

## CONSTITUTIONAL COMPARISONS: CONVERGENCE, RESISTANCE, ENGAGEMENT

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References in *Roper v. Simmons*<sup>1</sup> to foreign and international law — as relevant but nonbinding sources<sup>2</sup> — are in important respects a return to traditional methods of analysis, dating back to the Court’s earliest discussions of the Eighth Amendment. In 1879, the Court rejected a challenge to a sentence of death by shooting in the Utah Territory in part because “[c]orresponding rules [that] prevail in other countries” supported the practice.<sup>3</sup> Thereafter, the Court in many cases likewise considered foreign practice in resolving “cruel and unusual” punishment challenges.<sup>4</sup>

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<sup>1</sup> 125 S. Ct. 1183 (2005).

<sup>2</sup> Although there are many forms of international law, this Comment considers use of international legal sources only as nonbinding comparative authority (like foreign law) as occurred in *Roper*, see Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501, 525 (2000) (viewing “international law through the lens of comparative law”), and does not address when international law is binding or its effect when it is. The term “transnational law” refers to both foreign and international law.

<sup>3</sup> *Wilkerson v. Utah*, 99 U.S. 130, 134 (1879). At least one prior decision referred to foreign law in deciding whether a state law imposed a “punishment” in violation of the Article I, Section 10 ban on ex post facto laws or bills of attainder. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 318, 320–21 (1867) (considering contemporary French code and older English law). Eighth Amendment claims raised prior to *Wilkerson* were denied because the Eighth Amendment was not then, nor for many years thereafter, understood to apply to the states. See, e.g., *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 479–80 (1867) (commenting in dicta that the punishment was not “cruel, or unusual”); *O’Neil v. Vermont*, 144 U.S. 323, 332 (1892).

<sup>4</sup> In *Wilkerson* the Court referred positively to foreign law, while in later cases Justices referred to foreign practices or views both negatively and positively. See, e.g., *Weems v. United States*, 217 U.S. 349, 377 (1910) (noting the “alien source” of a punishment, “from a government of a different form and genius from ours,” in holding that the sentence violated the cruel and unusual punishment clause of the Philippines Constitution (treated as identical to the Eighth Amendment)); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion) (arguing that imposition of statelessness as punishment was condemned with “virtual unanimity” among the “civilized nations of the world”); *McGautha v. California*, 402 U.S. 183, 204–05 (1971) (discussing contemporary British experience in death penalty sentencing); *id.* at 280–82 (Brennan, J., dissenting) (responding to argument from British experience); *Furman v. Georgia*, 408 U.S. 238, 255–56 (1972) (Douglas, J., concurring) (suggesting that the death penalty was being administered as in ancient India, offending anti-caste commitments of the U.S. Constitution); *id.* at 275 n.18, 278–79, 296 (Brennan, J., concurring) (referring to practices of other “western” countries); *id.* at 351, 371 (Marshall, J., concurring) (asserting that experience here and abroad suggests death penalty abolition).

In 1989, Justice Scalia sought to overcome this interpretive tradition, asserting that only U.S. practice should be considered in making threshold determinations of what is “cruel and unusual.”<sup>5</sup> But as prior case law suggests, it is Justice Scalia’s view — that the practices of other countries are *irrelevant* to understanding “*American* conceptions of decency”<sup>6</sup> — that is anomalous and properly rejected in *Roper*.

Outside Eighth Amendment cases, references to foreign and international sources occur episodically in constitutional decisions throughout the Court’s history.<sup>7</sup> Although the Court does not discuss foreign

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does not affect crime rates and noting “the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment”); *id.* at 404 (Burger, C.J., dissenting) (arguing that the worldwide trend of legislative abolition of capital punishment does not support judicial abolition); *id.* at 438 & nn.23–24, 453–54, 462 (Powell, J., dissenting) (commenting on Canada’s and Britain’s experience in legislative abolition of the death penalty); *Gregg v. Georgia*, 428 U.S. 153, 184 n.30, 193 n.43 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (referring to the Report of the British Royal Commission on Capital Punishment); *Coker v. Georgia*, 433 U.S. 584, 592 n.4, 596 n.10 (1977) (arguing that death cannot be an “indispensable” penalty for rape in light of other countries’ practices and noting the “climate of international opinion” in holding it unconstitutional); *Enmund v. Florida*, 458 U.S. 782, 788, 796 n.22 (1982) (noting foreign and international law in holding the death penalty for felony murder unconstitutional); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion) (referring to views of “other nations that share our Anglo-American heritage” and “leading members of the Western European community” in concluding that the death penalty could not be imposed on those under age sixteen at time of offense); *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002) (noting worldwide disapproval of the death penalty for the mentally retarded); *see also* *Robinson v. California*, 370 U.S. 660, 672–73 (1962) (Douglas, J., concurring) (noting British treatment of drug addiction as an illness rather than a crime); *Solem v. Helm*, 463 U.S. 277, 292 (1983) (noting the Court’s past reference to foreign practice); *cf.* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (referring to “[t]he drastic consequences of statelessness [that] have led to reaffirmation in the United Nations Universal Declaration of Human Rights, Article 15, of the right of every individual to retain a nationality”); *Rudolph v. Alabama*, 375 U.S. 889, 889 n.1 (1963) (Goldberg, J., dissenting from denial of certiorari) (noting the trend throughout the world, in all but five of sixty-five reporting countries, precluding the death penalty for rape). I include both positive and negative references to foreign law, as both are consistent with the model I advance below.

<sup>5</sup> *See* *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (stating that the practices of other nations cannot “establish the first Eighth Amendment prerequisite, that the practice is accepted among our people,” though it may be relevant to deciding whether a “practice uniform among our people” is required by the Constitution (quoting *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting))).

<sup>6</sup> *Id.*

<sup>7</sup> Justices have referred to foreign experience in opinions for the Court as well as in important concurrences and dissents. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 31–33 & n.1, 35 (1905) (discussing foreign laws on vaccination); *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (referring to statutes in Great Britain, Switzerland, Austria, Holland, Italy, and Germany); *Wickard v. Filburn*, 317 U.S. 111, 125–26 & n.27 (1942) (discussing national powers in other federal systems); *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718 n.16, 734 (1997) (noting normative views and empirical experiences of other countries concerning assisted suicide); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651–52 (1952) (Jackson, J., concurring) (analyzing different foreign approaches to executive power in emergencies); *Lochner v. New York*, 198 U.S. 45, 71 (1905) (Harlan, J., dissenting) (comparing average workdays here and in other countries and describing working hours as “a subject of serious consideration among civilized peoples”). For pre-

or international law as much as some other national courts, references in *Lawrence v. Texas*<sup>8</sup> and *Grutter v. Bollinger*<sup>9</sup> can also be seen as returning to prior practice: for example, between 1949 and 1970, opinions of Supreme Court Justices referred to the Universal Declaration of Human Rights on several occasions.<sup>10</sup>

As suggested above, the Eighth Amendment's interpretive history supports the majority's use of foreign and international law in deciding what is "cruel and unusual." Past practice, however, is only a partial answer to debates over whether transnational law should be considered in resolving questions of U.S. constitutional law, debates linked to a broader set of disagreements about constitutional interpretation. Part I below argues more generally that considering foreign and international law within a framework of learning by engagement — assuming neither convergence nor disagreement — is a legitimate interpretive tool that offers modest benefits (and fewer risks than current debate suggests) to the processes of constitutional adjudication. Part II makes preliminary suggestions for standards of inquiry in using comparative law in constitutional adjudication and raises cautions about the difficulties of developing contextually accurate understandings of foreign law.

## I. CONSTITUTIONS AND THE TRANSNATIONAL: THREE MODELS

Although references to foreign law go way back in U.S. constitutional history, there is considerably more to refer to now. Before World War II, other countries offered experience in governance, but much less in the way of justiciable constitutional law. An era of human rights-based constitutionalism was born in the global constitutional moment that followed the defeat of Nazism, producing international human rights law and more tribunals issuing reasoned constitutional decisions. Sources of law from beyond U.S. boundaries continue to grow. While some are binding (such as ratified treaties), others are plainly not, including the domestic constitutional law of foreign countries, which nonetheless some national courts find relevant as

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1850 cases using the "law of nations" in constitutional interpretation, see Vicki C. Jackson, *Transnational Discourse, Relational Authority and the U.S. Court: Gender Equality*, 37 *LOY. L.A. L. REV.* 271, 335–37 & nn.227–28 (2003). For further discussion of constitutional cases referring to transnational law, see, for example, Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 *WM. & MARY L. REV.* (forthcoming 2005); Sarah H. Cleveland, *Our International Constitution*, 31 *YALE J. INT'L L.* (forthcoming 2005) (on file with the Harvard Law School library); and David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. REV.* 539, 545–49, 552–56 (2001).

<sup>8</sup> 123 S. Ct. 2472, 2481, 2483 (2003).

<sup>9</sup> 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring).

<sup>10</sup> See Jackson, *supra* note 7, at 307 n.127 (also noting references to the U.N. Charter).

“persuasive” or “relational” authority.<sup>11</sup> The U.S. Supreme Court has gone from being one of the only to one of many constitutional courts in the world, a change producing both opportunities for common learning and occasions for anxiety. As Chief Justice Rehnquist extrajudicially commented, “now that constitutional law is solidly grounded in so many countries . . . it’s time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process.”<sup>12</sup> The question is not whether but how constitutional adjudication responds to this growing corpus.

#### A. *The Models*

At least three models might broadly describe the relationships between domestic constitutions and law from transnational sources. Justice Scalia accused the Court in *Roper* of assuming the desirability of convergence with other nations’ laws — the Convergence Model. He proposed instead an approach that relishes resistance by national constitutions to outside influence — the Resistance Model. Neither of these models, standing alone, is a good fit with our constitutional practices. Rather, the Constitution can best be viewed as a site of engagement with the transnational, informed but not controlled by consideration of other nations’ legal norms and the questions they put to interpreters of our specifically national constitution — the Engagement Model.<sup>13</sup>

The Convergence Model sees national constitutions as sites for implementation of international law or for development of transnational norms. Reflected in scholarship exploring “generic” constitutional law or interpretive approaches,<sup>14</sup> this model also may be seen in post—

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<sup>11</sup> See *id.* at 290–306, 315–18; Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 194–204 (2003).

<sup>12</sup> William H. Rehnquist, *Foreword* to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, at vii, viii (Vicki C. Jackson & Mark Tushnet eds., 2002) (reprinting remarks made in 1999); see also Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT’L JUD. OBSERVER, June 1997, at 2, 2 (predicting that Justices will look to foreign constitutional courts, for example from Germany, Italy, and South Africa, because “[t]hey have struggled with the same basic constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies” and all “have something to teach us about the civilizing function of constitutional law”).

<sup>13</sup> This brief presentation is necessarily oversimplified. For example, “convergence,” a decentralized process of norm development by national judges leading to common methods of reasoning and similar results, is grouped with “implementation,” in which constitutions and domestic courts are seen as sites for enforcing a uniform body of international human rights law. Moreover, models may overlap, and these three may not capture some phenomena, including national constitutions’ roles in developing choice of law principles in multinational disputes.

<sup>14</sup> See, e.g., DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). For a discussion of David Beatty’s argument, see Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. (forthcoming 2005).

World War II constitutions that explicitly incorporate international law as a controlling legal norm.<sup>15</sup> The South African Constitution explicitly requires that international law be taken into account when interpreting constitutional rights and specifically authorizes its courts to consider foreign law,<sup>16</sup> manifesting a vision of the constitution as a site for possible convergence with transnational constitutional, or international, norms. Even without so explicit a mandate, courts in a number of other countries look to foreign or international law for guidance in resolving domestic constitutional questions.<sup>17</sup>

Constitutions can also provide a basis for resistance to, or differentiation from, foreign law or practice.<sup>18</sup> Outside the United States, domestic constitutions' provisions for national ownership or control of resources have functioned as a basis for resisting globalization's economic pressures.<sup>19</sup> Within this country, federalism has been advanced

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<sup>15</sup> See, e.g., GRUNDGESETZ [GG] [Basic Law] art. 25 (F.R.G.), translated in PRESS & INFO. OFFICE (F.R.G.), BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & David P. Curry trans., 1998) (making "general rules of international law . . . an integral part of federal law," taking "precedence over the laws and directly creat[ing] rights and duties" for inhabitants of Germany); see also Kay Hailbronner, *Fifty Years of the Basic Law — Migration, Citizenship, and Asylum*, 53 SMU L. REV. 519, 521–22 (2000). For a description of national constitutions, including Argentina's and Austria's, that give specific human rights treaties constitutional stature, see Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1891–95 (2003). Cf. GRONDWET NED. [Constitution] art. 91.3 (Neth.) (authorizing treaties inconsistent with the constitution if approved by a two-thirds vote of both chambers of the States General).

<sup>16</sup> S. AFR. CONST. 1996 art. 39(1).

<sup>17</sup> See Jackson, *supra* note 7, at 292–302 & n.108 (discussing cases in India, Botswana, and Canada referring to international or foreign law in interpreting constitutional rights); see also *id.* at 310 n.136 (noting the Bangalore Principles, which encourage interpretation, including of constitutional law, in Commonwealth countries in light of international human rights law). Canada's Charter of Rights and Freedoms permits limitations of rights only if "demonstrably justified in a free and democratic society," CANADIAN CHARTER OF RIGHTS AND FREEDOMS, § 1, Part I of the CONSTITUTION ACT, 1982 (being sched. B to the Canada Act 1982, c. 11 (U.K.)), and might be viewed as implicit authority to consider comparative constitutional practices. For other articulations, by Canadian justices, of Canada's approach as implementing international human rights obligations, see Knop, *supra* note 2, at 514, 518. Even the United States has a default position to interpret domestic statutes in accord with international law. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>18</sup> See, e.g., Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004) (discussing *Lochner* as a significant negative precedent in Canadian constitutional development); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 313–20 (2003) (arguing that "aversive" foreign models have influenced U.S. constitutional law).

<sup>19</sup> For example, in 1996 the Colombian Constitutional Court held unconstitutional two bilateral investment treaties. See David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, in REGULATION 501, 524–26 (Colin Scott ed., 2003) (also noting 1999 constitutional amendment in partial response); see also *La Bugal-B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, 421 S.C.R.A. 148 (Jan. 27, 2004) (Phil.), available at <http://www.supremecourt.gov.ph> (invalidating a statute authorizing certain service contracts with foreign companies under a constitutional provision prohibiting foreign control of mining production), *rev'd on motion for reconsideration*, G.R. No. 127882 (S.C. Dec. 1, 2004)

as an affirmative reason to resist constitutionalizing human rights norms derived from transnational sources.<sup>20</sup> Justice Scalia's position is more aggressive, sometimes evincing a kind of willful indifference to foreign law in constitutional interpretation<sup>21</sup> and insisting that "comparative analysis [is] inappropriate to the task of interpreting a constitution."<sup>22</sup>

Third, constitutional law can be understood as a site of engagement between domestic law and international or foreign legal sources and practices. On this view, the constitution's interpreters do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience. Transnational sources are seen as interlocutors, offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflection of others'.<sup>23</sup> The foundational case on judicial review is illustrative: In *Marbury v. Madison*,<sup>24</sup> the written character of the Constitution was used to differentiate the U.S. government from Britain's and justify the legitimacy of judicial review, while the Court also drew affirmatively on British traditions of suing the King to define the "essence of civil liberty."<sup>25</sup> Examples can also be seen in other countries' law, including Canadian cases that carefully consider U.S. First Amendment

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(Phil.), available at <http://www.supremecourt.gov.ph>. Tensions between transnational economic regimes and domestic constitutions are evident elsewhere, in related but distinct ways. See, e.g., Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1941-49 (2004) (describing the Hungarian Constitutional Court's rejection of changes in welfare laws required by the International Monetary Fund); J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 54, 63 (Kalypso Nicolaidis & Robert Howse eds., 2001) (describing how national courts "stand at the gate and defend national constitutions against illicit encroachment from Brussels").

<sup>20</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1599-1605 (2004).

<sup>21</sup> See, e.g., *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people.")

<sup>22</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

<sup>23</sup> For helpful discussions of engagement through "dialogical" interpretation, see Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 835-38, 855-65 (1999); and Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 424-27, 437-39 (2003).

<sup>24</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>25</sup> See *id.* at 163, 176-78. Notwithstanding "genealogical" or "originalist" accounts, *Marbury's* invocation of British law — emphasizing the distinction between limited and unlimited government and the availability of judicial relief against the monarch — reads more as an illuminating contemporary comparison.

cases, sometimes to distinguish and sometimes to agree with their conclusions.<sup>26</sup>

It is this third model of comparison as engagement or interlocution that *Roper* illustrates. Both the majority and Justice O'Connor were willing to look to outside law and practice to interrogate their judgment of whether the punishment is constitutionally disproportionate in the United States, but only after considering more important factors, including state law and practice. For Justice Kennedy, foreign law, practice, and reasoning — though not “controlling”<sup>27</sup> — helped to confirm the Court’s judgment based on the weight of state practices and its view of the moral capacities of adolescents. Justice O'Connor resisted any categorical division of U.S. law from global currents: “[T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.”<sup>28</sup> Foreign law, however, did not affect her view that no domestic consensus against the juvenile death penalty yet existed, nor did it persuade her that the death penalty would be morally disproportionate for all seventeen-year-olds.<sup>29</sup> Each of these Justices preserved an Eighth Amendment methodology in which the law and practices of the states held first place in the analysis — not a stance conducive to a commitment to converge with international or transnational norms.<sup>30</sup>

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<sup>26</sup> Compare *R. v. Keegstra*, [1990] 3 S.C.R. 697, 743–44 (Can.) (concluding that even if hate speech statutes were unconstitutional in the United States, Canada’s statute is permissible partially in light of Canada’s commitment to multiculturalism), with *United Food & Commercial Workers Local 1518 v. KMart Can. Ltd.*, [1999] 2 S.C.R. 1083, 1118–21 (Can.) (agreeing with a distinction drawn in First Amendment law between leafleting and picketing). For a South African case dealing with quite divergent foreign authorities, see *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 685–703 (S. Afr.) (considering approaches of abolitionist and retentionist jurisdictions when deciding on the constitutionality of the death penalty in South Africa).

<sup>27</sup> *Roper*, 125 S. Ct. at 1198.

<sup>28</sup> *Id.* at 1215–16 (O’Connor, J., dissenting); see also *id.* at 1216 (“[A]n international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus.”).

<sup>29</sup> *Id.* at 1214. Her decision to vote to sustain the state law reflected her confidence in the capacity of “individualized sentencing” determinations of culpability. *Id.*

<sup>30</sup> But cf. Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153–56 (2005) (arguing that the Court used foreign jurisdictions to “expand[] the denominator” by which a consensus was determined). A simple mathematical model does not capture the Court’s process of coming to judgment. The Court first analyzed how the weight of state law compared to that in *Atkins v. Virginia*, 536 U.S. 304 (2002), how the weight of authority had changed since *Stanford v. Kentucky*, 492 U.S. 361 (1989), and the actual practices of states in imposing the death penalty on juvenile offenders. See *Roper*, 125 S. Ct. at 1192–94, app. A at 1200–02 (fifty state analysis). It then discussed the moral status of juveniles, noting the more limited capacity of adolescents to control their impulses and to resist bad influences, as well as the still formative phase of their personal development, to conclude that they are unlikely to be among the “worst offenders,” with “extreme culpability,” for whom the death penalty is proportionate. See *id.* at 1194–98. Further analysis of the fifty states’ laws on marriage, voting, and jury service ages, *id.* apps. B–D at 1202–05, supported treating eighteen as

### B. *In Praise of Engagement*

Engagement with foreign and international law, in a spirit of inquiry and openness to improved understandings,<sup>31</sup> is consistent with what David Strauss has described as the “common law” method of constitutional interpretation, constrained by the bounds of constitutional text and prior interpretive practices<sup>32</sup> and by a hesitation, more important in constitutional cases, to interfere with democratic decisionmaking. Engagement with transnational legal sources may helpfully interrogate understanding of our own Constitution in several ways, three of which I discuss here.<sup>33</sup>

First, to the extent constitutional systems perform similar functions, similar concerns may arise about the consequences of interpretive choices.<sup>34</sup> If more than one interpretation of the Constitution is plausible from domestic legal sources,<sup>35</sup> approaches taken in other countries may provide helpful empirical information in deciding what interpretation will work best here.<sup>36</sup> To be sure, there are difficult questions of comparability in drawing conclusions about the effects in

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the accepted age of legal maturity. Acknowledging that a rare juvenile might have the requisite maturity to be classified among the worst offenders, the Court found that individualized assessment posed too great a risk that the crime’s heinousness would wrongly overwhelm consideration of youth in mitigation. *Id.* at 1197. Only after discussing these factors did the Court address foreign and international law. Although the weight of foreign law may have prompted some to fresh thinking, the structure of the Court’s argument supports its description of the use of foreign law as confirmatory, rather than integral to its analysis.

<sup>31</sup> Cf. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263, 287–88 (1987) (linking openness to persuasive authority with the idea of law as inquiry).

<sup>32</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing that legitimate interpretation should not be seen as a search for a single authoritative source but as grounded in understandings that evolve, through rational decisions in the common law method, over time). The battle over foreign references is in part about interpretive theory, see, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005), a large topic that cannot be fully addressed in this space.

<sup>33</sup> For further discussion, see Jackson, *supra* note 7, at 320–24, 347–51.

<sup>34</sup> See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238–65 (1999).

<sup>35</sup> See also Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 140 (emphasizing the importance of a question being “open”). Textual and historical differences among constitutions may rule out certain approaches. A grand jury may not represent the “best” approach to preliminary criminal investigation, but it is required by constitutional text in certain federal cases.

<sup>36</sup> See *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting); see also, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125–26 & n.27 (1942) (noting that three other large wheat-exporting nations — Canada, Australia, and Argentina — were federal systems, and in each the national government controlled wheat regulation); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 440 (1964) (White, J., dissenting) (“No other civilized country has found such a rigid rule necessary . . . [and] the executive of no other government seems to require such insulation from international law adjudications in its courts . . .”).



the United States of a rule applied elsewhere.<sup>37</sup> For example, Justice Breyer's suggestion in *Printz v. United States*<sup>38</sup> that European federal experience supported the constitutionality of federal commandeering did not discuss significant differences between U.S. and German federalism that make direct comparisons far more complex.<sup>39</sup> Nonetheless, the experience of comparable countries offers potentially useful information.

Second, comparisons can shed light on the distinctive functioning of one's own system. Foreign constitutional courts sometimes consider U.S. case law but decline to follow it,<sup>40</sup> demonstrating that engagement with foreign law need not lead to its adoption. Our Court, no less than others, can draw such distinctions.<sup>41</sup> Considering the questions other systems pose may sharpen understandings of how we are different.<sup>42</sup> Canada, for example, upheld its hate speech statute using highly contextualized reasoning;<sup>43</sup> thoughtful comparison might consider whether a larger polity with more decentralization of criminal justice, like the United States, would benefit from more formalist doctrine to protect speech.<sup>44</sup>

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<sup>37</sup> On the limits of comparative functionalism, including the problem of "omitted variables," see Tushnet, *supra* note 34, at 1265–69.

<sup>38</sup> 521 U.S. 898, 976–77 (Breyer, J., dissenting).

<sup>39</sup> See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 269–70 (2001) (noting that the German legislature's upper house consists of members of the subnational governments); see also Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 819–20 (2004).

<sup>40</sup> See, e.g., *Lavigne v. Ont. Pub. Serv. Employees Union*, [1991] 2 S.C.R. 211, 256–58 (Can.) (opinion of Wilson, J.); *Amalgamated Soc'y of Eng'rs v. Adelaide S.S. Co.* (1920) 28 C.L.R. 129, 146–48 (Austl.).

<sup>41</sup> See, e.g., *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (noting that European constitutional courts may hear cases brought by legislators to challenge statutes, while holding that members of Congress lacked standing to challenge the Line Item Veto Act).

<sup>42</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94, 597–610, 613–14 (1952) (Frankfurter, J., concurring) (implicitly distinguishing the Constitution, with its insistence on separation of powers and lawmaking by the legislature, from fascist dictatorships). As Kim Scheppelle notes, "Nazi Germany and the Soviet Union became irresistible points of reference for the Supreme Court . . . in many doctrinal contexts." Scheppelle, *supra* note 18, at 313; see also, e.g., RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 177–247 (1999).

<sup>43</sup> See Kent Greenawalt, *Free Speech in the United States and Canada*, LAW & CONTEMP. PROBS., Winter 1992, at 5, 15–25 (contrasting Canada's "nuanced, contextualized" proportionality analysis in free speech cases with more categorical U.S. rules, such as those forbidding content-based regulation).

<sup>44</sup> For an account of why formal, categorical rules may result in more correct decisions once error risks of more nuanced standards implemented by decentralized decisionmakers are taken into account, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 538–44 (1988). See also Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 259 (2003) (suggesting that decentralization of prosecution makes hate speech regulation more dangerous in the United States than in Canada).

Third, foreign or international legal sources may illuminate “supra-positive” dimensions of constitutional rights,<sup>45</sup> as when constitutional text or doctrine requires contemporary judgments about a quality of action or freedom — the “reasonableness” of a search, the “cruelty” of a punishment. Many modern constitutions include individual rights that protect similar values at an abstract level, often inspired by human rights texts.<sup>46</sup> Such rights, although embedded in particular national constitutions, have “universal” aspects, reflecting “the inescapable ubiquity of human beings as a central concern” for any legal system and widespread (though not universal) aspirations for law to constrain government treatment of individuals.<sup>47</sup>

### C. *Ethical Engagements, Transparent Judgments*

Looking to foreign law may also enhance judicial decisionmaking by expanding opportunities for ethical engagement with the views of those having equivalent responsibility and aspiring to similar impartiality.<sup>48</sup> U.S. judges are ethically required to avoid discussion of pending cases with outsiders,<sup>49</sup> an isolation that is particularly weighty for judges on a court of last resort. Such ethical rules reflect aspirations for decisions based on judges’ impartial, reasoned views of the best understanding of the law. Achieving this understanding may require a

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<sup>45</sup> Neuman, *supra* note 15, at 1866–72 (describing how constitutional rights have “suprapositive,” “consensual,” and “institutional” aspects). Controversy about “normative” uses of foreign law may reflect a more general critique of judicial normativity, but considerations of fairness, operating within other interpretive constraints, are part of common law constitutional development. See Strauss, *supra* note 32, at 900–02.

<sup>46</sup> Unlike some post–World War II constitutions, ours does not explicitly “align[]” with modern human rights texts, see Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 86 (2004), and the depth of existing U.S. case law may also decrease the relative benefit of resort to transnational law, see Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 523–24 (2000). Yet given U.S. influences on human rights texts and on foreign constitutional law, there are overlapping understandings of “concepts like liberty, equality, and privacy” that provide some foundation for comparative illumination. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 54 (2004).

<sup>47</sup> Jackson, *supra* note 39, at 272 n.207; see also Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 691–94 (1976) (arguing that some constitutional provisions reflect “universal” values capable of being illuminated by the considered views of other courts); cf. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (noting limitations on “the authority of any human government, especially of any free government existing under a written constitution, to interfere” with individual autonomy).

<sup>48</sup> See Neuman, *supra* note 46, at 88 (noting that “an argument that has already proven persuasive to an impartial body responsible for striking a balance between the claims of order and liberty” may be more persuasive to courts than “self-serving advocacy” or “normative speculation”).

<sup>49</sup> See, e.g., ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) & cmt. (2003) (prohibiting ex parte communications, including with law teachers or other experts, absent notice to parties and opportunity to comment).

judge to distance herself from her own first reactions, testing them for prejudice and subjecting them to reasoned interrogation.<sup>50</sup> Looking at foreign constitutional court decisions may be a partial intellectual substitute for conversation, a testing from outside that may be particularly helpful on the most controversial and apparently value-laden choices. Reflective comparison, then, may offer the hope of more impartiality, rather than less, as judges use foreign decisions as a way of distancing themselves from and checking their own first reactions.<sup>51</sup>

Comparison today is inevitable. It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one's own.<sup>52</sup> These impressions, which may influence views of U.S. constitutionalism, could be incorrect or subject to interpretive challenge. Overt references to what judges believe about other countries will often provide helpful transparency.<sup>53</sup> A recent sequence of decisions provides an example. Chief Justice Burger's concurring opinion in *Bowers v. Hardwick*<sup>54</sup> implied

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<sup>50</sup> Reading the parties' briefs and the lower courts' opinions and discussing issues with one's law clerks are important parts of this process. But they are not equivalent to engaging as equals with others who bear a similar weight of decision. Bound as they are by the Court's past decisions, moreover, state supreme courts may be more constrained in exploring hard new constitutional questions than are the constitutional courts of foreign countries. See Gil Carlos Rodriguez Iglesias, *The Judge Confronts Himself as Judge*, in JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 275, 277 (Robert Badinter & Stephen Breyer eds., 2004) ("The essential question is . . . the degree to which a judge has freedom to choose. In this respect, the position of a judge within a hierarchy, where parties can obtain supervision through appeals, differs from that of a judge on a supreme court." (emphasis omitted)). And opportunities for interchange within the Court are limited by, inter alia, the small number of Justices.

<sup>51</sup> Reflective comparisons can "challenge assumptions that existing ways of proceeding are 'necessary' or 'natural.'" Jackson, *supra* note 7, at 347; cf. Jennifer Nedelsky, Communities of Judgment and Human Rights 25 (Feb. 2, 2004) (unpublished manuscript, on file with the Harvard Law School Library) (noting that communities of judging help "mitigate the effect of [a judge's] own idiosyncrasies").

<sup>52</sup> See Michael Kirby, Justice, High Court of Austl., Grotius Lecture at the Annual Meeting of the American Society of International Law: International Law — The Impact on National Constitutions 40 (Mar. 29, 2005) (transcript available at <http://www.asil.org/pdfs/kirbygrotius050401.pdf>) (noting that "the real issue is not whether [international and foreign] sources will inform" decisions, as is inevitable, but whether "judge[s] should disclose — and be ready to debate" their views).

<sup>53</sup> Prudence may counsel restraint in discussing foreign materials even if one considers them. See Judith Resnik, *Law's Migration: From Shelley v. Kraemer to CEDAW and Kyoto — American Exceptionalism, Silent Dialogue, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. (forthcoming 2005) (on file with the Harvard Law School library) (noting silent dialogue with the transnational in the face of political backlash); see also Jackson, *supra* note 7, at 324 & n.193; cf. Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 292–94 (2003) (arguing that use of foreign law should be avoided as it detracts from accessibility and hampers development of constitutional rule of law culture). However, absent special circumstances, candor is to be preferred because giving reasons, thereby subjecting analysis to rational scrutiny, is one of the most important constraints on judging. See, e.g., David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38, 750 (1987).

<sup>54</sup> 478 U.S. 186 (1986).

that homosexual sodomy was universally condemned in western civilization.<sup>55</sup> *Lawrence* responded by noting that, prior to *Bowers*, the European Court of Human Rights had held that such a prohibition violated the European Convention.<sup>56</sup> This sequence suggests that comparisons with what judges think they know about other systems are inevitable, and illustrates that overt references can be a form of accountability, permitting correction of errors.

#### D. *Rejecting Resistance*

The Resistance Model, by contrast, provides less room for revealing or correcting errors. Although its proponents raise important concerns about democratic legitimacy and judicial discretion, these involve larger questions about constitutional interpretation and should not prevent cautious use of comparative material.

Empirical or functional uses of foreign law, while raising difficult issues of comparability, do not pose serious questions of legitimacy. Although Justice Scalia objected to the *Printz* dissent's references to foreign federalisms, three years earlier Justice Scalia invoked empirical information about the functioning of other democracies in much the same way — as a functional argument to support the constitutionality of a challenged law.<sup>57</sup> If comparative legal experience is relevant to support the constitutionality of a challenged law, it cannot logically be excluded from consideration in cases going the other way<sup>58</sup> — but reasons related to a judge's role in a constitutional democracy might demand greater certainty from all sources before declaring a law unconstitutional.

Some commentary argues that reference to foreign law for substantive insight on contested constitutional issues is inconsistent with the democratically “self-given” character of our Constitution.<sup>59</sup> This

<sup>55</sup> See *id.* at 196–97 (Burger, C.J., concurring).

<sup>56</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

<sup>57</sup> See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (noting practices of other democracies as support for the constitutionality of a state law banning anonymous handbilling); *cf.* *Schiro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004) (Scalia, J.) (relying partly on the “mixed reception” of trial by jury in other countries to decide that habeas relief was not available for past breach of a “new rule”).

<sup>58</sup> *But cf.* Mary Ann Glendon, Op-Ed., *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14 (distinguishing references to foreign law in decisions upholding statutes from such references in decisions invalidating a law).

<sup>59</sup> See, e.g., Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, 48; see also Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2006 (2004) (“[T]he U.S. Constitution is supposed to reflect our own fundamental legal and political commitments — not a set of commitments that all civilized nations must share. It is the self-giveness of the Constitution, not its universality, that gives it authority as law.”); *cf.* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2699–2700

argument misconceives the source of the Constitution's legitimacy and the interpretive traditions in which it is grounded. The Constitution is ours because many generations have made it so, through a complex process that begins with the adoption of the original text and amendments but entails layers of contest and interpretation — including prior interactions with ideas and practices shared by transnational communities — that shape its meaning over time.<sup>60</sup> The Constitution did not come to protect equality for women and racial minorities only because it was “self-given” in 1789, or 1868, or 1920, but because of ongoing contests over its meaning.<sup>61</sup>

One important strand of our national constitutional identity is the belief that the United States should be a leader in protecting those individual rights with roots in the U.S. Constitution. *Miranda v. Arizona*<sup>62</sup> clearly articulated this view. After discussing rules for interrogating suspects in England, Scotland, India, and Ceylon, the Court wrote:

Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. *Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described.* We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.<sup>63</sup>

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(2003) (suggesting that U.S. constitutional culture is more concerned with “will” and “legitimacy” than “reason” or “justice”).

<sup>60</sup> See Jackson, *supra* note 7, at 337 nn.231–33 (describing the transnational character of the women's movement that led to adoption of the Nineteenth Amendment); see also *Roper*, 125 S. Ct. at 1215–16 (O'Connor, J., dissenting). The constitutional structure, including Article V's supermajority provisions for amendments, was not the product of a process meeting contemporary standards of equality and democracy. See Jackson, *supra* note 7, at 330–41. It is thus not surprising that racial minorities and women have drawn from transnational as well as domestic resources in their constitutional struggles for equality. See Resnik, *supra* note 53 (manuscript at 15, 19) (arguing that both the civil rights and women's movements should be understood as “part of a global effort” and that there is no “stem[ming] the currents of thought producing rights that . . . do not respect lines that people draw across land”).

<sup>61</sup> See Resnik, *supra* note 53; see also MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* 79–114 (2000); John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 709–11, 731–42, 746–50 (2004). For a discussion of how the language of “human dignity” entered U.S. constitutional discourse as part of a transnational legal reaction to Nazism and Stalinism, see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934–39 (2003).

<sup>62</sup> 384 U.S. 436 (1966).

<sup>63</sup> *Id.* at 489–90 (emphasis added); cf. *New York v. Quarles*, 467 U.S. 649, 672–74 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (discussing *Miranda*'s use of foreign law). Notwithstanding the exceptionalism in the above-quoted statement, it is one

When a judge finds foreign practice or reasoning helpful on a constitutional issue and refers to it, she acts as a U.S. judge, trying to give the best reading to the U.S. Constitution.<sup>64</sup> To be sure, as Gerald Neuman has elegantly noted, even rights with apparently “suprapositive” meaning may also have specifically national aspects, in their mechanisms for enforcement and in their particular texts.<sup>65</sup> Learning from decisions elsewhere, then, is always limited by the need to be mindful of institutional and other contextual differences. But unmitigated resistance to considering foreign law in defining those constitutional protections intended to protect aspects of human freedom and dignity that transcend national boundaries cannot be justified in light of our Constitution’s complex history and universalist components.

Critics also argue that resort to foreign or international law, especially to illuminate substantive aspects of rights, illegitimately expands judicial discretion.<sup>66</sup> But constitutional interpretation in our common law tradition already involves considerations of multiple interpretive sources, including text, intent, precedent, history, structure, values, and pragmatic consequences.<sup>67</sup> When domestic interpretive sources align, foreign or international law will not move U.S. judges toward a different result. When internal sources are more ambiguous or contested, judges’ disciplined reflection on foreign law does not so much expand

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that interrogates understandings of U.S. law by referring to the practices of foreign regimes, a posture that stands in some contrast to Rubinfeld’s analysis, *supra* note 59, at 2006. See also *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) (“We boast of the freedom enjoyed by our people above all other peoples.”).

<sup>64</sup> See Tushnet, *supra* note 44, at 257–67. The distinction between binding and persuasive authority bears on objections from democratic legitimacy: whatever its persuasive value, foreign law is not binding and does not have the same authority as the Court’s own precedents.

<sup>65</sup> Neuman, *supra* note 15, at 1876–77. The exclusionary rule, for example, might be viewed as such a particular remedy for violations of right. *But cf.* *California v. Minjares*, 443 U.S. 916, 919 (1979) (Rehnquist, J., dissenting from denial of stay) (urging reconsideration of the exclusionary rule and noting that no other country “mechanically” excludes reliable evidence).

<sup>66</sup> See, e.g., Joan L. Larson, *Importing Constitutional Norms from a “Wider Civilization”*: *Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1303–26 (2004) (finding no justification for the use of foreign law in “moral fact-finding,” and arguing that such use expands counter-majoritarian judicial discretion); see also *Lawrence v. Texas*, 123 S. Ct. 2472, 2495 (2003) (Scalia, J., dissenting) (condemning the Court for “impos[ing] foreign moods, fads, or fashions” (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari))). The most “morally” controversial cases often are genuinely “hard.” It is not surprising that judges read particularly widely on such issues; indeed, it may be especially helpful. See Jackson, *supra* note 7, at 320–21. In such cases, however, the tension between prudential silence and reasoned discussion may also be especially acute. See *supra* note 53.

<sup>67</sup> See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Strauss, *supra* note 32; *cf.* *Hurtado v. California*, 110 U.S. 516, 531 (1884) (suggesting that interpretation of the Due Process Clause ought not “exclude the best ideas of all systems and of every age”). Interpretive possibilities are limited by the judge’s need to test insights from foreign law within the context of U.S. law and its most authoritative sources.

discretion as provide a perspective on the best resolution within what is plausible in U.S. constitutionalism.<sup>68</sup>

### E. Convergence and “Our Constitution”

At the same time, an important source of the Constitution’s legitimacy, and hence of judicial review, is our experience of it as ours. To retain legitimacy, judicial decisions interpreting the Constitution must be, and be seen to be, grounded in U.S. interpretive traditions. Foreign law cannot, by itself, represent what is “deeply rooted in this Nation’s history and tradition,”<sup>69</sup> though it may pose questions or provide information that help judges determine what is. Absent a clear constitutional commitment to convergence (as may exist elsewhere), it would be hard to justify proceeding as if the Constitution were simply a site for implementing transnational norms. The presumption that statutory law be interpreted in accord with international law,<sup>70</sup> for example, has considerable support: the Constitution itself was designed in part to enable better compliance with our international obligations. But as a tool for *constitutional* interpretation, an across-the-board presumption for convergence with nonbinding foreign and international law is inconsistent with the range of constitutional purposes and with existing interpretive practices.<sup>71</sup>

Constitutions function both internally and externally. They empower and constrain governments; they facilitate democratic self-governance; they express national values and self-understandings; and

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<sup>68</sup> See Jackson, *supra* note 7, at 342–43; *supra* pp. 118–19 (concerning the capacity of comparativism to check uncritical instincts). A strategy to discredit references to foreign law is to associate their use with infamous or divisive outcomes, as in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See, e.g., Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT’L L. 57, 69 & n.94 (2004). What Chief Justice Taney’s opinion for the Court in *Dred Scott* illustrates is, among other things, the danger of rigid originalism, not of reliance on foreign law. See *Dred Scott*, 60 U.S. (19 How.) at 407–12, 424, 426 (arguing that the original “eyes and thoughts” of those who wrote the Declaration of Independence and the Constitution, as in other “civilized” countries at the time of the Framing, excluded those “of African descent” from the polity and dismissing the idea that “any change in public opinion . . . in the civilized nations of Europe or in this country” should lead to a changed understanding of the Constitution). The two dissenting opinions made use of contemporary foreign authority to contest Chief Justice Taney’s conclusions. See, e.g., *id.* at 534–35 (McLean, J., dissenting) (“[N]o nation in Europe . . . considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations.”); *id.* at 591–92 (Curtis, J., dissenting) (discussing different foreign laws on slavery, including British, French, and Prussian law).

<sup>69</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), *quoted in Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting). Unlike Justice Scalia’s later use of the phrase, Justice Powell’s reference in *Moore* coexisted with broader reference points, including “western civilization.” See *id.* at 503 nn.10–12.

<sup>70</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>71</sup> Convergence, even with respect to international law, may be impracticable in any event. See Knop, *supra* note 2, at 507, 525–31 (arguing that international law is “multivocal” and will be interpreted differently in different countries).

they embody historically specific compromises and agreements. They also establish the identity and status of the nation in a community of nations. Benefits of interpreting domestic law in accord with our treaties and with customary international law include promoting respect for international law and influencing the content of customary norms of international law.<sup>72</sup> And when the U.S. Constitution commits to a particular norm — like the ban on cruel and unusual punishment — our understanding of that domestic norm may benefit from considering transnational materials.<sup>73</sup> But some constitutional purposes, including the implementation of specific historic compromises, are incompatible with an across-the-board Convergence Model.

The Engagement Model at present holds the most promise for a usable approach to transnational law in U.S. constitutional interpretation. It allows for both convergences and divergences, but unlike other models does so without a thumb on the scale in either direction, permitting more differentiated influences of foreign and international law in an essentially interlocutory framework.<sup>74</sup> It focuses attention where it belongs, on the meaning of the U.S. Constitution, but does not purport to require intellectual blindness to the transnational legal world in which our Constitution functions.<sup>75</sup>

## II. ENGAGEMENT, STANDARDS OF INQUIRY, AND *ROPER*

Seeing constitutions as sites of engagement with foreign and international law contemplates the development of standards of inquiry. Although a thorough analysis is beyond the scope of this Comment,

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<sup>72</sup> See Jackson, *supra* note 7, at 313–14. At least some of these benefits can accrue from considering foreign and nonbinding international law in the Engagement Model.

<sup>73</sup> See Koh, *supra* note 46, at 45–46 (noting uses of international law in constitutional interpretation in situations involving “parallel rules” or “community standards”). The term “unusual” in the Eighth Amendment might provide textual support for a “convergence” approach — but the Court in *Roper* did not so argue. More generally, the U.S. debate has been “less about whether courts *must* consider nonbinding . . . transnational authority, than whether it is *permissible* to do so.” Jackson, *supra* note 7, at 324–25.

<sup>74</sup> Query whether *Lawrence* exemplifies a convergence or engagement approach. Cf. Anderson, *supra* note 59, at 41 (arguing that constitutional comparativism, though defended “merely as a means of rationally acquiring information,” is “something more passionately normative”); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 73–74 (2004) (criticizing *Lawrence* for its failure to note distinctions between the European legal context and ours). *Lawrence*’s main use of foreign law was to challenge prior assumptions about European law, but the Court also wrote in a more normative vein. See *Lawrence*, 123 S. Ct. at 2483. Were *Lawrence* read to suggest that foreign decisions could establish a presumption against the constitutionality of U.S. laws, it would move toward convergence; I do not read *Lawrence* as establishing such a standard, but rather as finding European law helpful in confirming the Court’s analysis of the issue in U.S. law. See Neuman, *supra* note 46, at 90.

<sup>75</sup> Cf. Neuman, *supra* note 46, at 87 (noting that in the modern economy “the effective enjoyment of liberties often depends on the overlapping laws of several countries”).



what follows are some preliminary thoughts on those standards and their application in *Roper*.

First, the legitimacy of looking to foreign experience will vary with the issue, depending on the specificity and history of our constitutional text, the degree to which the issue is genuinely unsettled, and the strength of other interpretive sources. Whatever the foreign practice, the U.S. Constitution requires a grand jury for federal prosecutions; by contrast, the text of the Eighth Amendment invites comparison with other countries, as its oldest case law suggests, and some constitutional terms, like “treaty” or “war,” may require consideration of international practice.

Second, the persuasive value of a foreign source will depend on a combination of its reasoning, the comparability of contexts, and its institutional origin. Whether the source is a judicial decision on a constitutional issue, an international norm, or an ordinary statute or government practice might matter.<sup>76</sup> Some international norms are more aspirational than enforceable in character, yet the Court must render enforceable judgments.<sup>77</sup> National courts make decisions for an ongoing government of which they are a part; their decisions enforcing constitutional limits while sustaining an effective national government may be regarded by the Court as more serious or weighty.<sup>78</sup> And practices of countries with commitments to human rights, democracy, and the rule of law roughly comparable to ours are likely to have more positive persuasive value as to the empirical consequences of doctrinal

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<sup>76</sup> That a democratic foreign country has a particular law may suggest its empirical relationship to a well-functioning democracy but does not directly speak to whether a court, interpreting its specific national constitution, should sustain or invalidate a similar law. *Cf. Furman v. Georgia*, 408 U.S. 238, 437–38, 461–65 (1972) (Powell, J., dissenting) (arguing that the foreign practice of legislative abolition of the death penalty did not support judicial abolition under the Constitution).

<sup>77</sup> See also *Harding*, *supra* note 23, at 439–52. International and domestic sources, however, may overlap. For example, when countries implement international human rights covenants through their constitutions, understanding the constitution requires knowledge of international law. Moreover, some international law is binding, though questions can arise about its internal effects. See, e.g., *Medellín v. Dretke*, 125 S. Ct. 2088 (2005). Treaties ratified by the Senate may bear on constitutional issues, by indicating the views of the political branches or by extending legislative authority. See *Missouri v. Holland*, 252 U.S. 416 (1920); see also *Cleveland*, *supra* note 7 (manuscript at 58–62) (discussing the relevance to constitutional interpretation of acceptance or rejection by political branches). Sarah Cleveland also suggests that using foreign law, as distinct from international law, in constitutional interpretation poses specific challenges, including “judicial misinterpretation of a culturally contingent foreign practice.” *Id.* (manuscript at 7 n.49).

<sup>78</sup> *Cf. Charles Fried, Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 823 (2000) (noting that “because the judge exercises power, because her decision directly [a]ffects lives, she will have thought differently and perhaps more deeply, more responsibly” than writers of scholarly articles). *But cf. id.* at 817–19 (opposing Justice Breyer’s reference to foreign law in *Printz* as a novel expansion of the interpretive canon).

rules, the legitimate justifications for government action, or the implications of basic constitutional commitments.<sup>79</sup>

Determining comparability, however, is a serious challenge, which cautions a slow and incremental approach to considering foreign law. U.S.-trained lawyers and judges may lack the expertise to evaluate foreign legal materials appropriately.<sup>80</sup> Constitutional decisions, even on issues having “suprapositive” aspects, are always the product of particular institutional arrangements for judicial review in a particular polity and may have features attributable primarily to particularities of constitutional text, history, or past precedents. Understanding what is comparable often requires knowledge well beyond the immediate question, especially on issues such as federalism, which entails highly interdependent and historically contingent structures.<sup>81</sup>

Third, legitimate legal argument requires fair use of sources, including respect for the context of a decision and appropriate recognition of divisions of opinion.<sup>82</sup> There is a difference, moreover, between trying to identify world practice in deciding whether a punishment is “cruel and unusual,” which may call for a comprehensive survey, and trying to determine whether a government act is “rational” or “reasonable,” when the practices of a small number of roughly comparable countries may be helpful. Sometimes even a single opinion in its formulation of an issue may be helpful to a judge. What is fair treatment will depend on what use is being made of foreign experience.<sup>83</sup>

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<sup>79</sup> See, e.g., Koh, *supra* note 46, at 56 (urging consideration of “the practices of other mature democracies — not those that lag behind” in defining the Eighth Amendment’s evolving standard of decency); see also Strauss, *supra* note 32, at 923–24 (suggesting that mature democracies, even without written constitutions, are more comparable to the United States than newer ones).

<sup>80</sup> See Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 592–94 (1999). Legal vocabulary may seem familiar but have different conceptual connotations; reading decisions in translation leaves one dependent on the language and legal skills of the translator. David Strauss suggests that the benefits “from drawing on the accumulated wisdom of many societies would be outweighed by the unmanageability of the task.” David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1738 (2003). This conclusion is overdrawn: not all appropriate uses of foreign law will involve a comprehensive survey, and there is a developing infrastructure of scholarship on foreign and international law for judicial consideration. But the undoubted difficulties in getting foreign law right warrant caution. See also Young, *supra* note 30, at 165–67.

<sup>81</sup> See Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT’L J. CONST. L. 91 (2004).

<sup>82</sup> See, e.g., *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, 753–57 (Can.) (analyzing majority and dissenting opinions in U.S. religious freedom cases in deciding the constitutionality of Ontario’s Sunday closing law). On the need for fair reference, see Jackson, *supra* note 7, at 285–86; and McCrudden, *supra* note 46, at 507–08. Departures from requirements of accurate and fair use are likely to be tempered by the opportunities for critique, public and private, afforded by a multimember court.

<sup>83</sup> Jeremy Waldron’s justification for one use of foreign and international law — as “consensus” support for a normative proposition — resonates with David Strauss’s account of “common

Judged by these criteria, the *Roper* Court made limited but generally appropriate use of foreign and international materials in deciding the Eighth Amendment issue.<sup>84</sup> The language of cruelty invites a moral judgment and that of unusualness a more quantitative judgment, and the Court invoked foreign law on both.<sup>85</sup> Describing the “stark reality” that the United States was now virtually alone in formally approving the death penalty for juveniles,<sup>86</sup> the Court discussed several sources. It was careful to note the United States’s lack of agreement to the international covenants cited to show other nations’ legal positions and gave special weight to British abolition, in light of the British roots of the Eighth Amendment ban.<sup>87</sup>

Cases like *Roper*, with so strong a consensus in international and foreign law and practice prohibiting the juvenile death penalty, are likely to be rare.<sup>88</sup> Acknowledging that our country stands virtually alone in permitting a punishment prohibited by other national governments does not “subject” us to “foreign” law but may prompt deeper reflection on whether current interpretations live up to our own constitutional commitments.

Concerns have been raised that nonselective consideration of transnational law on issues other than the death penalty threatens

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law constitutional interpretation” and undermines to some extent the distinction between “nose counting” and “persuasive authority,” see Young, *supra* note 30, at 151–56, suggesting that a substantial consensus on a shared issue may reflect normatively persuasive iterations of reasoning and judgment. See Waldron, *supra* note 35, at 136, 138.

<sup>84</sup> The Court’s opinion gave principal weight to state laws and practices and its evaluation of the moral blameworthiness of adolescents. Especially given the change in state practice since the early 1980s, see Joan F. Hartman, “Unusual” Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 655 n.4 (1983) (reporting that only four of thirty-six death penalty states prohibited juvenile executions in 1983), and continued movement since *Stanford*, the Court’s account of the weight accorded these two factors is credible. See also *supra* note 30.

<sup>85</sup> See *Roper*, 125 S. Ct. at 1198–1200 (noting the reasons relied on, including “the instability and emotional imbalance of young people,” as well as the number of jurisdictions banning the juvenile death penalty).

<sup>86</sup> *Id.* at 1198; see also *id.* at 1199 (discussing the rarity, since 1990, of other countries executing juveniles).

<sup>87</sup> See *id.* at 1194, 1199–1200 (noting that the United States did not ratify the United Nations Convention on the Rights of the Child and entered a reservation to the International Covenant on Civil and Political Rights on the execution of juveniles). To give binding force to a convention the United States had not ratified would starkly pose problems of accountability and institutional competence. See Cleveland, *supra* note 7 (manuscript at 58–59). I do not understand the Court to have done so, but to have noted them, and practice thereunder, primarily to show other countries’ positions and for their “normative and functional insights.” Neuman, *supra* note 46, at 88.

<sup>88</sup> If there are competing lines of transnational law or practice (and depending on the purpose for which foreign law is being considered), greater attention to comparability questions would be needed. Cf. 151 CONG. REC. S10,172 (daily ed. Sept. 19, 2005) (quoting Chief Justice Roberts’s testimony at his confirmation hearings that “looking at foreign law for support is like looking out over a crowd and picking out your friends”).

foundational aspects of U.S. constitutional law.<sup>89</sup> Some other constitutional democracies have quite different approaches on abortion, hate speech, criminal procedure, and public support for religion; transnational legal sources are not a one-way ratchet along existing axes of liberal-conservative issues in the United States. But this is no reason to avoid engagement with foreign law, which requires issue-by-issue analysis and does not necessarily mean adoption, but thoughtful, well-informed consideration. Within the bounds of *stare decisis*, humility about prevailing views is not necessarily a bad thing.<sup>90</sup> The possibility of inducing such humility is a further reason to think of domestic constitutional law as being in an interlocutory relationship with transnational legal sources, open to exchange of ideas, agreement, and disagreement. Cautious comparativism within this framework is consistent with past interpretive practices; it is not a one-way ticket to a particular constitutional destination, but a tool for better reflection on what our Constitution means for us.

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<sup>89</sup> See, e.g., *Roper*, 125 S. Ct. at 1226–28 (Scalia, J., dissenting); see also Anderson, *supra* note 59, at 44–45 (arguing that to the extent constitutional comparativism is most compatible with pragmatic interpretation, it may diminish current protections of civil liberties).

<sup>90</sup> Cf. *Rochin v. California*, 342 U.S. 165, 171 (1952) (achieving “sufficient objectivity . . . demands of judges . . . self-discipline and self-criticism, incertitude that one’s own views are incontestable and alert tolerance toward views not shared”).