

Figures and Tables	Mean	Standard Deviation	N
<b>I. Group characteristics</b>			
Mean wealth quintile	3.13	.64	216
Plurality groups	3.17	.39	31
Minority groups	3.13	.68	185
Rebmean			
Plurality groups	.12	.33	515
Minority groups	.07	.26	97
Advantaged groups	.13	.33	418
Disadvantaged groups	.08	.28	232
	.15	.36	283
Adv			
Plurality groups	.45	.50	515
Minority groups	.63	.49	97
	.41	.49	418
Gpro			
Advantaged groups	.18	.24	515
Disadvantaged groups	.24	.29	232
	.17	.24	283
<b>II. Country Characteristics</b>			
GDP per capita in 1985	3419.82	4251.21	444
Population	44935.71	127582	444

Table 1. Descriptive Statistics.

	adv		Total
	Disadv	Adv	
No Rebel	241	212	453
	85.16	91.38	87.96
Rebel	42	20	62
	14.84	8.62	12.04
Total	280	235	515
	100.00	100.00	100.00

Table 2.  $\chi^2$  test of adv against rebmean. Pearson  $\chi^2(1) = 4.6582$  Pr = 0.031

	[1]	[2]	[3]
Depvar	<i>maxreb</i>	<i>rebmean</i>	<i>rebmean</i>
<i>adv</i>	-.27 (.19)	-.05* (.028)	-.01 (.035)
<i>gdp85</i>	-.00014 (.00011)	-.000038** (.000016)	-.000072** (.000022)
<i>lnpop</i>	.16 (.29)	.06 (.044)	.13** (.063)
<i>gpro</i>	-.79* (.43)	-.14** (.066)	-.29 (.24)
<i>constant</i>	1.87 (2.81)	-.048 (.44)	-.42 (.61)
N	444	444	364

Table 3. OLS Regression Results. Country-dummy coefficients omitted. Standard errors in parentheses. \*p<0.10 \*\*p<0.05



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## The Genetic Engineering of America’s Farmland: Concerns regarding patentability and the use of intellectual property rights

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### An inducement to create

The extent of patent law’s reach has long been a subject of interpretation and debate. In authoring the 1793 Patent Act, Thomas Jefferson viewed the patent monopoly not as a natural right, but as “an inducement to bring forth new knowledge.”<sup>1</sup> Science, he believed, was the most certain way to further societal progress.

Over the years, courts have broadly interpreted the patent statute, granting ownership over innovations once ineligible for protection. As intended by the framers of the original Act, expansion of the scope of patentability has nurtured the development of scientific spheres like biotechnology, but it has also allowed companies to exert a historically unprecedented amount of control within their industries. In recent cases involving biotech giant Monsanto Corporation, U.S. courts have consistently supported Monsanto’s patents on genetically modified seeds, holding farmers liable for infringement beyond their control.

This raises two questions: first, is it ethical to assign monopoly over a living thing, especially one as fundamental as seed? And second, how far does that right extend? Perhaps there is a line, as Jefferson proposed, where we must separate legitimate protection from abuse.

### Public tradition becomes private practice

In millennia past, seed breeding was not an exact science. Farmers selected and crossed the best-adapted varieties, building upon previous knowledge through experimentation. The trend toward science-based solutions spread to the U.S. from Europe in the 18<sup>th</sup> century, and as the economy grew increasingly dependent upon agricultural exports, the need for production uniformity and higher yields moved seed breeding from farms to centralized public research centers like universities.<sup>2</sup> Today, however, particularly in lucrative areas like commercial crop breeding and biotechnological applications, private agricultural research has — and

continues to — displace public research. In 1995, private investment constituted more than half of the \$20 billion spent on agricultural R&D in the developed world.<sup>3</sup> The major catalyst for this change has been the extension of intellectual property rights to biotechnologies, which has made investments in such projects more lucrative and thus appealing to companies seeking to maximize profits.<sup>4</sup> Although universities still play a role in the research process, their sources of funding too have shifted from being almost entirely public, to largely private, in nature.

Although agricultural technologies like machinery and chemicals have always been protected under the Patent Act, similar patent protections had never been extended to plants on the basis that they were creations of nature, which are not patentable. In 1930, Congress passed the Plant Patent Act (PPA), which permits the patenting of plants, but only those that reproduce *asexually*.<sup>5</sup> Congress had aimed to limit the reach of PPA, but conceding in 1970 that sexually reproducing plants needed some form of protection as well, passed the Plant Variety Protection Act (PVPA), which grants owners an exclusive right to multiply and market varieties of the protected seed for 20 years.<sup>6</sup> Though similar in nature to utility patents (a generic patent category for inventions that perform useful functions), PVPA made two critical exceptions: scientists could use PVPA-protected varieties for research, and farmers would be able to save patented seed for the next harvest.

The biggest change came in 1980, when the U.S. Supreme Court ruled in *Diamond v. Chakrabarty* that a living microorganism could be patented under the utility patent criteria for regular inventions.<sup>7</sup> The U.S. Patent and Trademark Office (U.S. PTO) affirmed and extended this new rule in *Ex parte Hibberd* (1985), which concluded that all sexually reproducing plants were eligible for utility patent protection.<sup>8</sup> Following the ruling,

the U.S. PTO began accepting applications for utility patents on sexually reproducing plants, even though Congress had never authorized the agency to do so.<sup>9</sup> With these revolutionary reinterpretations of the law, biotechnology became a highly attractive and lucrative industry, almost overnight.

### Utility patents v. PVPA

Some university researchers believe that the encompassing of genetically engineered<sup>10</sup> (GE) plants within the meaning of 35 U.S.C. § 101 — the section of the Constitution that enumerates criteria for patentability — is a beneficial change, since it has enabled companies to recoup their research costs, which can easily reach into the tens of millions for the requisite lab research, field testing, maintenance research, and commercialization steps. Without the potential for financial returns, private firms would have no incentive to pursue expensive biotech projects.<sup>11</sup>

Farmers, lawyers and policymakers tend to be less enthusiastic about the changes regarding plant patentability because the statutory exemptions that exist under PVPA do not apply to utility patents. In other words, patent holders can legally exclude use of the patented variety, even for research or agricultural purposes. One of the most controversial outcomes has been the use of this restriction by biotech companies to bar farmers from farming their land in the traditional manner. In fact, Monsanto’s “Technology Use Agreement,” which farmers must sign in order to use Monsanto’s GE seed varieties, *prohibits* farmers from saving seed and replanting it the following season.<sup>12</sup> Instead, farmers must purchase a new supply each year, a highly inefficient practice given that the perfectly acceptable seed from the first crop goes to waste. Those who fail to comply with the agreement terms — whether out of ignorance, negligence or no fault of their own — face serious financial consequences. This controversial agreement has been the basis for Monsanto’s suits against numerous U.S. farmers.

Agricultural law expert Dr. Roger McEwen predicts that the new utility patent rulings on plants will accelerate the movement of germplasm<sup>13</sup> ownership from the public to the private domain.<sup>14</sup> Monsanto already owns 647 biotech plant patents — far more than anyone in the market<sup>15</sup> — and the industry-wide total is only poised

to increase as corporations move to patent any seed that proves economically viable. In addition, the ability of patent holders to exclude researchers from using their genetically engineered plants for research purposes unrelated to the industry's interests has become an impediment to innovation. The only entities able to conduct research using these patents are the collaborating universities which, guided by the desires of the industry, have accordingly shifted away from the production of new conventional seed varieties to focus more heavily on biotech. This aspect has made it exceedingly difficult for farmers across the country to obtain high quality conventional (genetically unmodified) seed.<sup>16</sup> If this trend continues, public research institutions will essentially become an extension of private interests, neglecting the desires of farmers and consumers.

#### Monsanto takes the stand

Although court decisions and legislation throughout the 1980s nurtured the profitable privatization of biotechnology, the real test of strength for GE seed patents came at the end of the 1990s, when Monsanto sued a Canadian farmer, Percy Schmeiser, for infringement of its Roundup Ready® (RR) canola patent.

Monsanto genetically engineers its crops to withstand exposure to Roundup®, the company's trade name for its broad-spectrum, glyphosate-based herbicide. In order to make RR crops resistant to the Roundup, a researcher must locate an enzyme — typically from another plant or bacteria — that is similar to the plant's existing enzymes yet insensitive to glyphosate. The researcher then identifies a location in the host pathway that can be perturbed without rejecting gene uptake and inserts the isolated glyphosate-resistant enzyme into the plant cell, "splicing" (sticking) it next to the original DNA.<sup>17</sup> The plant now possesses an extra metabolic gene that makes it resistant to Roundup, and when the farmer sprays against weeds, only this tolerant RR variety will survive. Apart from its programmed resistance, however, RR behaves and looks no different than a conventional plant.

During the 1990s, neighboring farms began to adopt Monsanto's GE canola, and even though Schmeiser, a veteran farmer, had never purchased the RR seeds, nor signed the requisite Technology

Use Agreement to grow them, tests by Monsanto revealed that 95 to 98 percent of Schmeiser's 1,000 acres of canola crop were undeniably of that strain.<sup>18</sup> Schmeiser speculated that forces of genetic drift had brought RR canola pollen from nearby farms or passing trucks that were transporting seed, leading to a build-up of RR traits in his harvest without his knowledge. He admitted that a portion of the canola grown in 1997 had appeared unusually resistant to Roundup, but he did not make much of this fact. Like many farmers, Schmeiser keeps with the tradition of preserving seed from one harvest to the next, and some of this seed was inevitably mixed up with his regular stock when planting time arrived.<sup>19</sup>

Opinions on Schmeiser's innocence in the case vary. Terry Zakreski, Schmeiser's lawyer, explained that Schmeiser's hired hand had harvested the crop, and when it came time to select the seed for planting, Schmeiser had grabbed whatever was in his truck. The fact that some of the seed might have come from an area where he had sprayed Roundup to test for presence of RR did not occur to him.<sup>20</sup> Others contend that Schmeiser was not as innocent as he purported to be. Roger McEowen, a professor of agricultural law concedes that in the cases brought by Monsanto the prosecuted farmers *did* knowingly infringe. "Monsanto," he said, "is cautious to pursue only those cases it is confident it can win."<sup>21</sup>

Schmeiser's fate was sealed once it had been established that he had not been an innocent infringer: the trial court had ruled that levels of RR canola on Schmeiser's field were statistically high enough to demonstrate that he "either knew or should have known" that RR had contaminated his crop. But what if Schmeiser *had* been innocent? The Canadian Supreme Court clarified that because intent is considered in this type of case, had evidence pointed towards Schmeiser's innocence, the verdict might have gone in the other direction.<sup>22</sup>

#### The innocent infringer

*Monsanto v. Schmeiser* (2004) laid down the important precedent that *mere factual presence* of transgenic matter does not in itself automatically constitute patent infringement, but this holding applies only in Canada. American courts have reached a contrary conclusion, established in the landmark *Monsanto v. Dawson* (2000)

case: the process by which the technology arrives on the farmer's land is irrelevant. Whether through genetic drift, as in *Schmeiser*, or through "mistaken planting," as in *Monsanto v. McFarling* (2002),<sup>23</sup> a farmer is liable *unless* he notifies Monsanto immediately about the presence of the crop. Written opinions for numerous other U.S. cases brought by Monsanto reflect the same view.

This standard is inherently unfair for several reasons. First, how can ownership be granted over something that is both mobile and transformative? In the 2002 case *Harvard College v. Canada*,<sup>24</sup> the Canadian Supreme Court resisted following the U.S.'s footsteps when it struck down a patent on a genetically engineered mouse.<sup>25</sup> If U.S. law accepts that plants are patentable subject matter, then is the *product* of that plant, the seed, also protected? Dr. McEowen argues that one must distinguish between the two, and he cites *Schmeiser* — in which the court had upheld the patent's validity on the grounds that the *genes in and process* for creating the plant were protected, not the plant itself — as the closest anyone has come to defining this distinction. Differentiating between plant and seed, he says, will be crucial to the future of agricultural litigation.<sup>26</sup>

Second, this rule places an affirmative duty on the landowner to report to the patent holder regarding an intrusion.<sup>27</sup> From the perspective of property law, this is completely backwards; a landowner has total rights over his property, and anyone who encroaches on that territory is disobeying the law. In the case of patent infringement, the opposite is true: the one who is encroached *upon* is punished. Policy analyst Bill Freese draws an appropriate analogy: "if a farmer owns cattle, he has the responsibility to keep it from roaming onto others' fields. That's pretty obvious; everyone would agree that it is the farmer's responsibility to others to watch over that cow. Yet, on the patents for biotech seed it is reversed."<sup>28</sup>

But how can a farmer be held responsible for something as arbitrary as genetic drift? One study attempting to quantify the level of gene flow between GM and non-GM sources indicates that this is a complex process dependent on a number of different factors and cannot yet be accurately predicted by experiments. What is known is that cross-pollination

can occur at a considerable distance.<sup>29</sup> Therefore, one is presented with a scenario where the chance of contamination is likely, but there are no statistical measures through which farmers may predict to what extent or *where* this may occur. Should every farmer in every location remotely near a field using GMOs be expected to test his field for RR? Monsanto's solutions to the problems posed by the uncontrollable spread of its technology are woefully inadequate.

Ironically, Monsanto has been claiming injury where, in fact, it is the farmers who are most hurt by the appearance of GE crops in their fields. For organic farmers, the presence of RR seed literally contaminates their entire crop, making it unmarketable. The key issue is therefore one of duty. With ownership comes responsibility, and as owner of these patents, Monsanto should be liable for containing its proprietary technology. Conversely, the duty to uphold patent rights on a GM seed through the meticulous monitoring of one's field places an *undue burden* on the farmer. This is especially true because the only way for a farmer to tell if a genetically modified organism (GMO) has invaded his field is to spray Roundup, which will kill his entire conventional crop.<sup>30</sup> Either way, it seems, the farmer stands to lose.

In litigation against farmers, Monsanto also leverages its Technology Use Agreement, a contract that binds farmers to Monsanto's oversight and mandates a per-acreage-planted fee. The biggest issue seems to be that farmers are not fully informed of their obligations. Often the distributor — the person selling the seed to the farmers — fails to adequately explain the terms of the agreement to the farmer, or simply forgets to bring the contract at all. He makes a sale and, realizing he must still submit a signed contract to Monsanto, forges the farmer's signature after the fact.<sup>31</sup> Regardless of the circumstances, farmers are held financially liable, and if found in breach of contract, some have no choice but to claim bankruptcy. In addition, the agreement also requires that all litigation take place at one of two Missouri courts located in Monsanto's hometown. Needless to say, this puts farmers at an even greater disadvantage.<sup>32</sup>

#### Has genetic engineering delivered?

Proponents of biotechnology

repeatedly claim that commercialization of herbicide-resistant crops has led to a reduction in agricultural herbicide use. However, many opponents argue that these allegations are unfounded and misleading. According to policy analyst Bill Freese, the industry relies on data from the 1990s when there was a slight reduction in herbicide use, whereas now — having developed immunity to glyphosate — new "super weeds" are requiring that farmers use ever-increasing amounts of herbicide to achieve similar results. A study by Charles Benbrook, former head of the Board of Agriculture at the National Academy of Sciences, confirms just this: herbicide use across the herbicide-tolerant varieties of corn, soybean and cotton decreased in the first two to five years of commercial use, but has risen *every year since* for a total increase of 138 million pounds (5 percent) in the nine-year period between 1996 and 2005.<sup>33</sup> This trend carries implications not only for farmers — who now have to make a larger financial investment in growing their crops — but also for consumers and the environment.

The increasing tolerance of weeds has also tied farmers to Monsanto against their will. Rodney Nelson, a North Dakota farmer sued by Monsanto,<sup>34</sup> had switched to growing conventional soybeans for the Japanese market, but RR crops had so heavily saturated the market that other companies hesitated to invest money in new herbicides, leaving the Nelsons with no alternative but to return to RR soybeans. At this point, Roundup was the only chemical capable of exterminating the super herbicide-resistant weeds that had spawned in the area.<sup>35</sup> By tying the functionality of the herbicide to the GM crop, Monsanto has effectively transferred the need for a strong herbicide to seed purchases, keeping consumers addicted to its products in a very underhanded way.

#### Conclusions and the road ahead

By 2004 Monsanto had filed 90 lawsuits against 147 American farmers and 39 small businesses or farms, earning in excess of \$15 million.<sup>36</sup> Nonetheless, seed physiologist Kent Bradford believes that Monsanto does not care about the money it wins from these judgments; what it wants is for farmers to stop using its proprietary technology. In addition, the number of lawsuits brought by Monsanto is quite

trivial when considering the total size of the U.S. agricultural market that uses RR products and the fact that, in many of the cases, farmers were not even required to pay damages because they did not profit from the presence of the RR crops.

The true problem, however, is not a financial one, but a legal one and an ethical one. The issue here is that Monsanto is using its patents as leverage over farmers, and it is wrong. Robert Schubert argues that modern industrial agriculture is in many ways reminiscent of Middle Age European feudalism, under which wealthy lords granted land tenure to vassals in exchange for military service. The only difference is that today's vassals are small, independent farmers, and the landowning lords are agricultural giants that do not own land property rights, but *intellectual* property rights to the genetically engineered seeds that farmers must purchase each year in order to remain competitive.<sup>37</sup>

It is not fair, however, to blame everything on Monsanto. After all, the company is only acting in accord with the law as interpreted by the U.S. Supreme Court. It is therefore the Court's responsibility to overrule that precedent, or Congress must modify the statutory language of 35 U.S.C. §101, the PPA or the PVPA.<sup>38</sup> Granted, many of these consequences could not have been foreseen, and it is likely that even with amendments to legislation similar abuses will arise in the future. The law is not omniscient. But, in fact, that is part of its beauty — a malleability and capacity to shape and *be shaped* by society. The law is precisely what we want it to be. The question remains, however, whether we have the courage and the integrity to change it.

#### Notes

- Graham et al. v. John Deere Company of Kansas City et al., 383 U.S. 1, 9 (1966).
- Schubert R. Farming's New Feudalism. World Watch Magazine May/June 2005; 11.
- Chrispeels MJ, Sadava DE. Plants, Genes, and Crop Biotechnology. 2nd ed. Sudbury: Jones and Bartlett Publishers, 2003: 45.
- Chrispeels, 42.
- Plant Patent Act, 35 U.S.C. §§ 161-163 (1930, amended 1954): "Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state, may obtain a patent therefor, subject to the conditions and requirements of this title. The provisions of this title relating to patents for inventions shall apply to patents for plants, except as otherwise provided. In the case

of a plant patent, the grant shall include the right to exclude others from asexually reproducing the plant, and from using, offering for sale, or selling the plant so reproduced, or any of its parts, throughout the United States, or from importing the plant so reproduced, or any parts thereof, into the United States."

6. Plant Variety Protection Act, 7 U.S.C. § 2483 (1970) states, "Every certificate of plant variety protection shall certify that the breeder has the right, during the term of the plant variety protection, to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing a hybrid or different variety therefrom, to the extent provided by this Act."

7. *Diamond v. Chakrabarty*, 447 U.S. 303, (1980).  
8. The U.S. PTO reasoned that because microorganisms produced by genetic engineering were not excluded from patent protection under 35 U.S.C. § 101 (the section of the U.S. Constitution that enumerates criteria for patentability), the Supreme Court test was concerned not with whether an invention is living matter, but with whether or not it is the product of human ingenuity.

9. CFS, 14.  
10. Process through which genes and segments of DNA are taken from one species and implanted within another.

11. Van Deynze A. Telephone interview. November 28, 2006.

12. CFS, 15.  
13. Genetic resources (DNA) of an organism and collections of that material often used for breeding.

14. McEowen RA, Harl NE. Key Supreme Court ruling on plant patents. *Agricultural Law Digest* 2002; 13: 9-11.

15. CFS, 13.  
16. *Ibid*, 12.

17. Bradford K. Telephone interview. November 27, 2006.

18. *Monsanto Canada Inc. v. Schmeiser*, [2004] 1 S.C.R. 902, 2004 SCC 34, at paras. 4-6.

19. Fox JL. Canadian farmer found guilty of Monsanto canola patent infringement. *Nature Biotechnology* May 2001; 19: 396.

20. Zakreski T. Telephone interview. December 5, 2006.

21. McEowen R. Telephone interview. November 28, 2006.

22. Bereano P, Phillipson M. Goliath v. Schmeiser. *GeneWatch* 2004; 17.

23. *Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002); *Homan McFarling signed Monsanto's technology agreement stating that he would plant the seeds received for only a single season. McFarling ended up saving and replanting some of the seeds, and Monsanto sued for patent infringement. The jury ruled in favor of Monsanto and ordered that the defendant pay damages 120 times the applicable technology fee per bag; appellate court later invalidated the penalty, but the general ruling was upheld.*

24. Living organisms, it ruled, are not patentable subject matter under Canadian law.

25. The mouse was genetically engineered to carry a specific gene known as an "oncogene" that, when activated, would increase the mouse's susceptibility to cancer, thereby making it ideal for cancer studies.

26. McEowen R.  
27. McEowen RA. Legal Issues Related to the Use and Ownership of Genetically Modified Organisms. *Washburn Law Journal* 2004; 43: 644-645.

28. Freese B. Telephone interview. November 28, 2006/29.

29. Rieger MA, Lamond M, Preston C et al. Pollen-Mediated Movement of Herbicide Resistance Between Commercial Canola Fields. *Science* 2002; 296: 2388.

30. McEowen, 645.  
31. Freese B.

32. CFS, 23.  
33. Benbrook C. Genetically Engineered Crops and Pesticide Use in the United States: The First Nine Years. *BioTech InfoNet* October 2004; 36.

34. Monsanto sued the Nelsons in 1999, charging that they had saved and replanted Roundup Ready soybean seeds. Two years of intense litigation came to an end with an out of court settlement.

35. Nelson R. Telephone interview. December 5, 2006.

36. CFS, 33-34.  
37. Schubert, 10.  
38. McEowen.

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## Foreign Law in America's Constitutional Cases: A Sword Which Could Strike Both Ways

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Constitutional debate in the United States has now assumed an incredible shape. Liberal constitutionalists, academics, lawyers, and even progressive-minded Supreme Court justices impute much value to foreign law and court decisions (primarily Europe and the United Kingdom), while their conservative counterparts scoff at the entire notion. This neat demarcation of boundaries has lulled some members of the literati into believing that philosophical and ideological inclinations automatically define the weight one assigns to the corpus of foreign and international law. Although tempting, this picture belies a larger truth: the confirmatory and advisory role of foreign law (to help settle domestic disputes) is neutral in theory, but is driven by particular political results. Questions of federal power under Article I of the Constitution, the individual's civil liberties derived from the Bill of Rights, or some other intricate problem imply it is merely an accident of timing that modern progressives support, while conservatives oppose, this role of comparative constitutional law. Tracing the counterevidence from the New Deal's substantive due process days and examining the potential ripples in American law if foreign legal developments eventually change direction, this paper argues that the most efficient solution for progressives is to support comparative constitutionalism, but qualifiedly.

Five decades ago, Sir Isaiah Berlin published a book entitled *The Hedgehog and the Fox: An Essay on Tolstoy's View of History*.<sup>1</sup> In this influential work, Berlin astutely used the animal metaphors to broadcast his perception of the differences between the functional qualities of various legal and moral theorists—and, make no mistake, to delineate their divergent strands of philosophical thinking. Echoing the 7<sup>th</sup> century B.C.E. Greek poet Archilochus, Berlin explained that hedgehogs live out their entire lives entrenched in their vision of one central reality, this irrefutable truth they know as their own. All circumstances must yield to this grand unified theory. Foxes, on the other hand, retain a different perception of things. They put stock in life's multilayered variables to evince a complexity that eludes any particular leviathan of a unitary scheme. In essence, Berlin sought to show that principles cannot be so fickle as to yield to every tempest, but nor must they be so rigid as to be lifeless or somehow disconnected from reality. Engineering the balance in this area of law requires a delicate chisel, not a blunt hammer.

In this paper, I argue that the progressive legal community should privilege *not* the undeterred conceptual mammoth of foreign law as applied to America's constitutional cases but its

practical gifts, limitations, and historical lessons (including the Framers' own "decent Respect to the Opinions of [Human]kind"). In Part I, I trace the potentially large, and presently growing, consequences that adversely affect an over-broad espousal of the role of foreign and international law in American constitutional adjudication. This recent phenomenon is easier to believe in light of the fact that in 2004, 86 conservative members of Congress cosponsored or supported an anti-foreign law resolution, "Reaffirmation of American Independence," in the House of Representatives.<sup>2</sup> The hostile delineation of territories on the role that foreign and international legal principles will play in the United States' domestic constitutional cases — progressives advocating, conservatives opposing — should be reason for pause. In Part II, I use the history of substantive due process as a viable substitute to substantiate the possibilities if, and when, foreign notions of law and justice alter course.

In sum, the assumptions in this paper are not revolutionary; what may be revolutionary (or at least novel) are the inferences those assumptions lead us to. We have long considered these inferences as emotive virtues disconnected from the pithy logic and dispassion that truly "serious" scholars are said to champion. But in this paper I will demonstrate that those

same values represent the denouement of a complex network of inferences.

### I. CONSEQUENCES OF UNRESTRAINED TRANSNATIONAL COMITY

In the near future an ideological shift is likely to supplant the European and global community's legal and political liberalism (relative to the United States) with very conservative ideals. Some would go so far as to say that the election of Christian Democrat Angela Merkel in Germany (on the platform of weakening labor laws, promoting greater deregulation, and supporting social traditionalism) is a sound precursor to the dissolution of the welfare state. The same could be said of the elections of far-right politicians Jaroslaw Kaczynski as Poland's president and Jörg Haider as the governor of Carinthia in Austria. Beyond the West, too, extreme examples exist even in nations with strong democratic credentials. It does not take a contrarian to recognize a fitting *negative alternative*: the 1975-7 Emergency period in India, the world's largest democracy. Although the oppressive Indian regime did not endure in the long run, that Nation's Supreme Court did, in 1976, approve the practices of absolute press censorship, the arrest and detention of Prime Minister Indira Gandhi's opposition leaders, and mass sterilization of the poor, in the name of India's "internal disturbances"<sup>3</sup> — all acts which the Court found *ultra vires* its own authority to repudiate. Perilous path that it is, even a step in this direction is cause for concern. For a moment, entertain the odds that within a generation similar views might gain indefatigable momentum and, subsequently, official status in the United States.

Will American progressives then revert back to emphasizing the fair, egalitarian, individualistic values "original to the American experience," as Justice Kennedy of the United States Supreme Court sagely well-put in his *Roper v. Simmons* (2005)<sup>4</sup> opinion? Most likely so. Undoubtedly, to many legal gurus this paradigm shift will resemble the replacement of liberal pleas for judicial restraint in the early New Deal era by their later calls for vigorous judicial defense of civil liberties. The harsh charge of "ideological inconsistency" might also persist. In fact, this adherence to a singular ideology could even seem necessary in



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