

The Hollow Canon of Transnational Constitutional Engagement

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I. Introduction

At the turn of the century, an effervescence of cross-constitutional references in judicial decisions from new constitutional democracies in Hungary and South Africa to more established systems such as Canada, Italy, and the United States marked what, at the time, looked like a new constitutional era.¹ Complex processes of globalization seemed capable of infiltrating not only economics and public policy but also the realms of constitutional discourse and perhaps even doctrine, which in the past had been somewhat more insulated from transjurisdictional stimuli. In most constitutional systems, such transnational references were incorporated without much contestation. The fierce and deeply polarized debate that ensued in the United States around judicial practices of invoking foreign law that were significantly more sparse than in other jurisdictions,² seemed at first as yet another American constitutional oddity. And so it was, except that the American debate captured normative concerns that, while muted elsewhere, are undeniably relevant to modern constitutionalism.³ For instance, it is not self-evident why foreign law has or should have normative weight in the process of interpreting and applying a democracy's charter of

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¹ See Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2013); Ran Hirschl, *Comparative Matters: The Revival of Comparative Constitutional Law* (Oxford University Press, 2014).

² An empirical study from 2013 found 63 citations to foreign law in 225 years. See Stephen Simon, "The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study," *Journal of Law and Courts* 1(2): 279–301 (2013).

³ Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press, 2012).

constitutional self-government. Nor is it apparent how such practices can be deployed in the principled fashion we expect from courts of law. The canon of transnational constitutional engagement took shape around these questions.

This chapter turns to and on that canon. Its derisory sketch of alternative jurisprudential worldviews has failed to stabilize and support the practice of using foreign law in constitutional interpretation. Without support, transnational constitutional engagement of this type became victim to the vicissitudes of political and socioprofessional factors that had brought it about in the first place. It is not only in American constitutional law that engagement with foreign law has dried up over the past decade or so. Elsewhere, including in South Africa, such engagement has greatly diminished in extent and purpose. Nowhere, it seems, has transnational engagement delivered the doctrinal transformation that its proponents once saw as its promise.

I start by introducing the constitutional world of two death penalty cases as examples of transnational constitutional engagement: *Roper v. Simmons* (2005)⁴ in the United States and *S v. Makwanyane* (1995)⁵ in South Africa. Both cases attracted significant attention, yet their doctrinal and social legacies are complex. Section II explores those legacies through later cases involving life imprisonment without parole. Not only *Roper*'s detractors but also its own heirs undermined the promise of aligning American constitutionalism to norms of global constitutionalism as a mechanism for protecting children from cruel and disproportionate punishments. The next two sections connect the failures of constitutional engagement to the faulty theories offered in its support. The most common and weakest is pragmatism. A more promising but limited and ultimately unconvincing theory is Jeremy Waldron's conception of foreign law as the new *jus gentium*.

⁴ 543 U.S. 551 (2005).

⁵ *S v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

II. Death Penalty: The Constitutional World of *Roper* and *Makwanyane*

Roper v. Simmons was not the first or even the most visible case in which the U.S. Supreme Court used foreign law to interpret the U.S. Constitution, but it is the case that galvanized to an extent greater than most others what, in retrospect, is the canon of transnational constitutional engagement. *Roper* is part of a new chapter in the Supreme Court's protracted and non-linear jurisprudence on what the Eighth Amendment to the U.S. Constitution requires of states as far as capital punishment is concerned.⁶ Central to this new doctrinal chapter is a shift away from the crime or the method of execution and toward the offender.⁷ In *Atkins v. Virginia* (2002),⁸ the Supreme Court held that death is an inherently disproportional punishment as applied to mentally disabled offenders. The question in *Roper* was whether the Eighth Amendment allows a state to sentence to death a person under the age of 18 at the time of the offense.

The Court held that it does not. The insufficiently well-formed character of juveniles, their lack of maturity and underdeveloped sense of responsibility, as well as their susceptibility to negative influences and outside pressures all pointed to their diminished culpability. These traits lessened the penological justifications — retribution or deterrence — and made death a punishment always disproportionate, and therefore cruel and unusual, when applied to a minor. *Roper* drew “essential instruction”⁹ from developments at the sub-federal level ranging from infrequent application of the death penalty to juveniles to the rejection of this type of punishment or a consistent trend towards abolition in the majority of U.S. states. But state law is only part of the framework of reference. The “evolving standards of decency that

⁶ U.S. Constitution, Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

⁷ For a comprehensive account, see Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Harvard University Press, 2016)

⁸ 536 U.S. 304 (2002).

⁹ *Roper*, at 564.

mark the progress of a maturing society”¹⁰ open up the constitutional analysis of what constitutes a cruel and unusual punishment. But the breadth of the new framework it is a matter of interpretation. One narrow interpretation confines the constitutional analysis to the national realm, whereas a broader approach searches for such standards within the tradition of the common law, or of the legal cultures of the West, or, conceivably, at the global level. The majority in *Roper* proceeded in concentric circles, with different degrees of engagement at each level of analysis. Starting from the largest and presumably the most eclectic global perspective, the Court’s survey concluded that the “US is the only country in the world that continues to give official sanction to the juvenile death penalty.”¹¹ Moving inward towards its own common law tradition increased the Court’s level of comfort with more robust engagement with foreign jurisdictions. Justice Kennedy, writing for the Court, reviewed the reasons behind the elimination of the death penalty for juveniles in the United Kingdom, and deemed those reasons similar to *Roper*’s majority.¹²

Roper’s use of foreign law placed it in a larger constitutional age of transnational engagement. In *S v. Makwanyane*, the newly established Constitutional Court of South Africa considered whether the death penalty violated the country’s new Constitution. In a remarkably erudite and thoughtful opinion, President

¹⁰ *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958).

¹¹ This may sound stark but it is not, considering that Art. 37 (a) of the U.N. Convention on the Rights of the Child, to which all countries except the U.S. are signatory, reads: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” Nevertheless, the issue of what constitutes parole has become a matter of dispute. U.N. bodies, such as the U.N. Human Rights Committee, have stepped in to identify when the possibility of parole is so remote that a sentence is de facto life without parole. See Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Analysis* (Harvard University Press, 2019), at 105–108.

¹² It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae*, 10–11.

Chaskalson mentioned a plethora of foreign judgments, from India to Canada and from the U.S. to Tanzania to the European Court of Human Rights. Interpreting them through the theoretical lens of theories of punishment, he used these foreign judgments as dicta to strike down death as a form of punishment permissible under the South Africa's constitutional protection of rights to life and dignity. *Makwanyane* showed the world what constitutional engagement with foreign and international law could look like.¹³ To be sure, *Makwanyane* was to some extent the result of special circumstances.¹⁴ Building a new constitutional order on the legacy of apartheid left judges in need of traditions to serve as anchors and points of reference. References to foreign law could supply some of the missing traditions. Reputational considerations also must have played a role for a legal and political system seeking the recognition of more consolidated constitutional democracies. Finally, and of particular importance, South Africa's Constitution explicitly allows references to foreign law in constitutional interpretation.¹⁵

The lack of comparable textual foundations might explain some of the *Roper* Court's defensiveness in regard to cross-jurisdiction references. Arguing, vaguely, that what other countries "do" is "instructive," the majority in *Roper* wrote that "the opinion of the world community, while not controlling our outcome, does provide

¹³As befits an institutional innovator, the *Makwanyane* Court mentioned that, "[i]n dealing with comparative law, ... [it is] required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country" and, therefore, it can "derive assistance from public international law and foreign case law, but we are in no way bound to follow it." *Makwanyane*, para 39 (footnote omitted). The historical record notes the existence of earlier and equally impressive, in range and depth, instances of transnational engagement, such as Decision No. 23/1990 (X.31.) AB (Hungarian Constitutional Court).

¹⁴ Special, not unique. For comparison, see Frank Michelman, "Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa," 117 Harvard Law Review 1378 (2004).

¹⁵ Constitution of South Africa, Art. 39, 1: "When interpreting the Bill of Rights, a court, tribunal or forum—b) must consider international law; and c) may consider foreign law."

respected and significant confirmation for our own conclusions”¹⁶—conclusions that, presumably, the Court had reached independently of foreign law. Seeking to deflate criticism that interpreting a political community charter of constitutional self-government must be confined strictly to sources originating in that community,¹⁷ Justice Kennedy opined that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹⁸

The reference to the heritage of freedom echoes another, much-discussed case of the U.S. Supreme Court, *Lawrence v. Texas*,¹⁹ that struck down a statute criminalizing homosexual sodomy. Holding that the statute deprived gay and lesbian Americans of their liberty under the Due Process Clause of the Fourteenth Amendment, the Court, again per Justice Kennedy, referenced foreign law to show that the liberty interest whose protection the claimants sought in that case “has been accepted as an integral part of human freedom in many other countries.”²⁰ The Court drew that conclusion from the legal cultures of the West, as reflected in the cases of the European Court of Human Rights, as well as from developments in English law. The jurisprudence that supports this approach seems to be one where constitutions instill the normative commitments to abstract values such as liberty or equality of a political community but contingencies of time and place shape the meanings of those commitments in ways that may obscure some of their dimensions.²¹ Courts may seek to overcome those contingencies by reaching out to foreign law in order to bring to light “components of liberty in its manifold possibilities” and thus properly come to

¹⁶ *Roper*, at 578.

¹⁷ That reaction originates in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Scalia, J., dissenting).

¹⁸ *Roper*, at 578.

¹⁹ 539 U.S. 558 (2003).

²⁰ *Lawrence*, at 577.

²¹ See Vlad Perju, “Cosmopolitanism and Constitutional Self-Government,” 8 ICON 326 (2010).

“appreciate the extent of the liberty at stake.”²² The claimant’s case may ultimately turn on the ability of courts to reveal and understand these new possibilities. By contrast to *Roper*, the goal in this subset of cases is not to draw on a unitary world legal practice or a near universal norm but rather to carve out a shared, trans-jurisdictional normative space in which constitutional rights can be interpreted.

What about the risk that such transnational spaces harbour nominalist and self-serving beliefs that impermissibly undermine the promise of democratic self-government? Constitutional contingency is, for some, tantamount to political identity. I consider these arguments later. Noteworthy for now is that the weight of this objection is greater when, as in *Lawrence*, the constitutional decision-maker selects and often has to construct a particular legal tradition as opposed to situations such as *Roper* when the legal traditions of the world seem to overlap. By this standard, it seems that the anchor of *Roper*’s usage of foreign law runs considerably deeper. How deep, though, is what subsequent cases would reveal.

III. Life Imprisonment without Parole: *Makwanyane*’s and *Roper*’s Complex Legacies

The canon of transnational engagement treats *Makwanyane* and *Roper* as defining moments in setting the normative interface between constitutional legal orders. Yet, cases downstream reveal their legacies as more tentative and, in *Roper*’s case, considerably flailer than the canonists had assumed or hoped.

Makwanyane ordered that offenders already sentenced to death be subject to other “appropriate and lawful punishments.”²³ In most cases, that meant life imprisonment. The number of “lifers,” or offenders sentenced to life imprisonment, at least theoretically with the possibility of parole after serving the non-parole part of the sentence, increased dramatically a few years later when legislative reforms imposed mandatory minimum sentences for a significant number of crimes, including

²² *Lawrence*, at 567.

²³ *Makwanyane*, para 150.

premediated murder and some forms of aggravated rape but also for crimes such as trafficking and some terrorism-related offences.²⁴ The Constitutional Court upheld the facial constitutionality of the Act on separation of powers grounds, with a rich apparatus of references to both foreign constitutional law and theory.²⁵ But a more narrowly calibrated challenge subsequently struck down mandatory minimum sentences when the offender was a child between the ages of 16 and 18 at the time when they committed the crime.²⁶ Relying, in part, on a constitutional provision that children “are not to be detained except as a measure of last resort” and “only for the shortest appropriate period of time”²⁷ and, in part, on international law, especially the U.N. Convention on the Rights of the Child, as well as on foreign cases, the South African judges interpreted the principle of proportionality of punishment to require that children be imprisoned only as a measure of last resort and for the shortest period of time.²⁸ The attempt to protect children from this extreme form of punishment must be understood in the context where, as former Justice Cameron argued, South African prisons “are clogged within an inordinate number of lifers.”²⁹ Studies show that, in 2019, life imprisonment sentences represented 12% of the total prison population, an increase of more than forty-three times compared to the early 1990s. Between 2000 and 2014, the population of South Africa’s lifer population grew by 818%. Meanwhile, “violent crime still plagues” South Africa.³⁰ Since even among convicts who qualify for parole hearings, the possibility of being granted parole is sometimes purely theoretical given its uneven application, it seems fair to wonder if the life

²⁴ Criminal Law Amendment Act of 1997.

²⁵ *S v Dodo* (CCT 1/01) [2001] ZACC 16, paras 27–41.

²⁶ *Centre for Child Law v. Minister of Justice and Constitutional Development* (CCT98/08) [2009] ZACC 18.

²⁷ Art. 28, 1, (g).

²⁸ Ann Skelton, “Balancing Autonomy and Protection of Children’s Rights: A South African Account,” 88 *Temple Law Review* 887 (2016).

²⁹ Edwin Cameron, “South Africa’s prisons are crowded with ‘lifers,’ at great cost to our economy and even human rights,” in *The Daily Maverick* (10 November 2021) (available at <https://www.dailymaverick.co.za/article/2021-11-10-south-africas-faulty-approach-to-life-sentences-is-catching-up-with-us/>).

³⁰ *ibid.*

imprisonment regime in effect complies with *Makwanyane*'s broad interpretation of the constitutional dignity guarantees.

In the United States, where the death penalty remains constitutional, about one in seven people in prison are serving life sentences. Indeed, studies show that more people are serving life sentences today than there were people in prison serving any sentence in 1970.³¹ The number of offenders who serve sentences to life imprisonment without parole has increased steadily over the past decades, to include in the most recent study more than a quarter of all sentences to life imprisonment.³² The Supreme Court has interpreted the U.S. Constitution to permit such sanctioning regimes.³³ The only exception involves children.

In view of *Roper*'s reliance on the profile of offenders, it was only a matter of time before the legality of the next harshest available form of punishment for juveniles, life in prison without the possibility of parole, would also be put to a constitutional test. Five years after *Roper*, the Supreme Court ruled in *Graham v. Florida* (2010)³⁴ that life without parole violates the Eighth Amendment as applied to a juvenile convicted of a nonhomicidal offense. *Graham*, like *Roper*, cited research on the differences between children and adults in terms of their "lack of maturity" and "underdeveloped sense of responsibility."³⁵ Justice Kennedy, writing for the Court, duly noted "the overwhelming weight of international opinion against"³⁶ life without parole for nonhomicide offenses committed by juveniles. He qualified this statement

³¹ The total number in 2021 was 200,000. See <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>.

³² <https://www.statista.com/statistics/818006/number-of-people-serving-life-sentences-without-parole-in-the-us/>.

³³ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

³⁴ 560 U.S. 48 (2010).

³⁵ *Graham*, at 68.

³⁶ *ibid* at 81.

with the reminder that international opinion played only a confirmatory role, albeit “respected and significant,”³⁷ for the Court’s own conclusions.

Graham was important as a statement of principle but it affected only a little over 100 inmates held in state courts, mostly in the state of Florida. A far greater number of convicts—around 2,500—had been sentenced to life without the possibility of parole for homicide. Since both *Roper* and *Graham* spoke about children’s vulnerability in general terms, it seemed certain that those sentences would eventually be challenged under the *Roper/Graham* rationale. In *Miller v. Alabama* (2012),³⁸ the U.S. Supreme Court considered whether a sentencing scheme that mandates life in prison without the possibility of parole for juveniles convicted of committing homicides is consistent with the Eighth Amendment’s prohibition of cruel and unusual punishment. Justice Kagan, writing for the Court, answered the question in the negative. Since the reasoning in *Graham* and *Roper* was not crime-specific, it follows that the grounds why special punishments had to be carved out for children apply irrespective of the severity of the crime.

Yet, *Miller* made no mention of foreign law. The discontinuity with the *Atkins–Roper–Graham* line of interpretation was noteworthy since, here as in those earlier cases, foreign law reflected the consensus of the world legal systems. Amici had shown that “virtually every other country in the world either has never engaged in or has rejected”³⁹ sentencing juveniles to life without possibility of parole regardless

³⁷ *ibid* (citing *Roper*).

³⁸ 567 U.S. 460 (2012).

³⁹ Brief of Amnesty International et al. in Support of Petitioners, 3 (available at <https://eji.org/cases/miller-v-alabama/pleadings/>). In Germany, the Federal Constitutional Court held that life without parole violates human dignity in *Life Imprisonment* 45 BVerfGE 187 (21 June 1977). The Supreme Court of Canada struck down life without parole in *R v Bissonnette*, [2022] SCC 23. The European Court of Human Rights first held that life imprisonment without parole violates Article 3 of the European Convention of Human Rights in *Vinter v. United Kingdom*, 66069/09, 130/10, & 3896/10 (ECtHR, 2012), although that holding was later qualified in *Hutchinson v United Kingdom* 57592/08 (ECtHR, 2017). For a comparative analysis of these constitutional developments, see Mugambi Jouet, “The Abolition

of their crime. *Miller*'s failure to cite foreign law might at first seem inconsequential. Having already mentioned as dicta the weight of foreign opinion in *Graham* in support of the constitutional principle against life without parole, perhaps it seemed unnecessary to restate it in *Miller*. Or, perhaps an anticipation of the chorus of protest, both from within the court and from outside, might have dissuaded the Court from explicit transnational engagement. Only two years into her Supreme Court justiceship, Justice Kagan was perhaps unwilling to recant on her testimony during the Senate confirmation hearings about the irrelevance of foreign law in constitutional interpretation.⁴⁰ Support from foreign law seemed, moreover, optional. Here was a judgment that extended protection to vulnerable rights holders against state policies that indiscriminately inflicted cruel and unusual punishments. True, unlike prior decisions, this one did not explicitly rely on foreign law in interpreting the Eighth Amendment. But, again, why care? Wasn't it enough that *Miller* was a victory for criminal defendants?

It certainly seemed that way for a while. When deciding if *Miller*'s holding applied retroactively to over 2,000 juveniles then serving life sentences in state penitentiaries, the Court held, in *Montgomery v. Louisiana* (2016), that it did. The effect was to make those prisoners eligible for resentencing hearings. Such hearings, however, could still result in sentences to life without parole. Since *Miller* had only held that mandatory sentences violated the Eighth Amendment, it remained possible that courts could resentence juvenile offenders to life without parole so long as those sentences were discretionary, that is, so long as sentencing judges had discretion to impose a lesser sentence than life. Under *Miller*, life without parole can satisfy the

and Retention of Life Without Parole in Europe: A Comparative and Historical Perspective", *The European Convention on Human Rights Law Review* 4 (2023): 306-354.

⁴⁰ One can surmise why Justice Kennedy, still on the Court at the time *Miller* was decided, joined his junior colleague's majority opinion without writing separately. Perhaps Justice Kennedy decided against writing separately for considerations of collegiality and also because a failure to reference foreign law was not sufficiently significant, in this context.

proportionality requirement of the Eighth Amendment but only for juvenile criminals that courts deemed permanently incorrigible. Hence, the dispositive question became what constitutional requirements govern a judicial finding of permanent incorrigibility. If the constitutional mandates are stringent, for instance by requiring a separate factual finding by virtue of the reduced culpability of juvenile offenders, then *Miller*'s legacy will be of one kind. But if those mandates are lax, for instance if the Constitution requires only a discretionary sentencing procedure where judges take into consideration a defendant's youth, however they see fit, then an incorrigibility finding might not pose much of an obstacle to state courts bent on sentencing juveniles to life without parole with comparable frequency as they had before *Miller*.

The answer to that question would reveal *Miller*'s fragility. In *Jones v Mississippi* (2021),⁴¹ a new Supreme Court majority held that the Eighth Amendment required no separate factual finding of permanent incorrigibility at a sentencing hearing, or an on-the-record sentencing explanation of an implicit finding of permanent incorrigibility or any other formality to that effect. Sentencing judges comply with *Miller* whenever they have discretion to impose a sentence other than life without parole. But since, post-*Miller*, sentencing courts always have such discretion, *Jones*'s validation of implicit incorrigibility determinations makes at least understandable its dissenters' charge that *Jones* overrules *Miller sub silentio*. That much is clear, although it is worth noting that this claim relies on a broad interpretation of *Miller*'s holding. But that is not how the dissenters in that case, who became the majority in *Jones*, interpreted *Miller*'s holding. For them, at least as recounted retrospectively, *Miller* was not a sentencing overhaul or a big step to protect vulnerable defendants from a particularly cruel form of punishment. They saw it, rather, as a purely procedural rule that imposed a categorical ban on sentences mandatory under state law. It is an open question whether the narrow or the broad

⁴¹ 593 U.S. __ (2021).

interpretation of this holding is correct. And that is precisely the point. *Miller*'s meaning thus seems adrift, subject to whatever constitutional winds will blow its way.

It is probably naïve to believe that a reference to foreign law in *Miller* would have prevented *Jones*'s turn. So determined is the current Supreme Court majority to undo protections for criminal defenders that little can stop it, much less a reference to foreign or international law of the kind jurists of this ilk have long opposed. Nevertheless, a reference to foreign law would have anchored *Miller*'s meaning. And, in so doing, it would have exposed the extent of *Jones*'s departure from the line of precedent running from *Roper* to *Miller* to *Montgomery*. If *Miller* had sought to align American law with the near universal ban on sentencing persons under 18 to life without parole, then *Jones*'s dissenters would have been more convincing when arguing that the majority in *Jones* guts the “essential holding” of *Miller*.⁴² *Miller*'s disconnect from the transnational engagement of its own doctrinal lineage is not shallow, as if references to foreign law are a gratuitous adornment. To the contrary, that discontinuity impacts *Miller*'s—and *Montgomery*'s—essential holding. Detached from foreign law, what *Miller* (might have) meant as the exception became, at the hands of the future *Jones* majority, the rule. Seen retrospectively, *Miller* aimed (merely) to invalidate mandatory sentences but left open the possibility of discretionary sentences of juvenile to life without parole. That could only happen if the alignment of transnational constitutionalism was not within *Miller*'s scope.

From this perspective, most surprising about these recent Eighth Amendment cases is neither the hollowing out of recent precedent nor the Constitution's permissive approach to a cruel and racialized criminal justice system. Surprising, rather, is the deafening silence that surrounds the Court's failure to engage with foreign and international law in its development of core Eighth Amendment doctrine.

⁴² *Jones*, Sotomayor, J. (dissenting), slip op. 1. On the domestic front, as of early 2023, more than half of the U.S. states have banned juvenile life without parole. See <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/> (last accessed September 2023).

Neither the majority in *Miller* and *Montgomery*, nor the dissent in *Jones*, mentioned foreign law despite its doctrinal ramifications. Amici briefs that pressed the point— “[t]he community of nations rejects sentencing any juvenile offender to die in prison, whatever the offense,” read the Amnesty International brief⁴³—fell on deaf ears. Most striking, however, is that the silence on foreign law went beyond the Supreme Court. An otherwise active commentariat did not pick up the omission or express much concern on that score neither contemporaneously with *Miller* nor retrospectively after *Miller* was gutted.⁴⁴ The community of jurists, many of whom rightly lamented the Court’s decision in *Jones*, did not seem to believe that alignment with foreign law could have made a difference to the meaning of the Eighth Amendment. References to foreign law, and reliance on foreign law as a frame of reference, had simply vanished from this area of constitutional doctrine and from constitutional discourse.

IV. Constitutional Paths Not Taken

It might be tempting to explain the demise of engagement with foreign law in the United States Supreme Court by reference to obstacles that its defenders tried but failed to overcome. Why, asked the critics, should courts in well-established constitutional systems ever reach beyond the authoritative legal materials of their political community in interpreting that community’s constitutional charter of self-governing? How should normative commonality be conceptualized and operationalized for judicial use, especially in a legal system that conditions legality on pedigree?⁴⁵ Importantly, what elements of a judge’s commission authorize the use of extraneous references in a constitution that, unlike South Africa’s, is entirely silent on

⁴³ See n 39, p. 5.

⁴⁴ An exception is the ever-vigilant Heritage Foundation, which saw in the “mysterious disappearance” of international law arguments a “welcome shift in the Court’s jurisprudence.” Charles Stimson and Jonathan Levy, “The Mysterious Disappearance of International Law Arguments from Juvenile Sentencing in *Miller v. Alabama*” (available at <https://www.heritage.org/report/the-mysterious-disappearance-international-law-arguments-juvenile-sentencing-miller-v>) (last accessed September 2023).

⁴⁵ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

this matter? How could judges ever defensibly navigate real difficulties of understanding the meaning and cultural valence of foreign legal norms, especially given the limits of their knowledge, time, and resources? These are difficult questions. If answers fail to convince, little wonder that the practice of using foreign law itself would crumble. To be sure, given its proximity to power, constitutional theory is not always, or perhaps even often, convincing for reasons intrinsic to its theoretical worth.⁴⁶ Its appeal is a combination of anticipated usage, perceived through a political or ideological lens, as well as normative attractiveness, timeliness, discursive compatibilities, ease of use, and so on. It is how constitutional ideas and methods fit within a political and jurisprudential worldview, and how that worldview stands to benefit from the additions to its constitutional capabilities, that explain constitutional success or failure. The dominance of an isolationist conception that sought to defend its vision of American constitutional exceptionalism against an alternative jurisprudential worldview open to foreign law would, thus, explain transnational constitutional disengagement.

This line of reasoning explains disengagement as part of a wider, and presumably irresistible, set of cultural forces or even of redoubtable challenges aimed directly at undermining constitutional reliance on foreign law. That may be true, to some extent. But transnational engagement has also come undone under the weak defenses of its supporters. Judges perhaps are bound to invoke the strictures of their role morality to deny foreign law any precedential force. But what about other jurists? The orthodox assumption that foreign law can have at most persuasive, but never precedential, authority is ripe for questioning but rarely questioned. So is the oft-repeated claim that the use of foreign law is inescapably random and subjective. It seems hardly sufficient to offer, in response to the challenge that a commitment to democratic self-government restricted the array of sources that constitutional

⁴⁶ Originalism's rise to dominance in American constitutionalism serves as Exhibit A. See Edward A. Purcell, Jr., *Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon* (Oxford University Press, 2020).

decision-makers can legitimately access, to the exclusion foreign law, an answer that foreign law could nevertheless sometimes be instructive or useful as a heuristic device.

Critics of foreign law took it more seriously than its defenders. The former understood and rightly feared the effect on their jurisprudential worldview of an expansive engagement with the experiences in self-government of other political communities. Despite reassurances about the confirmatory role of foreign law, such references carried more than a tad of normativity. Recall that *Atkins*, *Lawrence*, and *Roper* relied on foreign law to overrule precedent.⁴⁷ Significantly, the precedents they overruled were not old decisions that had fallen into desuetude but, rather, they were recent cases dating back just about a decade—a blink of an eye, in constitutional time. The description of the role of foreign law as purely confirmatory, as if judges first reach their decisions using traditional sources and only then turn to foreign law for confirmation, is not self-evident. As the South African cases reveal, albeit without sufficient conceptualization, there seems to be more reliance on foreign law than the confirmatory paradigm suggests. One amicus brief in *Miller* describes the prohibition against life without parole for juvenile offenders as “one of the most widely accepted international human rights norms.”⁴⁸ That is no sleight of hand. It implies a robust normative view of foreign law.⁴⁹

Perhaps the critics’ most significant concerns involve how references to foreign law alter the nature of constitutional discourse. A robust judicial practice of incorporating such references invites lawyers to present arguments about foreign law and thus opens new dimensions of constitutional analysis. Similarly to how originalism brought a particular kind of history to the heart of constitutional

⁴⁷ *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Roper* overruled *Sanford v. Kentucky*, 492 U.S. 361 (1989); *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁸ See n 39, p. 2.

⁴⁹ I sketch out such an account in Vlad Perju, “Elements of a Doctrine of Transnational Constitutional Norms,” 22 *ICON* (forthcoming 2024).

discourse, so transnational engagement could make foreign law central to constitutional argument. In the view of critics, such a development would undermine the integrity of American constitutional discourse.⁵⁰ As modern legal positivism teaches, since public officials identify norms they recognize as law,⁵¹ changes to the categories of legal discourse can impact at a deeper level the inner workings of the legal order. The concern is that if foreign law enters the discursive stage, it may, in time and under propitious circumstances, harden into legal doctrine and even reshape its rule of recognition in the U.S. legal system.

While critics respond to this prospect with concern, one might expect defenders of transnational engagement to see the ascendancy of foreign law as an opportunity for renewal of a constitutional system that has been showing its diminished capacities for responsiveness, whose mechanisms of self-correction are in disrepair, and whose claim to impartiality has been torn apart by ideological polarization. Progressives have despaired about the trajectory of American constitutionalism at least since the Rehnquist court and with ever greater urgency over the past two decades. Among their concerns have been the rise of the unitary executive, the crumbling of the wall that once separated religion and state, the erosion of remedial racial classifications, the undoing of the right to privacy and especially reproductive freedom, the failure to afford education and other social entitlements and so on. Foreign law may not be the *deus ex machina* of constitutional adjudication, but, at least so long as courts continue to review the validity of political acts, many if not all of these doctrinal areas would benefit from recasting within a broader global constitutionalist framework. On the methodological front, foreign law might have countered, as much as anything could, the growing dominance of originalism and the

⁵⁰ Charles Fried, "Scholars and Judges: Reason and Power," 23 *Harvard Journal of Law and Public Policy* 807 (2000).

⁵¹ Legal positivists see that recognition as what makes law in a modern state. For a discussion in the case of foreign law, see Jeremy Waldron (n 3), at 54–56. The underlying jurisprudential theory is presented in H. L. A. Hart, *The Concept of Law* (2nd edn., Oxford University Press, 1994).

turn inwards in American constitutionalism that has accompanied it. The point, again, is not that foreign law is a panacea for all constitutional ills. Foreign law can be abusive and abused.⁵² But the paucity of alternative sources of renewal is such that foreign law arguably has sufficient potential to destabilize constitutional doctrines, challenge the exceptionalist nationalist vision that underpins them, and hopefully replenish to some extent the capabilities of American constitutionalism. But such an effect depends on the availability of conceptions that justify its legitimacy and its principled deployment.

V. Pragmatist Detours

Pragmatism fits the bill, though its valiantly “anti-theoretical” stance prevents it from casting itself that way.⁵³ Pragmatism’s first move is to displace the debate from a territory of abstract theory and into one about reality, facts, and the-world-as-it-is. “It is not the cosmopolitanism of some jurists,” Justice Breyer writes extrajudicially, that justifies transnational constitutional engagement, “but the nature of the world itself that demands it.”⁵⁴ The world demands it because its economic, technological, and political interconnectedness brings to courts cases with significant transnational dimensions. There are, however, important distinctions between engagement through international treaties, reliance on customary law, enforcement of extraterritorial norms, adjudication of multijurisdictional commercial agreements, and so on. In this landscape, reliance on foreign law in constitutional interpretation is in a category of

⁵² An early contribution that drew attention to this phenomenon is Kim Lane Scheppele, “Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models,” *ICON* 1(2): 296–324 (2003). A recent study is Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing* (Oxford University Press, 2021).

⁵³ Dworkin adds to anti-theoretical also the charge of populism, in Ronald Dworkin, “Darwin’s New Bulldog,” 111 *Harvard Law Review* 1718, 1718–1719 (1998) (“Posner’s arguments are in the service of a populist anti-theoretical movement that is now powerful in American intellectual life”). That label might apply to Richard Posner’s version of pragmatism, which was the context in which Dworkin made the charge, but it does not apply to Justice Breyer’s.

⁵⁴ Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage, 2016), at 245.

its own. What of the objections about the inherent malleability and illegitimacy of this particular form of transnational engagement? They are “important in the abstract,” Breyer concedes, but do not represent reality. That is, they “do not reflect the reality of today’s federal dockets, including the Supreme Court’s.” Since there is “no direct relation between the underlying fears they express and corresponding changes in American jurisprudence,” he writes, the critics “overstate their concerns” and are “beside the point.”⁵⁵

The point, as Justice Breyer sees it, is that law matters in the world and that high theory only feeds the kind of conceptualism or formalism that pragmatists have long dismissed as transcendental nonsense. Foreign law is comparative law in action, a method of constitutional problem-solving. Judges use it when they deem it useful; otherwise, they discard it. Foreign law can, for instance, reveal the consequences of alternative legal ordering in matters such as the federal control of state subunits,⁵⁶ the role of the executive during states of emergency,⁵⁷ the effect of racial quotas,⁵⁸ or the impact of constitutionalizing a right to physician-assisted suicide.⁵⁹ There are, of course, limits to these comparisons, given differences in social, political, and economic structures wherein different constitutional norms are embedded and shape the social effect of these norms and thus limit the usefulness of trans-jurisdictional comparisons. Be that as it may, pragmatists trust the decision-maker to control for such differences. They trust, for instance, that if these differences are too great, judges will sidestep foreign law. Disagreements among judges about the usefulness of foreign law are to be expected. But so long as judges justify their conclusions, disagreement is no more concerning in this context than in any other.

Note that, from this perspective, foreign law is at most useful but not controlling. In fact, according to pragmatism, no source or method of interpreting the

⁵⁵ *ibid* at 245.

⁵⁶ *Printz v. United States*, 521 U.S. 898 (1997).

⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁵⁹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

meaning of the Constitution is *a priori* controlling. Each can be relevant, depending on its practical effect in specific contexts. Thus, legal authority can never be abstracted from context. Much turns on the assessment of practical effect. For instance, should practical effect be understood as the distributive effect of legal norms or as the most efficient allocation of entitlements? If practical effect is understood consistently along the lines of one or the other or some third conception, that consistency must be supported by background justification that likely conflicts with pragmatism's adamant rejection of abstract theory. If, by contrast, the legal interpreter lacks any background consistency, then pragmatism opens itself up to a critique that its usage of foreign law is inherently strategic and unprincipled.

This latter possibility leaves pragmatism exposed to the methodological challenges that the use of foreign law is inherently unprincipled. It is, as critics like to say, like going to a party and chatting only with your friends. Even within the same legal tradition, there will almost always be some jurisdictions that will support one's side, for instance regarding the demands of constitutional equality and liberty on practices such as abortion, same-sex marriage, or physician-assisted suicide, just as there will be others that support the opposite conclusion. How, then, can one assess if foreign law is used in a principled manner?⁶⁰ This difficulty is compounded by challenges in handling references to foreign law. There is a worry that such references cannot lead to a result disfavored by the interpreter because their inherent manipulability makes it always possible to avoid any such result. Left addressed, these difficulties may end up contributing to the public's growing distrust in judicial decisionmaking. Now, it is true that courts sometimes must dedicate resources to the elucidation of the meaning of foreign norms.⁶¹ But the use of foreign law in

⁶⁰ Eric Posner, "A Review," 126 Yale Law Journal 504 (2016) ("The key problem is that while the Court does 'engage' with the world (as Breyer puts it), Breyer gives no reason for thinking that the Court engages with the world *well*," at 504).

⁶¹ *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865 (2018).

constitutional interpretation is not such a situation. The inherent difficulties of handling foreign law references with accuracy thus seem eminently avoidable.

Note, however, that not all situations involving the use of foreign law afford a high level of discretion. References to foreign law in the *Atkins*, *Roper*, *Graham*, *Miller* line of cases do not select affiliation from an array of available options. In matters regarding the death penalty or life without parole for juvenile offenders, almost all of the legal systems of the world are in agreement that these forms of punishment are disproportionate. The challenge of malleability is pointless. Nor does utility capture the weight of foreign law in such cases.

VI. Waldron's New *Jus Gentium*

Jeremy Waldron presents his original and multifaceted, if somewhat serpentine, account of foreign law as the new *jus gentium* as a jurisprudence for cases such as *Roper*. These cases have in common the existence of a near consensus of the legal systems of the world. Excluded from this account are individualized or “ad hoc” comparisons where there are profound divisions among legal systems. In those situations, foreign law is “sometimes sensible, oftentimes helpful and in rare cases indispensable.”⁶² That may be good enough for a pragmatist perspective but not for Waldron, who seeks to establish the normative authority of foreign law.

This framing allows Waldron to bracket institutional considerations regarding the judiciary and focus instead on the nature of the foreign law norms. These are norms that encapsulate global legal consensus, or areas of commonality among the legal systems of the world. Borrowing a concept that originated in Roman law, Waldron calls them norms of *jus gentium*. It means, in his interpretation, not “the law of any particular country, but the law of the world.”⁶³ These norms result from the “convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents (that) sometimes add up to a body of law that has its own claim on us: the

⁶² Waldron (n 3), at 7.

⁶³ *ibid* at 4.

law of nations, or *jus gentium*, which applies to us simply as law, not as the law of any particular jurisdiction.”⁶⁴ Courts that use foreign law in these situations are in fact applying the law of nations. The prohibition against the death penalty for crimes committed by minors, at issue in *Roper*, is Waldron’s central example. The prohibition against life without the possibility of parole fits his model equally well.

Waldron insists that these norms are to be identified inductively by identifying areas of overlap among the legal systems of the world. His concern is that a deductive method, which proceeds top-down from first principles, might blur the distinction between *jus gentium* and natural law and thus undermine the view of *jus gentium* as positive law. Yet herein lies one tension at the heart of this model. On the one hand, the dual insistence on the positive nature of *jus gentium* norms and the inductive method suggests a relatively small subset of norms. On the other hand, the model itself generates pressure to expand that subset.⁶⁵ Waldron aims for a jurisprudential solution. He warns against confusing commonality or overlap in the positive laws of various legal systems with the norms of *jus gentium* themselves. Commonality is a feature that confers legal authority to the norms, but the process of identifying the norms on which that authority is conferred is a different matter. That process is interpretative, not statistical, in nature. Norms of *jus gentium* are principles, not rules. Waldron’s conception at this point is Dworkinian through and through: “*jus gentium* consists of a body of principles, discerned interpretatively from the commonalities that exist among the positive laws of various countries, by a legal sensibility that is

⁶⁴ *ibid* at 3.

⁶⁵ It seems, rather, that Waldron expects *jus gentium* to overlap more or less with some narrow conception of the rule of law. Waldron does not provide a comprehensive list but does mention that “the body of *jus gentium* includes quotidian norms that secure the routine functioning of the legal system, such as the fundamental principles of contract and commercial law, as well as constitutional norms: the prohibition to execute people for crimes they committed as minors, rudiments of procedural due process, principles of the protection of free speech and religious freedom, probation against arbitrary arrest, the proportionality guarantee in criminal and constitutional law, guarantees of fair trial, basic elements of what we call ‘rule of law’, the law of self-defense,” in Waldron (n 3), at 6 and 32.

both lawyerly and moralized.”⁶⁶ Thus, it seems, the starting point is the overlap in the positive laws of different legal systems. The process identifies what we might call areas of surface commonality. Once such commonalities have been identified, the jurist must dig deeper through a process of interpretation that will reveal the background, supporting principles. These background principles are the norms of *jus gentium*. These are not a garden variety of disjointed principles but combine into a system of law. Waldron writes about:

taking seriously the possibility that deep, background principles, legal principles, may be inferred not just from a single existing body of positive law ... but also from multiple legal systems taken together. Indeed, principles whose presence might not be so apparent in one legal system may come more clearly into view when we look at a whole array of legal systems. And if that is the case, then their presence as legal principles will be a characteristic of law in the world—laws common to all mankind—rather than just the property of the individual systems in which they figure one by one.⁶⁷

This seems like a model for revealing “components of liberty” of the kind that *Lawrence v. Texas* sought to unveil through the use of foreign law. Dimensions of the principle of liberty, on which the petitioners in that case ground their claim, come more clearly into view by looking at other legal systems. Obstacles to the recognition of those claims, and implicitly of the claimant’s dignity,⁶⁸ appear as contingencies to overcome rather than aspects of liberty that must be entrenched further at the expense of the claimant’s liberty interests. This direction of inquiry certainly seems

⁶⁶ *ibid* at 35.

⁶⁷ *ibid* at 67.

⁶⁸ Joel Feinberg, *Rights, Justice and the Bounds of Justice* (Princeton University Press, 1980) (“What is called human dignity may simply be the recognizable capacity to assert claims”).

productive. The problem is that this is precisely the individualized or selective type of comparison that Waldron does not wish to explore. For this reason, Waldron's immediate move in the above passage is to further specify that these should be laws common to all mankind. Identifying positivity and commonality across legal systems as defining features of universal norms of *jus gentium*, with the corollary that these norms are rooted in "social fact"—specifically the fact of "a consensus, characterizing the positive law of various countries in the world"⁶⁹—aims to restore the distinction between selective and (near) consensus comparisons. But it also limits the use of the theory. For there is no good reason why the obscured dimension of liberty are, or should be expected to be, identifiable in all legal systems as a matter of positive law. Even when they are not, partial foreign law can reveal dimensions of a legal claim that decision-makers must identify and treat with due consideration.

One may speculate about Waldron's reasons for limiting so drastically his account to situations of near consensus. Institutional considerations likely played a role. A critic of judicial review,⁷⁰ Waldron might have thought that, were foreign law to radiate normativity beyond situations of near consensus, this might end up granting the judiciary powers beyond what he believes appropriate. Narrowness is the price to pay for depth. But if such concerns shaped the substance of the argument, then Waldron's account can hardly be said to bracket institutional considerations. If anything, these considerations, rather than the normativity of transnational norms, determine the shape of this theory.

A further difficulty concerns the conceptualization of *jus gentium*. True to its historical origins, Waldron's model sees these norms as addressing a gap in the legal system. Since *jus civile* norms applied exclusively to citizens, the question became what rules would apply to non-citizens, who were not the subject of enacted laws. One option might have been to derive these rules from *fas*, or moral principles. But

⁶⁹ *ibid* at 59.

⁷⁰ Jeremy Waldron, "The Core of the Case against Judicial Review," 115 *Yale Law Journal* 1346 (2006).

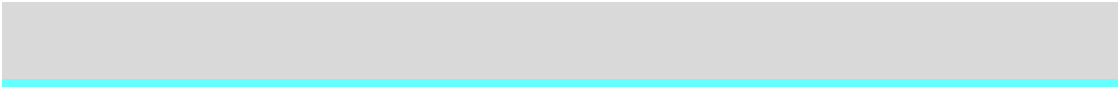
the Romans opted for a different and, in retrospect, superior method of deriving this body of rules from the legal systems of the world. Note, however, that the norms of *jus gentium* were essentially meant to supplant a gap. As such, they were eminently of a different orientation than modern *jus gentium*/foreign law norms, where the problem is not so much the existence of a gap in the legal materials as the meaning or interpretation of an existing norm. Put differently, the point of using foreign law in *Roper* or *Makwanyane* is not how to fill in the gap of a norm regarding the death penalty or a particular sanction; rather, it is the interpretation of an existing constitutional norms.⁷¹ Rather than an account of gap-filling *jus gentium*, a defense of foreign law should theorize a transnational *jus civile*.

Finally, there is the question of democratic self-government. To his credit, Waldron's takes on the critique that granting normative weight to foreign law undermines democracy. In the specific context of American law, this critique extrapolates from settled doctrines regarding the absence of a federal common law. Waldron shows convincingly the limits of analogizing from *Erie* to reach conclusions about foreign law, as well the limitations of *Erie*'s own conception of law and legal authority. Rather than law as the command of the legislator, modern jurisprudence after Hart conceives of law as the recognition of legal officials. In this account, legality depends not on pedigree but on practice and recognition of officials. Still, it helps to recall that Hart's analytical account sets out to illuminate the concept of law, that is, law anywhere in the world. It seems necessary that, when that is a constitutional law setting the terms by which a political community of free and equals is to govern itself, the point that practice makes law and pedigree is not determinant is more a problem than an insight.

VII. Conclusion

⁷¹ This might well create interesting questions of "judicial redundancy" resulting from the "duplication of subject matter" between the foreign and domestic norms. Jeremy Waldron, "Constitutional Norms," in Seyla Benhabib et al., *Another Cosmopolitanism* (Oxford University Press, 2008), 85.

I have argued in this chapter that the canon of transnational engagement has more often evaded rather than met the burden of justifying the use of foreign law in constitutional interpretation. At least in part as a result of that failure, such usage has declined and, in some legal systems, has come to a halt altogether. It is nevertheless the case, as this volume shows, that debates about foreign law have contributed to a broader interest in comparative constitutionalism. That interest has proven capable of sustaining itself without a direct lifeline to the practice of constitutional adjudication. That is probably fine, except insofar as the disconnect has undermined the normative ambitions of comparative constitutionalism. As far as the use of foreign law for interpretative purposes is concerned, it remains important to reflect on what it meant, what it could have been, and why it failed. “Thinking completes the act,” Hannah Arendt wrote, and added that “without the articulation accomplished by remembrance, there simple [is] no story left that could be told.”⁷² Telling the story for the purpose of remembrance may have its place, yet it is hardly gripping. But thinking—seriously and creatively—about foreign law for the purpose of preparing the next act is a project on whose success depends not just the future of comparative constitutionalism but that of constitutionalism itself.



⁷² Hannah Arendt, *Between Past and Future* (Penguin Books, 2006), 6.