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Ken I. Kersch

THE NEW LEGAL TRANSNATIONALISM, THE GLOBALIZED JUDICIARY, AND THE RULE OF LAW

KEN I. KERSCH*

INTRODUCTION

In recent years in the United States, constitutional reasoning and practice has been going global. For ma

countries.[2] And third, these efforts in the American judiciary are taking place in a distinctive reformist intellectual context in which many scholars and activists, both in the United States and around the world, are coming to understand legal transnationalism as an imperative.[3] As is evident from even the most casual perusal of the increasingly high profile journals of international law, scholars are now hard at work trying out alternative doctrines, seeking those that will be least politically vulnerable. Debates involving the applicability of the law of nations, customary international law, treaties, international agreements and pronouncements, and foreign practices, precedents, judicial reasoning (under the guise of "constitutional borrowing"), and public opinion to the decisionmaking processes of American judges deciding domestic constitutional cases, more and more are filling pages of these law journals. These calculated efforts to transform the way in which the Court considers domestic constitutional issues may very well mark the beginning of a major departure in the direction of American constitutional law.

This essay argues that the current transnational trend amongst judges and scholars is not, as some have argued, business as usual in the American courts. It contends that this transnational turn is notably distinctive in its historical and political origins and goals. Moreover, while the new legal transnationalism evinces a concern for the claims of democracy and the rule of law, as applied within advanced industrial democratic states like the United States, at least as it is directed toward domestic political and constitutional questions, it is part of an elite-driven, politically-motivated worldwide trend toward judicial governance, which is antithetical to democratic self-rule, if not to the rule of law itself.[4] More

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2. *See, e.g.*, Stephen G. Breyer, The Supreme Court and the New International Law, Speech to the American Society of International Law (Apr. 4, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html (last visited Jan. 6, 2005); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 231–35 (2003); Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society for International Law*, 96 AM. SOC. INT. L. PROCEEDINGS 348 (2002), *available at*

specifically, this movement ties a highly ideological vision of an emerging global polity to jointly moralized and administrative visions of judicial power, in the service of global judicial empowerment aimed at readily identifiable reformist political goals. Political activists within the United States, who have failed to achieve these goals through political campaigns at home, have turned their hopes to a newly autonomous globalized judiciary, through which they hope to secure their goals by alternative means.[5]

SOME HISTORICAL CONTEXT: WHY NOW

following dark days, the free world's sovereign nations (including, in time, the newly de-colonized nations) manifested a commitment to constitutional self-government. Sovereignty—understood then as a pre-condition of constitutional democracy—was, in this post-war context, highly valued. So long as free nations were committed to the rule of law and a few bedrock democratic principles (set out in hortatory fashion in the U.N. Charter and a series of prominent international declarations), the choice of institutions was considered the province of sovereign, self-governing states. What was important was that nations had constitutions. A comparative perspective was judged us2 of soveulk dcasovovi53 Td[(g9653 TdMC

Much discussion concerning the transnational turn in the law focuses on distinct arguments concerning the propriety of a single jurisprudential path involving, for example, the treaty

take shape. As this debate unfolds, the terms of the argument are becoming clear. And those favorable to judicial globalization are beginning to articulate defenses for this developing set of prETBTT0cTT0bt02 bt02 biT

dynamic such as this is in full swing, the real interest among participants is less the end to be pursued than the most effective instrumental grounds on which to justify it.

THE STRUCTURE OF JUDICIALIZED COSMOPOLITAN R

expertise, it may be instructive to consider the processes by which administrators who are not judges do the same thing.

Recent work by influential political scientists has improved our understanding of these processes. Studies of the construction of administrative autonomy suggest that, to succeed in consolidating their authority and autonomy, judges will need to work effectively in ways similar to those in which "bureaucratic entrepreneurs" have succeeded in analogous endeavors by building political coalitions, publicizing their accomplishments, and grounding their authority in appeals to problem-solving expertise. Analogously, these judges will also need to proceed gradually. "[B]ureaucrats who value their autonomy," Daniel Carpenter has written,

> will act in measured ways to preserve it, refraining from strategies of consistent fiat or defiance . . . [B]ureaucratic autonomy lies less in fiat than in leverage. Autonomy prevails when agencies [and, increasingly, judges] can establish political legitimacy—a reputation for expertise, efficiency, or moral protection and a uniquely diverse complex of ties to organized interests and the media—and induce politicians to defer to the wishes of the agency when they prefer otherwise.[38]

With respect to the emerging globalized judiciary, scholars have described a process that looks very much like that of bureaucratic formation at work among judges

And, indeed, this is precisely what they observe happening among judges. "[D]omestic judges, at least in the United States," they add, "are beginning to articulate their responsibility to 'help the world's legal systems work together, in harmony, rather than at cross purposes.' Such cooperation includes not only proced

of a global judicial community."[48] "Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to a visible international consensus on various issues—a consensus that, in turn, carries compelling weight."[49] Through the construction of "courts as quasi-autonomous actors in the international system,"[50] courts may not be able to create and administer "a formal global legal system," but she concludes, it "may be as close as it is possible to come."[51]

"Transnational civil society," an agglomeration of advocacy groups analogous to the one that sprung up around American judges in the aftermath of *Brown*

2005]

The brief discussion that follows is limited to considering the question raised most directly by the Supreme Court's *Lawrence* and *Grutter* (and the recent *Roper v. Simmons*) decisions: whether the U.S. Supreme Court should look abroad more extensively when thinking through its future constitutional rulings. In some cases, doing so might be described as "constitutional borrowing," but in others it is simply a question of heightened cosmopolitanism or awareness by American judges. This discussion will raise some general themes that may be applicable to our understanding and contextualization of the wide variety of more narrowly focused technical debates. I will begin by briefly isolating the two chief claims that have been made on behalf of this trend. The first claim is that it is a historical imperative, given the more general process of globalization that is taking place around the world. The second claim is that it improves the quality of judicial decisionmaking. This essay will then address a set of criticisms of these developments (and answers to them) bor4mes thE/gs a set o41gvedality

with an outward-looking judiciary shows the world that its government, as represented by its judges, is not unilateralist or isolationist, but is a "player" in the global game. Globalizing its judiciary is a manifestation of a government's adherence to the same restrictions on (or aggrandizements of) governmental power as other members of the club of legitimate governments around the world.[69]

A different class of justifications for a globalized judiciary has pointed to the wealth of information that a willingness to look abroad can bring to a judge's decisionmaking process. The argument here is simply that more information is better than less. "A good idea is still a good idea," Anne-Marie Slaughter says, "even if it comes from France."[70] The benefits are even stronger to the extent that one is convinced that key features of constitutional government are either widespread or universal. So, for example, if principles of subsidiarity and proportionality are inherent in both the U.S. and foreign constitutions, then judges in the United States will benefit from knowing how their foreign counterparts have grappled with those principles and dealt effectively with concrete problems of governance. The benefit is likely to be greater (and, hence, more justified) when a judge's domestic legal system bears a genealogical relationship to the foreign legal system from which he hopes to learn.[71] More information is better than less for a number of reasons: it is an aid to both standard and aspirational interpretation aimed at moral improvement—making imperfect constitutions the best that they can be—as well as to the constitutience, r253019system bdesprr

than less, regardless of the source. But, of course, in terms of legitimate sources of authority, requirements of the rule of law, and the institutional role of judges, common law borrowing and constitutional borrowing are not at all the same. Judicial uses and interpretations of extra-jurisdictional common law are amendable through ordinary legislative processes. Constitutional borrowings, by contrast, stand above legislative revision, and are amendable only through supermajoritarian processes.

In addition, despite the vague mood of "diversity" surrounding borrowing, proponents are actually *troubled* by the prospect of diverse opinions, world views, and approaches to governance. Judges excited by the potential of borrowing from others will have a strong tendency to undervalue diverse forms of liberal, democratic constitutional governance and will, ironically, work in the interest of diversity toward convergence.[81] To be sure, a diversity of legal cultures may be undesirable when some of those cultures are non-constitutional and non-liberal. But in liberal states, true diversity may simply be a sign of the vibrancy and well-developed

called upon to consider the texts, precedents, and experiences of the past and to give them a current meaning that is faithful to their earlier meaning under the altered legal, historical, and political conditions of the present.

Space travel, Mark Graber has suggested, may not be all that different from time travel.[85] To be sure, judicial forays into space travel require that judges have the ability to understand the social, political, and legal systems of other countries. We may think that judges are not likely to be very good at this. But, we have no reason to believe that the judges' understanding of their own system, particularly as it pertains to history, is especially good.[86] Even if we give American judges the benefit of the doubt with regard to their successes as time travelers within the American constitutional tradition, we could say their successes in this regard are due to sound training and experience. If we want judges to do a better job at space travel, then we simply need to do a better job at offering more courses in comparative constitutionalism. A generation of lawyers and judges with better training in comparative and international law than that provided to previous generations is likely to do a much better job of engaging in persuasive and successful comparative analysis. As American law schools are now making major efforts to turn legal education in precisely this direction, the prospects for more successful space travel are improving every day.

Ultimately, the real question is not whether it is good to look abroad or not, but rather whether, in a particular case, it is done well or done poorly. When the Court looked around the world to totalitarianism, it moved to make sure that, within the limits of its power, nothing like that would happen here. It may have successfully influenced the Court's criminal process jurisprudence in stimulating a renewed appreciation for the proprieties of basic due process in race cases coming out of the segregated South. Because at least some of the Court's justices, however, with the aim of preventing totalitarian "mind control," began an aggressive assault on religious influence in education, particularly Roman Catholic education, as part of its Establishment Clause jurisprudence, we may be considerably more dubious about the inclination.[87]

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85. I am grateful to Graber for raising this issue during his comments on an earlier version of this paper at the Conference on Global Constitutionalism at the University of Toronto, cited at this essay's outset.

86. *See generally* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524 (1995) (stating that judges are drawn to using history, but their work is often "replete" with problems).

87. *See generally* KERSCH, *supra* note 2, at 94–96, 292–325; RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 224–33 (1999); John T. McGreevy, *Thinking on One's Own: Catholicism in the*

It does not follow from the observation that the process of translation is a necessary and routine concomitant of judging that the process, undertaken in certain contexts and in a certain spirit, cannot serve as a critical adjunct to the process of revolutionizing constitutional thought. The key political and constitutional theorists of the Progressive Era, Herbert Croly and Woodrow Wilson, both spoke of what they clearly saw as transformative and, indeed, revolutionary new thinking in terms of translation. In the classic progressive statement of "The New Nationalism," *The Promise of American Life*, which became the anchor of Theodore Roosevelt's governing political philosophy, Herbert Croly argued that, in a context in which "underlying social and economic conditions are themselves changing," a simple fidelity "to traditional ways of behavior, standards, and ideals" would no longer be sufficient to realize "the promise of American life."[92] Under these conditions, a rigid, fatalistic, and conservative fidelity would be stifling rather than fulfilling. The solution, Croly famously argued, was to find new means for achieving what, in a broad sense, were considered the traditional ends.[93] Croly's call for the pursuit in modern America of Jeffersonian ends through the Hamiltonian means of a newly empowered, activist central state was an appeal for translation.[94] In many respects, his call was heeded, and a revolution in American government, and American constitutionalism, was at hand.[95]

Woodrow Wilson, a constitutional scholar and (in conjunction with his advisor Louis D. Brandeis) the chief articulator of the alternative transformational progressive vision, "The New Freedom," spoke of a process that involved both revolution and translation simultaneously. Wilson asserted: "We are upon the eve of a great reconstruction. It calls for creative statesmanship as no age has done since that great age in which we set up the government under which we live."[96] In the years to come, Wilson prognosticated, "revolution will come in peaceful guise, as it came when we put aside the crude government of the Confederation and created the great Federal Union which governs individuals, not States . . ."[97] At the

92. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 5 (Arthur Schlesinger, Jr. ed., 1965) (1908).

93. *Id.*

94. *Id.* at 17.

95. *Id. See also* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1997).

96. WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 32 (William E. Leuchtenburg ed., 1961) (1914).

97. *Id.*

democracies with correspondingly new commitments to the rule of law. These judges need to justify their newly claimed power and authority in ways that American judges, whose judicial review powers were institutionalized over two hundred years ago, do not.

In the United States, that power was justified by recourse to a theory of popular sovereignty, anchored in the necessity of a judge interpreting a written constitutional text.

was ruled by an emperor. Many European countries, even those that were longstanding democracies, worked their way through multiple constitutions over the course of their histories. Given this context, the increasingly heard plea that "they borrowed from us, so why shouldn't we borrow from them?" makes much less sense. The truth is that judges around the world borrow from the jurisprudence of the United States because the countries in which those judges sit, including those in western Europe, have relatively limited experience with constitutional self-government.

In contrast, the United States has over two centuries of *continuous* experience with such government under a written constitution that has served as an anchor to its unique form of civic nationalism. When the United States was a new nation, its judicial opinions contained many more allusions to foreign law, particularly English common law, than they do today. As America and its constitutional tradition grew, the usefulness of such references and allusions declined. Today, it is hardly necessary at all.

NONSENSE—BORROWING AND TRANSNATIONAL CONSULTATION BY JUDGES IS A LONGSTANDING PART OF THE AMERICAN CONSTITUTIONAL TRADITION

In a broad sense, the decision by the Supreme Court to look abroad is not new. Although few scholars have examined foreign influences on the Supreme Court's jurisprudence in any great detail, a preliminary reflection suggests certain categories of influence. As noted, citations to English common law decisions were common during the nation's early years. From its beginning, where appropriate, the Supreme Court—typically in cases involving international shipping and trade—frequently referred to the law of nations. In addition to references to international law and foreign case law, the Court and others who discussed the appropriate constitutional arrangements and practices also cited foreign experience as a guide to constitutional wisdom. The *Federalist Papers*, for instance, looked to the experiences of, among others, the English, Greeks, Romans, and Swiss as part of the process of working toward an intelligent constitutional design. Nineteenth and early twentieth century political reformers, operating before the courts and elsewhere in politics, made aggressive appeals to foreign, typically European, practices. They did so both to proffer alternatives to American constitutional habits and policies,

and to gather empirical evidence concerning the likely consequences of particular institutional arrangements and policies.[107]

European comparisons played a major role in the late nineteenth and early twentieth century Progressive Movement and in progressive policy arguments in general.[108]

For many, this history will suggest that the interest of key justices of the current Supreme Court in international and foreign precedent and practice, and the gathering of evidence from around the globe is business as usual for the Court. However, this is not the case. Some of the transnational turns cited above are more relevant to the Court's current transnational turn than others. Less relevant as legitimating precedent for the current turn are the borrowings undertaken by those either seeking to design a new constitution to be submitted to the states for ratification—and those turns abroad to a progenitor legal system, i.e. that of England, by common law judges in a newly independent nation with very little guiding law by which to steer. Also less relevant are citations to the law of nations in classic matters of international shh7 -1.153 Td[(co)-8(mm)7(on law)-5(judgesiecetw T10

It is for this reason that much of the discussion of the transnational turn has been rather technical in focus. Are we legally bound by treaty obligations in certain areas? Is customary international law binding on American judges? Is looking to foreign experience helpful in resolving complicated legal issues? Is constitutional borrowing appropriate and helpful? All these questions remain open to debate. To truly understand the significance of this phenomenon for our constitutional future, we must discuss it at an altogether different level.

CONCLUSION: THE GLOBALIZED JUDICIARY AND CONSTITUTIONAL SELF-GOVERNMENT UNDER THE RULE OF LAW

Most discussions of the impending transnational turn in American law involve highly technical debates concerning the domestic applicability of various forms of international law, or the propriety of introducing transnational evidence and arguments into domestic constitutional argument. What is missed by these discussions, and what is illuminated here in a largely, though not exclusively, descriptive and empirical manner, is that, viewed from a broader perspective, the mere fact that vigorous interest is now being shown in this entire constellation of questions is itself of major significance. That departure is reflective of a broad current of bold thinking among intellectuals in an array of academic disciplines concerning not only the place of the United States in the world, but also of the future of the nation state itself—thinking that, in a post-*Brown* era, has considerable implications for the politics of courts.

The highly technical and legalistic aspects of many of the discussions of related doctrinal questions involving such matters as treaty powers and customary international law as they are taken up particularly within the legal academy tend to obscure the profound issues of constitutional self-government at stake. The oscillation from the visionary to the legalistic has created an odd climate of discussion. The call for the globalization of American judges, for example, is simultaneously an open and furtive affair. Justice Breyer, for one, ended a recent speech encouraging judicial globalization by citing Wordsworth's paean to the French Revolution ("Bliss was it in that dawn to be alive/But to be young was very heaven"),[116] and yet, right-wing alarmism notwithstanding, its partisans insist, it is utterly routine.[117]

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116. WILLIAM WORDSWORTH, THE PRELUDE 444, Book X, line 693 (J.C. Maxwell ed., 1971) (1805).

117. J. Breyer, *supra* note 2.

In a similar spirit, Dean Harold Hongju Koh of the Yale Law School has characterized an increasingly celebrated federal court decision putting its imprimatur on the use of customary international law in human rights cases in U.S. courts as both business as usual for American courts and the *Brown v. Board of Education* of the transnational public law litigation movement.[118] Anne-Marie Slaughter has both trumpeted the increasing autonomy of judges around the world and the forging among them of self-conscious identity as instruments of global governance.[119] She has also reassured those who may be disturbed by such developments of the all but unchanged position of these judges within sovereign domestic constitutional systems.[120]

These shifts in emphasis obscure the highly ambiguous, if not hostile, relationship between the modern form of "judicial globalization" and the fundamental requirements of the rule of law. On the one hand, paradoxically, this new departure draws its sustenance from a renewed commitment to both constitutional government and international law around the world.[121] At the same time, however, in its marked preference for judges and interpretation over legislatures and legislating, its preoccupation with constitutional sovereignty as a problem, and its

constitutional actors and organs of American sovereignty. And, after due consultation with their fellow professionals abroad, whatever they decide must have been based on a reading of American constitutional values. As such, their newly globalized institutional milieu changes both everything and nothing.

Underlying these legal debates is politics—plain and simple. Legal scholars have become preoccupied with the "provincialism" of American judges because, in going about their business of deciding constitutional cases involving domestic matters such as affirmative action, federalism, welfare, homosexual rights, election law, and the death penalty, they have been reaching the wrong results—that is, results that have not coincided with those that the Warren Court ostensibly would have reached, results consonant with the policies of European social democracy. There is a sense that the United States is a global outlier because it is not a European social democracy.[123] Such a state of affairs has not been corrected by the elected officials in the United States. There is now some hope that it may be corrected by an increasingly autonomous, outward-looking, globalized American judiciary. Scholars and activists have been laboring indefatigably to construct just such a judiciary in the United States.

The palpable sense in American academia and elsewhere, that the United States is a global outlier, is strange in many respects. Far from being an outlier, the United States, in crucial aspects of its politics and its culture, including its commitment to democracy and the rule of law, is clearly within the mainstream of contemporary liberal democratic political orders.[124] In fact, so far as the normative case for constitutional borrowing is concerned, this simply must be the case. If our constitutional system and its underlying culture is significantly different from that of countries we seek to borrow from, the decision to borrow from those countries is on the weakest normative grounds. If, on the other hand, the countries we seek to borrow from are essentially similar to our own, it is not clear why the fact that we arrive at different conclusions about particular policy issues presents a problem in need of a solution.

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123. *See id.* at 342; Ackerman, *supra* note 7, at 773 (arguing that American judicial practice is provincial because "it does not engage the texts that have paramount significance for the rest of the world."); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNIFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (arguing that the U.S. should adopt Franklin D. Roosevelts' proposed second bill of rights, citing numerous international constitutions in support of broadening United States citizens' rights).

124. Indeed, it is quite plausible to argue that its commitment to constitutional self-government is more firmly rooted and stable here than elsewhere, which may itself be causing the very "problem" that the partisans of constitutional borrowing and other transnationalist trends are working so fervently to correct.

transnationalism is best accomplished through increased judicial consultation and borrowing in constitutional cases, is fundamentally *an administrative vision*. Its naked focus is on judges as policymakers, searching the globe for expert advice and experience on the best means of solving public policy problems, and the fact that it is being undertaken by judges rather than bureaucratic officials should not deceive us in this regard. It is decidedly a post-legal vision.[130]

In his classic book, *The End of Liberalism*, Lowi warned of the emergence in the late nineteenth and early twentieth centuries of a new governing order with a public philosophy committed to the practice of administration without law. In this philosophy, "interest group liberalism," centered around the new, relatively autonomous administrative agencies

The literature on "transnational civil society" also studies their ever-tightening relationship with transnational advocacy groups, who increasingly file policy briefs before them in an effort to influence their decisions.

Lowi's attack on the flight from self-government under the rule of law at the time of the New Deal was domestic in focus. That the same dynamics are now taking place at the global level and, in key policy areas, through the rulings of federal judges who are even less accountable than administrators, is a truly worrisome development. It is not too much to say that, although it is in its early stages, the very future of self-government under the rule of law within the United States is now at stake in these initiatives and debates.[132]

Longstanding, stable and successful democratic constitutions, like that of the United States, are defined by their relatively clear and transparent lines of responsibility and authority. The deliberate blurring of offices and authorities championed by proponents of judicial globalization are, as such, moves in an anti-legal and anti-constitutional direction.[133] Constitutions create a government; they do not launch quasi-autonomous luli-con t8un e(u8-23 n8(p b)ciom)8(ous9470052192109Tw 16.074p)4(in)4lianti-constid

global governance movement were dashed both by world events that belied their ideological understandings (such as the eruption of the Cold War) and, as the movement began to attract public attention, by popular political and constitutional resistance in the name of law, democracy, and self-governance.[134] As it grows in strength, this seemingly inevitable turn toward transnationalism and an increasingly globalized judiciary, at least in a vibrant and grounded democracy like the United States, will remain vulnerable to such events.

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134. *See* KERSCH, *supra* note 2, at 103–11 (describing the willingness to draw on international treaties in the wake of World War II); DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988) (describing the political battle between President Eisenhower and the anti-internationalist movement that provided the Bricker Amendment controversy). A rejoinder to allusions to the Bricker Amendment controversy that opponents of the transnational turn can expect is that, of course, there was popular resistance to an earlier transnational turn on the Court, but that it was motivated by racism. It is a familiar move among contemporary constitutional scholars who understand themselves as "progressives" to link constitutional provisions and decisions they do not like with racism, the ultimate trump card in contemporary progressive politics. Recent discussions of the electoral college and *Bush v. Gore*, and, for that matter (and bizarrely), the Clinton impeachment, have moved predictably along these lines. There is no doubt that white Southern concerns about racial issues were an important component of the Bricker Amendment controversy. But it is usually forgotten that two other worries concerning importations from abroad were also important: the issue of socialized medicine (Truman had proposed a national health care scheme) and the augmentation of labor union power in the wake of a series of paralyzing post-War strikes. While I certainly have no brief for racism, I believe the constitutional resistance provided by the Bricker-ites regarding the last two issues was both helpful and fortunate. Regardless, the key point is that this resistance to the aggressive judicial importation of foreign public policy standards, as a matter of historical fact, occurred, and, if the Court gets too aggressive in this regard, could very well occur again.