty years in Zaring's data set, the average citation rate is 0.0002, meaning roughly one foreign law citation per every *five thousand* cases—hardly a regular occurrence.

Zaring's results thus tend to mitigate Bork's assertions about increases in borrowing and enhance Slaughter's claims to the contrary. But even these data may not be telling the whole story. In countries with extensive vertical judicial hierarchies, such as the United States, it would seem prudent to disaggregate the occurrence of foreign citation by the court that actually referenced the comparative material. Figure 2 takes an initial step in that

12. Other work includes Goldman and Johnson (2005), who conduct a similar study focusing exclusively on the U.S. Supreme Court. They find increased activity in the use of foreign materials by both the justices—in opinions and at oral arguments—as well as litigants in their briefs. In the Australian context, von Nessen (1992) provides a descriptive account of the decisions of Australia's high court that cite U.S. precedent.

13. The included countries were Mexico, Canada, Germany, France, Italy, Japan, Belgium, Holland, Spain, Switzerland, Israel, India, South Africa, and Australia.

14. The black line represents a lowess smoothing line. Lowess is a statistical procedure that calculates a series of locally weighted linear regressions at various values across the x-axis variable, which, in our figures, is year. Because lowess can provide information about the relationship between two variables that might otherwise be obscured by noise in the raw data, it is an increasingly common tool for the presentation of bivariate relationships. See Jacoby (1997, 63–64) for more information.

15. This figure is similar to Figure 2 in Zaring's article (2006, 316), which normalizes the raw count of citations to 1995 numbers and then presents those results in five-year averages. While the substantive results are the same, we use the simpler citations per case method and present data for all years.

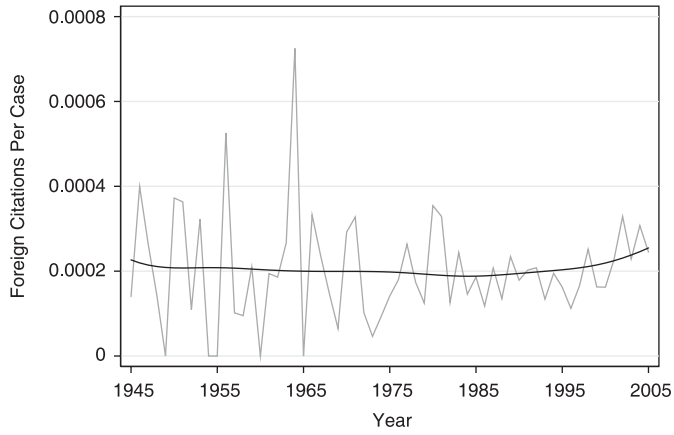

Figure 1. Citations to foreign law in the U.S. federal courts, 1945–2005. The light gray line shows the average number of foreign citations per federal case; the dark black line is a lowess smoothing line with a bandwidth of 0.80.

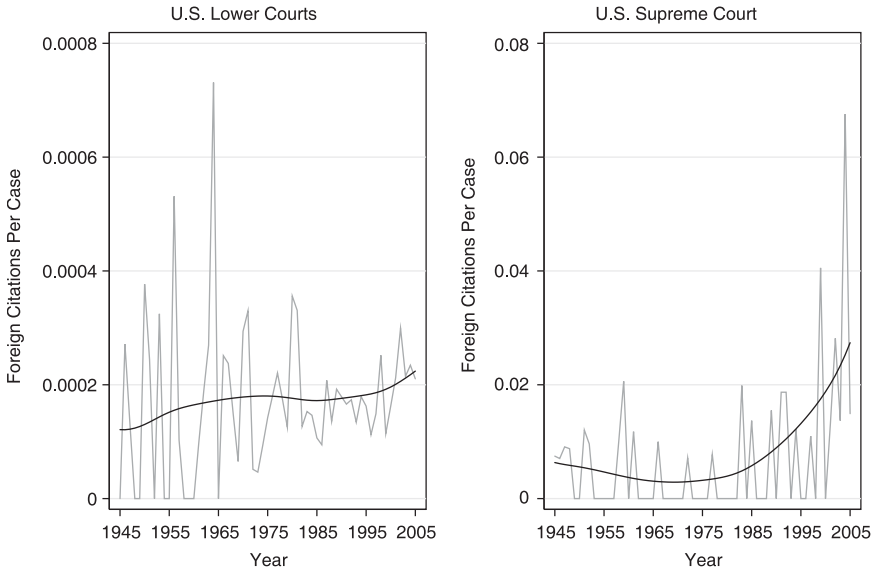

Figure 2. Citations to foreign law in the U.S. federal courts, by court level, 1945–2005. The left panel presents citation rates for the lower courts and the right panel presents citation rates for the Supreme Court. The light gray lines show the average number of foreign citations per case; the dark black lines are lowess smoothing lines with a bandwidth of 0.80.

direction. There we present the adjusted individual citation rates for the lower courts and the U.S. Supreme Court.[16]

If the hierarchical differences were nonexistent, we would expect to observe, first, lines for both the lower courts and the Supreme Court that were nearly identical in shape *and* second, vertical scales in similar increments. Neither holds. Note especially the differences in scale on the vertical axes. Whereas the lower courts retain the very low foreign citation rate, the Supreme Court's rate is substantially higher: on average, the justices cite foreign law in about one out of every two hundred cases (or roughly twenty-five times more often than the lower courts). Consider also the shape of the smoothing line across the three graphs. The aggregated data in Figure 1 show a *nearly* flat line across the last sixty years.[17] Disaggregating the data by court level alters that trend. Both lines now demonstrate clear upward movement, though the rates of growth vary by court level. The lower courts' has been far more gradual and constant across time than the Supreme Court's, which appears to have increased dramatically around 1980.

In short, in looking over these figures, one could find support for both Slaughter's and Bork's seemingly competing claims. We do see growth in the U.S. Supreme Court's use of foreign law, as Bork argues. But Slaughter could point to the flatter borrowing patterns among the lower courts as well as the (perhaps) less-than-expected increases in even the Supreme Court's citation rate. More generally, the figures shore up a point worthy of emphasis: even exploratory, descriptive empirical analyses can be informative—or at least more informative than a small set of self-selected cases, which occasionally are not just uninformative but can actually supply *mis*information. Even so, we can and should aim higher, moving beyond description and toward analyses that would, for example, provide leverage on the conditions that lead courts to import law, or not, and not simply on whether they do or don't.

Fortunately, we need not pursue this task blindly. For at least five decades now, sociolegal scholars have explored citation practices with an eye toward understanding how law evolves and develops in the United States. Merryman (1954, 1977) was one of the first to empirically examine the materials cited in written judicial opinions. While his study focused on a single court (California's Supreme Court), subsequent work widened the scope of analysis

16. A complete analysis would break down citation practices for each level in the judicial hierarchy. Because we lack disaggregated case statistics for all lower courts, we aggregate all courts below the U.S. Supreme Court into the "lower courts" category. Supreme Court opinion data for 1945–2004 are from Table 2–8 of Epstein et al. (2007, 80–81). For 2005, we relied on Spaeth's U.S. Supreme Court Database.

17. We emphasize "nearly" flat because, as we can observe, Figure 1 shows gradual upward movement that starts around 1995. It is this upward trend that we see in the disaggregated data displayed in Figure 2. We can also see the effect of aggregation when looking at the early years in the figures. For these, the aggregated rate is higher than the lower court rate alone because the Supreme Court cited more foreign law in those early years. This causes the aggregated line to be initially higher than the lower court line alone.

to encompass the exchange of citations across numerous state supreme courts (Friedman et al. 1981). (Interestingly, this line of work shares yet another similarity with studies of foreign law citation: political context. Friedman and his colleagues conducted their analysis at a time when state supreme courts that "borrowed" from other states were often accused of being "activist.")

These landmark studies, in turn, prompted the examination of the factors influencing whether a given state supreme court would reference another. In a particularly influential article, Caldeira (1985) looked to both individual characteristics of the cited court and relational characteristics to explore interstate court communication. Many of his findings seem likely to be important factors in the cross-national decision to engage in borrowing. He found, for example, that state courts with a strong cultural linkage are more likely to exchange citations than those lacking such a link. Another characteristic that is likely to be valid in the international context is the role of court prestige. State courts whose decisions were cited by other courts were, on average, more prestigious than those whose decisions were not cited.

Transporting Caldeira's theoretical framework to the study of international borrowing strikes us as quite promising. Equally so would be adaptations of a study undertaken by Fowler and his colleagues (Fowler et al. forthcoming) that uses social network analysis to analyze the relationship among the nearly twenty-nine thousand majority opinions of the U.S. Supreme Court. While Fowler et al. are ultimately interested in answering a question of a different scope,[18] we suspect that scholars of transjudicial communication would have much to gain by employing a similar methodology.

JUDGING IN THE CONTEMPORARY CONTEXT

In thinking about the conditions or circumstances that lead to judicial communication among the states, the tendency has been to focus on characteristics of the court, the state, or both. To this list, scholars of the federal courts have added characteristics of the judges themselves. Choi and Gulati (2006), for example, empirically demonstrate that appellate court judges are significantly less likely to cite to judges of the opposite political party than to those who share their partisan affiliation.

How might scholars of foreign borrowing attend to the propensities of individual judges? Both Slaughter and Bork supply some answers. On Slaughter's account, it is the wise and prudent judge who cites foreign law, shares information with her colleagues, and generally acknowledges, as did Justice O'Connor that, "No institution of government can afford now to ignore the rest of the world" (Slaughter 2002, 348). To Bork, such judges are not just

18. The Fowler et al. project ultimately seeks to develop a dynamic measure of how federal and state judicial hierarchies deploy American legal precedent to assess legal case salience.

unwise and imprudent; they are worse: they are liberals. As he notes, "Perhaps it is significant that the justices who [borrow] are from the liberal wing of the Court. This trend is not surprising, given liberalism's tendency to search for the universal and to denigrate the particular" (Bork 2003, 22).

Perhaps there is truth in Bork's insight about the liberal-conservative distinction, or at least the ideological makeup of current Supreme Court suggests as much. The proborrowing side appears to be anchored by liberals—Justices Breyer and Ginsburg—while the antiborrowing side is championed by conservatives—Justices Thomas and Scalia. The newest members of the Court, Chief Justice Roberts and Justice Alito, both conservatives, have also publicly decried reliance on foreign sources.[19]

On the other hand, if we include Chief Justice Rehnquist, and Justices O'Connor and Kennedy in the mix, the liberal-conservative dichotomy becomes more complicated. These justices are (or were) hardly liberal in their jurisprudence, yet quite willing to engage in transjudicial communication. We could say the same of the rather conservative Felix Frankfurter, who was famous for incorporating "polls" of jurisdictions abroad into his opinions.

That ideology is not terribly useful in sorting the isolationists[20] (e.g., Justice Scalia) from the internationalists (e.g., Justice Breyer) surely suggests a deficiency in Bork's account.[21] Then again, to completely brush aside politics and political motivations would be to ignore much of our collective knowledge about judging (see, e.g., Segal and Spaeth 2002; Sunstein, Schkade, and Ellman 2004).

Taken together, we know that a valid account of borrowing cannot be based purely on judicial ideology or completely void of the political influences that affect judging. Where, then, can we find such an account? Slaughter, and to a lesser extent Bork, both hint at an answer: a strategic account. As a general matter, these accounts suggest that judges have goals, typically to see the law reflect their policy preferences, but they are not unconstrained actors who make decisions based on their own ideological preferences. Rather,

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19. During his confirmation hearings, Chief Justice Roberts remarked, "[Foreign law] allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they're finding precedent in foreign law—and use that to determine the meaning of the Constitution. And I think that's a misuse of precedent, not a correct use of precedent" (Roberts 2005).

Similarly, Justice Alito said at his confirmation hearings, "I don't think that foreign law is helpful in interpreting the Constitution. . . . The structure of our government is unique to our country, and I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful" (Alito 2006).

20. We use these terms only as shorthand summaries. See, e.g., Kersch (2006) who applies the full spectrum of international relations theory to argue that a judge's view of the world influences her support—or lack thereof—for importing foreign law.

21. Calabresi and Zimdahl (2005, 750–52) seem to agree, and offer a different explanation: the Harvard Law effect. They note, for example, that three importers, Justices Breyer, Frankfurter, and Story, all taught at Harvard (2005, 839). Given that other well-known importers—e.g., Justices Warren, O'Connor, and Kennedy—did not, however, perhaps limits this explanation.

judges are strategic in that they realize their ability to attain their goals depends on a consideration of the preferences and likely actions of other relevant actors as well as to the relevant institutions that structure their interactions (see, e.g., Epstein and Knight 1998).

Sociolegal scholars have long put variants of these accounts to work to study internal relations among judges on collegial courts (Murphy 1964; Epstein and Knight 2000; Maltzman, Spriggs, and Wahlbeck 2000; Johnson, Spriggs, and Wahlbeck 2005) and external relations between courts and Congress (Eskridge 1991a, 1991b; Epstein, Knight, and Martin 2001). Bringing them to bear in the context of borrowing, if Slaughter and Bork are right, would not be much of a stretch.

Starting with goals, recall Slaughter's basic concern: courts and judges who fail to participate or otherwise remove themselves from the transjudicial dialogue will undermine their ability to influence other courts. In the language of international trade, a court should strive to be not a net importer or exporter but a balancer. If this sort of "tit-for-tat" is at work in the borrowing process—an empirical question—then Slaughter may be onto something. Chiefly, she suggests the possibility that judges' policy goals span beyond the borders of a given country to a courts' ability to set *international* legal policy. Whether this might motivate judges—and how it ranks among their various motivations—is open to debate, but it is certainly worth additional thought and study.

Turning to the idea of interdependent or strategic behavior, Slaughter focuses on the role that domestic public opinion can play as a check on a judiciary from importing too much. In her words, "When a developing international rule, as promulgated by a supranational tribunal, moves too far out of line with a prevailing domestic democratic consensus, the national courts will not follow" (Slaughter 2004, 82). Here she speaks specifically of judicial bodies, such as the International Court of Justice, but the same type of argument could apply to virtually any foreign precedent that a judge seeks to import or borrow. The ability to institutionalize a jurisprudence of borrowing is, therefore, conditional on public opinion. Courts that stray too far from mass opinion risk losing the legitimacy they need to issue efficacious legal policies, that is, policies that their societies will follow.

To be sure, this claim nicely serves Slaughter's own goals. On the one hand, she wants to encourage U.S. courts to look outward; on the other, she wants to assure them, as well as politicians and the public, that the practice won't spiral out of control (and become antidemocratic). But just because Slaughter may herself be acting strategically does not mean she's got it wrong. At the least she is certainly not alone in hinting at the interdependent nature of judicial choice in this area. Consider work by Hirschl (2004a, 2004b), who is also concerned with the notion of legitimacy but from an elite rather than mass perspective. He argues that the international growth of judicial power is a function of the strategic decision made by a nation's power holders

to "abide by the limits imposed by increased judicial intervention in the political sphere" (Hirschl 2004a, 84). Applied to the foreign law context, strategic importing thus could be used by judges on nascent constitutional courts to act as a legitimacy-enhancing mechanism. Building up a reservoir of support, in turn, may enable the court and its judges to work toward their policy goals.

Of course, this type of legitimacy-enhancing behavior is not without its share of potential problems. Rosenfeld (2001) notes that citation to foreign law, even when it is not entirely on point, may have the short-term consequence of lending legitimacy to a decision. But in the longer run the citing court may have risked painting itself into a constitutional corner. If criticizing or overruling their own decisions is politically untenable, for example, the judges—even if they so desired—may be unable to depart from the foreign holding.

And this is where Bork enters the picture. Normatively, we suppose, he would applaud courts that were concerned about their legitimacy in the way that Slaughter and the others have described it. As a practical matter, though, he believes the sorts of mechanisms designed to keep judges in line either no longer work or, at the extreme, no longer exist. In his words:

> There may have been a degree of restraint arising from apprehension about the reaction of the public, the profession, and other institutions of government. But whatever tradition there once was, it has indeed been broken by now, and any lingering apprehension has been dissipated by the inertia of political opposition. (Bork 2003, 82)

Bork thus seems to reject, as politically naïve, the idea that judges engage in strategic behavior; he is in some sense an attitudinalist. Nonetheless, for scholars of a different mind (us included) his claim serves to flesh out yet another group to which the internationally minded, legitimacy-oriented judge must attend: prominent lawyers and, perhaps, law professors, in addition to the mass public and politicians.[22]

Ultimately, though, the question of which side has the better case should be and, more to the point, can be, resolved by sociolegal scholars, for both Slaughter and Bork generate hypotheses amenable to empirical testing. For example, if Slaughter and Hirschl are right, we might expect to see variation in borrowing based on the preferences of the legislature and executive. As these branches become more cosmopolitan or outward looking, then transjudicial communication should increase. Conversely, an isolationist pair of branches should decrease the tendency for judges to import foreign law. Bork's assertion too lends itself to empirical scrutiny. We might ask, to provide one

22. See also Calabresi (forthcoming) who argues the Supreme Court and "lawyerly elites" are behaving at odds with American public opinion on the issue of borrowing (see note 6).

illustration, whether the relatively recent increase in foreign citations by the U.S. Supreme Court reflects a weakening of the constraint imposed by political elites, the public, and the legal community. Devising valid and meaningful measures of these ideas will not be easy, but this should certainly not dissuade scholars from starting what will certainly be an incremental process.[23]

These empirical implications from Bork's and Slaughter's accounts stress the external context of judging—that is, the extent to which courts take into account "outsiders" when they make their decisions. This emphasis should come as no surprise: the two authors are merely echoing the predominant concerns in the field. But strategic accounts of borrowing could also emphasize the internal features of judging—for example, the opinion-writing process on collegial courts (Maltzman et al. 2000)—and these too could prove useful in explaining borrowing. A very basic account of this flavor might center on the preferences of the pivotal member on the U.S. Supreme Court: the median justice. To the extent the median has a taste for comparative law, litigants might be more likely to incorporate foreign materials into their briefs. Likewise, as the fifth vote becomes increasingly opposed to borrowing, it would seem all the more likely that comparative analysis in the Court's opinions, as well as in written brief, would experience a decline.

In suggesting the deployment of internal accounts of judging, we are not advocating one approach over the other. Quite the opposite—neither internal nor external approaches necessarily have to be—or perhaps even should be—viewed in isolation. If the strategic account is useful, then surely both internal and external factors influence the use of foreign law on collegial courts. Of course, determining how these various factors might interact to constrain or open up the potential for strategic transjudicial communication is a long-term enterprise. But regardless of whether scholars focus on the external, internal, or both, strategic accounts may well lead to important theoretical and empirical breakthroughs. At the least, they will move us beyond the wise/unwise and liberal/conservative dichotomies that dominate today's debate over borrowing.

CONCLUSION

That Slaughter and Bork are participants in a normative debate is undeniable. But it is just as undeniable that their books shore up a large number of areas for positive research. We have emphasized three—the origins of borrowing, contemporary practices and patterns, and the willingness (or reluctance) of judges to import from other societies—but this list is hardly

23. The struggle over the last fifty years to find, for example, theoretically valid measures of judicial ideology and political case salience come to mind as two concepts that have benefited from the trial-and-error process.

exhaustive. To it, we might add questions about the resistance to importing law. Calabresi (forthcoming) suggests that mass public opposition is driven by the long-held belief of American exceptionalism. But whether the public in fact opposes the citation of foreign precedent is an empirical question—one that has not been adequately addressed. If there is opposition, could it be that foreign law is simply a lightning rod for general opposition to the policy outcome reached by the courts?

Yet another example centers on the question of how judges learn about foreign law developments. Slaughter and Justice Ginsburg point to the Internet and other resources that simplify the task. But we also suspect that lawyers play an important role here, just as they did (and do) in communicating social science evidence (e.g., the Brandeis Brief). If this is so, then many interesting questions emerge, not the least of which is in what direction does the casual arrow point: are the lawyers, through their written briefs, encouraging the judges to import law or are the judges, through their use of comparative materials, encouraging the lawyers?

We could raise many other questions, but the broader claim we want to stress is simply this: sociolegal scholars should no longer act as mere observers of the normative battles being waged over judges' use of foreign law. Nor should they join the debate as it is currently framed; this area of inquiry hardly needs more scholars trading insults or bon mots. What it does require, however, is for the sociolegal community to apply its methodological skills to resolving the important questions about judging that Bork and Slaughter have done us the favor of raising.

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