# CONSTITUTIONAL LAW AND TRANSNATIONAL COMPARISONS: THE *YOUNGSTOWN* DECISION AND AMERICAN EXCEPTIONALISM

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In his dissent in *Roper v. Simmons*, Justice Antonin Scalia bemoaned the "brave new meaning" that the Court had given the Due Process and Equal Protection Clauses and, by implication, the Eighth Amendment.[1] One of his principal complaints about the majority opinion, holding that the Eighth Amendment prohibits imposition of the death penalty on a person below the age of 18 at the time of an offense, was its reliance on foreign and international law to reinforce its conclusion that such punishment was "cruel and unusual." Justice Scalia's reference to "brave new meaning," implicitly invoking the negative utopia of Aldous Huxley's famous novel,[2] is of a piece with his position that constitutions are designed to "obstruct modernity,"[3] that the "new" is irrelevant to interpreting the written constitutional text. Huxley's sarcastic title for his dystopic novel was, however, drawn from a more ambiguous reference in Shakespeare's *The Tempest*.[4] Brought up on a deserted island with only her father and his servant, Miranda falls in love with Ferdinand, who is washed ashore by a terrible storm created by her father; upon meeting others from Ferdinand's ship also washed ashore, she exclaims, "Oh brave new world, that hath such creatures in it!"[5] Miranda's

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1. 543 U.S. 551, 627 n.9 (2005) (Scalia, J., dissenting).

2. ALDOUS HUXLEY, BRAVE NEW WORLD (1932).

3. Antonin Scalia, *Modernity and the Constitution*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 315 (Eivind Smith ed., 1995).

4. For a quite different invocation of "brave new world," see Engel v. Vitale, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting).

5 WILLIAM SHAKESPEARE, THE TEMPEST, act 5, sc. 1.

statement can be read as one of exultation and celebration of the entrance of foreigners onto her isolated island, even as those with more knowledge can see the darker side of some of these strangers.

Whether one is inclined to exult or bemoan the occasional references to foreign or international law found in recent Supreme Court cases, one thing is clear: references to foreign or international law in the Supreme Court's constitutional jurisprudence are not new. Rather than being a brave or bold departure from established norms of interpretation that exclude their use, references to foreign or international law have played, episodically, a small role in many of the Court's most important opinions over time—sometimes being used to support propositions in dissent in cases subsequently overcome by constitutional amendment or different doctrine,[6] sometimes being cited to support holdings that would be eschewed or qualified today.[7] Although objections to the consideration of foreign or international law have been raised on grounds of national sovereignty, democracy, and the need to cabin judicial discretion,[8] none of these concerns should rule out all

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6. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 534 (1857) (McLean, J., dissenting) ("[N]o nation in Europe . . . considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations."); *id.* at 591–92 (Curtis, J., dissenting) (discussing different foreign laws on slavery, including British, French, and Prussian law); *cf.* Lochner v. New York, 198 U.S. 45, 71 (1905) (Harlan, J., dissenting) (comparing average hours of work in the U.S. and abroad and describing working hours as "a subject of serious consideration among civilized peoples" and by those with "special knowledge of the laws of health"). In the New York Court of Appeals, more explicit reference was made to British law. *See* People v. Lochner, 69 N.E. 373, 382, 384 (1904) (Vann, J., concurring) (noting that the New York statute regulating hours of bakers was modeled on but went beyond an 1863 British act and discussing health data from the United States and Britain to support the conclusion that regulation was justified as a health measure), *rev'd,* Lochner v. New York, 198 U.S. 45 (1905).

7. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 711, 727–30 (1893) (referring to the "inherent and inalienable right of every sovereign and independent nation" to exclude aliens in upholding a statute that, *inter alia*, required the testimony of "at least one credible white witness" to establish a Chinese person's prior residency and hence right to remain in the United States).

8. *See, e.g.*, Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, 48; Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 817–19 (2000); 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, 1303–26 (2004); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 161–67 (2005). For responses to some of these concerns, see Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 325–45 (2003) (acknowledging objections

such references, whose long history is the starting point for traditionalist analysis of their appropriate use in interpretation.

This essay is an expanded version of a talk I gave at an excellent panel discussion sponsored by the Federalist Society at Columbia University Law School in February 2006 on "Foreign and International Law Sources in Domestic Constitutional Interpretation." Part I argues that the use of non-binding foreign law in constitutional jurisprudence is not a novel form of judicial activism but, rather, a part of the interpretive traditions of the Court evident in many of its most important decisions. Use of foreign or international law is, however, demanding: it is easy to err in our understandings of the foreign; and many U.S. constitutionalists have not been trained in international or comparative law.[9] Part II tries to identify some differences between foreign and international law that may be relevant to their use in domestic constitutional interpretation. Finally, Part III responds briefly to the argument made by Professor Steven Calabresi in his comments on the panel and in a paper published elsewhere that American exceptionalism is a reason not to consider foreign and international experience.[10] To the contrary, I suggest that, if the United States is to be a "City on a Hill," a leader in the protection of human liberty and freedom (a goal that at times seems increasingly distant),[11] we must understand the contours of the terrain around us.

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from democracy and judicial discretion and arguing that they should not forbid careful consideration of foreign law and practice as persuasive authority); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 55–56 (2004) (rejecting countermajoritarian and sovereigntist objections to considering international and foreign law); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 257–67 (2003) (arguing that sovereignty is not threatened by decisions of U.S. judges that consider foreign law as nonbinding authority).

9. *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 592–94 (1999) (describing the "parochial" emphasis of U.S. legal education).

10. *See* Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. (forthcoming Dec. 2006), *available at* http://ssrn.com/abstract=892585 (last revised June 20, 2006).

11. *See, e.g.*, Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881 (2005); Amnesty International USA, Denounce Torture Initiative, http://www.amnestyusa.org/stoptorture/index.do (last visited Nov. 6, 2006).

## I. FOREIGN LAW IN THE COURT'S CONSTITUTIONAL JURISPRUDENCE: THE MISSING SEGMENT OF JUSTICE JACKSON'S *YOUNGSTOWN* CONCURRENCE

Notwithstanding the furor over the Court's reliance on foreign and international law in *Roper* and *Atkins v. Virginia*,[12] the history of constitutional adjudication in the U.S. Supreme Court reveals episodic references to foreign law,[13] often relating to the constitutionality of punishments or penalties. In January 1867, for example, the Court referred to both a contemporary French code and older English law in deciding whether a Mis-

12. 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."). In his dissent, Chief Justice Rehnquist lamented the majority's reference to foreign law (as well as to the views of religious and professional organizations and public opinion polls), stating, "The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any 'permanent prohibition upon all units of democratic government must [be apparent] in the operative acts . . . that the people have approved.'" *Id.* at 322 (Rehnquist, C.J., dissenting) (internal citations omitted).

13. For example, in a number of early cases the Court or its members referred to the "law of nations" or the practices of other civilized countries in resolving open constitutional questions. *See, e.g.*, Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 561, 569–72 (1840) (4-4 split) (Taney, C.J., opinion for four Justices) (relying in part on the practice of nations concerning the subjects appropriate for treaties to determine scope of federal power over treaties so as to preclude a state governor from deciding to extradite a fugitive to Canada); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–61 (1832) (finding, based in part on analysis of the law of nations, that Indian tribes under the Constitution retained rights of self-governance immune from state interference); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J. concurring) (referring to the "law of nations" in discussing exclusivity of the federal power to regulate interstate commerce); *see also, e.g.*, Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 137–38 (1812) (considering the practices of the "whole civilized world" in holding that a foreign sovereign's vessel is immune from *in rem* jurisdiction in U.S. ports). For further discussion of the early case law, see James H. Lengel, *The Role of International Law in the Development of Constitutional Jurisprudence in the Supreme Court: The Marshall Court and American Indians*, 43 AM. J. LEGAL HIST. 117 (1999); Jackson, *supra* note 8, at 335–37 & nn.227–28. For extensive discussion of other constitutional cases referring to transnational sources of law (that is, to foreign and international law), see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 545–49, 552–56 (2001); *cf.* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1932–38 (2003) (suggesting how the U.S. Supreme Court began using the idea of human dignity, in discussing individual rights, at the time the concept of human dignity was gaining currency in other parts of the world in reaction to Nazi abuses).

souri state law imposed a "punishment" in violation of the Constitution's Article I, Section 10 ban on ex post facto laws or bills of attainder.[14] In his opinion, Justice Field discussed English law at some length and also wrote that:

> In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.[15]

Foreign practice was relied on to support the Court's conclusion that the Missouri law, though characterized otherwise by the state, was sufficiently punitive to be in the nature of an ex post facto law or bill of attainder and thus prohibited by the Constitution.

One of the Court's earliest decisions on the merits of an Eighth Amendment issue also provides an example of reliance on foreign law, this time to sustain rather than to invalidate a law. In *Wilkerson v. Utah*, the Court in 1879 rejected a challenge to the particular method by which a death sentence was carried out, holding that death by shooting did not constitute "cruel and unusual punishment" of the sort prescribed by the Eighth Amendment.[16] In so doing, the Court referred to the "[c]orresponding rules [that] prevail in other countries," noting in particular that England permitted death by shooting for murder and other crimes.[17] In Eighth Amendment cases challenging a particular kind of punishment as cruel and unusual or challenging a particular punishment for a particular crime as cruel and unusual,[18] it is not new for the Court and its members to refer to other countries' legal practices as one source of information relevant to the determination of whether the punishment passes constitutional muster. The Court has done so in at least one case treating the foreign origin of a punishment as bearing on its unacceptability in the United States,[19] and in

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14. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318, 320–21 (1867).

15. *Id.* at 321.

16. 99 U.S. 130, 134–35 (1879).

17. *Id.* at 134.

18. The Court is far more likely to invoke foreign or international practice in these "substantive" Eighth Amendment cases than in the cases dealing with the special procedures that must be followed in order to constitutionally impose the death penalty under the Court's post-*Furman v. Georgia*, 408 U.S. 238 (1972), case law.

19. In the first case finding a penalty to constitute a "cruel and unusual" punishment prohibited by the Eighth Amendment, the Court noted that the chal-

other cases referring to the practices of other "civilized nations" to support the Court's conclusion that a particular punishment (for example, statelessness)[20] or the use of a particular penalty for a particular crime (for example, the death penalty for rape of an adult)[21] was constitutionally prohibited.

This line of decisions extends from the late nineteenth century through 1988.[22] In 1989, Justice Scalia, writing for the Court in

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lenged punishment derived from an "alien source," a "government of a different form and genius from ours." Weems v. United States, 217 U.S. 349, 377 (1910). The Court found that a sentence of imprisonment at hard labor, followed by continued civil disqualifications, for a financial crime—a penalty derived from Spanish law—violated the Cruel and Unusual Punishment Clause of the Philippine Constitution, which the Court treated as identical to the provision of the Eighth Amendment. *Id.* at 367–68, 381. In other cases, the Court or its members appear to draw more implicit distinctions in making comparisons between the United States and certain foreign countries (which are not stable representative democracies) that retain certain punishments. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551, 577 (2005) (listing the countries that, in addition to the United States, had executed juvenile offenders since 1990 as "Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China"); Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring in the judgment) (noting news reports that the U.S. ranks fourth in the world in executions, "after China, Iran, and Saudi Arabia").

Although foreign practice was relied on as a form of negative authority in *Weems*, casting into doubt the legitimacy of the punishment under "our" system, in other cases the Court has looked to the general practices of "civilized nations of the world" in rejecting a penalty to support its own determination of the penalty's cruelty or unusualness. *See*, *e.g.*, Atkins v. Virginia, 536 U.S. 304, 316–17 n.21 (2002); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 788, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 592 n.4, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion). In still other cases, foreign legal experience has been discussed as bearing both negatively and positively on the issue before the Court. *See*, *e.g.*, Gregg v. Georgia, 428 U.S. 153, 176, 184 n.30, 193 n.43 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 255–56 (1972) (Douglas, J., concurring); *id.* at 275 n.18, 278–79, 296 (Brennan, J., concurring); *id.* at 351, 371 (Marshall, J., concurring); *id*. at 404 (Burger, C.J., dissenting); *id.* at 438 & nn.23–24, 453–54, 462 (Powell, J., dissenting); McGautha v. California, 402 U.S. 183, 204–05 (1971); *id*. at 280–82 (Brennan, J., dissenting). For other, related discussions, see Solem v. Helm, 463 U.S. 277, 292 (1983); Rudolph v. Alabama, 375 U.S. 889, 889 n.1 (1963) (Goldberg, J., dissenting from denial of certiorari); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963); Robinson v. California, 370 U.S. 660, 672–73 (1962) (Douglas, J., concurring).

20. *Trop*, 356 U.S. at 102.

21. *Coker*, 433 U.S. at 592 n.4, 596 n.10; *see also Enmund*, 458 U.S. at 788, 796 n.22.

22. Thus, in 1988 Justice Scalia was writing in dissent to object to the plurality's reference to what Amnesty International claimed were the "civilized standards of decency in other countries." *Thompson*, 487 U.S. at 868–69 n.4 (Scalia, J., dissenting) (stating that "where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution").

*Stanford v. Kentucky*,[23] sought to cabin more tightly consideration of foreign law in Eighth Amendment cases, along lines he had proposed in a dissenting opinion the year before.[24] The attempt, however, was apparently short-lived—not surprising in light of the long prior history of the Court's considering foreign practice in Eighth Amendment cases. Throughout the 1990s, other Justices on occasion invoked foreign law in dissenting from denials of certiorari.[25] By 2002 the Court had returned to its prior practice of considering foreign and international law not as a primary factor but as a relevant consideration in resolving Eighth Amendment challenges and without explicit regard to the standard set forth in *Stanford*.[26]

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23. 492 U.S. 361, 369 n.1 (1989) ("While '[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,' they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.") (internal citations omitted).

24. *See Thompson*, 487 U.S. at 868–69 n.4.

25. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 995–97 (1999) (Breyer, J., dissenting from denial of certiorari) (citing foreign court decisions holding imposition of the death penalty following considerable delay to be prohibited under provisions analogous to the Cruel and Unusual Punishment Clause of the U.S. Constitution, and recognizing contrary foreign authority); Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari) (arguing that the Court should decide the question whether delay, in this case of 23 years, in carrying out the death penalty violates the Constitution, both in light of the decisions of courts in other countries holding that delays in carrying out death penalties violate constitutional provisions whose historic roots are the same as the Eighth Amendments and to address the practical difficulty created by a decision of the European Court of Human Rights prohibiting extradition of capital defendants to the United States in light of the delays associated with "death row" phenomenon in the United States); Gomez v. Fierro, 519 U.S. 918, 919 n.3 (1996) (Stevens, J., dissenting from denial of certiorari) ("Sadly, in refusing to hear these claims, the Court turns a deaf ear to an argument that courts in other countries have found persuasive." (citing State v. Makwanyane & Mchunu, Case No. CCT/3/94 (So. Afr. Const. Ct. June 6, 1995); Pratt v. Attorney General of Jamaica [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (en banc))); Lackey v. Texas, 514 U.S. 1045, 1046–47 (1995) (Stevens, J., respecting the denial of certiorari) (arguing that the claim that executing a prisoner following 17 years on death row would be cruel and unusual is substantial and deserving of further consideration in the lower courts, and noting in support thereof conclusions of English jurists and by "the highest courts in other countries [that] have found arguments such as petitioner's to be persuasive").

26. In *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002), the Court, in an opinion by Justice Stevens, alluded to the views of the world community in a footnote, without reference to the limitations suggested in *Stanford*. *Roper*'s more extensive references to foreign and international law, 543 U.S. 551, 561 (2005), are likewise not offered within the framework proposed in *Stanford*. To the extent that the effort in *Stanford* was to exclude consideration of foreign law, or to limit it to situations where a "uniform" practice and "settled consensus" existed, it was rejected

Reference to foreign and international law has not been limited either to decisions of the earliest period in our history or to cases involving Eighth Amendment issues. Indeed, many American lawyers (and perhaps even some law professors) are unfamiliar with important opinions on the Court's history that included discussion of foreign law, perhaps because of the way in which cases are edited for inclusion in casebooks. A powerful example is found in Justice Robert Jackson's deservedly famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[27] This opinion is excerpted in each of the twelve constitutional law casebooks that I checked, including those regarded as leading books in the field.[28] With few exceptions,[29] these excerpts omitted the discussion of foreign constitutional law that Justice Jackson introduced in the following terms:

> I do not think we rightfully may so amend [our forefathers'] work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here . . . .[30]

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in *Atkins* and *Roper*; to the extent that *Stanford* can be read as an effort to limit the role of foreign law to that of confirming conclusions to which domestic sources had led the Court, *Atkins* and *Roper* were arguably consistent with that effort.

27. 343 U.S. 579 (1952).

28. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 274–76 (2d ed. 2005); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 150 (9th ed. 2001); WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 397 (12th ed. 2005); DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1070–73. (3d ed. 2003); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 367 (5th ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 349–50 (15th ed. 2004); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 296–97 (7th ed. 2003); RUSSELL L. WEAVER ET AL., CONSTITUTIONAL LAW: CASES, MATERIALS AND PROBLEMS 153 (2006). For a suggestion that Justice Jackson's position may have been influenced by his experience as Chief Prosecutor at the Nuremberg trials, see FARBER ET AL., *supra,* at 1076.

29. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 830 (5th ed. 2006) (including a paragraph on Germany); 1 MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 471–72 (2d ed. 2006) (including four paragraphs on Germany, France, the United Kingdom, and the conclusion drawn). At least one other casebook includes the paragraph describing Jackson's conclusion from "contemporary foreign experience" without including the paragraphs describing that foreign experience. DOUGLAS W. KMIEC ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 419 (2d ed. 2004).

30. *Youngstown*, 343 U.S. at 650–51 (Jackson, J., concurring). The end of this passage is included in another casebook, CHARLES A. SHANOR, AMERICAN CONSTITU-

In the two-page discussion that followed, Justice Jackson examined German, French, and British history and constitutional practice in the period leading up to and during World War II. First, he described how the Weimar Constitution in Germany—though framed, as Justice Jackson noted, to "secure her liberties in the Western tradition"—permitted the President of the Republic, without the concurrence of the national legislature, to declare a state of emergency in which all individual rights could be temporarily suspended.[31] That power, as Justice Jackson described it, "proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored."[32]

Second, Justice Jackson explained that the law of the Third French Republic in the period before World War II provided for a very different kind of emergency known as the "state of siege."[33] As Jackson described the "state of siege" under the Third French Republic:

> It differed from the German emergency dictatorship, particularly in that emergency powers could not be assumed at will by the Executive but could only be granted as a parliamentary measure. And it did not, as in Germany, result in a suspension or abrogation of law but was a legal institution governed by special legal rules and terminable by parliamentary authority.[34]

These features of parliamentary involvement in the declaration of a "state of siege" and of the parliament's retaining the power

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TIONAL LAW: STRUCTURE AND RECONSTRUCTION 121 (2d ed. 2003), from which Justice Jackson's actual discussion of foreign law is omitted.

31. *Youngstown*, 343 U.S. at 651–52.

32. *Id.* at 651; *see id.* at 651 n.20 (citing several sources, including CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948)). Justice Jackson's emphasis on the emergency powers of the President was shared by later writers. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 6 (1994) (identifying, as among several "critical weaknesses," the President's "broad emergency powers" and power to dissolve the legislature). Justice Jackson referred to Professor Rossiter's analysis of the German constitution, an analysis that provides support for Jackson's description but is more complex and nuanced, discussing, for example, the legislative defaults of the German parliamentary body, its dismissal and inability to meet, and the temperaments of the leaders. *See* ROSSITER, *supra,* at 55–57, 64, 72–73 (1948); *cf.* CURRIE, *supra,* at 7 (suggesting that the most "basic difficulty . . . was not so much with the constitution as with the people . . . .").

33. *Youngstown*, 343 U.S. at 651.

34. *Id.* (citing ROSSITER, *supra* note 32, at 117–129).

to terminate the state of siege were analogous to features Justice Jackson stressed in describing Great Britain's constitutional practice.

Great Britain, Justice Jackson continued, had fought both world wars under what he called a "temporary dictatorship created by legislation."[35] As Parliament is not bound by written constitutional limitations, he wrote, "it established a crisis government simply by delegation to its Ministers of a larger measure than usual of its own unlimited power, which is exercised under its supervision by Ministers whom it may dismiss."[36] Quoting Winston Churchill, Justice Jackson noted that Britain's war-time crisis government "has been called the 'high-water mark in the voluntary surrender of liberty,' but, as Churchill put it, 'Parliament stands custodian of these surrendered liberties, and its most sacred duty will be to restore them in their fullness when victory has crowned our exertions and our perseverance.'"[37] Thus, Justice Jackson concluded, "parliamentary control made emergency powers compatible with freedom."[38]

Justice Jackson did not explain his choice of countries for comparison. One possibility is that these were the three foreign governments studied in the Clinton Rossiter book, *Constitutional Dictatorships*, on which Justice Jackson relied. Thus, knowledge about their constitutional systems was in a certain sense accessible, a factor that relates, but only indirectly and somewhat fortuitously, to larger questions of comparability. Although today one might think that the criteria for selective reliance on these particular countries' legal traditions would need explantion, perhaps Justice Jackson felt the relevance of these particular comparisons would be obvious to his audience. Beyond the "availability" criterion,[39] Germany and France had

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35. *Id.* (citing British statutes as well as Rossiter's work).

36. *Id.* at 651–52.

37. *Id.* at 652 (quoting Winston Churchill (citation omitted) and citing ROSSITER, *supra* note 32, at 279–81).

38. *Id.* at 651. For Rossiter's more complex view and emphasis on Churchill's "unique courage and personality" and the British government's "fine regard . . . for the liberties of the people," see ROSSITER, *supra* note 32, at 202, 205.

39. I do not mean to suggest that the "availability" of the Rossiter case studies distorted Justice Jackson's reasoning in the same way as is claimed about the availability heuristic in the literature on cognitive science and behavioral economics. I do mean to note that use of comparative law is limited by knowledge and available information and that one must be conscious of the possible effects of those limitations. In this country, more knowledge is available about legal systems and decisions from English-speaking countries, a factor that may have some indirect relation with issues of comparability since the introduction of both the

written constitutions, as did the United States, and the unwritten British "constitution" had long been the subject of commentary and discussion. Connections between these countries and the United States existed in demographic as well as legal terms: each of the three countries was located in Europe and had been a source of migration to the United States; the legal traditions of Britain had been of central importance in drafting the U.S. Constitution; and earlier Supreme Court decisions had alluded to the laws of both Britain and France in resolving other constitutional questions.[40] These connections might be indicative of a greater degree of background knowledge of their legal systems and historical contexts. Moreover, Germany's descent from an apparently "civilized," liberal democracy to a genocidal warmongering imperial state was one of the stunning transformations of its time, and one of which Justice Jackson had considerable knowledge from his work as prosecutor at the Nuremberg war-crimes tribunal.

Whatever the basis for selection, the conclusion that Justice Jackson drew from his comparison of emergency powers under these three countries was as follows:

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.[41]

Although the dissent did not explicitly respond to this argument, it appeared implicitly to have accepted Justice Jackson's claim that emergency powers must be subject to control "elsewhere than in the Executive who exercises them." I say this because the dissent's implicit response to the concern expressed by Justice Jackson (and others) about European dictatorships, was to argue that President Truman's action posed no risk of

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English language and common law legal systems are associated with British colonialism. More generally, any selection of countries for purposes of inferential comparison, negative or positive, raises questions of comparability and challenges of correctly understanding law in its context.

40. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318, 321–24 (1867).

41. *Youngstown*, 343 U.S. at 652.

dictatorship because he was acting to implement congressional statutes, had transmitted his order to Congress, and had plainly indicated it was subject to being changed or countermanded by congressional legislation.[42]

Justice Jackson's concurrence in *Youngstown* includes one of the more extensive discussions of foreign constitutional experience, but the Court or its members have referred to foreign or international law in resolving a number of other constitutional disputes. For example, foreign law was referred to on a separation of powers question by Justice Byron White in his dissent in *Banco Nacional de Cuba v. Sabbatino*.[43] Justice Frankfurter relied on foreign law in his discussions of several issues of intergovernmental tax immunities,[44] as well as in his opinion for the Court in *O'Malley v. Woodrough*.[45] In *O'Malley*, the Court rejected a challenge under the Compensation Clause of Article III to the extension of the federal income tax to the salaries of Arti-

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42. *Id.* at 709–10 (Vinson, C.J., dissenting).

43. 376 U.S. 398, 440 (1964) (White, J., dissenting) ("No other civilized country has found such a rigid rule necessary . . . [and] the executive of no other government seems to require such insulation from international law adjudications in its courts . . . ."). Justice White disagreed with the Court's conclusion that the "act of state" doctrine, supported by the constitutional separation of powers, precluded the courts from re-examining the validity of the act of a foreign government within its territories. The majority had discussed foreign cases bearing on the act of state doctrine as well. *See id.* at 421 n.21. Although the majority treated the act of state doctrine as a form of federal common law, compelled neither by the Constitution nor by international law, its interpretation was strongly driven by constitutional separation of powers concerns. *See id.* at 427–28, 431–33. It was on this point that Justice White invoked the laws of other civilized countries, citing specific cases in England, Netherlands, Germany, France, Italy and Japan. *Id.* at 440 n.1 (White, J., dissenting). Justice White further noted that the majority did "not refer to any country which has applied the act of state doctrine in a case where a substantial international law issue is sought to be raised by an alien whose property has been expropriated. This country and this Court stand alone among the civilized nations of the world in ruling that such an issue is not cognizable in a court of law." *Id.* For a different kind of argument from foreign law relating to the separation of powers as a limitation on judicial authority, see Furman v. Georgia, 408 U.S. 238, 437–38, 461–65 (1972) (Powell, J., dissenting) (arguing that the foreign practice of legislative abolition of the death penalty did not support judicial abolition under the Constitution).

44. *See, e.g.*, United States v. County of Allegheny, 322 U.S. 174, 198 (1944) (Frankfurter, J., dissenting) (relying on a Canadian Supreme Court decision on intergovernmental tax immunities to support his argument against the position of the U.S. government); Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring) (suggesting that the case, involving intergovernmental tax immunities, raised the "same legal issues" as in Australia and Canada under particular provisions of their constitutions).

45. 307 U.S. 277 (1939).

cle III judges, overruling the contrary holding of *Evans v. Gore*.[46] In his opinion for the Court, Justice Frankfurter noted that "the meaning which *Evans* v. *Gore* imputed to the history which explains Article III, Section 1, was contrary to the way in which it was read by other English-speaking courts," and he referred to decisions by courts in Australia and Canada interpreting differently-worded provisions based on the same English history.[47] Moreover, in cases dealing with individual rights under the Due Process Clause, Justice Frankfurter (whether writing for the Court or for himself) regularly invoked foreign comparisons,[48] and one of the Court's most famous constitutional criminal procedure cases, *Miranda v. Arizona*,[49] discusses foreign legal protections for police interrogation of criminal suspects at some length. Foreign comparisons are found, as well, in important cases addressing state government powers to regulate workplace conditions,[50] to require vaccination,[51] or to prohibit assisted suicide,[52] and dealing with the scope of the

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46. 253 U.S. 245 (1920).

47. *O'Malley*, 307 U.S. at 281 & n.6.

48. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 575 n.11 (1961) (Frankfurter, J., announcing the judgment of the Court and an opinion joined by Stewart, J.) (discussing foreign law on rules for interrogating suspects); Stein v. New York, 346 U.S. 156, 199–200 (1953) (Frankfurter, J., dissenting) (arguing that a confession should have been excluded as it would have been in Australia, Canada or India); Rochin v. California, 342 U.S. 165, 169 (1952) (discussing "notions of justice of English-speaking peoples" in finding stomach-pumping by the police to shock the conscience and violate due process) (internal citation omitted); *id.* at 170 n.4 (discussing Burke's observations on the English common law); Malinski v. New York, 324 U.S. 401, 416–17 (1945) (Frankfurter, J., concurring) (discussing "notions of justice of English-speaking peoples" in agreeing that admission of coerced confession required reversal).

49. 384 U.S. 436, 486–90 (1966). For further discussion of *Miranda*, see *infra* nn.98–104 & 106.

50. *See* Adkins v. Children's Hospital, 261 U.S. 525, 570–71 (1923) (Holmes, J., dissenting) (arguing that comparable laws in other countries supported the reasonableness, and hence the constitutionality under the Due Process Clause, of a federal law setting minimum wage for women); Muller v. Oregon, 208 U.S. 412, 419 n.1 (1908) (referring to laws governing workplace conditions in Great Britain, Switzerland, Austria, Holland, and Germany in support of the "reasonableness" under the Due Process Clause of an Oregon statute limiting the number of hours women could work); Lochner v. New York, 198 U.S. 45, 71 (1905) (Harlan, J., dissenting) (comparing average workdays in the United States and in other countries and describing working hours as "a subject of serious consideration among civilized peoples").

51. Jacobson v. Massachusetts, 197 U.S. 11, 31 & n.1, 35 (1905) (discussing foreign laws on vaccination).

52. Washington v. Glucksberg, 521 U.S. 702, 710 & n.8, 718–19 n.16, 734 (1997).

federal government's power to regulate economic activity under the Commerce Clause.[53]

As was true for *Youngstown*, even if a case is included in constitutional law casebooks, references to foreign law—often quite brief—may be omitted, creating the impression among American lawyers and judges that such considerations are a quite new phenomenon. As this brief discussion attempts to show, they are not. What is new, however, is the increasing quantity and quality of foreign court decisions on issues under written constitutions and quasi-constitutional instruments; what is also new is the greater ease of access to such information. With increased opportunities come increased obligations to be thoughtful about how transnational materials are used, about the limitations of our knowledge, and about the challenges of comparison, without blinding ourselves to the benefits to be had from informed consideration of the experience of other legal systems. Among the many questions to be thoughtful about are the relative positions of international law, as such, and foreign comparative law in constitutional adjudication, to which I now turn.

## II. FOREIGN AND INTERNATIONAL LAW DISTINGUISHED

In *Roper*, the Court referred both to international legal sources and to the laws of foreign countries as forms of nonbinding, persuasive authority. References to foreign law go back, as noted earlier, to the oldest of the Court's Eighth Amendment cases, and references to international legal sources or the practices of "civilized" nations can be found in some of the Court's earliest constitutional decisions as well as in more contemporary post-World War II decisions. Foreign law and international law, moreover, are not unrelated. Both are "transnational" from the domestic vantage, that is, both involve forms of law that apply outside of the United States. And one form of international law, customary international law (or what the early Court referred to as the "law of nations"), reflects the general practices of nations engaged in because of a

53. Wickard v. Filburn, 317 U.S. 111, 125–26 & n.27 (1942) (upholding a federal regulatory scheme's application to limit the production of wheat for home use on family farms, and noting that three other large wheat-exporting nations—Canada, Australia, and Argentina—were federal systems, and in each the national government controlled wheat regulation).

felt legal obligation,[54] thereby making national legal practice of some relevance to the determination of customary international legal norms.[55]

As I have argued elsewhere, the Court must consider both the nature of the domestic issue and the context of the transnational material in deciding whether a transnational legal source will be helpful in constitutional adjudication.[56] Some constitutional issues are grounded in highly specific, nationally distinctive constitutional commitments on which foreign and international law are either silent or irrelevant. In contrast to the Eighth Amendment's ban on cruel and unusual punishment, other provisions—the Fifth Amendment's grand jury requirement, the Second Amendment's right to bear arms, the allocation of two senators to each state, and the age requirements for public office—might each be regarded as having that kind of specificity and distinctiveness that make transnational sources

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54. *See* RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation"). It is not practice alone that makes customary law. *See id.* cmt. c ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law."); *see also* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060 ("The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law."). Although a state would presumably not feel "legally free to disregard" its own law, the focus of the "felt obligation" inquiry to ascertain customary international law is evidently a sense of legal obligation to the *international* community. *See Developments in the Law—International Environmental Law*, 104 HARV L. REV. 1484, 1504 (1991) ("A rule of customary international law develops when states follow a constant practice under the conviction that international law requires their conduct."); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 78–81 (2006) (confirming the somewhat tautological character of the felt legal obligation requirement). The existence of national laws and legal practices may be found to reflect such a sense of obligation and thus contribute to the development of customary international law. *See infra* note 60; *cf.* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 10–11 (2006) (explaining why it is "extremely difficult to draw bright line rules between invocations of international law and widespread comparative state practice").

55. Conversely, some countries incorporate international law into domestic law at the level of a constitutional norm. *See, e.g.*, CONST. ARG. art. 75(22), *translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 14 (Gisbert H. Flanz ed., 1999) (identifying several international human rights documents as of constitutional status, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights); *cf.* S. AFR. CONST. 1996 art. 39 (requiring courts to consider international law in interpreting the South African Constitution's bill of rights).

56. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 125 (2005).

largely irrelevant to plausible interpretive questions. The Fifth Amendment requires that all federal criminal prosecutions for "capital or otherwise infamous" crimes be initiated by a grand jury, with limited and defined exceptions.[57] The fact that looking at the criminal procedure in other countries might lead some to conclude that a grand jury is superfluous, or less than an ideal check on prosecutorial discretion, is largely irrelevant. The text of the Fifth Amendment is clear, and the required use of a grand jury in federal criminal prosecutions is a settled issue.[58] Thus, the relevance and legitimacy of looking to foreign law vary depending upon the domestic legal issue, the clarity of the statutory or constitutional text, and our own interpretive traditions.

The Court must also consider the nature of the transnational legal source being invoked, because "the persuasive value of [such] a . . . source will depend on a combination of its reasoning, the comparability of contexts, and its institutional origin."[59] There are a number of possible distinctions between foreign and international law that may bear on their relevance to domestic constitutional adjudication.[60] In this section I make a preliminary effort to try to identify some of those distinctions.

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57. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

58. Although foreign or international law would not be relevant to whether a grand jury is required to initiate federal capital felony prosecution, it might be helpful in deciding on interpretive questions about the application of this requirement. *Cf., e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (holding that the grand jury requirement of the Fifth Amendment was not made applicable to the states through the Due Process Clause of the Fourteenth Amendment). In *Hurtado*, the Court suggested that the concept of "[d]ue process of law . . . is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe" and implied that interpretation of the Due Process Clause should not "exclude the best ideas of all systems and of every age . . . as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice." *Id.* at 531 (explicitly referring to the Magna Charta but in the context of a question under the Fourteenth Amendment's Due Process Clause).

59. Jackson, *supra* note 56, at 125.

60. International law's generative sources vary considerably. They include, inter alia, treaties to which states expressly agree (which may be bilateral, regional, or open to all states) and "customary law" based on the practices of states (to which, for the most part, states impliedly consent or acquiesce). *See* MURPHY, *supra* note 54, at 66–83. The binding force of international law also varies: from *jus cogens* norms that, in theory, bind all nations (regardless of state consent) and have something of the character of natural law, to customary law which binds all but "persistent objectors," to treaties and other international agreements, which bind only those who ratify or accede to them. *See* MARK W. JANIS, AN INTRODUCTION

To begin with, international law is sometimes binding on a national state—as when a treaty is ratified—and, perhaps as important, international law may become binding by virtue of custom and official practice. Just as there may be reasons to avoid interpreting statutes to place a country in violation of its international obligations,[61] so, it has been argued, there may be reasons to avoid constitutional interpretations that would do so.[62] Foreign law, on

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TO INTERNATIONAL LAW 27, 63, 54–55 (4th ed. 2003); MURPHY, *supra* note 54, at 11, 81–83. Domestic law (which is "foreign" law in other domestic polities) is recognized or developed by national states and is binding within the national state. International and domestic law may, however, be closely related and significantly interdependent, as when the domestic laws of a large number of states coalesce around a norm that becomes a source of international law. *See supra* note 54 (discussing customary international law). Moreover, national law may contribute to the development of supplementary rules of international law, even if they do not constitute customary law. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1031, 1060 (referring to "general principles of law recognized by civilized nations"); RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) (1987) (referring to "general principles common to the major legal systems of the world," from which rules accepted by the "international community of states" may be derived); *id.* at § 102(4) ("General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate."); MURPHY, *supra* note 544, at 86–88.

61. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .).

62. *See, e.g.*, Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, (Princeton Univ. Program in Law and Pub. Affairs, Working Paper No. 04-017, 2004), *available at* http://ssrn.com/abstract=600677 (arguing that some originalist understandings would support a presumption to interpret the U.S. Constitution to be consistent with international law); *cf.* M.D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514, 531–32 (1988) (reproducing the "Bangalore Principles," which commend the "growing tendency for national courts to have regard to . . . international norms [in] cases where . . . domestic law—whether constitutional, statute or common law—is uncertain or incomplete"). Describing a form of "cosmopolitan originalism," Professor Flaherty notes the distinction between an interpretive presumption that the Constitution itself not violate international law and a more aggressive presumption that the Constitution be interpreted as consistent with international law, and argues for the latter. Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT'L AFF. 477, 480, 493, 495–99 (2006). There are, of course, arguments against applying any such strong interpretive presumption to constitutional interpretation, derived from theories of popular sovereignty and the difficulty of democratic response to constitutional (as compared to statutory) decisions, as well as the availability of sub-constitutional methods of coming into compliance with international law. *Cf.* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868, 869 (1997) (arguing that customary international law should not be treated as a form of federal common law because of the threat it poses to the constitutionally prescribed process of

the other hand, is never as such binding, nor does it, as such, become so.[63] Ignoring or acting contrary to foreign law will not put a state in violation of its own legal obligations.[64]

Second, customary international law is presumptively applicable to all nations, while foreign law always contains an implicitly comparative question. Except where a state has specifically indicated its disagreement with a norm, customary international law is considered a binding obligation of all states.[65] Of course, many questions about customary international law arise. Given its customary character, the content of a norm—or its existence as a norm of customary international law—may be hotly disputed;[66]

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lawmaking). I do not seek to resolve this debate here. My point is only that failure to follow international law can put a nation in violation of its legal, international obligations with potential adverse consequences in the international community. Although some might argue that international law does not impose consequences for its violation that systematically differ from the consequences of departing from the (nonbinding) consensus of comparable nations, there is something distinctive about the violation of a binding international legal norm, at least if it is regarded as legitimate under "principles of right process." THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990); *cf. id.* at 15–40 (arguing for focus on "legitimacy," rather than "law," in understanding the "compliance pull" of international rules).

63. However, as noted earlier, *see supra* notes 54 & 60, foreign law that becomes very widespread might be taken as evidence of a norm of customary international law, which could be treated as binding in the absence of an objection. While foreign laws may contribute, then, to the creation of a binding norm of customary international law, it remains the case that, of itself, foreign law is not domestically binding.

64. Even if a state has breached a binding international legal obligation, there may be domestic law barriers to remedying that breach through domestic adjudication. *See, e.g.*, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006). And, not all forms of international law are binding. Some may be non-binding because they have been rejected or not accepted by the political branches of the nation, *see infra* note 65, a factor that, Professor Cleveland suggests, should be relevant, but not dispositive, on whether courts consider it in constitutional interpretation. *See* Cleveland, *supra* note 54, at 105–24 (arguing that, when evaluating the relevance of international law to domestic constitutional interpretation, courts should consider the "receptiveness" of the constitution to its use; how well-defined and universally accepted the international norm is, including whether states comply with it in practice; the extent to which the international norm has been otherwise accepted or rejected by the United States; and any limits that international law imposes on operation of the international rule). Professor Cleveland does not rule out reliance on such nonbinding forms of international law as a form of persuasive authority on issues on which the Court exercises independent constitutional judgment. *See id.* at 8–9, 115–22.

65. *See* RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987) ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures").

66. The degree to which the legal rules of international law, as compared to domestic law, are clear and determinate is itself contested. *Cf.* Karen Knop, *Here and*

the remedy for violation of the norm may depend not on international law but on domestic law; and questions may arise about whether a particular country has objected to the norm so that it is not binding. But ordinarily no question of comparative judgment is raised.[67]

Resort to specific foreign law, in contrast to customary international law or based on treaties widely subscribed to, almost always involves questions of comparison, of how to choose what to look at, and of what that is relevant can be learned from the practices of another legal system.[68] Each nation-state and each constitutional order is to some extent distinct, and thus efforts to reason from what exists in one to another will necessarily involve at least an implicit comparison. Even a right expressed in identical terms in two different nations may have different enforcement mechanisms or institutional implications, depending on other features of the particular constitutional system.[69] Structural provisions that are designedly interdependent (as federalist balances of power typically are) pose particular difficulties for efforts to compare with respect to only a single element,[70] as Justice Breyer attempted to do in *Printz v. United States*.[71]

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*There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 507, 515–18, 525 (2000) (contrasting "traditional" understanding of international law as either binding or not with a more "multivocal" understanding of the diverse meaning and uses of international law and noting the "blurring of international law into comparative law").

67. In the unusual case where customary international law develops but does not apply to a country because it has been a persistent objector, *see* MURPHY, *supra* note 54, at 81, some comparative judgment may be needed in deciding on the relevance of the international rule as a source in constitutional interpretation. *Cf. Roper v. Simmons*, 543 U.S. 551, 578 (2005)(indicating that certain "fundamental rights" embodied in the practices of other nations "underscores the centrality of those same rights" here).

68. *See also* Cleveland, *supra* note 54, at 11 (suggesting that "use of the comparative practices of individual states for constitutional analysis" present "difficulties, such as the potential for misinterpretation of a culturally contingent foreign practice and legitimacy concerns arising from selective and anecdotal use . . . [that] are less implicated by the use of widely accepted foreign practices and international rules . . . .").

69. *See* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1876–77 (2003).

70. For an explanation of how difficult comparison is between federal systems given the interdependent, "package"-like character of federalism-related provisions and the contingent, historically specific circumstances that give rise to federal constitutions, see Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 21 DUKE L. J. 223, 226, 269–74 (2001); Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 102–109 (2004).

71. 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

Indeed, cases like *Roper* are highly unusual, in that relatively clear and almost universally adopted international norms appear to be reflected in the law and practice of the countries that have subscribed to the international law norm.[72] To have the kind of virtual consensus (in law and in practice) among the nations of the world on how to operationalize a particular rule against inhumane punishment—so as to ban capital punishment for those under eighteen years of age—is very rare.[73] And where foreign practices are in conflict—even among nations that are similar in their commitment to liberal democratic values—comparison must be particularly cautious and self-aware in identifying why a particular foreign country is, or is not, a useful comparison.

Third, national constitutional law in a rule of law system—one in which the law actually functions to constrain the gov-

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72. *See* Roper v. Simmons, 543 U.S. 551, 577 (2005) ("Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice . . . . In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."). *Roper* relied on both comparative practice and international conventions as persuasive, not binding, authority, providing "confirmation" of the Court's prior analysis. *See id* at 575. The dissent criticized the Court particularly for relying on international conventions that the United States had not ratified (U.N. Convention on the Rights of the Child) or to which it had taken a reservation on the specific issue (under the International Covenant on Civil and Political Rights), suggesting that doing so was inconsistent with the Constitution's commitment to the President and Senate of treaty-making power. *Id.* at 622–23 (Scalia., J., dissenting). As noted above, a state can refuse to agree to most international legal norms, and the state's posture, Professor Cleveland suggests, should be considered in deciding whether an international source should be considered in constitutional interpretation. *See supra* note 64. Whether a state's refusal to agree should prevent *any* consideration of the international norm is a complex question, especially where the norm is being considered as one of many nonbinding sources and where the norm is widely subscribed to and practiced. *See* Cleveland, *supra* note 54, at 79 (stating with apparent approval that *Roper* "relegated the use of international law to the secondary role of reaffirming a perceived national consensus"); *see also supra* note 67.

73. *See* Cleveland, *supra* note 54, at 79. For a normative argument in favor of considering a strong consensus among comparable nations, see Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 143–47 (2005) (analogizing legal to scientific problem solving). Although there are many nations that have ratified a wide range of human rights treaties, there is reason to believe that practice deviates more widely with respect to many such norms than it did with respect to state-sponsored execution of juveniles by the time of the *Roper* decision. On the complex and sometimes inverse relationship between ratification of human rights treaties and actual respect for human rights, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

ernment—might have greater persuasive value to judges of other domestic constitutional courts than international law, which is sometimes regarded as more like "law-on-the-books" than "law-in-action." This gap between what is said and what is done is viewed as quite large in some areas.[74] Relatedly, international norms are not always articulated and applied by bodies that, like the courts of the United States, are themselves part of an ongoing government. For example, the United Nations Human Rights Committee, which has monitoring and interpretive responsibilities for the International Covenant on Civil and Political Rights,[75] is not a court, but a committee, and it is a committee of the United Nations, which does not have general governmental responsibilities comparable to sovereign

74. *See* Hathaway, *supra* note 73, at 1940 (finding in major quantitative study that "noncompliance with treaty obligations appears to be common"). Perhaps human rights is an area in which Professor Louis Henkin's well known assertion that most countries comply with most international law most of the time holds less true. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 320–21 (2d ed. 1979). Of course, domestic legal systems also face gaps between law in the books and law in action, and simply because a constitutional court announces a decision does not mean it will be complied with. Justice Breyer's citation, in his dissent from denial of certiorari in Knight v. Florida, 528 U.S. 990, 995–97 (1999), to a judicial decision from Zimbabwe earned criticism, in part because Zimbabwe's rule of law traditions were not strong enough to credit that judicial decisions would correspond with practice on the ground. *See* Justices Antonin Scalia and Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, Discussion at the American University Washington College of Law (Jan. 13, 2005), http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument (last visited Nov. 4, 2006) (reporting Justice Breyer's statement that citing the Zimbabwe decision may have been "a tactical error" because Zimbabwe is "not the human rights capital of the world"). The correspondence between the stated legal norm and the practice will vary in both international law and domestic law, from country to country and from issue to issue. Indeed, scholars for many years have asked whether significant parts of the U.S. Constitution were not a "sham." *See* Edward McWhinney, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE 8–9 (1981) (discussing the Thirteenth, Fourteenth, Fifteenth, and Eighteenth Amendments in contrasting "law-in-books" and "law-in-action"); Walter F. Murphy, *Constitutions, Constitutionalism and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al. eds., 1993) (noting Charles Beard's critique of the Constitution's hypocrisy). Even in contemporary American life there may be areas where compliance with the U.S. Supreme Court's decisions is far from complete. *See* Mark Tushnet, *Conservative Constitutional Theory*, 59 TUL. L. REV. 910, 913 (1985) (asserting that the Court's "school prayer decisions are widely evaded"). The opposition between international law and domestic law with respect to correspondence with practice, then, is not a sharp one, but nonetheless may be telling in some cases and on some issues.

75. International Covenant on Civil and Political Rights, *adopted* Mar. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

nations.[76] Foreign constitutional law, by contrast, may involve interpretations of fundamental law that will constrain action by an ongoing government, and such rulings may have more persuasive value than international legal norms. There is a level of seriousness, at least if one is dealing with a national rule of law system in which decisions of a constitutional court are treated as having binding force,[77] arising from the fact that the judges enforcing the rule live in the country in which the rule is to be applied and, as part of the system of governance, are subject to institutional reactions of other parts of the government.

Fourth, international law simply does not address many important constitutional issues having to do with the structure of government, questions that are addressed by the domestic constitutional systems of many other countries. Thus we have Justice Jackson's concurrence in *Youngstown* discussing the relationship between executive and legislative power in the context of three other countries; the debate between Justices Breyer and Scalia in *Printz* about the relevance of how foreign federal systems dealt with the capacity of the national government to require subnational governments to enforce national laws; and even Justice White's dissent in *Sabbatino* discussing whether the judicial power could properly address certain issues without interfering with executive power.[78] All of these cases dealt with issues about which, so far as I am aware, customary international law has had little to say and major international human rights covenants also remain, for the most part, silent.[79]

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76. *See* MURPHY, *supra* note 54, at 320–23; Office of the United Nations High Commissioner on Human Rights, Human Rights Committee, http://www.ohchr.org/english/bodies/hrc/index.htm (last visited Dec. 9, 2006). The Committee receives and reviews reports from states-parties, issues "general comments" on interpretive issues, and responds to individual complaints (pursuant to an optional protocol to the ICCPR and available only as to those states that are parties to that protocol) with the Committee's "Views."

77. These comments apply with most force to constitutional interpretations. Yet foreign law in the form of statutory law or practices, adhered to in an ongoing government, may also have bearing on questions that arise in constitutional interpretation in some doctrinal settings, for example, as to what practices are regarded as "reasonable," or "necessary." On the difference between constitutional law and constitutional experiences, see Jackson, *Narratives of Federalism*, *supra* note 70, at 249–50.

78. *Youngstown*, 343 U.S. at 635–39, 651–53; *Printz*, 521 U.S. at 921 n.11; *id.* at 976–77 (Breyer, J., dissenting); *Sabbatino,* 376 U.S. at 440 (White, J., dissenting).

79. Some international human rights provisions, and increasingly the case law under the European Convention on Human Rights (ECHR), do speak to structural issues relating to judicial remedies and the impartiality and independence of courts. *See*, *e.g.*, ICCPR, *supra* note 75, at arts. 2(3)(b), 8(3)(b), 9(3)–(4), 14(1). The ICCPR further requires that deprivations of liberty be pursuant to such grounds

Fifth, international law may be a necessary element in the interpretation of some constitutional terms, such as the meaning of "treaty," in order for the provision to serve its constitutional purpose. If there is an issue about a claimed substantive limitation on the treaty power, most scholars, including many originalists, would consider it relevant to understand not only how treaties were understood at the framing, but how treaties are now generally understood in the contemporary international legal environment.[80] Presumably, the purposes of the Treaty Clause (and the references to treaties in Article III and the Supremacy Clause) have to do with enabling and enforcing agreements with other countries, and those provisions would be ineffective to their purpose if their meaning did not correspond to the ongoing nature of international relations. Likewise, Congress's power to define "Offenses against the Law of Nations" must be understood as having some independent content, derived from international law; given the plain intent to establish the United States as a sovereign in the community of nations, it seems implausible that the Framers and ratifiers would have intended to freeze the details of then-current un-

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and procedures "as are established by law." *Id.* at art 9(1); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, *adopted* Nov. 25, 1950, 213 U.N.T.S. 221, 228 [hereinafter European Convention on Human Rights or ECHR] (requiring an "independent and impartial tribunal", a provision interpreted, for example, in McGonnell v. United Kingdom, Case No. 28488/95, 30 Eur. Ct. H. R. 289 (2000), to find the Royal Court of Guernsey to lack impartiality because the Bailiff, who served as the senior judge on the Court, also served in the executive and legislative parts of the government and had presided over the legislative body's adoption of a development plan at issue in the litigation). However, apart from Article 1's declaration of the right of "peoples to self-government," Article 25's declaration of the rights to vote, to participate in the conduct of public affairs, and to have equal rights to access to the public service, and its ambiguous references to rules established "by law," the ICCPR appears silent on forms of government organization or relationships between executive and legislative power. *Compare* U.S. CONST. arts. I, II. This is not to say that customary or treaty law might not further develop over time. On the possible further development of "separation of powers" jurisprudence from provisions of the ECHR, see Note, *Burying the Truth: The Murder of Belfast Human Rights Lawyer Patrick Finucane and Britain's "Secret" Public Inquiries*, 74 FORDHAM L. REV. 3297, 3309–17 (2006) (describing arguments, including by the British Parliament's Human Rights Committee, suggesting that an inadequately independent investigatory inquiry into a murder could violate Article 2 of the ECHR).

80. *See, e.g.*, John O. McGinnis, *"Outsourcing Authority?" Citation to Foreign Court Precedents in Domestic Jurisprudence: Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801, 803–04 & n.2 (2006); Michael Ramsey, *Agora: The United States Constitution and International Law: International Materials and Domestic Rights: Reflections on Adkins and Lawrence*, 98 AM. J. INT'L L. 69, 71 (2004).

derstandings of such offenses.[81] Most foreign law, by contrast, would not have any such specific relationship to constitutional interpretation, except where (as is the case with some British law) it has what Sujit Choudhry calls a "genealogical" relationship to a constitutional provision[82] (that is, it is understood as the source of a provision's origin and thus as bearing on its correct understanding).

So international law, and the law of particular foreign countries, may exert different kinds of pulls or influences on different kinds of constitutional issues depending on the issue and the particular foreign or international source proposed. Both, however, can offer a potentially valuable "outsider" perspective on domestic legal issues, offering deliberative benefits—both by way of contrast and positive comparison—to U.S. constitutional decisionmaking.

## III. CONSTITUTIONAL COMPARISON AND AMERICAN EXCEPTIONALISM

As I have elaborated elsewhere, cautious and careful comparativism can promote better understanding of our own history and constitutional values and how they should be interpreted to apply to the new problems that will inevitably arise.[83] Looking at foreign or international law (referred to here as "transnational law") can be a lens through which we can see our own distinctiveness, or, alternatively, develop an under-

81. One might regard this form of reasoning as an act of "translation," *see* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993), or simply as a sensible understanding of the purpose of a constitution, one that must have been intended from the nature of the constitutional endeavor. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). For a related issue of statutory interpretation, see Sosa v. Alvarez-Machain, 542 U.S. 692, 715, 720, 731–34 (2004) (concluding that under the Alien Tort Statute of 1789, federal courts could not "recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations," as the paradigmatic cases (involving, for example, safe conduct or piracy) at the time of enactment would have had, when "gauged against the current state of international law.").

82. Sujit Choudhry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 838–39 (1999).

83. For elaboration, see Jackson, *supra* note 56, at 116–19; Jackson, *Narratives of Federalism*, *supra* note 70, at 278–79; Jackson, *supra* note 8, at 347–58; *cf.* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1239–65 (1999) (noting possible benefits of comparison in analyzing constitutional functions, but cautioning that such comparisons are necessarily "problematic" insofar as they omit "institutional details unique to the systems being compared").

standing of possible approaches to shared constitutional challenges.[84]

Although the Supreme Court has referred to transnational law in several recent cases holding state laws unconstitutional,[85] resort to transnational law has also been made in cases upholding state laws against constitutional challenge.[86] Foreign law has been used as a "negative" or "aversive" precedent in the development of criminal procedure rights in the 1940s and 1950s, and as a more positive source on the need for and effects of requiring protective warnings to suspects during coercive interrogations.[87] It has also been invoked to support reconsidering or limiting the exclusionary rule.[88] Additionally, looking at

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84. *See* Jackson, *supra* note 56, at 119 (discussing benefits of "reflective comparison"); Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENTARY 803, 829–57 (2004) (reviewing DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004)) (discussing possible benefits, and disadvantages, of relying on proportionality analysis, developed in constitutional courts elsewhere, in domestic constitutional adjudication); Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13–14 (1996) (urging reliance on foreign law to evaluate constitutionality of harsh punishment for possession of marijuana under standards of proportionality); Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (arguing that where there is an interpretive choice, it is appropriate to consider foreign constitutional experience as bearing on whether "commandeering" is inconsistent with robust federalism). Although considering foreign or comparative experience is often associated with a kind of pragmatic or consequentialist approach, looking at how other systems, such as Australia, deal with problems of translation over time might be of interest to originalists concerned with interpretive problems that arise under an old constitution.

85. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003).

86. *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Muller v. Oregon, 208 U.S. 412 (1908); Jacobson v. Massachusetts, 197 U.S. 11 (1905); s*ee also* Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

87. On aversive precedents, see Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003) (describing how totalitarian, fascist, or Nazi governments functioned as oppositional precedent for the U.S. Supreme Court in developing the modern constitutional law of criminal procedure). On foreign law as a positive example, see *infra* notes 98–102 and accompanying text (discussing Miranda v. Arizona, 384 U.S. 436 (1966)).

88. *See*, *e.g.*, California v. Minjares, 443 U.S. 916, 919 (1979) (Rehnquist, J., dissenting from denial of certiorari) (referring to "comparative law" in questioning the Fourth Amendment exclusionary rule); Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (quoting a scholarly article's discussion of how the exclusion of improperly obtained evidence cannot be necessary for judicial integrity "when no such rule is observed in other common law jurisdiction such as England and Canada, whose courts are otherwise regarded as models of judicial decorum and fairness") (citation omitted); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (stating that the exclusionary rule "is unique to American jurisprudence" and not followed in either England or Canada); c*f.* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2678

legal practice in other comparable polities can shed light on what it means to have a constitution committed to human freedom and equality within a system of effective governance, and what kinds of justifications warrant intrusion on protected freedoms or distinctions among persons in the enjoyment of rights.[89] If past is prologue, there will always be new, hard, and open questions of constitutional law, particularly under the provisions of the Due Process and Equal Protection Clauses, as, for example, when features of human identity once accepted as justifying disparate treatment are re-understood.[90]

It has recently been argued, however, that American exceptionalism is a reason for the Court to abandon its consideration of foreign or international law in resolving domestic constitutional issues.[91] But American exceptionalism is inherently comparative. According to Professor Calabresi's account, there is a strong theme in American history influenced by the Puritan ideal that society and government in this new world were to be "A Shining City on a Hill;" we were to be elevated, a "model" government in comparison to the rest of the world;[92] we were to be, in President Reagan's words, which Professor Calabresi

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(2006) (rejecting interpretation of an international convention to require suppression of defendant's statements in part because "[t]he exclusionary rule as we know it is an entirely American legal creation"). *But cf. id.* at 2678 n.3 (noting that British and Australian judges may have discretion to exclude for violations of statutes implementing the convention); *id*. at 2706–08 (Breyer, J., dissenting) (noting British origin of suppression remedy and describing practice in civil law jurisdictions of investigating judges, who may simply ignore improperly obtained evidence).

89. *See* BEATTY, *supra* note 84 (arguing that constitutional courts around the world rely on the same analytic of proportionality to test the justifications for and hence legality of government action); *cf.* Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 25 (2002) (explaining why a "judge should not advance the intent of an undemocratic legislator [and] must avoid giving expression to undemocratic fundamental values").

90. *Compare*, *e.g.*, Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (holding that segregation does not imply inequality and is a mark of inferiority only in the minds of the "colored race") *with* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding that racial segregation, in part because it imposes a sense of inferiority on black children, is unconstitutional). *See also* Bowers v. Hardwick, 478 U.S. 186 (1986) (finding no denial of the Fourteenth Amendment in application of a criminal sodomy statute to private consensual adult behavior), *overruled by Lawrence*, 539 U.S. at 558.

91. *See* Calabresi, *supra* note 10. For other arguments that look to particular aspects of U.S. constitutional culture to justify or explain the relative paucity of comparative reference in U.S. constitutional cases, see, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004); Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2699–2700 (2003).

92. Calabresi, *supra* note 10, at 1, 27 (internal citations omitted).

quotes, a "beacon" of freedom and liberty to the rest of the world.[93]

One cannot be a city on a hill, however, if one is not surrounded by valleys or plains. One cannot be a beacon of light if one operates below the terrain of those who are supposed to see it. One cannot be a leader in the protection of freedom if one ignores baselines of freedom elsewhere. American exceptionalism is, therefore, linked to elements of our experience viewed comparatively in constitutional adjudication. Two examples are illuminating.

In *Plessy v. Ferguson*,[94] the Court rejected a challenge under the Fourteenth Amendment to a state law requiring racial segregation in public transportation, thereby legitimating a regime of racial segregation and subordination that lasted as a formal matter nearly six decades, until *Brown v. Board of Education*,[95] and whose vestiges, many believe, continue to this day. As the sole dissenter in *Plessy*, Justice Harlan wrote, "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds."[96] This well-known statement would now be accepted by virtually all U.S. lawyers as embodying a core constitutional principle. But Justice Harlan went on, in a comparative vein, stating, "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law."[97] By comparing the people of the United States to those peoples above whom our people enjoy freedom, Justice Harlan cuts to the heart of the comparative nature of exceptionalism: how, he asks, can the United States profess an ideology of freedom and liberty superior to all others while at the same time failing to extend that freedom and liberty to all of its own citizens?

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93. *Id.* at 47–48 (quoting President Reagan as saying, "We cannot escape our destiny . . . . The leadership of the free world was thrust upon us two centuries ago . . . . And she's still a beacon, still a magnet for all who must have freedom.").

94. 163 U.S. 537 (1896).

95. 347 U.S. 483 (1954).

96. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

97. *Id.*

Justice Harlan's comparative vantage was found in a lone dissent, albeit one of the great dissents that has come to be recognized as stating a better constitutional understanding. In *Miranda v. Arizona*,[98] an iconic case from the 1960s, it was the Court itself that spoke in a comparative vein. The issue in *Miranda* was the constitutionality of custodial interrogation of a suspect without the presence of counsel and without warnings as to the defendant's rights to remain silent and to have the assistance of counsel. The Court held that, in order to protect the Fifth Amendment right against self-incrimination, statements made by a suspect in custodial interrogation given in the absence of prior police advice of their constitutional rights were not admissible. In the course of explaining the decision, the Court discussed in some detail the then present rules for the interrogation of suspects in England, Scotland, India, and Ceylon,[99] and gave a consequentialist, pragmatic account of their relevance. As Chief Justice Warren put it, "Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them."[100] The Court, however, was concerned not only with whether the warnings it was requiring would interfere with legitimate police work, but with the protection of the underlying right. In this regard, and invoking the traditions of American exceptionalism as reason to embrace the experiences of these nations, the Court wrote:

> Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.[101]

Thus, the Court's opinion in *Miranda*, like Harlan's dissent in *Plessy*, can be read to express a vision of American exceptionalism—the idea of the United States as a city on a hill, with its

98. 384 U.S. 436 (1966).
99. *Id.* at 486–90.
100. *Id.* at 489.
101. *Id.* at 489–90.

liberty-protecting Constitution—as a positive reason to look at how U.S. practices compare to those of other countries.[102]

At the same time, the Court did not adopt any of the particular practices of the foreign countries it described in their detail,[103] but rather it modeled the constitutionally required warnings on those already in use in the United States by the Federal Bureau of Investigation.[104] Plainly, foreign practice was not considered a form of binding precedent, but a useful, "outside" example shedding light on the requirements of human liberty relevant to understand what the constitutional prohibition on coerced self-incrimination required. Given aspirations for judges to be impartial and to maintain, as a matter of judicial ethics, a kind of isolation from the immediate legal community, considering "outsider" perspectives found in transnational sources of law can be particularly helpful.[105] (As a practical matter, requesting briefing on possibly comparable foreign law would be a useful way of avoiding errors and fairly airing arguments about comparability.[106] Developing this practice may prove beneficial over time, because given the amount of information available about foreign legal practice, there is an increased likelihood of implicit comparisons—comparisons that, without self-awareness and the checks of legal argument on both sides, may turn out to be erroneous.[107])

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102. It may be that every nation has its xenophobias and its more and less xenophobic moments. And it may be a matter of prudence for a court to refrain from offering as reasons for its decision arguments that will detract from its public acceptance. But as I and others have argued elsewhere, reason-giving is an important constraint on judging, and most of the time a default rule of candor is to be encouraged. *See, e.g.*, Jackson, *supra* note 8, at 335–37 & nn.227–28; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38, 750 (1987).

103. Thus, for example, the Court described Scottish law as prohibiting virtually all statements made in custodial interrogation prior to the suspect's opportunity to consult with counsel and to appear before a magistrate. *Miranda*, 384 U.S. at 488 n.59. The warnings required by the Court, however, permitted custodial interrogation to proceed in the absence of a request for counsel. *See id.* at 487 n.57 (quoting from the English Judge's Rules, including a requirement that a written record be made "of the time and place at which any such questioning or statement began and ended and of the persons present").

104. *See id.* at 483–86. *But cf. id.* at 500 n.3 (Clark, J., dissenting) (arguing that the warnings required by the Court went beyond those used by the FBI in advising that counsel would be provided if the defendant could not afford counsel).

105. *See* Jackson, *supra* note 56, at 118–20.

106. *Cf. Miranda*, 384 U.S. at 521–23 (Harlan, J., dissenting) (arguing that, in the foreign countries discussed, prosecutors had other advantages that counterbalanced the adverse effects on law enforcement of their high protection against custodial interrogations).

107. *See* Jackson, *supra* note 56, at 119–20 (discussing Chief Justice Burger's opinion in *Bowers* and its failure to show awareness of a prior decision of the European

There remain important and difficult questions about how to determine whether an issue is one on which comparative practice is relevant, and if so, what countries on what issues are comparable, and what the relevance is of the presence or absence of a particular rule of constitutional or statutory law.[108] The Eighth Amendment's ban on cruel and unusual punishments is something of an easy case, both because of its language, which invites judgment by way of comparison, and because of its fairly consistent interpretive history, by which the Justices, from the earliest cases, have looked to foreign law and practice both in cases where they upheld and in cases where they did not uphold a domestic punishment. Across the range of constitutional issues, though, it is difficult to offer non-contextualized rules for considering or not considering transnational law, for reasons grounded in the nature of constitutional adjudication.

In brief, there are multiple modalities,[109] or sources,[110] of legitimate constitutional argumentation that can be identified in the Court's constitutional jurisprudence. Some issues are going to be controlled to a greater extent by the Constitution's text and original purposes or by clearly controlling precedents, in which there might not be room or reason to look further. In other areas, the Constitution's text will require a contextualized judgment—as it does with some issues under the Fourth

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Court of Human Rights inconsistent with his argument about the status of homosexuality in Western civilization).

108. As suggested earlier, whether foreign law is constitutional or statutory may be relevant to its persuasive value. *See supra* note 77 and accompanying text. *Compare, e.g.*, Furman v. Georgia, 408 U.S. 238, 275 (1972) (Brennan, J., concurring) (referring to practices of other western countries), and *id.* at 351 (Marshall, J., concurring) (referring to abolition of death penalty in other jurisdictions and its effects on crime rates), *with id.* at 404 (Burger., C.J., dissenting) (describing abolition of capital punishment outside the United States as a legislative trend that did not support judicial interpretation of the Constitution to bar the death penalty), and *id.* at 438 & nn.23–24, 453–54, 462 (Powell, J., dissenting) (discussing legislative abolition of the death penalty in Canada and Britain).

109. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (discussing six modalities of constitutional argument: historical, textual, structural, prudential, doctrinal, and ethical).

110. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987) (arguing that constitutional interpretation involves multiple interpretive sources, including text, intent, constitutional theory and purpose, precedent, and values); *see also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

Amendment's ban on unreasonable searches,[111] a concept on which we do not have a monopoly and on which the practices of other rights-protecting democracies, or the practices of totalitarian states, may be illuminating examples of what is and is not reasonable. And on some issues of constitutional law, the Court has in the past and will in the future consider the consequences of alternative, plausible interpretations in making a judgment as to the better constitutional rule; on these consequentialist judgments, which are partly empirical, the experience of comparable polities may be helpful.

I do not suggest that the Court consider transnational sources of law on all constitutional issues. There may well be opportunity costs that exceed the potential benefits in some cases of domestic constitutional law; for example, issues on which the domestic legal materials are so rich or so well-settled and the foreign or international materials are so sparse or conflicting that the effort of mastering the transnational materials is not worthwhile.[112] There are issues on which international or foreign law are not relevant, either because experience is not comparable or because of specificities in constitutional text or experience that support a distinctive domestic interpretation. But at the same time, there is no reason to close one's eyes to the experience of other countries grappling with similar problems, including the role of a court in interpreting and enforcing written constitutional limits on democratic government.

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111. For a brief discussion of "proportionality" analysis in Fourth Amendment law, see Jackson, *Being Proportional, supra* note 84, at 849 n.145 (discussing Lago v. Atwater, 532 U.S. 318 (2001)).

112. I thank Dan Meltzer for emphasizing this point in conversation. *See also* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1738 (2003). For other reasons not to refer to foreign or international law, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1612–16 (2006) (suggesting, *inter alia*, that U.S. law has been interacting with foreign law throughout history, but that political resistance may have contributed to strategic silences about this dialogue).