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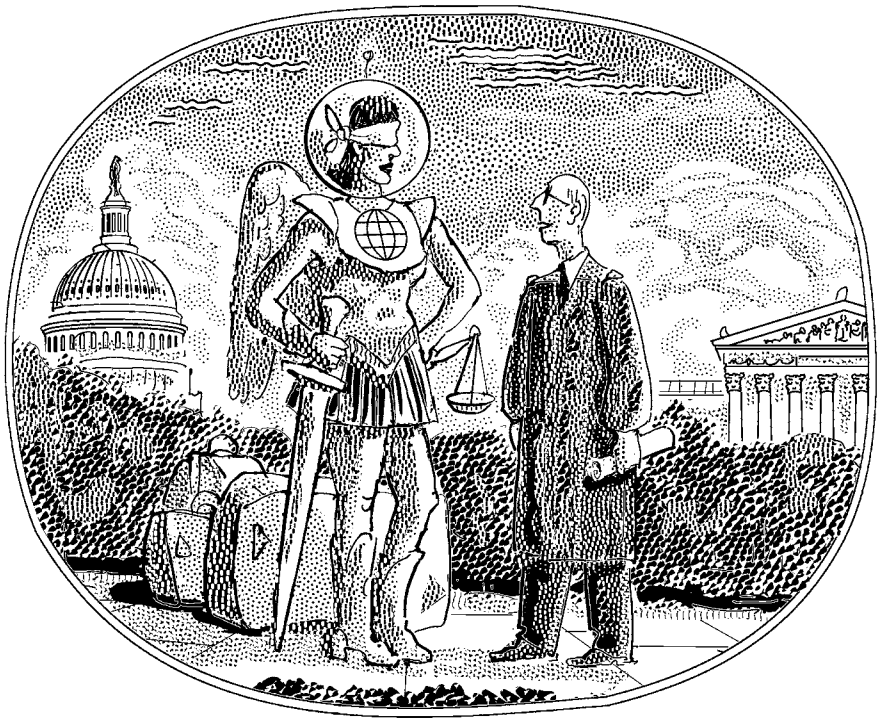
Book Review by Brian Callanan

Justice League International

The Court and the World: American Law and the New Global Realities, by Stephen Breyer.
Alfred A. Knopf, 400 pages, $27.95 (cloth), $17 (paper)



"Welcome to the United States of America."

Writing the court's lone dissent in the 1999 case of *Knight v. Florida*, Justice Stephen Breyer relied on no less an authority than the Supreme Court of *Zimbabwe* to support an inmate's claim that his long wait on death row—prolonged by his own appeals—made his punishment unconstitutional. Justice Clarence Thomas pounced: were there a shred of support for the right to a speedy execution "in our own jurisprudence," he wrote, "it would be unnecessary" to rely on foreign sources. Breyer later confessed that invoking Zimbabwean precedent was "what one might call a tactical error." Maybe so. But the practice caught on, and a working majority of the Court now periodically uses foreign legal sources in U.S. constitutional cases.

To his credit, Breyer is the only Justice who has seriously attempted to explain the practice. Some years ago, he joined with the late Justice Antonin Scalia to debate this and other legal flashpoints. Since judges in constitutional democracies around the world often face "problems" similar to those confronting American judges, Breyer argued, why not consider how they solved those problems? "It will not bind me," he said, "but I may learn something." Scalia answered that the opinions of foreign judges should be irrelevant to originalists and non-originalists alike: modern foreign sources have no bearing on the Constitution's original meaning, and even those who wish to see the Constitution evolve through judicial decree surely want it to reflect the views of the *American* people. Breyer never quite mustered a clear response. Rather than advance a theory of interpretation legitimizing the use of foreign law, Breyer treats this practice, in the words of NYU School of Law's Jeremy Waldron, as a "matter of getting a little bit of help here and a little bit of help there."

Breyer's new book, *the court and the World: American Law and the New Global Realities*, does not much improve on that formulation. The Court's most internationalist member seeks not to win but to transcend the debate over foreign law by placing it in fuller "context": the many areas of law that require the Court "to analyze foreign or international legal rules, statutes, or practices to arrive at a reasoned decision." Breyer takes his readers on a tour of *uncontroversial* uses of foreign law to show that objections to the *controversial* uses are "beside the point."

Noting that global commerce increasingly generates cases that involve foreign law and facts, he lauds "the Court's practice of taking into account the relevant international effects of its decisions." But that practice is based on the well-established presumption that, as a matter of international comity, Congress does not enact laws that clash with foreign legal regimes without clearly saying so. The point is to honor, not alter, legislative purpose.

Some federal statutes and constitutional provisions expressly contemplate the use of international law. The Alien Tort Statute (1789), for example, opens federal courts to lawsuit by foreign nationals alleging a tort "committed in violation of the law of nations or a treaty of the United States." Human rights advocates have long sought an expansive interpretation of the statute, though the Court has adopted a more limiting construction over the last dozen years. But all sides agree that we cannot make sense of the Alien Tort Statute without consulting the customary international law (up to and including that of the founding era) that forms the "law of nations."

Breyer concludes that worries over the use of foreign law in constitutional interpretation "cannot but recede [when] set against" his ex-

amples. But that is more wish than argument. The author's unobjectionable examples concern cases in which foreign laws, institutions, or practices were clearly implicated by the controversy before the court. Those cases do not blunt the charge that the Court too often uses foreign legal authority to reshape constitutional provisions that have *nothing to do* with foreign practices. In *Roper v. Simmons* (2005), for example, the Court struck down the death penalty for juveniles. That decision delegitimized the laws of 25 states based, in part, on foreign and international law, including a treaty that the United States never ratified. "The overwhelming weight of international opinion [is] against the juvenile death penalty," Justice Anthony Kennedy wrote for the Court; "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."

Breyer suggests that the court's critics suffer from "some version of the psychological phenomenon of displacement," blaming foreign law usage when their real grievance is with a case's outcome. Projection by the author may be a more apt diagnosis. It is striking that Breyer's use of foreign law in constitutional cases so reliably yields progressive results. In cases in which world opinion is more retrograde the international dialogue falls silent. In *Obergefell v. Hodges* (2015), for example, the Court recognized a constitutional right to same-sex marriage—with no mention of the European Court of Human Rights' contrary judgment one year earlier. Indeed, foreign law does not make it into the footnotes in cases addressing issues ranging from abortion to punitive damages to criminal procedure, matters on which European sensibilities generally point to more conservative policies.

But the core objection to the Court's innovative use of foreign law is not that it is foreign or even that it is cherry-picked. It is that foreign sources are rarely probative of the Constitution's original meaning. As Scalia quipped: "I use foreign law more than anybody on the Court. But it's all old English law"—that is, founding-era authorities that elucidate how those who wrote and ratified the Constitution understood its language and legal concepts. The same cannot be said about the latest ruling of the *Cour de Cassation*.

Justice Breyer would do better to acknowledge that the foreign law controversy is an offshoot of a larger and deeper jurisprudential debate—a debate that handwaving about "globalization" cannot moot. For the pragmatist who, like Breyer, approaches judicial decision-making as "a kind of problem solving," it might make sense to consult the opinions of foreign colleagues "who have faced comparable problems." "The wheel needn't be reinvented every time," he observes. But the real question is not whether judges should reinvent the wheel; it is whether the people's representatives, through statutory law or constitutional text, have already prescribed its dimensions. For those who believe that fidelity to original meaning is "the only approach that explains why judges have the final word" (as Judge Frank Easterbrook put it), the judicial task is not invention but interpretation. The judge is engaged less in "problem solving" than discerning the solution crafted by lawmakers.

It is not enough, then, for Breyer to announce that "the nature of the world itself demands" the use of foreign law because foreign law is everywhere in use. Breyer's analysis requires a more candid recognition that there is a line between the many commonsense uses of foreign law and the few much-disputed uses—a line that traces to a debate over first principles.

It is not only judges who are going global. In his most provocative chapter, Breyer marvels at the proliferation of international regulatory bodies charged with oversight of matters ranging from the mundane (limits on bluefin tuna fishing) to the major (ozone emission restrictions). These developments, he argues, are both salutary and inevitable in an increasingly "interdependent world." But he suggests that the United States is too often a loner: that hidebound adherence to the U.S. Constitution risks hindering America's full participation in global regulatory regimes.

Take the problem of delegation. The old understanding of our Constitution was that legislative authority can be exercised, in John Locke's formulation, only "by such men, and in such forms" as the people have authorized. The modern administrative state made quick work of that. Since the New Deal, Congress has assigned vast lawmaking power to federal regulatory agencies, and the Supreme Court has blessed all but the most unbounded delegations.

But what about legislative delegations by treaty to *international* regulatory bodies? "To the extent that the Constitution inhibits such delegation," Breyer explains,

> it increases the difficulty of the United States in arriving at cooperative solutions with other countries to shared problems, such as environmental degradation, public health, threats to national security, and the like. If we cannot contribute to these bodies and participate in their work, others will do so nevertheless, and our voice in the effort and its outcomes will be diminished.

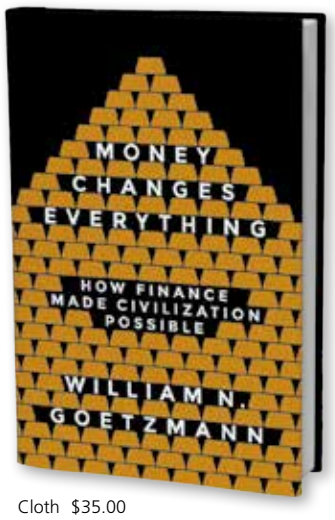
Reviewing the scant case law on this issue, Breyer urges the need to find a pragmatic constitutional accommodation for such delegations.

A 2006 case before the federal appeals court in Washington, D.C., illustrates the controversy. A major environmentalist group sued the Environmental Protection Agency for failing to comply with decisions made under the auspices of the "Ozone Secretariat." That is its real name; it exists to police an international environmental pact known as the Montreal Protocol. The United States signed the protocol and amended the Clean Air Act to conform to it. Years later, environmentalists challenged the EPA on the grounds that its regulation of ozone-depleting chemicals had not kept pace with decisions made by signatory parties convened by the Secretariat. The EPA was bound to follow those decisions, the challengers argued, because they were issued by an organization created by a U.S. treaty and recognized by federal statute for the purpose of setting binding international standards. The court of appeals rejected that interpretation. If the Ozone Secretariat's "'decisions' are 'law,'" Judge A. Raymond Randolph wrote for the unanimous panel, "then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution." That would "raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers." Instead, the court interpreted the applicable statute and treaty as creating a "political commitment rather than a delegation of lawmaking authority."

But Breyer thinks this holding presents a "dilemma." On the one hand, if rules issued by international regulators cannot bind the nation, then "how is the United States to remain an active participant in worldwide efforts" to combat environmental pollution and other concerns? On the other hand, international rulemaking may lack "guarantees of fairness that American administrative (or perhaps constitutional) law demands"—guarantees such as public notice and judicial review. The challenge is to "reconcile the expansion of international regulation with the procedural and substantive safeguards that domestic law typically provides," as most European nations have done.

This is a remarkable soft-pedaling of the constitutional difficulties. Insufficient "safeguards" are the least of the concerns raised

Changing the Conversations that Change the World



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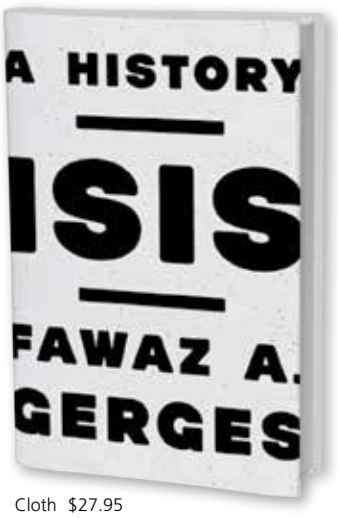

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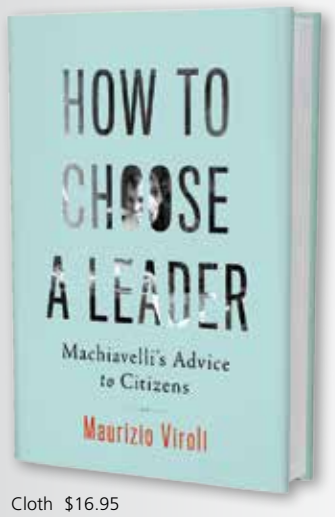

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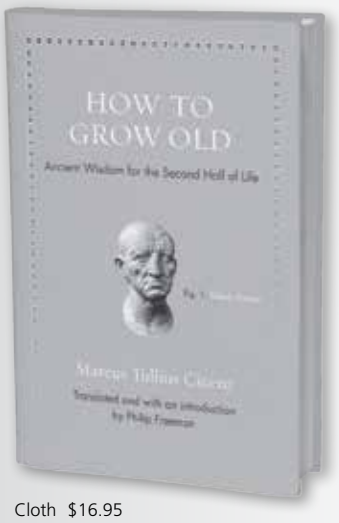

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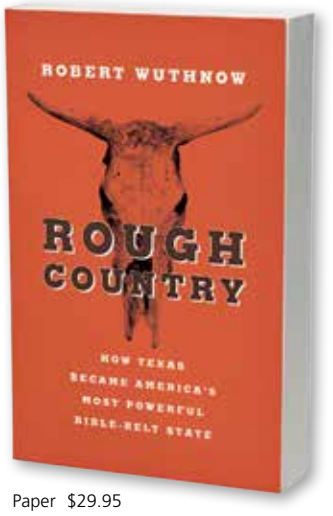

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—Maximilian Auffhammer, University of California, Berkeley

by authorizing international bodies to issue rules that have binding force under U.S. law. International regulators are not organs of our government. The Constitution vests in them neither legislative nor executive authority. Their officers are selected entirely outside the Appointments Clause process. Delegation of significant lawmaking authority to an international regulatory apparatus would seem to create a new branch of government and further estrange the American people from those who make their laws.

But rather than address these fundamental problems, Breyer frames delegation difficulties as a puzzle to be solved through legal ingenuity. The trick is to "experiment with different approaches" and "work out what bodies, national or international, should review the fairness, transparency, and legality of findings of international regulators." He notes that the architects of the New Deal achieved a similar feat by permitting broad delegations to the federal bureaucracy, while adopting rules of procedure to "ensure agency fairness" and provide for judicial review. A comparable workaround should be possible for international regulation, for Americans "cannot, in our own interest, stand on the sidelines." It is a well-worn appeal to necessity and effective administration over fidelity to the Constitution's institutional design. Think of it as the internationalist phase of Progressivism's impatience with constitutional forms.

But the analogy to the bargain underlying the American administrative state understates the problem. The Court has sustained broad legislative delegations to executive branch agencies because it is often difficult to draw a line between statutes that leave room for valid executive discretion and those that impermissibly delegate legislative power. But it is easy to draw a line between the bureaucracies of Washington and the directorates of Brussels. The Court has also taken some comfort in the fact that federal agencies are headed by appointees chosen (and in most cases, removable) by a democratically elected president. International regulatory bodies, by contrast, have only the most attenuated line of accountability to the America people.

Nor can we be confident that legislative delegations authorized by treaty would be confined to recognizably "international" issues. The Court has not opined on the scope of the Treaty Clause of the Constitution since *Missouri v. Holland* (1920), which suggests that no subject is beyond its reach. On this view, U.S. treaties, and the statutes that implement them, are not limited to the powers enumerated in Article I. (But neither, really, are the lawmaking powers of Congress "as interpreted since the 1930s," Breyer reassures us.) There is a strong current against that expansive reading; Justices Thomas, Scalia, and Samuel Alito have all argued that the treaty power is best understood as limited to matters that concern intercourse among nations. But until that understanding commands a majority, there is no reason to assume that federalism or other structural constraints would limit treaty-authorized regulation.

Ceding significant lawmaking authority to international regulators would effect a sea change in our constitutional order. More than a legal reordering, it would advance the United States further on the path of depoliticization all too familiar in Europe by channeling power away from the nation's political branches toward a smiling phalanx of supranational technocrats. In that sense, it logically follows from the rise of the administrative state and the judicial license to reinvent constitutional norms: both represent a flight from politics and republican self-government. It is unfortunate that Justice Breyer didn't see fit to explain how this move could possibly be squared with our Constitution.

Brian Callanan is staff director and general counsel of the U.S. Senate Permanent Subcommittee on Investigations.