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### The Puzzling Parameters of the Foreign Law Debate

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# THE PUZZLING PARAMETERS OF THE FOREIGN LAW DEBATE

Vlad F. Perju\*

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## I. INTRODUCTION

The moment has finally arrived for American constitutional thought to engage with the laws and legal practices of other nations. Prompted largely by the Supreme Court’s reference to foreign constitutional practices in a number of high-profile cases,<sup>1</sup> this encounter may become central to the reshaping of American constitutional discourse in the early stages of the twenty-first century.<sup>2</sup> References

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<sup>1</sup> Among the recent cases, see *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (Stevens, J.) (referring to the opinion of the world community that executing the mentally retarded is wrong), *Lawrence v. Texas*, 539 U.S. 558, 571–73 (2003) (Kennedy, J.) (discussing the values of Western civilization regarding homosexual conduct), and *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (Kennedy, J.) (mentioning the “stark reality” that the United States is the only country in the world that gives official sanction to the juvenile death penalty).

<sup>2</sup> American constitutional law is currently going through a period of profound transformation. In a letter to his readers explaining his decision not to complete work on the third edition of his epoch-making treatise *American Constitutional Law*, Professor Laurence Tribe had this to say about the general current state of American constitutional law and about the impact of foreign and international law:

[W]e find ourselves at a juncture where profound fault lines have become evident at the very foundations of the enterprise [of constitutional law] . . . .

....

to foreign law, especially when made in the process of constitutional interpretation, can trigger the type of self-examination that, regardless of outcome, is likely to leave a lasting imprint on American legal thought.

This Article reflects on the discourse that has accompanied the opening up of American law to the reality of global constitutional phenomena. Central to this discourse is the debate over the authority of foreign laws and legal practices in the process of domestic constitutional interpretation. The debate offers illuminating insights into how a form of discourse can shape the American constitutional self-understanding. That discourse, this Article contends, straightjackets the constitutional imagination that the encounter with foreign law has the potential to enrich and refine. When approached with some degree of detachment, this debate seems encased in a series of unconvincing, if familiar, distinctions and normative justifications that have cemented much of the American constitutional mindset. The foreign law debate provides an ideal setting for studying the subtle ways in which the potentialities inherent in the global constitutional framework are tamed and neutralized.

The analysis here is confined to a subset of the broader interaction between American law and what has been called transnational law,<sup>3</sup>

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. . . The new century, it increasingly seems, marks what look like the beginnings of a period of profound transformation. There is an emerging realization that the very working materials of American constitutional law may be in the process of changing. . . .

There is . . . a sharp continuing debate addressing how the work of Congress fits within the corpus of constitutional law . . . [and] about whether and when treaties and other forms of international law can themselves impose quasi-constitutional norms and limitations on [the U.S. government] . . . .

The recent interest in comparative law is but one spark in an ongoing explosion of inter-disciplinary scholarly effort . . . .

Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 295, 297–98 (2005).

<sup>3</sup> “Transnational law” was first discussed in Phillip C. Jessup, *The Concept of Transnational Law: An Introduction*, 3 COLUM. J. TRANSNAT’L L. 1 (1963), and later developed in HENRY STEINER & DETLEV VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (1968). See Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599, 2626 (1997) [hereinafter Koh, *Why Do Nations Obey*] (noting that the transnational law approach was characterized by “its focus on the transnational, normative, and constitutive character of global legal process”). “Transnational law” is also used as a loose category that encompasses, on the one hand, both international and foreign law and, on the other hand, domestic law. See Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305, 306 (2001) [hereinafter Koh, *Globalization of Freedom*] (“[W]e must start treating transnational law as its own category. Domestic and international processes and events will soon become so integrated that we will no longer know whether to characterize certain concepts as local or global in nature.”). For the use of the term “transnational law” in constitutional law, see Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 239 (2003).

or world law,<sup>4</sup> or global law.<sup>5</sup> What characterizes this latter body of law, however one chooses to label it, is that it encompasses both international law, in its customary as well as treaty-based forms, and foreign law, which in this understanding includes the internal arrangements of the world's legal systems. The focus here is the interaction between American law and foreign law at the constitutional level, and how this interaction has been conceptualized in constitutional discourse.<sup>6</sup> More specifically, this Article is concerned with the expansion of the canon of authoritative materials to include foreign constitutional practices for purposes of domestic constitutional interpretation.<sup>7</sup> However, nothing in my argument implies that the use of foreign law is or should be limited to the constitutional realm,<sup>8</sup> nor that its impact should be analyzed exclusively by reference to decisions of federal courts and in particular the U.S. Supreme Court.<sup>9</sup> While there are good independent reasons why constitutional law is a relevant setting for analyzing the authority of foreign law in the American legal system, my analysis tracks closely the structure of the foreign law debate as it has crystallized in contemporary constitutional discourse.

One caveat should be noted regarding the relation between foreign and international law. There are cases, such as the ban on the death penalty for juveniles or the mentally handicapped, when the solutions of the world's legal systems converge and, accordingly, the domains of foreign law and customary international law overlap.<sup>10</sup> The very fact of their convergence might be the effect

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<sup>4</sup> See Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1622 (1995) (defining "world law" as the body of law that "combine[d] inter-state law with the common law of humanity, on the one hand, and the customary law of various world communities, on the other").

<sup>5</sup> See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (see especially Chapter Two, *Judges: Constructing a Global Legal System*).

<sup>6</sup> Throughout this Article, the use of "comparative constitutionalism" refers to this interaction.

<sup>7</sup> "Foreign constitutional practices" means the decisions of foreign courts as well as more general practices such as modes of reasoning, models of institutional interaction, etc. Unless specified otherwise, this term throughout the Article is synonymous with "foreign law."

<sup>8</sup> See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 129 (2005) (disapproving of the fact that many scholars explain the citation of foreign law only in constitutional cases). For a discussion of the use of foreign legal materials outside constitutional law, see Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 280-83 (1997) (discussing the doctrine of informed consent in different legal systems).

<sup>9</sup> See generally Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1641 (2004) (arguing that state judges are in a particularly good position to take advantage of the potential of comparative constitutional law).

<sup>10</sup> See *infra* Parts II and III.

of a norm of international law on domestic legal systems.<sup>11</sup> Yet the distinction between foreign law and international law is useful to keep in mind, as is the difficulty in separating them at times, given the claim that challenges to their authority from a domestic perspective rest on different grounds. International law is said to suffer from a democratic deficit,<sup>12</sup> whereas the difficulties with foreign law sources are mainly methodological and concern the need for accuracy in cross-constitutional comparisons.<sup>13</sup> This Article challenges the soundness of such clear-cut distinctions by showing that, contrary to the common wisdom in contemporary constitutional discourse, the democratic objection and methodological worries mutually reinforce each other.

My analysis of the encounter between American law and foreign constitutional practices is both descriptive and normative. At a descriptive level, the Article shows how the constitutional debate in its current form fails to do justice to the transformative potential intrinsic to that encounter. . Despite a flurry of contemporary scholarship in this area, the central questions are being evaded. A survey of the foreign law debate shows the limitations of the different theoretical models proposed in the literature. For instance, both advocates and opponents of the use of foreign law in constitutional interpretation point to the lack of a methodology for judges looking at foreign law sources. Such a methodology would help answer questions about which jurisdictions judges should consult, how to check sources and references, how they can escape the dangers of nominalism, and how to assess the relevance of a particular provision or line of reasoning outside of its broader legal, cultural, and historical context. Because even advocates of the use of foreign law would be hard-pressed to propose workable methodologies, they limit their defense of the use of foreign law to a small number of cases, such as the death penalty, where an emerging consensus among the world's legal systems makes it easier to evade the above challenges.

At a normative level, this Article exposes a misunderstanding about the relation between method and substance in contemporary constitutional discourse. It

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<sup>11</sup> The prohibition on capital punishment for crimes committed by juveniles is mentioned in a number of international documents. *See* United Nations Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); *see also* International Covenant on Civil and Political Rights art. 6(5), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); African Charter on the Rights and Welfare of the Child art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

<sup>12</sup> *See generally* John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 313–14 (2006). Of course, the democratic deficit is only one argument against the use of international law. A more comprehensive list can be found in Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 37–38 (1995) (arguing that international law is “blocked, sidestepped, or ignored at almost every turn” by American courts because it is unknown, not raised, unusual, foreign, undemocratic, not law, not applicable, trumped by domestic law, not persuasive, or not appropriate).

<sup>13</sup> *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 101 (2006).

argues that methodological misgivings of the type that have been at the center of the argument against the use of foreign law are the by-product of disconnecting method from substance. In fact, it is only by articulating a theoretical vision and, through it, the normative grounds for the use of foreign law, that answers could be found to largely legitimate methodological worries.<sup>14</sup> These answers have far-reaching implications for our understanding of the nature of a constitutional system, the commitments of American constitutional democracy, and the role of constitutional adjudication.<sup>15</sup>

The Article begins by drawing the contours of the foreign law debate, followed by an analysis of the distinction around which the debate in its current form has crystallized. The distinction is between situations where there is an emerging world consensus from those in which no such consensus is in sight.<sup>16</sup> In the first case, which is taken up in Part III, authority can rest on either the reasons behind a given consensus or it can be content-independent, for instance when it is based solely on the fact of the existence of a consensus. The Article discusses both situations by reference to the Court's juvenile death penalty decision in *Roper v. Simmons*.<sup>17</sup> It then turns to the debate over the domestic status of customary international law norms, whose family resemblance with the foreign law debate has thus far been by and large ignored. This will set the stage for understanding the subtlety and shortcomings of the approach that portrays foreign law as the modern *ius gentium* (law of nations). In Part IV, the Article takes up substantive and methodological challenges to the use of foreign law mostly by reference to "piecemeal comparisons." Part IV discusses the argument from self-government, the argument from normative constitutional coherence, and the argument from the

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<sup>14</sup> The lack of a theory is often lamented in the literature. See Joan L. Larsen, *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, 1327 (2004) ("This 'everyone's doing it' approach to constitutional interpretation requires explanation and justification. Yet, to date, neither the Court nor the academy has offered a justification that satisfies. Until they do, it seems we are better off to abandon this particular use of foreign and international law."); see also Diane Marie Amann, *"Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597, 604 (2004) ("[C]onsultation [of external norms] remains selective, unbounded by any coherent criteria."); Cleveland, *supra* note 13, at 88 (qualifying the use of international law as sloppy and opportunistic).

<sup>15</sup> Contemporary legal scholarship has usually proceeded in the reverse direction by subjecting international and foreign law to the authority of traditional models of constitutional theory. See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 59 (2004) (applying Alexander Bickel's constitutional theory to argue that the authority of foreign law for purposes of constitutional interpretation poses an "international countermajoritarian difficulty"); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1196 (2005) (discussing the phenomenon of globalization through the prism of John Hart Ely's constitutional theory).

<sup>16</sup> Throughout this Article, the "world consensus" means "emerging world consensus."

<sup>17</sup> 543 U.S. 551 (2005).

integrity of American constitutional discourse. The method of this Article is to engage with some of the main theories that have given the foreign law debate its current structure. While my analysis does not purport to offer a definitive answer the question of the authority of foreign law, its conclusions about the limitations of the dominant form of discourse are meant to change the terms of the debate.

## II. THE FOREIGN LAW DEBATE

This Part II provides a few clarifications about the scope, nature, and structure of the foreign law debate. In a sense, it is far from obvious why the influence of foreign practices on American law should become the subject of debate. Legal systems do not develop identities in a vacuum. Although with time they might acquire greater control over their environments, or learn how to adapt to them, they can never fence themselves off completely from their influence. The American constitutional system is no exception. The Declaration of Independence urges “decent respect to the opinions of mankind”;<sup>18</sup> the Federalist Papers counseled attention “to the judgment of other nations”;<sup>19</sup> the constitutional text refers to foreign nations and mentions the existence of the law of nations;<sup>20</sup> the early cases of the Marshall Court discussed at length the law of nations;<sup>21</sup> it was international law that provided the point of reference for the Supreme Court’s elaboration of the powers inherent in national sovereignty in the aftermath of the Civil War;<sup>22</sup> the American civil liberties movement had its “roots in a pre-World War I international law cosmopolitanism”;<sup>23</sup> and the Cold War, some scholars have argued, explains in large part the success of the Civil Rights Movement,<sup>24</sup> when doctrines such as free speech, equal protection, privacy, and Fourth Amendment

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<sup>18</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Justice Ginsburg has taken this as the starting point of her defense of the use of foreign law in constitutional interpretation. See Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Annual Meeting of the American Society of International Law (April 1, 2005) available at <http://www.asil.org/events/AM05/ginsburg050401.html>. But see Eugene Kontorovich, *Disrespecting the “Opinions of Mankind,”* 8 GREEN BAG 2d 261 (2005).

<sup>19</sup> THE FEDERALIST NO. 63 (Alexander Hamilton or James Madison).

<sup>20</sup> U.S. CONST. art. I, § 8.

<sup>21</sup> See, e.g., *Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Both cases are discussed in Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44–45 (2004).

<sup>22</sup> Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 82–83 (2004).

<sup>23</sup> See John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 705 (2004).

<sup>24</sup> JOHN SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (Harvard Univ. Press 2004) (2002); see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988).

jurisprudence were meant to distance American law from the totalitarianisms that plagued last century.<sup>25</sup>

While the modern foreign law debate is informed to some extent by this long history, its point is more normative and forward-looking. What is being debated is the expansion of the canon of methods of constitutional interpretation to include foreign constitutional practices alongside text, structure, history, values, pragmatic consequences, and others. Thus defined, the foreign law debate is not coextensive with the broader field of comparative constitutionalism—for instance; matters of constitutional design are not covered—although the Article uses them interchangeably.

Three elements bear emphasis at this stage: first, the agents of the expansion are judges, not scholars or legislators;<sup>26</sup> second, the debate refers specifically to constitutional interpretation, although the use of foreign law is not limited to the constitutional realm;<sup>27</sup> and third, the expansion is self-conscious in that its agents are aware of its methodological, structural, and substantive implications for the entire corpus of constitutional law. At one level, these implications are evaluated from the perspective of core constitutional principles such as separation of powers, democratic self-government, or judicial review. At another level, implications are assessed by their impact on American constitutional discourse, more specifically on how the ascription of normative force to foreign law may alter the integrity of that discourse.<sup>28</sup>

The evolution of the foreign law debate has so far been marked by two distinct stages. The challenge at the first stage was to demonstrate a family resemblance between American constitutional law and foreign constitutional developments, with the implication that the latter could help American lawyers gain a more refined understanding of their own system.<sup>29</sup> This pursuit of self-

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<sup>25</sup> See Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996) (“[T]he desire to articulate principles that distinguished America from the Soviet Union and Nazi Germany contributed to a long line of liberal Supreme Court decisions from the Second World War through the Warren era.”). Professor Primus’s article also shows how awareness of totalitarianism’s “brooding omnipresence” offers a key of interpretation for the main developments in constitutional theory during the same period. *Id.* at 456–57.

<sup>26</sup> For a discussion of the relevant differences, see Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 808–13 (2000).

<sup>27</sup> See generally Waldron, *supra* note 8, at 143–47.

<sup>28</sup> See, e.g., Ernest Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT’L L.J. 527, 545 (2003) (“The problem is that I fear domestic constitutional law may soon cease to exist as an autonomous discipline. Who makes the law? . . . What rights do I have? Well, a few under the domestic constitution—but also others under international human rights treaties and the like. It is just increasingly unrealistic to study constitutional structure without including supranational institutions and constitutional rights without including the corpus of international law.”).

<sup>29</sup> Included in this category Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997), Sujit Choudhry, *Globalization in Search of Justification: Toward*



knowledge, which is standard in comparative legal studies, collided with an ingrained sense of the uniqueness of the American constitutional experience.<sup>30</sup> Hence the seemingly modest claims and almost apologetic tone that characterized the first wave of scholarship.<sup>31</sup> Foreign practices admittedly had no normative teeth, but they could still shed an “empirical light”<sup>32</sup> on issues such as the recognition of a right to die,<sup>33</sup> or unveil a false pretense of necessity in arguments about constitutional structure in issues such as federalism,<sup>34</sup> or simply help to understand the peculiarities of American constitutional doctrine in areas like free speech.<sup>35</sup> Interest in foreign law would have receded quickly if it had not been picked up by legal practice. For both sociological<sup>36</sup> and normative<sup>37</sup> reasons, reference to foreign materials began to increase considerably in judicial opinions. This practice brought about an uproar from other constitutional actors—judges, legislators, and scholars—who opposed it as undemocratic. American law and constitutional cultures were brusquely awakened to the reality of a larger constitutional world.

The second moment in the debate grew out of this initial reaction.<sup>38</sup> While at this stage claims about the normativity of foreign constitutional practices have

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*a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999), and Mark Tushnet, *The Possibilities of Comparative Constitutionalism*, 108 YALE L.J. 1225 (1999).

<sup>30</sup> For an example of using foreign law to reflect on U.S. constitutional doctrine, see Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737 (2004).

<sup>31</sup> See Tushnet, *supra* note 29, at 1228 (“My claim is . . . rather modest: U.S. courts can sometimes gain insights into the appropriate interpretation of the U.S. Constitution by a cautious and careful analysis of constitutional experience elsewhere.”); see also Choudhry, *supra* note 29, at 824 (“My goal, though, is somewhat narrower: to describe and explain the interpretive methodologies used, and the normative justifications offered, by courts for their use of comparative jurisprudence in constitutional interpretation.”).

<sup>32</sup> This phrase was coined by Justice Breyer. See *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

<sup>33</sup> *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (Rehnquist, C.J.) (discussing the experience with the legalization of physician-assisted suicide in the Netherlands).

<sup>34</sup> See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 126 (2005).

<sup>35</sup> See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 29–56 (Michael Ignatieff ed., 2005).

<sup>36</sup> See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 44. See generally Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZED WORLD 253, 254 (Joseph S. Nye Jr. & John D. Donahue eds., 2000) (discussing legitimacy-seeking strategies to explain the migration of constitutional ideas); SLAUGHTER, *supra* note 5, at 96–99.

<sup>37</sup> See Roger P. Alford, *In Search of a Theory for Comparative Constitutionalism*, 52 UCLA L. REV. 639, 659–73 (2005) (discussing natural law as a theoretical model for comparative constitutionalism).

<sup>38</sup> Among the scholarship representative of this second moment are Jeremy Waldron, *supra* note 8, at 139–32, Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149–51 (2005), and Jackson, *supra* note 34, at 122–23.

grown more robust, partly due to the Court's reference to foreign law in cases such as *Atkins v. Virginia*<sup>39</sup> and *Roper v. Simmons*,<sup>40</sup> they have also shrunk. The defense of the use of foreign law is now confined to situations where there is an emerging international consensus on the issue under consideration, as was the case in *Roper* with the ban on juvenile death penalty<sup>41</sup> or in *Atkins* with the ban on the execution of mentally handicapped offenders.<sup>42</sup> As we shall see later, the defense of the use of foreign law that turns on the existence of an emerging legal consensus depends on the questionable assumption that narrowing the claim for the authority of foreign law also deepens it. Contrary to the expectations of its advocates, the depth effect cannot occur because this strategy begs the questions about methodology (Which jurisdictions to cite? How to escape the dangers of nominalism? How to check the accuracy and relevance to foreign cases?) posed by those skeptical of the use of foreign law. These worries are paramount in mature constitutional systems that tend to guard closely their methodological gates.

The polarization of the current structure of the foreign law debate has radicalized its participants even more. The debate centers around two poles. At one pole are the "internationalists" who regard the use of foreign law as an inevitable outcome of legal globalization. They draw attention to the line that separates domestic from international law, which is shifting due to developments in both legal realms.<sup>43</sup> At the domestic level, the advent of rights-based constitutionalism has opened constitutional law to influences originating outside its traditional domain.<sup>44</sup> At the international level, the evolution after the Second World War of international law has started to encompass relations between states and their citizens, which traditionally were part of the domestic constitutional realm.<sup>45</sup> Since

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<sup>39</sup> 536 U.S. 304, 317 (2002).

<sup>40</sup> 543 U.S. 551, 575–78 (2005).

<sup>41</sup> *See id.*

<sup>42</sup> *See Atkins*, 536 U.S. at 317.

<sup>43</sup> *See Vicki C. Jackson, Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 271–72, 286, 309 (2003) ("This new normativity of human rights law is reflected in the way references to other constitutional courts' decisions are often accompanied by references to international legal norms as well. The sense of distinctive sovereignties is diminished, as is the strong distinction between domestic constitutional law and international legal norms . . . ." (footnote omitted)).

<sup>44</sup> The phrase "rights-based constitutionalism" comes from Neuman, *supra* note 22, at 84.

<sup>45</sup> This constituted a departure from a Benthamite vision of international law. *See generally* M.W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405 (1984), for a description of Bentham's contribution to international law. However, it is true that international law may have never been purely Benthamite, at least in this respect. *See* Beth Stephens, *Sosa v. Alvarez-Machain: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 544–45 (2005) ("International law in the late-eighteenth century included the law governing relations among states and the 'more pedestrian' law governing individuals when they acted across state lines, as in the law merchant. But the Court found that international law also included a 'narrow set' of 'hybrid international norms' in which the 'rules binding individuals for

foreign law is part of this broader legal convergence, the “internationalist” camp argues that attempts to resist are doomed to fail.<sup>46</sup>

This position fails to explain why the bastion of constitutional interpretation ought not to be protected from the influence of foreign law. The question is not one of inevitability, since there seems to be widespread agreement that, in one form or another, the use of foreign law will only increase over the coming years.<sup>47</sup> However, awareness of inevitability is hardly a source of comfort. To the extent this expansion of the canon of authoritative materials is deemed illegitimate, its critics—the “traditionalists”—argue that it should be resisted. Law is a domain of principled decision making<sup>48</sup> and an argument is necessary as to what makes the use of foreign law for interpretative purposes “principled.” In the end, both the internationalist and traditionalist positions fail to make explicit and defend the normative premises that inform them. They cannot hope to succeed without making the justification of those premises internal to their arguments.

### III. WORLD LEGAL CONSENSUS

Until the Court’s recent decision in *Roper*, the United States was the only country in the world that officially sanctioned the juvenile death penalty in the twenty-first century.<sup>49</sup> The Supreme Court affirmed the constitutionality of this practice as late as 1989.<sup>50</sup> In *Stanford v. Kentucky*, the Court decided, in a five-to-four split, that the Eighth Amendment’s prohibition of “cruel and unusual punishment” did not invalidate state laws that made capital punishment available for murders committed by children between sixteen and eighteen years old at the time of their crime.<sup>51</sup> Writing for the majority, Justice Scalia concluded that the Court could “discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment [for juvenile offenders].”<sup>52</sup> During

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the benefit of other individuals overlapped with the norms of state relationships.” (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

<sup>46</sup> See, e.g., Anne-Marie Slaughter, *A Brave New Judicial World*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 35, at 277, 297 (comparing attempts to resist the use of foreign law to attempts to block the Internet).

<sup>47</sup> See Slaughter, *supra* note 46, at 302 (“In a decade, perhaps two, judicial references to the decisions of their foreign counterparts will be no more surprisingly than the introduction of foreign elements into American cuisine.”).

<sup>48</sup> See Michelman, *supra* note 30, at 1759 (describing law’s telos as a domain of principled social decision-making).

<sup>49</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>50</sup> See *id.* at 574.

<sup>51</sup> 492 U.S. 361, 380 (1989); see also *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding unconstitutional capital punishment for offenders *under* sixteen years old at the time when they committed the crime).

<sup>52</sup> *Stanford*, 492 U.S. at 380.

the ten years prior to the *Stanford* decision, only four countries—Rwanda, Pakistan, Bangladesh, and Barbados—had executed minors.<sup>53</sup>

By 2004, the United States had become the only country in the world that continued to have the juvenile death penalty in the books.<sup>54</sup> At the national level, five states had abandoned it in the intervening years since *Stanford*, bringing the total number of states that prohibited it, either by carving out specific exceptions or as part of a general ban on the death penalty, to thirty.<sup>55</sup> In *Roper*, the Court overruled its own precedent and decided that juvenile death penalty is unconstitutional under the Eighth Amendment.<sup>56</sup> Although evidence of recent state legislative enactments was “less dramatic” than in other Eighth Amendment cases with a similar history in the Court,<sup>57</sup> the majority nevertheless deemed this evidence “significant” and pointed out that evidence of a national consensus is less in numbers than in “the consistency of the direction of change.”<sup>58</sup> Another leg of the Court’s argument was that social science findings regarding differences between juveniles and adults (lack of maturity, underdeveloped sense of responsibility, and susceptibility to outside pressure and influence) do not warrant the inclusion of juveniles in the category of the worst offenders to whom the death penalty should ostensibly be confined.<sup>59</sup> That conclusion, combined with the exceptional nature of the penalty and the argument that its social purposes—retribution and deterrence—failed to provide adequate justification in the case of juvenile offenders, led the Court to impose a categorical ban.<sup>60</sup>

After presenting each of these arguments, the Court referred to “the stark reality” that the United States remained the only country in the world to allow the death penalty for juveniles.<sup>61</sup> Proceeding with cautiousness, the Court took pains to emphasize that foreign constitutional practices are instructive, not determinative, of its own interpretation of the Eighth Amendment.<sup>62</sup> It is not entirely clear from the Court’s opinion whether reference to the world consensus was meant as a self-standing argument or simply as an additional ground that added weight to

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<sup>53</sup> See *id.* at 389; see also *Roper*, 543 U.S. at 577 (stating that Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, The Democratic Republic of Congo, and China have executed minors since 1990).

<sup>54</sup> *Roper*, 543 U.S. at 575.

<sup>55</sup> *Id.* at 564.

<sup>56</sup> *Id.* at 574–75.

<sup>57</sup> *Id.* at 565. This is to be compared with the rate of abolition of the death penalty for the mentally handicapped. Between 1989 and 2002, sixteen states had moved in that direction. This trend weighed heavily in the Court’s consideration of the constitutionality of state laws that still allowed it. See *Atkins v. Virginia* 536 U.S. 304, 314–15 (2002).

<sup>58</sup> *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315).

<sup>59</sup> *Id.* at 569–71.

<sup>60</sup> *Id.* at 571–72. In her dissenting opinion, Justice O’Connor argued for a cases-by-case approach in assessing the constitutionality of capital punishment for juveniles. See *id.* at 605 (O’Connor, J., dissenting).

<sup>61</sup> *Id.* at 575.

<sup>62</sup> See *id.* at 578.

conclusions the Court had reached independently. On the one hand, in asserting whether a form of punishment is cruel and unusual, the Court's own methodology urges consideration of the "evolving standards of decency that mark the progress of a maturing society."<sup>63</sup> Ever since its first statement almost half a century ago, this standard has been taken to include the views of other "civilized nations."<sup>64</sup> For example, in *Thompson v. Oklahoma* the Court reflected on its method of interpreting the Eighth Amendment, observing that it had previously "recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."<sup>65</sup> On the other hand, the Court mentioned that "the overwhelming weight of international opinion against the juvenile death penalty . . . does provide respected and significant confirmation" for its own conclusions in direct relation to its social scientific findings.<sup>66</sup>

The question is, what exactly is being invoked in cases where the Court refers to the unitary practices of other nations? In his dissent in *Roper*, Justice Scalia wrote that "'acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*," and then continued, "which is surely what it parades as today."<sup>67</sup> Justice Scalia happens to reject the Court's method of interpreting the Eighth Amendment—hence, his choice of the word "parades"—but the question remains valid even without any subversive innuendoes.

Professor Ernest Young's recent analysis of the *Roper* Court's use of foreign law is an original and forceful answer to this question.<sup>68</sup> His starting point is somewhere between Justice Scalia's and established precedent. For Professor Young, the question is still open whether the practice of foreign jurisdictions is relevant for the purpose of the Eighth Amendment.<sup>69</sup> Theoretically, foreign law can offer factual or normative guidance. *Roper*, he argues, falls in the latter category because the Court's use of foreign law was meant "to 'confirm' a proposition of *value*," namely that "the death penalty is disproportionate punishment for offenders under 18."<sup>70</sup> Normative guidance can take two forms: one is content

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<sup>63</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>64</sup> *See id.* at 102 (referring to the international community of democracies); *see, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (acknowledging that the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved by the world community); *Enmund v. Florida*, 458 U.S. 782, 796–97 & n.22 (1982) (discussing the abolition of the felony murder doctrine in other legal systems); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (surveying how many nations retained the death penalty for rape).

<sup>65</sup> 487 U.S. 815, 830 n.31 (1988).

<sup>66</sup> *Roper*, 543 U.S. at 578 (mentioning that the world consensus rests "in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime").

<sup>67</sup> *Id.* at 628 (Scalia, J., dissenting).

<sup>68</sup> Young, *supra* note 38, at 148.

<sup>69</sup> *See id.* at 167.

<sup>70</sup> *Id.* at 150 (citing *Roper*, 543 U.S. at 574).

dependent—when the authority of foreign constitutional practices is persuasive in the sense that it derives from the *reasons* underlying those practices—another is content independent (“nose-counting”)—when authority rests on *numbers*, that is, on the mere fact that foreign jurisdictions subscribe to a given view regardless of underlying justifications.<sup>71</sup> Professor Young accuses the *Roper* Court of engaging in this form of “nose-counting,” and considers the decision telling of the Court’s general approach to foreign law.<sup>72</sup>

Part III.A looks at Young’s critique of the content-independent authority of foreign law. Part III.B turns to alternative models that portray the authority of foreign law as a function of the substantive reasons on which the world legal consensus rests. Part III.C looks at the interaction between American law and the international legal order in the context of debates about the domestic status of customary international law norms. This sets the stage for a study of the approach in Part III.D that sees in the world legal consensus an instantiation of modern-day *ius gentium*.

#### A. Content-Independent Authority

The authority of a legal norm is content-independent when it does not depend on that norm’s background justification. In the case of foreign legal norms the background reasons – internal to each system – that led to consensus are less relevant compared to the fact of the consensus itself. Professor Young accuses the *Roper* Court of ascribing content-independent authority to the emerging global norm about the nature of capital punishment for juvenile offenders. In his view, the Court engaged in “nose-counting” foreign jurisdictions.<sup>73</sup> Assuming that this descriptive account of the Court’s reasoning is correct, the method may appear problematic on two grounds.

One is that it is not authorized by constitutional text or structure.<sup>74</sup> Young subscribes to this view<sup>75</sup> since, as we saw, he does not consider settled the Court’s method of interpretation in Eighth Amendment cases. However, the problem with this view is that few of the established methods of constitutional interpretation have support in constitutional text or structure, so this argument is fatally overinclusive.

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<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 152, 155 (“[The] lack of interest in the reasons underlying foreign practice is characteristic of the Court’s employment of foreign law . . . . The Court is not persuaded by new rationales, but rather by the mere fact that foreign jurisdictions take a particular view . . . . It is deferring to numbers, not reasons.”).

<sup>73</sup> See *id.* at 153–56.

<sup>74</sup> See Tushnet, *supra* note 29, at 1231–32 (“[T]he Constitution must *license* the use of comparative material for the courts to be authorized to learn from constitutional experience elsewhere.”). One such example is the Constitution of South Africa, which stipulates at article 39 (1,c) that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.” S. AFR. CONST. art. 39, cl. 1(c) (2005).

<sup>75</sup> See Young, *supra* note 38, at 163–65.

“Nose-counting” may also appear problematic because it lacks moral authority: in and by itself the fact of consensus carries no guarantee of moral authority. This idea requires qualification. In a sense, the point is intuitively true: slavery was morally wrong even when the vast majority thought the opposite. Similarly, one would not need to look at foreign practices to determine whether it is morally permissible to execute human beings for crimes they committed when they were children. In fact, one would not need to look at domestic practices either, or “look” at all. Thinking the matter through—in an armchair, if you wish—would do. From a strong natural law standpoint, the fact that others may or may not subscribe to a given moral position does not add or subtract from its moral weight. But “nose-counting” would lack moral authority even if the latter rested on weaker grounds. Presumably consideration of “evolving standards of decency” in Eighth Amendment jurisprudence entails a weak form of conventional morality. Even here, moral authority has to rest on an assessment of the reasons behind the consensus of states, and not simply on the *fact* of its existence.<sup>76</sup> That fact itself could be the result of international arm-twisting, legitimacy-seeking, or simply a tendency to fall into patterns by imitating the behavior of other states (“acculturation”).<sup>77</sup>

The charge that nose-counting lacks moral authority is strong, but it can only make an impression if one believes in a connection between law and morality. It may well be that nose-counting lacks such authority, but if all other legal matters do also, then this charge is rather off-point. Professor Young seems to subscribe to such a view, albeit with a caveat: in addition to lacking legal authority, nose-counting *parades* as having some moral authority for strategic, unprincipled reasons.<sup>78</sup> The mere *fact* of a world consensus was used strategically in *Roper* to “swell the denominator,”<sup>79</sup> that is, to enlarge the community by reference to which the decency of a standard was to be assessed. “[B]y shifting focus from the domestic to the international plane[,] . . . the *Roper* majority made an implausible claim of ‘consensus’ into a plausible one.”<sup>80</sup>

One should not hasten to deny that the mere *fact* of world consensus might carry at least some moral authority. To acknowledge that does not commit one to a

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<sup>76</sup> However, there may be some circumstances where the fact of consensus itself, irrespective of the reasons on which it rests, is somehow deemed moral. For such a classification and corresponding discussion, see Larsen, *supra* note 14, at 1293–98. For a similar account that treats the fact of consensus as “persuasive,” see Cleveland, *supra* note 13, at 11 (“Today, where a foreign or international law norm is not itself legally binding on the United States, it is the consensus of states regarding shared common values that gives the norm its persuasive force.”).

<sup>77</sup> Young, *supra* note 38, at 157 (citing Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638–56 (2004)).

<sup>78</sup> *See id.* at 155.

<sup>79</sup> *Id.* at 153.

<sup>80</sup> *Id.* at 149. For a discussion of the strategy of limiting/expanding the relevant community, see also Larsen, *supra* note 14, at 1322–25.

full-blown natural law conception whose jurisprudential credentials are rather suspect nowadays. Legal authority may very well need to rest on more than purely moral grounds, yet moral authority may sometimes be necessary to establish the existence of legal authority. It is widely accepted among most contemporary positivists that a legal system contains a “minimum content of natural law.”<sup>81</sup> This is where framing the debate in terms of the relevant denominator tends to overlook the importance of the specific subject matter under consideration.

The denominator problem has figured most prominently in First Amendment obscenity cases, and Young’s argument about foreign law rests explicitly on those aspects of constitutional jurisprudence.<sup>82</sup> Since what passes as obscene is not determined by thinking matters through in an armchair, but rather by reference to “community standards,” debates in this area have centered on methods of determining the relevant community.<sup>83</sup> Constitutional protection of this form of speech turns on how the denominator is determined, but it should be remembered that here as elsewhere method tracks subject matter. If we start from the idea of a “minimum content of natural law,” regardless of one’s views about what that *minimum* should include, there will always be subject matters that are left uncovered. In fact, it is quite likely that the minimum should include a rule against executing children but not one about nude dancing. This is why analogies in denominator situations break down. The denominator problem is not the same in *Roper* as in obscenity cases, and, what is more, portraying the problem of foreign law in *Roper* as one of choosing the right denominator gets the stages of legal analysis in the reverse order. Even if one sought to justify the use of foreign law by reference to subject matters included in the “minimum” content of natural law that arguably all legal systems share, the starting point should emphasize the subject matter and not the denominator problem. Now, it is doubtful that a theory that focuses on the idea of a minimum core of natural law does justice to the potential of comparative constitutionalism, but even if it were otherwise there would still be no reason to believe that the mere fact of world legal consensus tells us which subject matters should be included in that minimum core.

The strength of both arguments against recognizing the content-independent authority of foreign law in situations of world consensus is not self-evident. It is time now to turn to the descriptive dimension of Professor Young’s analysis.

He is correct to point out that nose counting, rather than substantive engagement, characterizes the Court’s normative use of foreign law.<sup>84</sup> However, *Roper* is not the ideal case to make this point. For one, the Court’s own precedents in Eighth Amendment jurisprudence include foreign jurisdictions within the relevant community for determining standards of decency. This makes Professor

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<sup>81</sup> H.L.A. HART, *THE CONCEPT OF LAW* 193–200 (2d ed. 1997) (1961); *see also* Neil MacCormick, *Natural Law Reconsidered*, 1 OXFORD J. LEGAL STUD. 99, 99–101 (1981) (reviewing JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).

<sup>82</sup> *See* Young, *supra* note 38, at 158–61.

<sup>83</sup> *See id.* at 159–60 (citing several illustrative cases).

<sup>84</sup> *See id.* at 151.



Young's claim that the Court "use[s] foreign law [in *Roper*] to 'confirm' a proposition of *value*"<sup>85</sup> somewhat misleading. In fact, the Court looks at foreign law as part of a broader methodology for reaching a value-laden conclusion about the proportionality of a form of punishment. Substantive arguments are available that question the appropriateness of this methodology. Perhaps considerations of which punishment is disproportionately cruel and unusual are matters of cultural contingency or historical development that do not travel well from one society to another. Comparative law scholars have analyzed why standards of decency vary among societies<sup>86</sup> and some have argued that forms of constitutional self-understanding prevent cross-constitutional borrowing.<sup>87</sup> But these substantive arguments differ starkly from positions that begin by postulating a standpoint—usually against the use of foreign law—whose subsequent revision is subject to conditions that are virtually impossible to meet.

The descriptive and evaluative dimensions of the argument against the use of foreign law in cases such as *Roper* are inextricably linked. To understand them, one needs to spell out what in the constitutional discourse allows the critics to postulate a standpoint against foreign law and then derive their positions from it. In their purest form, exemplified by Justice Scalia's originalist argument against foreign law in *Roper*,<sup>88</sup> these positions are tautological. If the point of constitutional interpretation is defined to exclude any influence of foreign law, then the only avenue left for defending the relevance of foreign law is rejecting that specific theory of constitutional interpretation. Because the history on which originalism relies is itself subject to interpretation, originalism à la Scalia becomes more of a conceptual claim about the role of constitutional interpretation and of constitutional law more generally.<sup>89</sup>

In its less extreme version, such as Professor Young's, the argument against foreign law falls short of tautology but its conclusions remain tightly packed in its premises. Even if arguments from democracy, constitutional structure, and institutional competence—that Professor Young invokes and which are discussed at some length later—are meant to challenge the use of foreign law as nose-counting, it is difficult to see how any possible conception, including one that advocates the use of foreign law as persuasive authority, could ever meet them.

To be sure, there is nothing intrinsically objectionable about holding such a

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<sup>85</sup> See *id.* at 150.

<sup>86</sup> See, e.g., James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1281–87 (2000).

<sup>87</sup> See, e.g., Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2678 (2003).

<sup>88</sup> See *Roper v. Simmons*, 543 U.S. 551, 608 (2005).

<sup>89</sup> To prove this point, it helps to remember that there are other types of originalism. For instance, based on her interpretation of early American constitutional history, Justice Ginsburg concluded: "In the value I place on comparative dialogue—on sharing with and learning from others—I count myself an originalist . . ." Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 330 (2004).

view. What is problematic, however, is framing the argument in a way that does not acknowledge its normative assumptions and does not make their defense an integral part of the argument. My point at this stage is only to draw attention to the discursive structure that makes it possible to take the initial standpoint against foreign law for granted.

*B. Persuasive Authority*<sup>90</sup>

As we saw above, Professor Young has little to say about the possibility of using foreign law as persuasive authority.<sup>91</sup> But suppose the Supreme Court were to engage substantively with the reasoning of foreign courts.<sup>92</sup> The model that is usually deployed to capture this type of interaction is that of a transnational judicial dialogue. Judges enter what resembles an ideal conversation with their foreign peers. Devoid of formal rules or any patterns of undue pressure, the only authority recognized in this conversation is that of the better legal argument. For anyone who sees law as not (entirely) a matter of will but (also) of reason, the prospect of such a dialogue is appealing.<sup>93</sup>

Take the example of the death penalty for adult offenders. In the world today there is an emerging consensus against the death penalty. Foreign courts have addressed the issue of the compatibility of death penalty with the values of a modern democratic state in a number of occasions and have produced elaborate decisions, oftentimes by engaging the arguments of their American counterparts.<sup>94</sup> American courts face no textual hurdle in becoming part of this cross-

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<sup>90</sup> Persuasive authority is discussed at length in Vlad Perju, *Comparative Constitutionalism and the Making of a New World Order*, 12 CONSTELLATIONS 464, 476–79 (2005).

<sup>91</sup> See Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 261 (1987) (discussing the role of persuasive authority “as a necessary means of relief from the instrumentalism of contemporary national law-making”). It should be noted that the distinction between precedential and persuasive authority is somewhat ambiguous. Oftentimes precedential authority in law is recognized as such because it is also persuasive. Common-law judges routinely have to select among different lines of precedent that are equally relevant to the case at hand. The doctrinal classification of the case, the level of generality and the precise formulation of the claim, the facts deemed relevant—all are tools available to judges in distinguishing precedents they do not find persuasive.

<sup>92</sup> See generally Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 193 (2003) (examining the global community of courts emerging in transnational litigation through “constitutional cross-fertilization” and “active cooperation and vigorous conflict among national courts”); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000) (analyzing “judicial globalization” by way of interaction and cooperation between national and international law).

<sup>93</sup> See Waldron, *supra* note 8, at 146–47.

<sup>94</sup> See, e.g., *State v Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.); Decision No. 23/1990 (X. 31) Alkotmánybíróság [AB] [Constitutional Court], Oct. 24, 1990, Magyar Közlöny [MK.] 1990/107 (Hung.), translated in 1 E. EUR. CASE REP. CONST. L. 177 (1994).

constitutional dialogue, as they would in joining a similar conversation about, say, the right to bear arms.<sup>95</sup> Furthermore, the Court has been struggling with the constitutionality of capital punishment for decades and the issue remains far from settled.

A survey of case law shows that the death penalty debate has two components. One is the crafting of procedural guarantees in cases where the death penalty is sought that would eliminate the possibility of judicial errors. The experience of foreign courts could be used to shed an “empirical light” on various criminal procedures. This is what we have referred to above as the factual, as opposed to normative, use of foreign law. The second component of the debate is normative and refers to the compatibility of capital punishment with values such as human dignity that inform the normative core of the Eighth Amendment.<sup>96</sup> Given the role of dignity in the constellation of values that characterizes any modern constitutional democracy, foreign law could be used as persuasive authority. It bears emphasis that these two components, and corresponding usages of foreign law, are not entirely disconnected. The relevance of empirical data is likely to be called into question unless a certain commonality by way of normative background is established.

Since their decisions lack precedential authority,<sup>97</sup> foreign courts can influence the reasoning of American judges only to the extent the latter deem their arguments persuasive. If they do not, then American judges can reason their way out of an emerging world consensus. Let us now assume that the reasoning of foreign courts does contain arguments that have the potential to persuade their American counterparts.<sup>98</sup> Yet it can be safely predicted, given how divisive the American legal debates on the topic of the death penalty have been and for how long the debate has been raging, that not all judges are likely to be persuaded by any one argument. What does the persuasive authority model say about this situation?

At first blush, it seems this model gives judges a relatively easy way out: they would only need to indicate that they find the arguments of foreign courts unpersuasive. On closer inspection that way out might not be all that easy. The burden would fall on these judges to show *why* they remain unpersuaded, and that requires that they engage with the arguments of foreign courts. These practical consequences are somewhat obscured by an untenable, if pervasive, distinction between precedential and persuasive authority. In the case of precedential

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<sup>95</sup> See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639–42 (1989).

<sup>96</sup> See Paulo G. Carroza, “My Friend Is a Stranger”: *The Death Penalty and the Global Jus Commune of Human Rights*, 81 TEX. L. REV. 1031, 1077–79 (2003).

<sup>97</sup> See Stanford Levinson, *Looking Abroad when Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 353 (2004) (arguing that it would be foolish to claim that foreign decisions have precedential authority).

<sup>98</sup> See, e.g., *Makwanyane*, 1995 (3) SA 391. For an analysis, see Carol S. Steiker, *Pretoria, Not Peoria—S v. Makwanyane and Another*, 1995 (3) SA 391, 74 TEX. L. REV. 1285, 1287–89 (1996).

authority, judges who are *not persuaded*—for whatever reasons—that a given precedent should apply engage in a process of distinguishing that precedent from the case under consideration. Of course the doctrine of *stare decisis* compels them to follow established precedents, but it is common for judges to dig out the facts of a given case in search of details that would justify departure from precedent. As far as persuasive authority is concerned, this model is based on the premise that the mere fact of shifting the burden of justification will have enough of an impact on the constitutional debate. As any lawyer knows, the *onus probandi* often determines the winner in a legal battle.

It is doubtful that this is one of those cases. Shifting the burden might have such an impact, but that is precisely why these attempts will remain vigorously resisted. What fuels the debate about the burden of proof is a deeper normative clash between different visions of constitutionalism. A normative vision allowed Professor Young to argue from a standpoint against the use of foreign law without having to defend that initial choice; a different normative vision supports the case for recognizing foreign law as a persuasive authority. This clash is present in other areas of law, as our study of the debate between revisionist and modernist positions in customary international law will demonstrate.<sup>99</sup> This instinctive skepticism toward foreign and international matters is rooted in a specific understanding of the American constitutional project.

### C. *Lessons from the Customary International Law Debate*

Custom has long been a puzzle in international law. By definition, custom reflects “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>100</sup> The problem is that both of its constitutive elements are vague and insufficiently defined: It is unclear what qualifies as a general, unitary, and consistent state practice, just as it is difficult to determine *opinio juris*, or the motivations that drive states to act the way they do. The second explanation is that these difficulties have not downplayed the authority of state obligations deriving from customary international law in relation to treaty-based obligations. While in the latter case, claims to the effect that international law norms impinge on national sovereignty can be easily deflected by pointing out that their authority ultimately rests on the express decision of the domestic “sovereign,”<sup>101</sup> the authority of

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<sup>99</sup> The relevance to foreign law is even more direct, given the inherently comparative methodology used in identifying rules of customary international law. See, e.g., Rex D. Glensy, *Which Countries Count: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 362 (2004) (observing that customary international law norms are “inherently comparative in nature in that it requires courts to canvass a variety of materials, including some sources which originate abroad”).

<sup>100</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

<sup>101</sup> This made Professor Mark Tushnet qualify arguments cast in the language of sovereignty in discussions about the authority of foreign law as “misleading.” See Tushnet,

customary international law is implied from the fact that the domestic sovereign does not object to the existence of the customary rule.<sup>102</sup> The distinction between implied and express authorization gains weight considering the sacrosanct role of sovereignty in legal thought.

These difficulties are compounded by recent developments in customary human rights law. From a traditional model that developed inductively and included rules of war, maritime affairs, and diplomatic relations, custom has now become a deductive and “purposive”<sup>103</sup> process that relies less on state practice and more on general statement of rules. Torture, for example, is considered a rule of customary international law even if it cannot be said, especially nowadays, that states are engaged in a unitary, general, and consistent practice of prohibiting its use. Some have called for bolder moves to recognize the status of customary international law norms to a long list of human rights, including freedom of expression, religious freedom, or even social rights.<sup>104</sup>

The domestic status of international law is a matter regulated internally by any legal system. In American law, the canonical statement was made by the Court in *The Paquete Habana* more than a century ago: “International law is part of our law.”<sup>105</sup> The exact meaning of these words, as far as the domestic status of customary international law is concerned, has recently become a matter of controversy. Two schools of thought, which have been labeled “modern” and “revisionist,” offer radically different historical narratives and accounts of the state of doctrine.

The “modern” school argues that customary international law norms had the status of self-executing general common law under the regime of *Swift v. Tyson*,<sup>106</sup> when common law was determined independently by both federal and state courts<sup>107</sup> and followed the regular hierarchy of rules whereby decisions of federal authorities trumped those of states. In *Erie v. Tompkins*, the Court put an end to

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*supra* note 3, at 261; *see also* Cleveland, *supra* note 13, at 9 (arguing that international law is not foreign).

<sup>102</sup> This point is compounded by arguments about what qualifies as an instantiation of the “persistent objector” rule. For instance, a treaty reservation, as in the case of the U.S. reservation to article 6(5) of the International Covenant on Civil and Political Rights, *supra* note 11, that prohibits juvenile death penalty, may not qualify as an objection to an emerging international practice that could arguably be seen as a norm of customary international law. *See* Cleveland, *supra* note 13, at 120–21.

<sup>103</sup> Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 326–28 (1997) (describing the phenomenon and attributing the phrase “purposive creation of custom” to LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 33, 37 (1995)).

<sup>104</sup> *See id.* at 366–68 (and references included therein).

<sup>105</sup> 175 U.S. 677, 700 (1900).

<sup>106</sup> 41 U.S. (16 Pet.) 1, 9 (1842).

<sup>107</sup> *See* Louis Henkin, *International Law as Law in the United States*, 82 *MICH. L. REV.* 1555, 1557–58 (1984).

this regime when it denied the existence of a federal *general* common law,<sup>108</sup> thus setting the basis for a *new* federal common law restricted to areas in which “a federal rule of decision is ‘necessary to protect uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law.”<sup>109</sup> This development called into question the domestic status of customary international law, which could now be either part in the “new” federal common law or be left within the attributions of states. As the “modern” school of thought argues, the Court took the view in *Banco Nacional de Cuba v. Sabbatino*<sup>110</sup> that it made little sense to leave the determination of the domestic status of various norms of customary international law within the attributions of states. First, such a regime threatened to jeopardize the unity of meaning of customary international law across the United States, and, second, states lacked international law recognition. The other (revisionist) school of thought<sup>111</sup> denies the “modern” approach to customary international law post-*Erie*. It claims that because norms of customary international law were not self-executing federal law pre-*Erie*, and because *Erie* conditioned its incorporation into the new corpus of federal law on express authorization of a political branch, it follows, first, that, lacking such authorization, customary international law post-*Erie* is state law and, second, that it cannot form the basis for federal jurisdiction.<sup>112</sup>

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<sup>108</sup> 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied . . . is the law of the state.”).

<sup>109</sup> *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)) (other citations omitted); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (mentioning the Court’s precedents in rules about the interpretation of collective-bargaining agreements and evidentiary privileges in federal-question cases).

<sup>110</sup> 376 U.S. at 423–27.

<sup>111</sup> *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995).

<sup>112</sup> There are some intermediate positions that do not fit within either of the above two schools of thought. *See* Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 193–205 (2001) (dividing the revisionist argument on constitutional grounds into two parts and arguing that it is correct about international law not preempting inconsistent state law, but wrong about international law not forming the basis for federal jurisdiction); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 467–85 (2002) (arguing that customary international law should be treated as “general law,” neither federal nor state law in nature, but which would remain available to both state and federal courts to apply following traditional principles of the conflict of laws); *see also* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91, 91 (2004) (arguing that customary international law is best “viewed as a *tertium quid*, neither federal nor state law, but, rather, law to be applied in appropriate cases by federal courts in instances where they

The division between modern and revisionist positions mirrors a distinction between two conceptions of American constitutionalism (democratic and internationalist constitutionalism) that structure much of the contemporary constitutional discourse and which the Article explores in the next section.<sup>113</sup> It suffices for now to point out that the revisionist historical interpretations were first advocated less than a decade ago by scholars and judges who were becoming wary that the “new” customary human rights law threatened the democratic character of American law. Consider, as a hypothetical, the implications of recognizing the ban on juvenile death penalty or even the prohibition of the death penalty in general as a norm of customary international law.<sup>114</sup> The main difference between the revisionist and modernist positions refers to whether federal courts have the power to authorize the incorporation of these norms into the federal common law. If they do not, and a political branch does not expressly authorize their incorporation, they are state law and enjoy whatever degree of protection the various states afford them. This is what the revisionist position advocates. If, by contrast, courts are given that power, as advocates of the “modern” position intimate that they have, then, once incorporated, their status would be superior to both state law and prior acts of Congress and inferior to the Constitution, which remains the supreme law of the land, and later acts of Congress.<sup>115</sup> The revisionists reject the “modern” account on grounds of federalism, separation of powers, and representative democracy.<sup>116</sup> Their reasons for rejection would be even stronger had they been presented with a claim that customary international law norms are self-executing, i.e., that even post-*Erie* they do not require express authorization into federal law.

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otherwise possess jurisdiction” (footnote omitted)); Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 495–97 (1997) (arguing that the norms of customary international law applied in federal courts should be limited to *jus cogens* norms).

<sup>113</sup> See *infra* Part IV.A.

<sup>114</sup> Some scholars have made this suggestion. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 *SUP. CT. REV.* 295, 307–08, 322–26 (1994); Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 *GA. J. INT’L & COMP. L.* 165, 168–77 (1995).

Assume further that the United States could not invoke the persistent objector rule, thus neutralizing its application. For a discussion of the invocation of this rule in the context of the juvenile death penalty, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 *DUKE L.J.* 485, 516–35 (2003).

<sup>115</sup> See Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 386–87 (1997) (“Absent . . . dissent, customary human rights norms represent valid international obligations of the United States . . . [I]f the United States has acquired human rights obligations that impose further limitations on the States [than those imposed by domestic constitutional law], then these obligations are presumptively enforceable. If Congress opposes the application of such norms in domestic law, it has the constitutional authority to deny them domestic enforcement.”).

<sup>116</sup> See Bradley & Goldsmith, *supra* note 111, at 861–70.

However, that is not the case with the rules in our hypothetical, and it would not be the case with any rule of customary human rights law.

At first blush, the reasons for rejecting the modern position seem very strong. What amplifies them significantly is, as we saw, the purported danger of a large body of customary human rights law that threatens to become part of American law after bypassing democratic channels. It is essential for our purposes to understand exactly what this danger is. As the revisionists see it, the danger is that human rights activists might succeed in convincing federal courts to incorporate the body of “new” human rights rules *en masse*. Revisionists perceive the danger as real given that some courts are known as sympathetic to such claims. For instance, the revisionists see many of the internationalist-flavored decisions in American law, which are often invoked by the “modern” school of thought, as part of a “crusade” by the Second Circuit Court of Appeals.<sup>117</sup>

Relevant for our purposes is that the revisionists’ portrayal of the danger is a wild exaggeration, and that the debate it has sparked is indicative of the dynamics of the broader constitutional paradigm. In addition to problems that plague the “new” customary human rights law within the field of international law, and about which the “revisionists” remain conspicuously silent,<sup>118</sup> domestic American law does not—for good or worse—run the risk of being invaded with “undemocratic” customary rules about, say, minimum wage or the right to decent health care. This observation need not rely on the Court’s decision in *Sosa*,<sup>119</sup> which, being decided in 2004, could not have answered the revisionists’ fears a decade ago. My point rather is that one could easily have anticipated that if the Court were ever to recognize a right of the federal judiciary to incorporate customary human rights norms, the most it could have done was exactly what it eventually did in *Sosa*. That decision does not warrant the apocalyptic predictions of the revisionist school of thought.

*Sosa* concerned the interpretation of the Alien Torts Statute (“ATS”), which was adopted by the first Congress in 1789 and has been, since the decision of the Second Circuit Court of Appeals in *Filartiga v. Pena-Irala*<sup>120</sup> in 1980, the main legal tool for international human rights litigation in federal courts. Section 1350 of the statute reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>121</sup> While the issues arising under the ATS constitute only a subset of a broader debate about customary international law, it specifically addressed revisionists’ fears in that it laid down the criteria that federal courts

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<sup>117</sup> See Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 630 (2002) (referring specifically to the discovery of the Alien Tort Statute in the 1980s).

<sup>118</sup> For an account of different theories of custom within international law, see generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

<sup>119</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>120</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>121</sup> 28 U.S.C. § 1350 (2006).



ought to use in incorporating customary human rights norms into federal law. Even if section 1350 has a specific domain of application, the *Sosa* decision retains its relevance for our purposes because, first, the interpretative mechanism it laid down will apply throughout American law whenever customary human rights norms are invoked and, second, the ATS remains the main tool for international human rights litigation (in case the revisionists are equally concerned that the separation of powers prevents courts from overstepping into the domain of foreign affairs, which they might see as falling exclusively within the domain of the executive).

At issue in *Sosa* was whether section 1350 created a cause of action to sue in federal courts to recover damages for violation of an alleged norm of customary human rights against arbitrary arrest and detention.<sup>122</sup> In short, the Court was asked to decide whether section 1350 is purely jurisdictional or whether it also creates a cause of action. While all of the Justices agreed that the provision was jurisdictional, they parted ways as to whether legislative intent indicates that new causes of actions could be created under the statute for violation of customary international law, other than those that constituted a violation of the laws of nature at the time when the statute was adopted. The majority answered this question in the affirmative, deciding in essence that the most egregious perpetrators of the most egregious violations of international law can be held accountable in American courts.<sup>123</sup> The Court held that the door for causes of action that effectively incorporate customary human rights norms into federal common law “is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms.”<sup>124</sup> In order to qualify for protection, the norms whose violation is alleged have to be, first, clearly and specifically defined and, second, accepted among civilized nations.<sup>125</sup> None of the Justices believed that the norm

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<sup>122</sup> 542 U.S. at 697–99.

<sup>123</sup> *See id.* at 735–39. There is disagreement about the correct interpretation of the Court’s holding in *Sosa*, but this much is clear. *See* Stephens, *supra* note 45, at 535.

<sup>124</sup> *Sosa*, 542 U.S. at 729.

<sup>125</sup> *Id.* at 732. In addition to the criteria that the norm has to fulfill, the claim itself has to meet a number of requirements: it has to be filed after domestic remedies have been exhausted, its resolution ought not to interfere with a policy of case-specific deference to the political branches, etc. *See id.* at 733 n.21. It might be worth adding one additional remark about the language that the Court used in spelling out the above criteria. It is surprising that the nineteenth-century distinction between civilized and uncivilized nations should find its way into a decision of the Court in the twenty-first century. An example is the language of article 38 of the Statute of the International Court of Justice, which mentions among the sources of international law “the general principles . . . recognized by civilized nations.” Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1031. This formulation was replaced in the *Restatement Third of Foreign Relations Law* by the “general principles common to the major legal systems.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (emphasis added). For scholarly analysis, see generally GERRIT W. GONG, *THE STANDARD OF ‘CIVILIZATION’ IN INTERNATIONAL SOCIETY* (1984). Among the recent scholarship is ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

against arbitrary arrest and detention (no use of torture was alleged) in that particular lawsuit qualified as sufficiently narrow.<sup>126</sup>

Justice Scalia's dissent embraced the revisionist position and urged against an interpretation of section 1350 that would give federal courts the discretion to recognize causes of action for violations of modern customary international law.<sup>127</sup> No political branch has authorized courts to incorporate customary international law into federal common law, which is the *sine-qua-non* condition post-*Erie*.<sup>128</sup> In reply, the majority, per Justice Souter, argued that the Court's interpretation was supported by an original intent interpretation of what violations of the law of nations meant at the end of the eighteenth century and concluded, after looking back at two centuries of decisions incorporating international norms into the body of American law, that "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."<sup>129</sup>

Hardly anyone had reason to be surprised that the Court imposed a set of conditions as to the nature and status of norms of customary human rights that can be given legal effect in American law. Revisionist alarmism is unjustified. Or at least it was not justified by worries about the indeterminacy of customary international law as much as by attempts to defend a vision of the American constitutionalism. As Justice Scalia wrote:

The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates.<sup>130</sup>

There is, however, a competing narrative. Writing in 1980, the *Filartiga* court—composed neither of international law professors nor human-rights activists—explained why the torturer had become the equivalent of the pirate and slave trader, a "*hostis humani generis*, an enemy of all mankind,"<sup>131</sup> and reflected on its own decision in that case as "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."<sup>132</sup> This narrative, which was embraced by Justice Souter's majority opinion in *Sosa*, counters the "revisionist" model on each of its claims. It argues that sovereignty is becoming

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<sup>126</sup> *Sosa*, 542 U.S. at 734.

<sup>127</sup> *See id.* at 739 (Scalia, J., dissenting).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 729–30.

<sup>130</sup> *Id.* at 749–50 (Scalia, J., dissenting) (emphasis added).

<sup>131</sup> *Filartiga v. Pena-Irata*, 630 F.2d 876, 890 (2d Cir. 1980) (emphasis added). The court qualified that statement by saying that the analogy holds for the purpose of civil liability. *Id.*

<sup>132</sup> *Id.*

disintegrated<sup>133</sup> and accordingly that the lack of a centralized decision-maker does not undermine the authority of customary international law.<sup>134</sup> It also makes the argument that international law has been considered part of American law throughout history.<sup>135</sup> Against authoritative jurisprudential accounts that denied international law the status of law,<sup>136</sup> it shows that there are no differences between domestic and international legal regimes.<sup>137</sup>

The point of contrasting these two narratives is to show that the debate about customary international law is less about the nature of those norms than about “notions that lie at the core of American legal self-understanding.”<sup>138</sup> The purported dangers that revisionists mention are exaggerations with little support in reality. The more likely explanation of their position is that customary human-rights norms seem to threaten both the hard theoretical core of American constitutionalism as well as the achievements of American constitutional law. The same is true about the foreign law debate. One is likely to resist claims about the relevance of customary human-rights norms, as well as the use of foreign law, if one starts from the strong premise that American constitutionalism should remain the only vehicle for recognition and enforcement of human rights in America.<sup>139</sup> Much of this comes down, as we shall see in Part IV, to an assessment of the record of domestic constitutionalism in protecting rights. Before we get to that part of the analysis, we need to consider the argument that foreign law has authority by virtue of being the modern *ius gentium*.

#### D. Foreign Law and the Law of Nations

One attempt to escape the polarization of the foreign law debate has been advanced by Professor Jeremy Waldron.<sup>140</sup> He argues, on largely pragmatic grounds, that the authority of foreign law in situations when there is an emerging legal consensus derives from it being the modern *ius gentium* (law of nations).<sup>141</sup>

The premise of this argument is that law, like science, is a “problem-solving enterprise.”<sup>142</sup> Framed in these terms, the self-understanding of legal actors is overshadowed by law’s function. This much is clear: a doctor’s metaphysical

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<sup>133</sup> See SLAUGHTER, *supra* note 5, at 152–62; Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2043 (2003). For an elaborate discussion of this phenomenon, see Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 CONSTELLATIONS 447, 331–45 (2005).

<sup>134</sup> This claim is made by Professors Bradley and Goldsmith. See Bradley & Goldsmith, *supra* note 103, at 331–45.

<sup>135</sup> See Koh, *supra* note 21.

<sup>136</sup> See HART, *supra* note 81, at 208.

<sup>137</sup> See Koh, *supra* note 21, at 2601.

<sup>138</sup> Aleinikoff, *supra* note 112, at 92.

<sup>139</sup> Bradley & Goldsmith, *supra* note 103, at 368.

<sup>140</sup> See Waldron, *supra* note 8, at 146.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

qualms matter little to the patient; what really matters is the cure. Foreign law appears as a valuable resource—a body of accumulated knowledge—that contains the answers that foreign legal systems have provided to common problems. Importantly, this body of knowledge contains only common answers. Professor Waldron’s theory is tailored specifically for cases like *Roper* where foreign solutions form “a dense and mutually reinforc[ing] consensus.”<sup>143</sup> This body of accumulated knowledge constitutes the modern *ius gentium* and provides the only possible grounding for a theory of the citation of foreign law.

The gist of this theory becomes clear once we ask how this model is supposed to have worked in *Roper*. American judges were confronted in that case with the problem whether to uphold the juvenile death penalty as constitutional.<sup>144</sup> Given the doctrinal corpus of American constitutional law, they specifically had to determine whether that form of punishment qualified as cruel and unusual within the meaning of the Eighth Amendment.<sup>145</sup> As it happens, there is already in the world a body of accumulated knowledge that comprises the answers of the world’s legal systems to the question whether adults should be executed for crimes they committed as minors. While foreign jurisdictions obviously did not address the specific question of the interpretation of the U.S. Constitution, the problem they addressed was indeed identical. Is this enough?

When judges decide cases, they apply a body of legal materials to a fact pattern. Depending on a judge’s legal theory, that body of legal materials can be broad or narrow: for instance, it may include moral principles or it may not; it may include foreign law or it may not. Not every fact pattern automatically qualifies as a legal problem, just as not every natural phenomenon automatically qualifies as a scientific problem. Whether a fact pattern is perceived as a problem depends on what the legal materials say about it. It is not a problem whether in the United States women have the right to vote because anyone agrees that the legal materials applicable to any fact pattern raising that question include the text of the Constitution, which is clear on this point. Similarly, for an originalist like Justice Scalia, the constitutionality of the juvenile death penalty is not a legal problem. Its answer is as obvious as the answer to why cancerous cells cause death is to a doctor. This point is important because a judge is unlikely to look at *ius gentium*, or anywhere else, for guidance unless they believe that guidance is needed—unless, that is, they believe the case before them qualifies as a legal *problem*. We see again the important connection between the questions with which a court is presented and the methodology it deploys in answering them. Hence the relevance of *ius gentium* as a body of law that contains answers to common problems is questionable.

In Waldron’s view, *ius gentium* does not replace or trump domestic law: it only guides its elaboration and development in those cases where domestic law is

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<sup>143</sup> *Id.* at 145.

<sup>144</sup> *Roper v. Simmons*, 543 U.S. 551, 555 (2005).

<sup>145</sup> *Id.*

open to a number of possible interpretations.<sup>146</sup> Going back to our judge faced with a question about the constitutionality of the juvenile death penalty, it turns out that a quick survey of foreign legal systems shows the existence of a common solution to this problem. This solution urges against executing adults for crimes they committed when they were children. To be sure, the existence of a consensus is no guarantee of truth. No one looking for moral truth would need to survey the world's legal systems. The existence of consensus on this matter is no more a guarantee of moral truth than is the lack of a consensus on same-sex marriages evidence that banning these marriages is morally permissible. Just like in science, the importance of a consensus is rather that it provides "an established body of legal insight, reminding [one] that [the] particular problem ha[d] been confronted before and that they . . . should . . . think it through in the company of those who have already dealt with it."<sup>147</sup> Common answers form an area of "overlap, duplication, mutual elaboration, and the checking and rechecking of results that is characteristic of true science."<sup>148</sup> Faced with the problem of the constitutionality of the juvenile death penalty, American courts would have as many reasons not to look at how that very problem has been addressed in other legal systems as would public health officials confronted with a new epidemic within their borders have for disregarding how that epidemic had been fought in other countries.<sup>149</sup>

The legal status of this body of available knowledge does not apply as a rule of customary international law (although it is not impossible "that penal practices might come under international law scrutiny in the same sort of way"<sup>150</sup>). Its legal force is indirect and in a sense more powerful, since it purports to serve as a guide in interpreting the meaning of the Constitution, which is the supreme law of the land. Its interpretative authority rests on two grounds. We have already encountered the first one: it would be unwise not to benefit from the existence of a body of law in solving difficult problems at hand. *Ius gentium* could for instance help with the many difficulties regarding the administration of the death penalty. This assumes, of course, that the commonality was established so that challenges to the relevance of empirical data or comparative lessons about constitutional structures can be set aside. However, quite apart from the above remarks about what questions qualify as problems, the necessity of "translation" raises legitimate concerns. As Justice Scalia argued in *Roper*, the existence of juries as sentencing authorities in American law is an essential element in determining the constitutionality of the juvenile death penalty.<sup>151</sup> This goes to show that "foreign authorities . . . do not even speak to the issue before [the Court]."<sup>152</sup> Other authors have also warned of the dangers of nominalism in constitutional comparisons.<sup>153</sup>

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<sup>146</sup> See Waldron, *supra* note 8, at 139.

<sup>147</sup> *Id.* at 133.

<sup>148</sup> *Id.* at 138–39.

<sup>149</sup> *Id.* at 143.

<sup>150</sup> *Id.* at 139.

<sup>151</sup> See *Roper v. Simmons*, 543 U.S. 551, 623–24 (2005) (Scalia, J., dissenting).

<sup>152</sup> *Id.* at 624.

<sup>153</sup> See Tushnet, *supra* note 29, at 1307.

By failing to address the criteria for establishing “commonality,” Waldron eschews too many of these difficulties.

The purported authority of *ius gentium* is grounded also in a second set of considerations. To identify them, we need to ask whether this authority is one based on reasons or numbers. Since Waldron’s model is meant to apply only to those situations where there is an emerging world consensus,<sup>154</sup> its authority is at least partly based on what above we called “nose-counting.” It is emphatically not limited to that: “*ius gentium* is more than the sum of its parts, [it is] a dense and mutually reinforced consensus.”<sup>155</sup> This consensus confers special weight to the authority of foreign law, one that sets it apart from under-theorized, purely instrumental grounds.<sup>156</sup> At the same time, we know that the existence of world consensus is no guarantor of truth; Waldron remains, after all, a legal positivist. In fact, while the substantive, reason-based authority of *ius gentium* varies from topic to topic, its prima facie authority is that of “the accumulated wisdom of the world on rights and justice.”<sup>157</sup> As history shows, *ius gentium* represents a more grounded focus of aspiration to justice, “looking not just to philosophic reason but to what law had actually achieved in the world.”<sup>158</sup> It is in this sense that the authority of this additional body of law can be said to rest on both the fact of consensus and the reasons that support it.

The *ius gentium* theory has two main limitations. First, it does not speak to the legitimacy of enlarging the interpretative canon by including references to *ius gentium* in the elaboration and development of domestic law. While it is true that this theory is not confined to constitutional interpretation, the fact that it refers specifically to the Court’s use of foreign law in *Roper* is sufficient to evaluate it by its constitutional implications. Waldron hopes to dispose of this problem by addressing an audience already convinced that law is the domain of reason rather than will. If law is a problem-solving rational activity, then no available body of knowledge ought to be ignored. That is what the law’s aim—its promise to justice—entails.<sup>159</sup> Waldron’s theory implies the Constitution is law above all else, law even before it is “supreme law,” and hence a constitutional theory is necessarily parasitic upon a more general legal theory. If the use of *ius gentium* is

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<sup>154</sup> See Waldron, *supra* note 8, at 132.

<sup>155</sup> *Id.* at 145.

<sup>156</sup> This is what Justice Breyer’s defense of the use of foreign law on pragmatic grounds looks like at times. See Antonin Scalia & Stephen Breyer, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases*, 3 INT’L J. CONST. L. 519, 522 (2005).

<sup>157</sup> Waldron, *supra* note 8, at 138.

<sup>158</sup> *Id.* at 134.

<sup>159</sup> *Id.* at 140 (“In addressing this problem, we need all the help we can get. If these issues have been wrestled with in a number of other jurisdictions, then our commitment to the pursuit of justice should lead us to examine the end product of their labors for guidance.”); see also Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 761 (2001).

justified as part of law's telos, then one should not be overly worried about constitutional legitimacy.

This argument dovetails well with the assertion that *ius gentium* is the product of a reflective equilibrium between positive law and natural law.<sup>160</sup> Positive law need not abandon its aspirational dimension. Like many recent legal theories, this one also emphasizes the complementary character of the two schools of jurisprudential thought. However, a question remains about the place of *history* in this model. It should not be overlooked that history colors our understanding of the reflective equilibrium between positivism and natural law. Professor Waldron's views on this matter are nuanced. Unsurprisingly, he points out that "courts have invoked *ius gentium* [depending] in part on the purposes, traditions and categories of the particular court using it."<sup>161</sup> He also rejects Savigny's essentializing local customs because, first, it would inadvertently foreclose what legal systems can learn from one another in "technical matters" such as the administration of the death penalty and, second, it would turn a blind eye to "the complex rights and wrongs" of the legal matter under consideration.<sup>162</sup> All these points are well taken, but one remains with the feeling that history is still not given its proper due. By history it is meant, the idea of law as an ongoing historical project.<sup>163</sup> A sound jurisprudential project must integrate a moral dimension (from natural law theory), a political dimension (from legal positivism), and a historical dimension (in the historical school). As we learned from debates about customary international law and constitutional interpretation, questions about the legitimacy of using foreign law seem to always come down to the self-understanding of the American legal/constitutional identity. History plays a crucial role in understanding constitutional identity. Waldron's emphasis on the problem-solving nature of law and science prevents him from giving history its due. Perhaps neglect of history is the price that Waldron's conception pays for avoiding the polarized camps of the foreign law debate.

A second limitation of the conception under consideration is its exclusive focus on situations where there is a world consensus. This is clearly not a contingent limit in Waldron's theory. The very authority of *ius gentium* is predicated on the existence of an emerging consensus. What is more, Professor Waldron does not argue that *ius gentium* provides only one of the possible grounds on which foreign law can be cited. He argues adamantly that it is the only one: "[Piecemeal citation] . . . as though it were a casual matter of getting a little bit of help here and a little bit of help there,"<sup>164</sup> of the type Justice Breyer's pragmatism supports, "would be easy to discredit."<sup>165</sup>

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<sup>160</sup> Waldron, *supra* note 8, at 136. For reflective equilibrium in moral philosophy, see JOHN RAWLS, *THEORY OF JUSTICE* 48–51 (1971).

<sup>161</sup> Waldron, *supra* note 8, at 136.

<sup>162</sup> *Id.* at 140.

<sup>163</sup> See generally Harold Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 795 (1988).

<sup>164</sup> Waldron, *supra* note 8, at 144.

<sup>165</sup> *Id.* at 145.

Easy or not, it is unclear why that should not be the required explanandum of any theory of the citations of foreign law. If the *Roper* Court could look for guidance at foreign law, why cannot the Court do the same when faced—as it soon will be—with a challenge to the constitutionality of the ban on same-sex marriages? Why should it matter that there is no world consensus on same-sex marriages? Why would the Court (or courts in general) need less guidance in that case than it did when deciding on the constitutionality of the juvenile death penalty? One possible answer is that Professor Waldron, who is a noted opponent of judicial review,<sup>166</sup> believes that the Court should have no role reviewing duly-passed legislation that makes the institution of marriage unavailable to same-sex couples. The problem with this answer is that the *ius gentium* model is not directed exclusively to judges. Legislators—who were placed on the jurisprudential map almost single-handedly by Professor Waldron<sup>167</sup>—should equally take into consideration the law of nations (although it is unclear why they should be limited to situations of world consensus). Whatever advantages a model that limits the use of foreign law to a small core of instances of world consensus may have, they are far outweighed by its shortcomings. The lack of relevant differences between cases such as the juvenile death penalty and those of same-sex marriage, the right to die, affirmative action, or gender discrimination makes that point unequivocally. It is a merit of Waldron's theory that it presents the authority of foreign law from the perspective of the decision-maker. Yet, from that perspective, it makes little sense to treat these two cases differently.<sup>168</sup> Both in cases of world consensus as well as in those of “piecemeal comparisons,” courts need guidance, and should be able to make use of whatever resources there are. It would do injustice to the potential of comparative constitutionalism, and to the quality of work that we expect from our judges, to limit the use of foreign law to situations of world consensus.

#### IV. PIECEMEAL COMPARISONS

Let us begin again with an example. It is only a matter of time before challenges to the constitutionality of the ban on same-sex marriages reach the Supreme Court. After the Court in *Lawrence* struck down as unconstitutional a Texas statute criminalizing homosexual sodomy,<sup>169</sup> it will soon be asked to square that decision with the practice of banning same-sex marriages, especially since marriage has long been recognized as a fundamental interest that deserves

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<sup>166</sup> For the most recent statement of his views on this matter, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2007).

<sup>167</sup> See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

<sup>168</sup> The Chief Justice of the Supreme Judicial Court of Massachusetts has powerfully made this point. See Marshall, *supra* note 9, at 1642 (“How odd . . . when one stops to think of it: A novel issue of constitutional law will send us, our clerks, and counsel to the library to uncover any possible United States sources of authority—including the note of a second-year law student. But in our search for a useful legal framework, we ignore the opinion of a prominent constitutional jurist abroad that may be directly on point.”).

<sup>169</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).



heightened protection.<sup>170</sup> The aim here is not to offer predictions about the Court's answer, but rather to ask whether the Justices should "look for guidance" at foreign sources in making their decision.

A quick survey of the world's legal systems shows that no consensus on this matter is in sight. While more and more jurisdictions are setting in place forms of unions for same-sex couples that resemble marriage in all but name, the contentious constitutional issue is whether a ban on same-sex marriage is at odds with principles of constitutional equality and liberty that all modern constitutions guarantee. So far, only a handful of countries have given same-sex couples access to marriage, either by legislative action (e.g., Spain and the Netherlands) or by judicial decisions (Canada) or by legislative action at the request of courts (South Africa). In the United States, only Massachusetts has so far struck down the ban as unconstitutional under state law.<sup>171</sup>

Hence arguments for the authority of foreign law cannot rest on numbers, but neither can efforts to undermine it. If one looks at trends, as the Court did in *Roper*,<sup>172</sup> then recent developments add up to sufficient evidence of an ongoing trend in an area where virtually no changes have occurred over time. It follows that reference to numbers by either side is inconclusive. Whatever authority foreign law might claim would have to rest on reasons. We now enter the area of what Professor Waldron called "piecemeal citation," which is, he warned, "easy to discredit."<sup>173</sup>

It is not difficult to see why. The central concerns refer to a lack of methodology in how judges should use foreign sources. What jurisdictions they should consult, how to check sources and references, how to escape the dangers of nominalism, and how to assess the relevance of a particular provision or line of reasoning outside of its broader legal, cultural and historical context—these questions are significantly more difficult to answer in the case of "piecemeal comparisons" than a situation of world consensus. Yet unless an answer is provided there is a serious risk that judges will cite foreign sources in a selective and unprincipled way as part of their broader strategy to "sell" results based on personal preferences rather than on law.

This argument is sufficiently powerful even without overstating it. Concerns about methodology are often used as arguments against judicial review. It is claimed that citing foreign law can dramatically expand judicial discretion since the accuracy and relevance of the citations cannot be reliably verified. Whether or not particular instances where foreign law is invoked would be wrong, inappropriate, or strategically motivated, the charge is that the effect would be the same: expansion of judicial discretion. This line of criticism assumes that a methodology has not been worked out, which at this point remains an open

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<sup>170</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>171</sup> See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

<sup>172</sup> *Roper v. Simmons*, 543 U.S. 551, 604 (2005).

<sup>173</sup> Waldron, *supra* note 8, at 145.

question. Even so this worry seems exaggerated because it inadvertently amplifies the authority of one method of constitutional interpretation over all others. As one commentator notes:

[C]onstitutional interpretation in our common law tradition already involves considerations of multiple interpretative sources, including text, intent, precedent, history, structure, values, and pragmatic consequences. When domestic interpretative resources align, foreign or international law will not move U.S. judges toward a different result.<sup>174</sup>

Its outward-reaching dimension would indeed set foreign law apart from other sources. However, placing it alongside other interpretative tools shows that it is unfair to cry “judicial discretion” when virtually all other methods have been, and still are, deeply contested. It is for this reason that concerns about methodology in using foreign law should be kept separate from concerns about judicial discretion.<sup>175</sup>

Methodological concerns in this area can only be answered by defending a substantive normative vision of constitutionalism whose by-product will be a defensible methodology for using foreign law. In what follows, the Article makes the case for the connection between method and substance by discussing three different theses that challenge its authority. According to the first thesis, expanding the canon of interpretative materials to include foreign law would undermine core assumptions about the democratic self-government of the American people.<sup>176</sup> The second thesis argues that using foreign law is a form of constitutional borrowing that may alter the normative makeup of the American constitutional system.<sup>177</sup> The third thesis voices the worry that a widespread use of foreign law in constitutional adjudication will undermine the integrity of the American constitutional discourse.<sup>178</sup>

#### A. *The Argument from Self-Government*

This argument claims that including foreign constitutional practices in the canon of authoritative interpretative materials violates basic democratic principles of self-government. It is a condition of freedom to be subject only to such laws as one would impose upon oneself, either directly or through representatives.<sup>179</sup> It would therefore take some work to show on what grounds the laws of other nations

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<sup>174</sup> Jackson, *supra* note 34, at 122 (footnote omitted).

<sup>175</sup> Neuman, *supra* note 22, at 90 (“[I]nterpretative aids may increase the resources available to judicial discretion, but prohibiting their use would hardly have prevented judicial activism, of either the liberal or the conservative variety.”).

<sup>176</sup> See *infra* Part IV.A.

<sup>177</sup> See *infra* Part IV.B.

<sup>178</sup> See *infra* Part IV.C.

<sup>179</sup> See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1998).

can claim authority over American citizens. One can easily see why such efforts might be destined to fail. The reason is not necessarily the impossibility of working out a conception of such grounds, as in some version of cosmopolitanism, but rather that it would be very difficult to demonstrate that those grounds are the same as those on which American law has built its claim to legitimacy over the course of its history. The claim is that American conception of democratic self-government simply does not allow for the use of foreign law for purposes of constitutional interpretation.

To start, this claim has to be restated as one about American democracy. After all, European states are also democracies, whose citizens are presumably no less self-governed than Americans, and nevertheless do not seem worried about using non-European legal sources in interpreting their founding documents. The same is true about India, Israel, South Africa, Canada, and many other systems. An explanation is needed as to what, if anything, sets American democracy apart. This explanation is particularly important considering that the argument from self-government is often invoked as self-evident. The aim in this Part is to question whether there is anything self-evident about it. In fact, when analyzed closely, the American conception of self-government is, in fact, the object of deep interpretative disagreements. Since any given interpretation has to prove its historical and normative soundness, it follows that dismissing the authority of foreign law requires more than a mere declaration of incompatibility with a purportedly “self-evident” conception of self-government.<sup>180</sup>

Professor Jed Rubenfeld recently advanced a comparative formulation of the argument from self-government.<sup>181</sup> His claim is that American and European conceptions of constitutionalism are fundamentally different. The American conception, which he terms “democratic constitutionalism,” sees “constitutional law as embodying a particular nation’s fundamental, democratically self-given”—through national democratic processes—“legal and political commitments.”<sup>182</sup> The emphasis here is on the Constitution as “the product of a national participatory political process, through which people commit to writing the fundamental values or principles that will govern their society.”<sup>183</sup> The invention of eighteenth-century America was not constitutional democracy, but rather democratic constitutionalism.<sup>184</sup> By contrast, in Europe, democracy comes before constitutionalism.<sup>185</sup> The latter is understood as a series of checks and constraints on democracy.<sup>186</sup> In the European conception, it is less important that the constitution be “the product of a national participatory political process . . . [than

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<sup>180</sup> Compare Alford, *supra* note 37, at 709–12 (claiming that comparativism is inconsistent with political democracy).

<sup>181</sup> See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

<sup>182</sup> *Id.* at 1999.

<sup>183</sup> *Id.* at 1993.

<sup>184</sup> See *id.* at 2000–01.

<sup>185</sup> See *id.* at 1975.

<sup>186</sup> See *id.* at 1971.

that it] recognize human rights, protect minorities, establish the rule of law, and set up stable democratic political institutions.”<sup>187</sup> By American standards, “international constitutionalism” is deeply antidemocratic. The roots of this difference, Professor Rubinfeld argues, are to be found in history, more specifically in the radically different lessons of the Second World War.<sup>188</sup> For Europeans, the war exemplified the horrors of nationalism, democracy, and popular sovereignty that brought tyrants like Hitler and Mussolini into power.<sup>189</sup> By contrast, victory taught Americans to cherish their particular form of nationalism and democracy.<sup>190</sup> These lessons shaped subsequent attitudes toward international law. Europeans saw it as a check on national sovereignty; for Americans, by contrast, it was a tool to Americanize the world by promoting a “constitutionalism in which fundamental rights as well as protections of minorities would be laid down as part of the world’s basic law, ostensibly beyond the reach of ordinary political processes.”<sup>191</sup> The success of the latter project contained the seeds of its own destruction: the more successful international constitutionalism became, the stronger its claims on the United States; the less responsive the United States grew to these claims, the more the international community was using international law to contain U.S. power. On this basis, Rubinfeld concludes that claims to authority made by international law are undemocratic by American standards and thus fated never to succeed.<sup>192</sup>

It is unsurprising that from the perspective of “democratic constitutionalism” international legal norms and foreign constitutional laws are treated similarly. If anything, the approach to international legal norms applies even more powerfully to claims about the relevance of foreign law. Even if incorporated into American law, international legal rules would still have a lower status than the Constitution. Notwithstanding, recognizing foreign law as a method of interpretation would impact directly on the Constitution itself, the supreme law of the land.

Consider, for instance, the exchange between the majority and dissenting Justices in *Roper* regarding the invocation of the Convention of the Rights of the Child.<sup>193</sup> Writing for the majority, Justice Kennedy mentioned article 37 of the convention, which bans the juvenile death penalty.<sup>194</sup> Since the United States was not a signatory to the convention, Justice Kennedy’s point was by necessity purely interpretative. In fact, he specified that only the United States and Somalia have not ratified the convention, as further evidence of an emerging world consensus on the matter before the court.<sup>195</sup> Justice Scalia did not let that pass unnoticed, scolding the majority for its disregard of basic principles of self-government. In

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<sup>187</sup> *Id.* at 1993.

<sup>188</sup> *See id.* at 1971.

<sup>189</sup> *See id.* at 1985–86.

<sup>190</sup> *See id.* at 1986.

<sup>191</sup> *Id.* at 1982.

<sup>192</sup> *See id.* at 2017–18, 2020.

<sup>193</sup> *See supra* note 11.

<sup>194</sup> *See Roper v. Simmons*, 543 U.S. 551, 576 (2005).

<sup>195</sup> *See id.*

interpreting the U.S. Constitution, the majority invoked a convention that the American people, through their representatives, have refused to ratify.<sup>196</sup> This is a violation of the principle of self-government, which is the core of the American conception of “democratic constitutionalism.”<sup>197</sup>

Yet Justice Kennedy’s position does not rest on as frail a foundation as its opponents suggest, and this has important implications for gauging the strength of the argument from self-government. Scholars have argued that American constitutionalism is every bit as internationalist as European constitutionalism. This is both a normative and historical thesis about the fading distinction between international and foreign law, on the one hand, and domestic law, on the other. In this view, the disintegration of sovereignty has elements no less pronounced in the United States than in other parts of the world.<sup>198</sup> The old top-down order is now being replaced by a myriad of horizontal networks established among institutional actors (legislators, regulators, and judges). The allegiances of individuals tracks this development, since in the post-sovereign era “individuals owe loyalty not only to the governments that rule their geographical area, but have many other allegiances—corporatist, nongovernmental and community—that crosshatch with national borders.”<sup>199</sup> The normative argument follows the historical one. The crisis of legal positivism after the Second World War opened the way for an expansion of the domain of normativity, that has become the peculiarity of contemporary legal thought both domestically<sup>200</sup> and internationally.<sup>201</sup> Fundamental rights, enshrined in both national bills of rights and international human rights documents, have a suprapositive dimension, meaning that they are “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.”<sup>202</sup>

The internationalist and the traditionalist (or “domestic constitutionalist”) positions have different implications as far as the use of foreign law is concerned. From a domestic constitutionalism perspective, it could be claimed either that (1) American law could—but should not—revisit its democratic commitments in order to accommodate foreign/international insights (Justice Scalia<sup>203</sup>), or that (2) the

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<sup>196</sup> *See id.* at 613 (Scalia, J., dissenting).

<sup>197</sup> *See id.* at 623–24, 628.

<sup>198</sup> *See* SLAUGHTER, *supra* note 5, at 131–65.

<sup>199</sup> Stacy, *supra* note 133, at 2043.

<sup>200</sup> *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

<sup>201</sup> Dean Harold Koh of Yale refers to this as the “resurgence of Kantianism.” Koh, *Why Do Nations Obey*, *supra* note 3, at 2628. He illustrates this resurgence by mentioning the books of Thomas Franck. *See generally* THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

<sup>202</sup> Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *STAN. L. REV.* 1863, 1868 (2003).

<sup>203</sup> One can anticipate the objection that Justice Scalia’s position about constitutional change is institutional and thus agnostic about change as long as the people, either directly or through representatives, are the ones undertaking it. While this position is one among

American conception of self-government could and maybe even should undergo a process of change, considering that democracy may not be the only value worth upholding (Professor Rubinfeld<sup>204</sup>), or, finally, that (3) the American conception of self-government is first and foremost a cultural conception that cannot be changed deliberately (Professor Paul Kahn<sup>205</sup>). From the internationalist perspective, the answer to the relevance of foreign law for constitutional interpretation could not be more obvious. “*What sense does it make,*” one prominent internationalist asks, “to construe evolving, universally recognized constitutional concepts such as ‘due process’ and privacy solely in light of national historical tradition?”<sup>206</sup>

Neither position is supported by sufficient empirical evidence to warrant strong (self-evident) claims about the American conception of self-government. In each case, additional normative considerations provide the needed support for a specific interpretation of the demands of self-government. Neither purportedly self-evident historical explanations nor purportedly self-evident arguments about the impact of globalization are sufficient. The wall between international and domestic realms has not yet collapsed, although major cracks are indeed visible. The internationalists’ argument about the crumbling wall requires more than pointing continuously to the cracks. After all, the traditionalists argue that such cracks, whose existence they acknowledge, ought to be fixed. An answer is needed to the question of “why tear down the wall,” just as an answer would be needed about why to not let the wall collapse. These answers need to rest on a conception of American constitutional identity, which is prior to and informs the American conception of self-government. What is the place of foreign law in shaping the American constitutional identity? This is the central question, which cannot be answered merely by invoking the argument from self-government.

### *B. The Argument from Normative Constitutional Coherence*

This second thesis sees the use of foreign law as a form of constitutional borrowing and urges caution on the ground that it may impact on the normative cohesion of the American, or of any other advanced, constitutional system. From this perspective, the relevance of foreign law is neither wholesale rejected nor wholesale embraced. Its use can have both advantages and dangers. The advantage is that it may enrich the receiving legal system. The danger is that, in case of a misfit, it might destabilize the receiving legal system, especially if incompatibility

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many possible positions—in fact, Justice Holmes believed something along those lines—it does not appear to be Justice Scalia’s view. See his dissent in *Atkins* about the practices of the world community whose “notions of justice are (thankfully) not always those of our people.” *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting).

<sup>204</sup> Rubinfeld, *supra* note 181, at 2020 (“Democracy is not the only value in the world. International law could be worth supporting even if it is undemocratic. The point is a matter of candor. To support international law is to support fundamental constraints on democracy.”).

<sup>205</sup> See Kahn, *supra* note 87, at 2677–79.

<sup>206</sup> Koh, *supra* note 21, at 54–55 (emphasis added).

is discovered late, after the damage has been inflicted. A helpful analogy, organic overtones aside, is that of a tissue transplant that the receiving body might reject but only after if it has already shattered its internal equilibrium. But how exactly can “bad borrowing” destabilize the internal equilibrium of the receiving constitutional system? What could be the possible damage?

Professor Mary Ann Glendon has suggested one possible answer to this question in her analysis of Canadian abortion law.<sup>207</sup> She pointed out that:

A difficulty with borrowing bits and pieces of American constitutional law . . . is that these segments may encode certain views about law, the nature of man, and the position of the individual in society that may be at odds with those of the Canadian Charter, the Canadian people, and even of the Canadian judge who occasionally seeks illumination from American precedent.<sup>208</sup>

She continues: “[i]t is a nice question to what extent one can selectively adopt elements of the United States Supreme Court decisions without inadvertently succumbing to the world-view they carry within them.”<sup>209</sup> The assumption is that American and Canadian constitutional/legal systems embody a certain worldview, which is, we must assume, largely coherent. It is common in comparative studies to portray constitutional systems monochromatically. Seen from afar, details are harder to spot. The German system is said to embody communitarian values;<sup>210</sup> the American political and constitutional system is often described as individualistic.

At first glance, such assertions seem unproblematic. As Professor Glendon pointed out, regulation of abortion under the *Roe v. Wade*<sup>211</sup> regime was remarkably liberal by world standards.<sup>212</sup> She saw it as an expression of individualism, another instance of the damage that an emphasis on individual rights at the expense of community values has inflicted on the American public

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<sup>207</sup> See Mary Ann Glendon, *A Beau Mentir Qui Vient de Loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569, 584–86 (1989).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Winfried Brugger, *Communitarianism as the Social and Legal Theory Behind the German Constitution*, 2 INT’L J. CONST. L. 431, 431–60 (2004).

<sup>211</sup> 410 U.S. 959 (1973).

<sup>212</sup> Glendon, *supra* note 207, at 585 (“More than any other country, the United States has given priority in its constitutional law to individual liberty and has adopted a posture of rigorous official indifference toward moral issues. It is, by contrast, characteristic of post-war Western European constitutions and high court decisions that they strive harder to balance a variety of social goods among which individual rights play an important but not overriding role; that they envision individuals less as autonomous and more as situated within social relationships; and that they usually present rights correlative with responsibilities.”). I disagree with Professor Glendon’s assessment. In the case of abortion, for instance, recognizing a pregnant woman’s right to choose expresses an unmistakable moral stand.

discourse.<sup>213</sup> Other areas of law also fit the individualistic mold. Speech, for instance, is protected in the United States to an extent unfathomable in other jurisdictions.<sup>214</sup> The lack of constitutional protection for economic and social interests is another case in point.<sup>215</sup> However, the emphasis on individualism is meant as more than just a common theme that underlines different areas of doctrine. Its aim is to show that constitutional doctrine, and law in general, is an expression of deep cultural identity. Legal rules do not come from nowhere: they find their origin in views about the nature of man and society, as they crystallize over time in given cultures. The American and, say, Canadian or German legal cultures have crystallized differently. In constitutional borrowing there is a risk of glossing over these differences. However, none of this is meant as a strong thesis against borrowing. Glendon rejects take-it-or-leave-it approaches to foreign law, which are all too common in the debate between traditionalists and internationalists.<sup>216</sup> Neither legal xenophobia nor legal xenophilia is acceptable.<sup>217</sup> By placing law within a broader universe of values, this thesis urges nothing more than honesty and caution in the use of foreign sources. The soundness of this argument is questionably untenable, on a strong reading, or trite, on a weak reading.

Let us start by observing that in a weak reading Glendon's concerns can be easily addressed. Critical judgment need not be suspended when using foreign sources. To argue that foreign law can be used in constitutional interpretation says nothing about the authority of any given line of reasoning. As we have seen, even under a persuasive authority model in a situation of emerging world consensus, courts can reason their way out of that consensus. One would therefore expect "negative comparisons" to be possible in the absence of such a consensus. In fact, evidence indicates that oftentimes judges define their positions by contrast with those adopted by their foreign peers.<sup>218</sup> Using foreign jurisdictions as negative

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<sup>213</sup> See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

<sup>214</sup> Schauer, *supra* note 35, at 29–56.

<sup>215</sup> See Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 35, at 90, 90–110.

<sup>216</sup> See Glendon, *supra* note 207, at 570.

<sup>217</sup> This approach shares considerable common ground with the one recently proposed by Professor Vicky Jackson, who argues that both the "convergence" and "resistance" models should be rejected in favor of an "engagement" model, which she defines as an essentially interlocutory framework. See Jackson, *supra* note 34, at 112–18.

<sup>218</sup> See Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *TULSA L.J.* 15, 26–27 (1998) ("Considering and articulating the differences that mandate the adoption of a different solution is . . . a particularly useful exercise [because it] . . . helps not only when we *accept* the solutions and reasoning of others, but when we *depart* from them, since even then, understanding and articulating the reasons a different solution is appropriate for a particular country helps make a better decision."). The same theme of the negative use of foreign decisions is explored by Kim Lane Scheppele, *Aspirational and Aversive*



examples is an important step in the development of constitutional systems. For instance, the American agonizing experience with substantive due process has loomed large in the minds of constitution-makers from Canada<sup>219</sup> to India<sup>220</sup> as well as in those of constitutional interpreters.<sup>221</sup>

However, at a deeper level, Glendon operates with an indefensible conception of the nature of constitutional systems.<sup>222</sup> Portraying such systems as monoliths of either the individualistic or communitarian variety is both static and reductionist. It is static because it fails to account for exchanges whose outcomes create a constitutional system. It is a strikingly narrow conception that defines law only in terms of the judicial decision settling a given legal controversy and brackets away the arguments that each side argued before the court, the different interpretations they relied on, and the visions of man, society, and law in which they were steeped. For the claimant asking a court to strike down a law that cuts back on his social benefits, the legal system is not “individualistic,” just as the litigant asking for the protection of his speech regardless of the serious emotional harm it causes to others does not experience the legal system as “communitarian.” To describe it in these terms marks a significant, and in my view unfortunate, departure from how its immediate subjects experience the legal system as well as an unwarranted simplification of the path by which judicial decisions, and legal rules in general, come into existence.

Glendon’s approach is also reductionist because it conflates one dimension of any constitutional system at the expense of all others. Of course mature systems contain both liberal and communitarian elements; they would not reach maturity and gain whatever legitimacy they might have if they did not. The degree of normative responsiveness to citizens’ demands is one criterion for assessing the legitimacy of a constitutional system. In a pluralist society, these demands are conflicting and in continuous fluctuation, thereby making it an imperative that the legal system ought not ossify. Notwithstanding widespread conceptual analysis in

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*Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 296–324 (2003), and Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597 (2000).

<sup>219</sup> Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 1–55 (2004).

<sup>220</sup> See Klug, *supra* note 218, at 605–06 (discussing the exchanges between Justice Frankfurter and Sir B.N. Rau on the topic of substantive due process).

<sup>221</sup> Glendon, *supra* note 207, at 577 (“[I]t does not seem an exaggeration to say that the shadow of the United States Supreme Court’s long history of struggle with substantive due process review of legislation is omnipresent, brooding over nearly every paragraph of [Chief Justice Dickson’s] reasons for judgment [in *R. v. Morgentaler*].” (citing *R. v. Morgentaler*, [1988] S.C.R. 30 (Can.))).

<sup>222</sup> Of course, Professor Glendon’s is not the only conception that assesses the impact of foreign law on the coherence of the domestic constitution system. Justice Scalia’s position toward the use of foreign law in constitutional adjudication also fits under this heading. For an analysis along these lines, see Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 441–43 (2003).

legal thought, one should not forget that they are social constructions.<sup>223</sup> But the crux of the matter is that any advanced legal system presents itself as an unstable equilibrium of a *number* of such conflicting visions. This instability, which is identifiable in any almost area of doctrine, has two sources: (1) the existence of a plurality of visions; and (2) the tendency of any powerful vision to undermine itself.<sup>224</sup> A constitutional system has the potential to develop in any number of directions. Few of these directions are “unnatural,” only those violating clear constitutional provisions that do not choose the path of constitutional amendment, though some of them may of course be highly undesirable. Hence the argument from normative coherence fails to support a strong case against the authority of foreign law. We now need to make the transition from normative challenges to the use of foreign law to challenges that are mainly methodological. As we shall see in the next section, this is an easy transition because the two types of arguments mutually reinforce each other.

### C. *The Argument from Methodology*

As we saw in Part I, fears about the potential impact of a lack of methodology explain the shift in the second stage of the foreign law debate toward defending the use of foreign law only in situations where there is an emerging world consensus. The intuition is that methodological questions—such as which jurisdictions judges should consult, how to check sources and references, how they can escape the dangers of nominalism, and how to assess the relevance of a particular provision or line of reasoning outside of its broader legal, cultural, and historical context—are more difficult to answer in situations of piecemeal comparisons, with serious implications about the integrity of constitutional discourse.<sup>225</sup> Hence methodological challenges may be fatal to claims regarding the authority of foreign law in such situations. Before assessing their impact, let us start by analyzing their content.

We begin by distinguishing two sets of methodological concerns. One set of concerns looks at methodology from the perspective of the mechanics of constitutional adjudication. The other set refers to the implications for the integrity of constitutional discourse.

Including foreign law in the canon of authoritative materials would have momentous implications for the mechanics of constitutional adjudication.<sup>226</sup>

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<sup>223</sup> See generally Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005).

<sup>224</sup> See generally ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996) (advocating a radical transformation of legal analysis)

<sup>225</sup> “Less pronounced” is not tantamount to “nonexistent.” See *supra* text accompanying note 198.

<sup>226</sup> See Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 267 (2003) (“Neither I nor my law clerks can easily find relevant comparative material on our own. The lawyers must do the basic work: finding, analyzing, and referring us to that material. There is a chicken-and-egg problem: the lawyers will do so only if they believe

Having to engage with the reasoning of foreign courts is almost certain to trigger a chain reaction throughout the legal system: briefs would mention them, lawyers appearing before courts would have to be prepared to answer questions about them, lower courts would follow suit, and so on. This development would represent “a distinct break in American constitutional-legal practice.”<sup>227</sup>

Three lines of argument open at this point. The first is *sociological*: whatever great advantages expanding the canon of authoritative materials might have in an ideal situation, the legal profession is uniquely unqualified for this task. This is not an argument about the expansion of the canon of authoritative materials;<sup>228</sup> it refers specifically to the sorry state of a legal profession unprepared to engage meaningfully with foreign materials.<sup>229</sup> Law schools do not require their students to become literate in foreign law, and this situation is mirrored at the level of the judiciary. This argument is sufficiently strong even without exaggerating it. A cursory look at a typical law school curriculum suffices to demonstrate the resources of American law in adapting to new vocabularies. Experience suggests that if the legal market indicates demand for foreign law, the legal profession will supply it. Yet a worry remains about overburdening ill-equipped jurists with the task of engaging meaningfully with foreign resources. It follows that just as we might not trust our judges’ ability to arrive at morally right answers in hard cases so here we are cautioned against expanding the canon of authoritative materials by including foreign sources.<sup>230</sup>

The second line of argument is *normative* and points to the achievements of the current system of constitutional adjudication. The assumption is that these achievements would be jeopardized if the constitutional structure were to open up to foreign influences. In its procedural version, this is an argument that constitutional discourse meets expectations by projecting interests and struggles over worldviews within a stable framework in which defeat is only temporary and second chances always exist. The constitutional system is said to have reached over time the proper equilibrium that settle these expectations. The normative version of this argument goes a step further and argues, in one version, that the system in its current form has the capacity to get a high percentage of cases morally right or, in a weaker form, that the current constitutional arrangement

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the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must help to break down barriers between disciplines . . .”).

<sup>227</sup> Frank Michelman, *Integrity-Anxiety?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 35, at 241, 263.

<sup>228</sup> See generally Fried, *supra* note 26, at 811–13 (discussing constraints on authoritative materials available to judges as compared with materials available for scholarly articles).

<sup>229</sup> See Ackerman, *supra* note 29, at 774.

<sup>230</sup> See Frederick Schauer, *Constitutional Positivism*, 25 *CONN. L. REV.* 797, 797 (1993) (distinguishing between morally right answers and legally right answers).

meets the requirements of legitimacy, though not of justice.<sup>231</sup> It follows that there is no reason to open it to foreign law sources or modify it in any other way.

The third—*functionalist*—argument grows out of the second but does not share its normative presuppositions. The claim here is that expanding the canon might make it impossible for the constitutional system to perform its functions. To the extent these functions are seen as valuable, this position shares significant ground with the second, normative argument in its proceduralist or weak substantive versions. So, what could this function be?

Professor Frank Michelman of Harvard argued recently that the function is the very survival of the American polity.<sup>232</sup> This is, importantly, an argument about the function of constitutional discourse and not about the system as such: it refers to perceptions, not to the reality behind it. Its starting point is the pervasiveness of moral disagreement in contemporary American society. Americans disagree, genuinely and deeply, over virtually every question of public life, from abortion to hate speech to welfare benefits to balancing security and liberty in times of war. Their disagreement about rights reflects deeper disagreements about justice. In fact, this argument goes, disagreement is so deep that it could, if left unchecked, endanger the very stability of American society. The political function of constitutional law is to provide a common ground, a form of discourse in which all self-governing citizens can engage. “In order to maintain a *public* discourse on governmental performance regarding people’s rights, Americans apparently need some point of normative reference more publicly objective than it feels as though morality can be for us. Enter constitutional law.”<sup>233</sup>

However, constitutional law may prove unable to carry such a heavy burden. Its predicament should be understood against the backdrop of the impact of modernity on traditional models of structuring constitutional meaning.<sup>234</sup> As one scholar writes, “if there is a common theme in the history of thought and of politics, it consists precisely in failure to sustain claims of unconditional authority on behalf of particular ways of talking, thinking, living, and organizing society.”<sup>235</sup> The fear is that unless its repertoire is somehow replenished, constitutional thought will reach a breakdown point. The consequences of that evolution would be momentous. In a society accustomed to “the privileges of the individual

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<sup>231</sup> See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

<sup>232</sup> See Michelman, *supra* note 227, at 241–76.

<sup>233</sup> *Id.* at 267–68.

<sup>234</sup> See Morton J. Horowitz, *The Supreme Court, 1992 Term—Forward: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32, 34 (1994) (“Because it grew out of traditional conceptions of fundamentality that were rooted in religious structures of meaning, constitutional law has always tended toward incorporating a pre-modern vision of timeless and unchanging truths—toward, in a word, equating legal fundamentality with legal fundamentalism. . . . Thus arises the question . . . : how can the idea of fundamentality be rescued from its historic association with fundamentalism?” (footnote omitted)).

<sup>235</sup> ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY* 576 (1987).

conscience,”<sup>236</sup> unbridled disagreement could shatter not only what Rawls called “stability for the right reasons”<sup>237</sup> but social order itself. The use of foreign law may be the trigger of this process of destabilization.

It should be remembered that this argument remains one about the implications of a lack of methodology. The problem is that, so framed, it is difficult to see what methodology could ever quiet such fears. If the cost of using foreign law may be the breakdown of social order, then no benefits could ever outweigh it, regardless of how persuasive the available methodology might be. The risk would simply not be worth taking. However, this is not Professor Michelman’s conclusion.<sup>238</sup> He documents the phenomenon, but does not endorse it. In fact, he believes the anxiety over the future of constitutional discourse is exaggerated and that joining the transnational constitutional conversation might in fact replenish the resources of American constitutional discourse rather than undermine them.<sup>239</sup>

The lesson, then, reaches deeper. Including foreign law in the canon of interpretation would indeed send a shockwave that would be felt across the constitutional system from the mechanics of adjudication to the structure of discourse and the content of particular constitutional doctrines. There is no point in denying this effect, and no reason to be apologetic about it. It is fair to oppose it on the ground that constitutional discourse in its current form delivers on its promise to an acceptable extent, and hence there is no reason to take risks. Michelman does not, others do. How are we to adjudicate this controversy?

The success of a theory of comparative constitutionalism under the terms of the current debate often seems to come down to an assessment of how satisfactorily the constitutional system performs its tasks.<sup>240</sup> But now it seems that we are reaching even deeper layers insofar as it is impossible to answer the above question without having some understanding of what those tasks may be. It is at this point that a functionalist model that relies on perceptions runs out of steam. The duty of a constitutional democratic system cannot only be to secure social order; it is, as we saw, to achieve “stability for the right reasons.”<sup>241</sup> This change in emphasis forces an assessment of how the current constitutional structure, broadly understood, approximates “stability for the right reasons.” If it comes close to it, then the sociological objection we introduced above, which anchored opposition to

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<sup>236</sup> I borrow this formulation from Jeremy Waldron, *The Primacy of Justice*, 9 LEGAL THEORY 269 (2003).

<sup>237</sup> See RAWLS, *supra* note 231, at xlii.

<sup>238</sup> At this point, some go even further and portray the impact of foreign law on American constitutional discourses as a danger to the sovereignty of American law. See, e.g., Young, *supra* note 28, at 542 (“[S]overeignty in American law is intimately bound up with the basically procedural nature of our constitutional commitments.”).

<sup>239</sup> See Michelman, *supra* note 227, at 276.

<sup>240</sup> See Bradley & Goldsmith, *supra* note 103, at 368 (“Domestic constitutionalism has been the primary vehicle for recognition and enforcement of human rights in this country.”).

<sup>241</sup> See *supra* note 237 and accompanying text.

foreign law in considerations about the state of the legal profession, is likely to prevail.<sup>242</sup> If, by contrast, the system does so poor a job that one finds it hard to remain committed to it, a defense of the use of foreign law is likely to become considerably stronger. My point is that because analysis entails evaluation, a defense of the use of foreign law has to be mounted from an internal point of view. The pressure exerted by the constitutional discourse has structured the foreign law debate in ways that preclude such an internal-point-of-view analysis.

Sociological statements about the how the legal system performs its functions cannot capture the difference between stability, on the one hand, and “stability for the right reasons,” on the other, whatever those “right reasons” might be. This point also answers the worry that judges lack a methodology in using foreign law. However sound these worries may be, they are not enough to undermine the authority of foreign law. One can still aim at defining the tasks of domestic constitutional law in a way that mandates, or permits, the use of foreign law. Methodological worries, just like the critique that emphasizes self-government or normative constitutional coherence, are challenges to be met, rather than insuperable trammels that foredoom the claim to authority of foreign law. Hopefully, these arguments are sufficient to demonstrate the deep connection between methodological challenges to the use of foreign law and substantive visions of constitutional law. It follows from these conclusions that it is both possible and necessary to defend the use of foreign constitutional practices by articulating substantive visions of constitutional law that make the use of foreign law an integral part of their normative jurisprudential outlook.

## V. CONCLUSION

This Article has discussed the use of foreign law for purposes of constitutional interpretation as part of the process of awakening of the American legal mind to the reality of a larger constitutional world. To this encounter, American constitutional thought comes rather ill-prepared. This is not only a conclusion about the limited potential of the foreign law debate, but also a more general statement about the contemporary American constitutional discourse. Regardless whether or not the canon of constitutional interpretation should be extended to include foreign sources, it is striking how unwelcoming the terms of the foreign law debate are for engaging with the issues that an encounter of this magnitude raises.

In order to understand the causes of this predicament, we analyzed a number of recurrent themes in American constitutional discourse. At the heart of the

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<sup>242</sup> The normative argument could equally well come across as convincing. *See, e.g.*, Young, *supra* note 28, at 543 (“One fear entailed by sovereignty concerns is that delegation of lawmaking and law enforcement authority to supranational structures may interfere with domestic arrangements that, in our country at least, seem to be functioning relatively well. . . . [O]ne does not lightly throw [for instance, the habeas corpus] structure out the window in favor of a largely untested international procedure with unpredictable effects.”).

argument against the use of foreign law are a set of assumptions about the relation between the role of methodology in constitutional adjudication, the integrity of constitutional discourse, and the normative commitments of constitutional law. We pierced the veil of plausibility that methodological worries seem to enjoy by showing how they rest on interpretations of the normative commitments of American constitutionalism whose truth-value is not self-evident. The encounter with foreign law constitutes an opportunity to reflect anew on these normative commitments. Thus far this opportunity has not materialized, but time has not yet run out. This Article has argued that these debates should be first undertaken at a normative level where different visions of constitutional law clash, rather than be carried out in purely methodological terms. Failure to do so will result in a missed opportunity.<sup>243</sup>

Consider, for instance, the array of constitutional systems that are used in cross-constitutional comparisons. This array is currently limited to a small number of jurisdictions that include Canada, South Africa, Germany, and sometimes Israel.<sup>244</sup> A strong argument can be made that such limitations endanger the process of constitutional self-discovery, which is the outcome of broadening one's constitutional horizons.<sup>245</sup> Part of the potential of comparative constitutionalism is its promise to expand the range of constitutional comparisons by unveiling normative affinities among constitutional experiences that so far have not entered into dialogue with one another.<sup>246</sup> To paraphrase one of Justice Black's remarks,

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<sup>243</sup> Not all scholars subscribe to this view of the opportunity occasioned by the encounter with foreign law. For a less enthusiastic view, see generally RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGIN AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). I discuss this further in another publication. See Vlad Perju, *Towards Juristocracy*, 68 *MOD. L. REV.* 1038, 1038–41 (2005) (book review).

<sup>244</sup> For a conception that defends the use of foreign law as persuasive authority only by reference to a small number of jurisdictions, see Glensy, *supra* note **Error! Bookmark not defined.**, at 359 (defending the limitation of cross-constitutional comparisons to a small number of jurisdictions).

<sup>245</sup> For a discussion of these dangers in the broader context of comparative law, see Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 *HARV. INT'L L.J.* 411, 411 (1985).

<sup>246</sup> The same point is made by Harold Koh. Koh, *Globalization of Freedom*, *supra* note 3, at 310 (“But as I learned—at times painfully—during my recent public service, the best way for American law professors to learn about the astonishing global changes also happens to be the most inconvenient—namely, for us to leave the comfort of our offices and to visit and work in difficult foreign environments—not just to visit abroad on sabbatical in comfortable Northern Hemisphere universities in Florence, Berlin, Oxford or Tokyo, but actually to go and conduct research and public policy work in some of the world's most dynamic centers of legal change, for example, Indonesia; Nigeria; China; North, West, and South Africa; and the Balkans.”).

there is no principled reason why cross-constitutional comparisons should be confined to a small core of jurisdictions.<sup>247</sup>

This may be true unless, of course, one fears the consequences of not having a workable methodology when looking across borders. This Article has questioned the soundness of this point. Instead of making the methodological challenge the end of the debate about the authority of foreign law, we should see it as its starting point. Rather than working out a theory of comparative constitutionalism around these methodological objections, as has happened with the—largely failed—attempts to confine the authority of foreign law only to those situations where there the solutions of world’s legal systems converge, we should confront these objections head-on. Here as elsewhere, method should track substantive visions, not vice-versa.

There are strong reasons why reference to foreign laws and legal practices should be used in constitutional interpretation. Among the most powerful, in my view, is that they expand the normative universe of constitutional decision-makers.<sup>248</sup> Constitutional law, like political philosophy, is largely concerned with the interpretation of the meaning and implications of commitment to values such as equality, liberty, dignity, life, etc. Most of the time, these values are recognized by constitutional text.<sup>249</sup> Comparative constitutionalism is a repertoire of frameworks within which various dimensions of these values are available for exploration.<sup>250</sup> No one constitutional context can claim monopoly over their meaning. In this light, cross-constitutional explorations are justified on the ground that different systems have developed particular vocabularies and structures that may shed light on dimensions of justice that are obscured in other constitutional contexts. Such an argument rests on a number of assumptions about the nature of constitutional systems and the role of constitutional adjudication that have been elaborated above.

Whether along this or any other paths, the conclusion remains that we would do well to depart from the terms of the current foreign law debate and look around for fresh sources of inspiration. The awakening of American law to the larger legal world constitutes a unique opportunity to turn inward and look critically at the dominant form of constitutional discourse. A prerequisite for success is to step

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<sup>247</sup> The remark paraphrased is: “why should we consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice.” *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring).

<sup>248</sup> Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 112 (2002) (“[C]omparative constitutional law is a good source of expanded horizons and cross-fertilization of ideas across legal systems.”).

<sup>249</sup> See, e.g., U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); *id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>250</sup> For an approach to comparative constitutionalism along these lines, see Upendra Baxi, “A Known but an Indifferent Judge”: *Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INT’L J. CONST. L. 557, 588 (2003).



outside that discourse and gain some degree of normative independence from its gravitational force. Once outside and looking around, we might like what we see, or we might not. But look we should, as this opportunity is one we cannot afford to miss.