1. Introduction

Is it ever appropriate for American courts to cite or defer to foreign law? The question was posed earlier this year in a bitter dispute among the justices of the U.S. Supreme Court in *Roper v. Simmons*, the juvenile death penalty case. One of the frustrating things about *Roper*, however, is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law. The justices who cited foreign law simply gave the impression they thought it was a good idea. Writing for the Court, Justice Kennedy said it was “proper” to take foreign law into account and that the practice of referring to the laws of other countries could be “instructive” for the Court’s interpretation of the Eighth Amendment. But he did not explain the jurisprudence behind this view. Equally, the justices who opposed the practice simply condemned it in *Roper*. To all appearances, they did not see a theory of the authority of foreign law which needed to be refuted. It was just a practice to be denounced. It may seem odd to say that the opponents of a practice have a responsibility to articulate a theory of it just as much as its defenders. But opponents should try to refute the best case that can be made for the practice they oppose. In fact, as we shall see, it turns out that one of the most vociferous opponents – Justice Scalia – has come closest of all the justices to articulating a theory of the citation of foreign law that might make sense of the practice – though, I hasten to add, he articulated it just in order to refute it.

The theory that is called for is not necessarily a complete jurisprudence. But it has to be complicated enough to answer a host of questions that the practice gives rise to – questions about the authority that is accorded foreign law (persuasive versus conclusive authority), questions about the areas in which the citation of foreign law is appropriate or inappropriate (private law, for example, compared to constitutional law), and questions about the choice of which foreign legal systems to cite to (democracies, for example, or tyrannies like Zimbabwe). The theory has to be general enough to explain the use of foreign law in all the cases where it is appropriate, not just in cases of a particular kind: too many scholars call for a theory which will explain the citation of foreign law in *constitutional* cases rather than in American law generally.
of foreign legal materials has to be persuasive enough to dispel the serious misgivings that many Americans have about this practice: why should American courts cite anything other than American law? Above all, it has to be a theory of law. The argument cannot just be that it would be a good diplomacy to ingratiate ourselves with the Europeans. It must explain why American courts are legally permitted (or obliged) to cite to non-American sources, and how the practice of doing so connects with their status as courts of law not just as political institutions.9

An example may help get at the sort of theory I have in mind. When courts cite their own precedents, they do so on the basis of a theory which we call "stare decisis." Stare decisis provides a platform on which judges can articulate and defend their deference to precedent. It explains why deference is appropriate even in cases where justice or policy seems to require a different result. It explains why precedent is more important in some cases than in others. And it explains its relation to other sources of law (the difference between stare decisis in common law and stare decisis in constitutional interpretation, for instance). No doubt the details of stare decisis are controversial. There are several rival conceptions—the Dworkinian theory of law as integrity, the pragmatic theory of predictability and secure expectations, and the old idea of the common law “working itself pure.”10 But even if one disagrees with a judge’s particular conception of stare decisis, it is surely better that he should have such a theory than that he simply give the impression that he thinks it a good idea to defer to precedent. And we should want nothing less for the citation of foreign law.

In his dissent in Roper, Justice Scalia said that the Court's citation of foreign law was unprincipled and opportunistic.11 However, even this does not mean there cannot be a good theory to support the practice. Using our analogy again, Justice Scalia has sometimes argued that the Court’s following and departing from precedent in cases involving individual rights is unprincipled and opportunistic.12 But it doesn’t follow that he rejects stare decisis (or that he thinks it is not worth developing a theory of precedent). Similarly, we should not reject the idea of a theory of the citation of foreign law simply because we see foreign law being cited opportunistically; we should reject it only if we think inconsistent and unprincipled citation is inevitable under the auspices of this theory.

Though it appears from his dissent in Roper that Justice Scalia’s denunciation of the citation of foreign law proceeds without any appreciation that such citation is based on a theory, dicta from a concurrence by him in another recent decision – Sosa v. Alvarez-Machain (2004)13— indicate that he does have in mind a theory of the authority of foreign law (which he wishes to refute). The Court in Roper did not commit itself to this theory. But I want to consider it all the same.

Sosa concerned a claim under the Alien Tort Statute (ATS). A physician, kidnapped from Mexico by persons working for the U.S. Drug Enforcement Agency and brought to this country for

9 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 STATE LAW JOURNAL 1283 (2004), at pp. 1316-18, mentions “the argument from foreign policy” that is sometimes used to justify U.S. Courts’ reliance on foreign law: citing foreign law, it is thought, will reduce American diplomatic isolation on human rights issues.

10 RONALD DWORKIN, LAW’S EMPIRE (1986); pragmatic theory; Coke.
11 “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry. ... Either America’s principles are its own, or they follow the world; one cannot have it both ways.” Scalia dissenting in Roper
trial in relation to the torture and murder of a DEA agent, sued for damages under the ATS in respect of his unlawful arrest. The ATS, enacted in 1789, provides that federal district courts shall "have cognizance ... of all causes where an alien sues for a tort only in violation of the law of nations," and Alvarez-Machain argued that his kidnapping from Mexico was a violation of the law of nations. The Supreme Court rejected his claim for damages, arguing that the ability of American litigants to rely on "the law of nations" to generate new claims of action had been seriously curtailed by the 1938 decision of the Court in *Erie Railroad Company v. Tompkins.* The Court in *Sosa* said that the federal courts now had only a very limited discretion to recognize new heads of action in this regard, a discretion that the Court for various reasons declined to exercise in the plaintiff's favor. Justice Scalia, concurring in the judgment, took a somewhat different approach. He said the ATS must be read as its framers understood it. The framers of the statute evidently took the idea of the law of nations seriously. But they understood it in a narrow sense to refer to "the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates)." Scalia denied that the federal courts had any discretion – even the most limited discretion – to recognize new grounds of action (unrecognizable to those who enacted the ATS) under the rubric of the law of nations. Then he added this:

The notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign's treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human-rights advocates. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty ... could be judicially nullified because of the disapproving views of foreigners.

Now that last comment seems to look forward to cases of exactly the sort we are discussing, cases like *Roper* which do not involve the ATS, but which do involve reference to the sort of global legal consensus that lies at the foundation of the idea of the law of nations. I think Justice Scalia is right in thinking that this is the implicit theory behind the Court’s citation of foreign law in cases like *Roper.* So I would like to bring it out into the open and give it a run for its money, as our best hope of a theory explaining what is going on when federal courts cite to foreign law. The theory will be that when our courts cite foreign law they do so not because it is French law or Zimbabwean law or even British law, but because the foreign law they cite represents part of an established legal consensus – the law of nations, ius gentium – to which recourse may properly be had for solving legal problems which various jurisdictions have in common. I may not be able to persuade readers that the citation of foreign law is in fact justified on this ground, only that this ground affords the best hope of a theoretical justification. And I think this discussion will be useful in establishing how much of our accepted wisdom about the law of nations -- and about law in general -- has to be modified in order to give this theory any chance of succeeding.

To develop an argument that the citation of foreign law in a case like *Roper* can rest on the idea of the law of nations, we have to do a number of things. We have to say what the law of nations is and distinguish it from natural law. I shall give an account of the law of nations and of this distinction in section 2. In section 3, I will distinguish the law of nations approach form modern

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14 304 U.S. 64 (1938)
15 Scalia J. (concurring), in *Sosa,* at 2775.
16 Ibid., at 2776
lnatural approaches to these matters. Section 4 will be devoted to some consideration of how the law of nations approach (or the approach to legal problems that I set out in section 4) might bear on issues regarding the death penalty. In section 5, I shall show that American jurisprudence is still capable of recognizing the law of nations for the purposes of a case like *Roper*, despite the corrosive positivism of *Erie*. In this regard, we need to go beyond the stodgy Latin apparatus of *ius gentium*, and start thinking directly about law and legal problems in a way that makes this account of the citation of foreign law appealing: I shall set out an account of this kind in section 6. I will end, in section 7, with some brief comments on the relation between this theory and the rather causal invocation of foreign law in a case like *Roper*.

2. The Law of Nations (*Ius Gentium*)

[9] The law of nations is often used as a synonym for (what we call) international law. But it once had a broader meaning, in which it comprised something like the common law of mankind not just on issues between sovereigns but on legal issues generally – on contracts, property, crime, and tort. It was a set of principles that had established themselves as a sort of consensus on the topics they addressed among judges, jurists and lawmakers around the world -- a preponderance of juristic opinion in a form that could be presented normatively to judges or lawmakers faced with particular problems in their particular jurisdictions.

[10] An analogy which I shall use throughout this Comment is between the law of nations and the established body of scientific findings. Existing science claims neither unanimity among scientists nor infallibility; nevertheless it stands as a repository of enormous value to individual researchers as they go about their work, and it is unthinkable that any of them would try to solve the problems that have been entrusted to them without drawing on the body of established scientific results, to supplement their own individual work and to provide a basis for its critique and evaluation. Similarly, the idea of the law of nations makes itself available to law-makers and judges as an established body of legal insight, reminding them that their confrontation with some particular problem -- for example, whether adults can justly be executed for crimes committed when they were children -- is not the first time mankind has grappled with the issue and that they, like scientists, should try to think through the problems they face in the company (or on the shoulders) of those who have been that way before.

[11] Terminology is a particular problem in this area. The law of nations is often referred to using terms like "general common law," "federal common law," and "customary international law." There is nothing wrong with these labels. But I shall use the Latin phrase “*ius gentium*” to refer to the law of nations in the more comprehensive sense that I have indicated – a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems. Terms like "federal common law" I regard as functional terms which are used to indicate particular roles that the law of nations may play in the complex structure of American federalism. One of my arguments will be that the fact that an appeal to the law of nations is precluded or severely restricted in some contexts and for some purposes does not prove that it is not available for other purposes. The fact that we reject the idea of general common law, for example, does not show that *ius gentium* may not figure in a case like *Roper v. Simmons*, as a legitimate source of normative legal inspiration.

[12] In the history of jurisprudence, *ius gentium* represented the coming together of two more ancient ideas. One was the idea of natural law, understood (in the words of Cicero) as “right reason,
in accordance with Nature, ... of universal application, unchanging and everlasting.”\textsuperscript{17} The other was a more technical jurisprudence that developed first in Rome to deal with cases in which the interests of foreigners were involved. Though Rome contained a great many non-Romans, foreigners could not have the benefit of Roman law itself (\textit{ius civile}). As Sir Henry Maine put it,

The expedient to which \[the Romans\] resorted was that of selecting the rules of law common to Rome and to the different Italian communities in which the immigrants were born. ... [T]hey set themselves to form a system answering to the primitive and literal meaning of Jus Gentium, that is, Law common to all Nations. Jus Gentium was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were \textit{all the nations} whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil.\textsuperscript{18}

[13] At its inception, the Romans had no particular respect for \textit{ius gentium}. They did not think of it as capturing the essence of law or going to the heart of the matters it dealt with. It was simply an expedient. Only after it became associated with Greek idea of natural law did it begin to be regarded (in Maine’s words) as “a great though as yet imperfectly developed model to which all law ought as far as possible to conform.”\textsuperscript{19}

[14] Now, the idea of natural law also involved the idea of commonality: just as fire burns in Persia as well as in Greece, so murder is wrong in Rome and wrong in Carthage. The difference was that the law of nature posed itself explicitly as a juridical ideal: what does human reason as such (not Greek or Roman or Persian tradition) tell us about the basics of human action and relationship, the basics of justice and injustice, right and wrong? To answer was to provide human law with a focus of critical aspiration: lawmakers should aim at natural law and inasmuch as they deviate from it, what they enact falls short of the character of true law. But though natural law had this normative focus, \textit{ius gentium} nevertheless afforded an obvious site for natural law speculation. Indeed, many natural-law-oriented jurists preferred to focus their normative study on \textit{ius gentium}.\textsuperscript{20} In its association with this comparative jurisprudence, natural law was brought down to earth from the lofty heights of purely philosophical speculation; it became a brooding omnipresence \textit{on the ground}, so to speak. \textit{Ius gentium} presented itself as natural law understood as an ideal for man-in-society, man as involved in institutions and interactions with other men, not just man in respect of his animal nature.\textsuperscript{21} Natural law might give us the very basic premises of a normative account; but \textit{ius gentium} embodied a set of enduring intermediate principles that one might use as touchstones for actually existing legal systems.\textsuperscript{22} True, the two bodies of jurisprudence – natural law and \textit{ius gentium} -- might differ in their content: slavery, which was always thought to be an affront to the law of nature, was plainly an incident of the \textit{ius gentium} in ancient times. And they might differ also in their
character: *ius gentium* could change and evolve while the law of nature by definition was immutable.

Despite these differences, *ius gentium* grew to become something more than just an expedient for immigrants or an exhibit of legal anthropology. In its association with natural law, it took on a role similar to that of equity in later jurisprudence -- a method of cutting through layers of local technicalities and idiosyncrasies to get at the essence of justice. As such, it came to be seen as an additional body of law which could correct and supplement the *ius civile* on its home ground. So the author of Justinian's *Institutes* was able to say:

> Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state, and is called the civil law [ius civile], as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations [ius gentium], because all nations make use of it.\(^{23}\)

If *ius gentium* concerns relations and transactions in domestic law, how did it ever get so tightly associated with international law? There are various explanations. In its original role, *ius gentium* often dealt with issues -- like the status of ambassadors -- which we would regard as international law issues, along with the issues of private law concerning merchants, sojourners, and immigrants.\(^{24}\) Like *ius gentium*, international law was seen as something over and above *ius civile*, and both were associated in that regard with natural law and with the emergence of a body of positive law on explicitly natural law foundations. But as international law developed on its own account, legal positivists would put *ius gentium* under hard analytic scrutiny. Bentham’s scrutiny was the most devastating: he said either "the law of nations" meant "the mutual transactions between sovereigns as such," what he called (and he invented the term) “international law, or it meant the law of private mercantile and maritime transactions, or it meant natural law."\(^{25}\) The last of these was nonsense; the second was increasingly being covered by applicable municipal law; and that left only the first to give meaning to the phrase.

But the association of *ius gentium* with *ius inter gentes*, international law, was never complete. Its residual connotations allowed it also to pick up on issues which might or might not be included under “international law,” but were not just matters between sovereigns. These distinctions were much less crisp when Bentham was writing (which was also around the time of the founding of the United States) than they were say in the middle of the twentieth century;\(^{26}\) and they have become less crisp now with the significance of human rights law as an aspect of international law.

In any case, among scholars and among those who took a less fanatically positivist approach to natural law jurisprudence, *ius gentium* continued to function also as *ius intra gentes*\(^{27}\) -- the study

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\(^{26}\) Harold Koh, _____ 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 43, at 45 (date?): “[A]t the beginning of the Republic, U.S. courts drew no sharp line between international and foreign law, precisely because of the extensive overlap of these two bodies of law.”

\(^{27}\) Trnavci, op. cit., at p. 207, cites FRANCISCO DE VICTORIA, DE INDIS ET DE IURE BELLII
of significant commonalities between the (municipal) law of one people and the (municipal) law of another people, and the exploration of those commonalities for critical and normative purposes. And that continues to this day: *ius gentium* is still referred to both as inspiration for domestic law and as aspiration for a uniform body of transnational law. A quick survey of modern scholarship reveals that it is believed to afford a useful framework for thinking about such topics as data-protection,\(^{28}\) anti-trust,\(^{29}\) and copyright.\(^{30}\) And even in strictly domestic cases — cases involving no diversity or transnational element at all -- we see something like *ius gentium* being appealed to as a basis for solving an otherwise intractable problem. Consider the well-known case of *Riggs v. Palmer*,\(^{31}\) the case of the man who murdered his grandfather and then claimed an inheritance under his grandfather’s validly executed will.

> [A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.\(^{32}\)

Indeed, this appeal to deep legal principles that resonate beyond the boundaries of our own legal system has not only survived but become the *leit-motif* of a whole modern jurisprudence.\(^{33}\)

Historians of jurisprudence have spent gallons of ink on the question of whether, in these assorted areas of legal concern, *ius gentium* should be conceived as natural law or positive law. The fact is that at various times and for various purposes it has been conceived as both, and also as the product of a sort of reflective equilibrium between the two. On its own, philosophical inquiry into natural law was conceived as unsatisfactory, but so too was a merely empirical inquiry into the existence of legal consensus. If consensus was to function normatively, it had to be less than complete (so that there could be someone whose choices were guided by it). But if one is looking for anything less than a complete consensus, then there are choices to be made, and those choices would necessarily be guided by a sense of justice and right.\(^{34}\) On the other hand, that sense of justice and right would not be idiosyncratic but would itself be informed by the attention one paid to the extent, depth and character of consensus on various issues. This process of back-and-forth, which is well understood in moral philosophy,\(^{35}\) accounts for the Janus-faced status of the *ius gentium* and it accounts also for its character as a rich and textured source of both moral and legal insight.

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31 115 N.Y. 506, 511-2, 22 N.E. 188, 189-90 (1889).

32 Ibid., at 512 (Earl J.).


34 The process would be “interpretive” in Dworkin’s sense: see RONALD DWORKIN, *LAW’S EMPIRE ___ (1986), on the relation between fit and moral appeal in interpretation.

Given all this, *ius gentium* could operate effectively in both positive and critical modes. It could operate as positive law in cases where the legal resources it offered were needed directly for the settlement of disputes. And it could operate like natural law, in a critical capacity, when positive legal systems looked to it for inspiration or critique on matters they purported to deal with themselves. Thus, it continued to play a role as positive law in international cases,36 and also in those cases which we would not call strictly international but transnational cases, but which involved what Blackstone called "civil transactions and questions of property between the subjects of different states."37 There were the cases, too, in which individuals fell between the cracks, so to speak, or cases of individuals whose misdeeds (like piracy or the slave trade) were of concern to more than one society.

How it was referred to depended, again, on what was being done with it, and also on the traditions and categories of the particular legal systems from which people looked out at it. In cases involving law between nations, the law of nations is referred to as “customary international law” – in *Filartiga v. Pena-Irala*, for example, and in *The Paquete Habana*.38 In private law cases, on the other hand, it is referred to as though it were something quite different. In England and America, *ius gentium* was associated with the heritage of the common law and it was invoked in that capacity in cases like *Lyde v. Lyde* and *Swift v. Tyson*, though judges still used the words of Cicero to refer to it as “not the law of a single country only, but of the commercial world. Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.”39 In *Riggs v. Palmer*, it was referred to as “fundamental maxims of the common law” and as “universal law administered in all civilized countries.” As I have already indicated, I don’t think these labels or the differences between them should preoccupy us too much should be treated as ends in themselves. “General common law” and “customary international law” are not so much separate bodies of law as separate ways of referencing one and the same jurisprudential enterprise.

### 3. Contrast with Natural Law Argumentation

Some scholars have argued that the citation of foreign law in modern American cases is best understood in natural law terms.40 But it is not easy to see how the connection between natural law and the citation of foreign law is supposed to work. Modern natural law theory validates the posing of direct moral questions about justice and right in the course of adjudication. According to natural lawyers, judges are often required to make moral judgments as part and parcel of figuring out what the law is. Now these judgments are not to be understood as mere personal preferences. Judges are to ask questions about moral facts in a spirit of objectivity: they may get them wrong but they aspire to be right, and they accept that their judgments are answerable to the moral facts. But if this is what

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36 See e.g. *The Paquete Habana* 175 U.S. 677 at 700 (1900); “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations…” (Gray J., for the Court)

37 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 340 (1900).


40 For example, Larsen, op. cit., p. 1293, associates it with “moral fact-finding.” See also Alford, op. cit., at pp. 659-73 (suggesting that the practice of citing to foreign law might be rooted in natural law).
natural law adjudication involves, then the citation of foreign law seems mysterious: if one is trying to get at the truth, why would one defer to other people’s answers to these moral questions (let alone the answers of Frenchmen or Zimbabweans)? Why not just ask the questions directly and answer them oneself?

There’s a cynical response to this point. Perhaps judges are embarrassed to be heard making moral pronouncements in their own voice, even under the cover of natural-law objectivity. Justice Scalia once remarked:

It’s pretty hard to put together a respectable number of pages setting forth (as a legal opinion is supposed to do) analytical reasons for newly imposed constitutional prescriptions or prohibitions that do not at all rest ... upon logic or analysis, but rest instead upon one’s moral sentiments, one's view of natural law, one's philosophy, or one's religion.41

Reference to official judgments, whether local or foreign, helps rescue the judge from a feeling of nakedness. Instead of just asserting that it is objectively wrong to execute people for crimes committed when they were children and hoping that others will treat this as an insight into moral facts (as opposed to the expression of a subjective sentiment), one talks of “the overwhelming weight of international opinion against the juvenile death penalty.” It somehow sounds more substantial.42

However, I think this may be more of a problem for modern natural law theory than for the natural law tradition. Natural law jurisprudence never used to be a matter of individuals just inserting their own moral judgments into legal reasoning, any more than natural science was ever just a matter of merely individual assertions about energy or gravity. In both cases, what was at stake was the accumulation of knowledge among a community of inquirers, not just the validation of individual intuitions. No one in the modern world would take seriously announcements about energy or gravity that were uttered without reference to the work of the scientific community at large; and if the person making the announcement were to say that the reason he didn’t mention what other physicists had figured out on this issue was that he was seeking objective knowledge undistracted by existing opinion, we would think he was daft rather than a serious student of the laws of nature. It is hard for us, however, to imagine something similar for right or justice, accustomed as we are to the privileges of the individual conscience. Yet this is exactly what the ius gentium was thought to be, in its normative capacity. It was supposed to represent the accumulated wisdom of the world on justice and right, accumulated not from the musings of philosophers in their


42 One can see how the difficulty arises. Analytic philosophers have rightly insisted that if moral realism is true, then ordinary first-level moral propositions like “The juvenile death penalty is wrong” are the appropriate vehicle for conveying beliefs about moral reality. One doesn’t need to add any qualifier such as “objectively” to the word “wrong”; see Ronald Dworkin, Objectivity and Truth: You’d Better Believe It, 25 PHILOSOPHY AND PUBLIC AFFAIRS 87 (1996). The trouble is, however, that these are also the formulations one would use to express purely personal attitudes if emotivism were true, i.e., if there were no such thing as moral facts or natural law. (Cf. Jeremy Waldron, The Irrelevance of Moral Objectivity, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert George ed., 1992), 158.) So speaking this way is an uncomfortable thing to hear yourself doing in a world where your audience is divided (or mystified) as to whether there is an objective natural law or not. Half the audience will think there are no moral facts and that you are just imposing your own values; and even the other half (who believe in moral facts) will be divided between those who agree with you about what the moral facts really require and those who think you have got the moral facts wrong!
attics, but from the decisions of judges and lawmakers grappling with real problems in a non-academic way. And it was “accumulated” not just in the crude sense of one thing being added to another, but in the sense of overlap, duplication, mutual elaboration, and the checking and rechecking of results which is characteristic of true science. The point is not that this sort of accumulated consensus is a guarantor of truth. It is not: a consensus in either field (law and natural science) can be wrong. The point is rather that there is no sane alternative in either field to paying attention to the established body of findings to which others have contributed over the years.

4. Ius Gentium and the Juvenile Death Penalty

If the law of nations comprised nothing but customary international law, then it would not be easy to invoke it in a case like Roper, in regard to what is essentially a domestic intra-national issue of crime and punishment. I am not saying it would be impossible. In some ways, modern international law, preoccupied as it is with human rights, has expanded outwards from being purely ius inter gentes to taking cognizance of the way states treat their subjects in their internal dealings. We no longer allow bare assertions of national sovereignty to block the international scrutiny of human rights observance. For example, torture is a proper subject of international law even when a government is torturing its own nationals in its own territory and it is not inconceivable that penal practices might come under international law scrutiny in the same sort of way, particularly when they involve a corporal or a capital element. But this argument does not need to be made. Apart from the modern expansiveness of international law, ius gentium is and always has been concerned with the whole range of legal issues. It has never been entirely displaced by the law of nations in the narrower sense. So we might continue to regard it as a source of guidance as much in areas of crime and punishment as in other more obviously transnational contexts.

Does this mean that ius gentium is omnipresent?

Is there any area of law where it would not be appropriate to look to it for guidance and inspiration? Is there no area of law where people are entitled to rely on their own customs, traditions and democratic instincts? The question, I think, misunderstands the authority that ius gentium is supposed to have. In areas where municipal legal systems already have law of their own, its function is not to preempt that law but to be available to guide its elaboration and development. So the real question is: are there areas of law where it would be inappropriate to seek guidance from the ius gentium, that is, from a broad consensus of the experience of other legal systems with legal problems of this kind?

Some have speculated that law is essentially relative to local conditions. It varies according to climate or geography or according to the temper and virtue of a people. But that can’t be the end of the matter. Where law varies according to circumstances, we should not treat that variation as impervious to argument or evaluation. It is possible to seek guidance from accumulated legal experience of mankind as to which norms should be sensitive to circumstances and which should not, as to which variable factors might appropriately give rise to variation in legal norms, and as to how sensitive legal variations should be to the degree of variation in circumstances.

Others have suggested that law is essentially relative to the peculiarities of local customs.

No doubt there are some areas where the lawmakers of a society have made it plain that they will

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43 I am grateful to Nicholas Degani for pressing this point.
44 The locus classicus is Montesquieu, The Spirit of the Laws [citation], cited in this context by Mary Anne Glendon in her account of “rights-parochialism” in Rights Talk [citation.]
45 The locus classicus is Error! Main Document Only. Frederick Charles von Savigny, Of the Vocation of
stick to their own customs or preferences whatever the international community thinks. The United States has taken this sort of adamant stand with regard to the death penalty itself, and for the time being American courts are proceeding as though there is no constitutional issue about the mere existence of the death penalty on which guidance from the *ius gentium* could be helpful. But there are many areas in relation to the administration of the death penalty where there are open legal questions and problems to be resolved, and on which *ius gentium* guidance is appropriate. The question of whether the juvenile death penalty is to be excluded on the basis of the sort of considerations embodied in the Eighth Amendment is a question of this kind. Other societies don’t face *exactly* this question, but they have faced questions about rights, dignity, and death penalty administration that are close to it, sufficiently close that it would be churlish and irrational not to invoke the guidance of whatever consensus has been reached among the nations on this point.

Another way of putting the matter is this. For the time being, we may have *just decided*, as a matter of national will, not to rule out the death penalty altogether. But a case can still be made that we should not just *decide* whether it is cruel or unjust to execute young adults for crimes committed when they were children. Since it is an open question in our system whether this practice is to be regarded as constitutional, we should try to figure out some of the complex rights and wrongs of the matter, and all the peculiar issues of culpability and responsibility. In figuring that out, we need all the help we can get; and if these issues have been wrestled with in a number of other jurisdictions, then, committed as we are to issues of justice, rights and responsibility, it makes sense to look to what they have concluded to see what we should conclude. So even if the modern death penalty is quintessentially and peculiarly American, the accumulated legal wisdom of mankind, embodied in the *ius gentium*, may still have something to offer us in this regard.

5. The Challenge of *Erie*

I now want to turn to a different sort of challenge to the theory (of the citation of foreign law) that I have been considering. Introducing the comments I quoted earlier from his concurrence in *Sosa*, Justice Scalia referred to the “avulsive change” in our thinking about the law of nations wrought by the decision of the Supreme Court in *Erie Railroad Company v. Tompkins*. So here’s the question: If we accept what was said about general common law in *Erie*, can we still talk about *ius gentium* as a resource for courts to use in the general way that I have indicated? Or, if we accept what was said in *Sosa* about the radically attenuated meaning to be given now to “the law of nations,” is there any way in which the law of nations can be invoked outside the ATS context to address the issues that arise in a case like *Roper*?

I think the answer in both cases is “Yes.” It is true that both precedents place severe limits on people’s ability to ground claims of various sorts on the law of nations and on their ability to cite it as conclusive authority in particular contexts. But what gets invoked in a diversity case or what

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*Our Age for Legislation and Jurisprudence*, originally 1814, trans. Abraham Hayward (Birmingham, Alabama: Legal Classics Library, 1986), p. 27, with his idea of the “organic connection of law with the being and character of the people” and his comparison of a people’s law to their language. See also Sarah K. Harding, *Error! Main Document Only. Comparative Reasoning And Judicial Review*, 28 Yale Journal of International Law 409 (2003) at p. 411: “Legal systems reflect the cultures within which they are situated and thus have unique and highly contingent identities. In particular, the organic quality of the common law firmly embeds it in local norms and customs. The interdependency between law and the culture within which it is situated is indeed one of the defining features of the common law, and is crucial to its ongoing vitality. Given this close connection between law and local culture, foreign law seems to have very little place in judicial reasoning.”

gets considered as the substantive ground of a claim under the ATS does not necessarily determine the status of the law of nations or *ius gentium* in other contexts. As we have seen, *ius gentium* makes its appearance in the legal system of the world at different places and under different labels, and most of the doctrines licensing or restricting its appearance are context-sensitive rather than general. Some recent discussions are quite simplistic about this. Curtis Bradley and Jack Goldsmith, for example, say that “[d]omestic law [has] absorbed the private-law elements of the law of nations,”47 implying that everything useful that *ius gentium* did in regard to private law is now done by domestic private law. But, even if that is true, it neglects the process by which that absorption has taken place and it begs the question whether it is still taking place. Was it taking place in *Riggs v. Palmer*, for example? If it was, then something beyond domestic law must still have been available in 1889 to be absorbed into domestic law in that case. Anyway, Bradley and Goldsmith entirely ignore the critical and suggestive role that *ius gentium* may play in this domain. If we are evaluating domestic doctrine or wrestling with unresolved doctrinal issues, we may look to the *ius gentium* as a source of insight. But if we can do that, its “absorption” into domestic law so far as its positive-law uses are concerned says nothing about its status as a critical resource.

I think the real difficulty with the position I am outlining is that some of the skepticism about *ius gentium*—particularly the skepticism expressed in *Erie*—is not just functional, but ontological. In this regard, the Court in *Erie* seemed to draw on and endorse the dogmatic theory of Justice Holmes in his dissent in the *Taxicab* case.48 In the *Taxicab* case, Justice Holmes spoke of the "subtle fallacy" involved in referring to a body of law as though it could exist apart from the institutional provenance that gave it its authority. There is no such thing as general common law, Holmes argued; there is just the common law of this jurisdiction or that jurisdiction. Law does not float free in a way which transcends the political sources of its authority:

If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.

He applied this to the idea of general common law, which, as we saw, was cited in *Swift v. Tyson* as "[n]on ... alia lex Romae, alia Athenis; sed ... apud omnes gentes." A body of law, said Holmes, can’t just be. Law “in the sense in which courts speak of it today does not exist without some definite authority behind it,” and the definite authority must be that of a particular state.49 In this sense the endorsement of Holmes’s view in *Erie* is said to have lent to legal positivism the authority of the U.S. Supreme Court.50 And if that position is now authoritative, then it seems there is simply nothing for courts to look to under the heading “*ius gentium.*” Like “the law of Middle-Earth,” the phrase denotes something imaginary, something that doesn’t exist.

There are, however, a number of reasons for rejecting this line of argument. First of all, *Erie’s* endorsement of Holmes’s theoretical observations is dicta; it was not necessary for the

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49 276 U.S. 518, 533.
decision in *Erie*, which, as a number of scholars have remarked, is best understood as a case about the role of federal courts not as a case about the concept of law.\(^5\) Secondly, the particular version of positivism embodied in Holmes’s dicta – the crude sovereignty-centered positivism of John Austin\(^5\) – is now almost universally rejected among positivists, and the forms of positivism that have replaced it by no means support Holmes’s dogmatic rejection of general common law.\(^5\) In any case, positivism’s general credentials are suspect today,\(^5\) and among the theories that look to supplant positivism are some which place front and center principles of the sort that *Riggs v. Palmer* associated with “universal law administered in all civilized countries.”\(^5\)

Anyway, even if by some chance a dictum in *Erie* quoting a dissent in *Taxicab*, drawing upon a discredited jurisprudence that no respectable theorist now holds, were to be regarded as authoritative on what law is and what sort of thing can count as law, still that would not preclude an appeal to *ius gentium* as something which law-makers and judges might appropriately take into account in solving the problems that face them. For in this critical natural-law role, it is not necessary that *ius gentium* be understood positivistically: what is necessary is that it be seen as a source of normative insight grounded in the positive law of various countries and relevant to the solution of legal problems in this country. In this sense the whole *Erie*/*Taxicab* apparatus is irrelevant to the sort of the role that – on my account – *ius gentium* can be seen as playing in *Roper*.

### 6. Legal Problems and Legal Science.

We do not live in an age in which the utterance of magic words like “*ius gentium*” is sufficient to license the practice of basing American legal conclusions on non-American legal premises. Invoking the law of nations may confer some jurisprudential respectability. But we also need to consider directly what reasons there are for taking this line of thought seriously, at the beginning of the twenty-first century.

I have several times invoked the image of science and of scientific problem-solving to explain the relevance that a consensus of foreign law might have in relation to legal decisions in the United States. Let me now set out this analogy in full. Consider how we would expect our public health authorities to deal with the problem posed by a new disease or epidemic. It would be ridiculous to say that because this problem had arisen in the United States, we should look only to American science to solve it. On the contrary, we would expect those responsible for the health of our community to look abroad to see what scientific conclusions and strategies had emerged and been tested and mutually validated in the public health practices of other countries. And that’s how I believe we can think of the citation of foreign law in a case like *Roper*. The relation between the juvenile death penalty and the values embodied in the Eighth Amendment is a difficult problem for us. The dignitarian issues, the tangled issues of culpability and responsibility, are hard to think through. In paying attention to what other jurists have done with this issue, we treat it as a problem to be solved in part by attending to the established deliverances of legal science, by which I mean not just the forensic sciences that are relevant to the decision in that case – forensic psychology, for

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\(^5\) JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED


\(^5\) 115 N.Y. 506, 511-2, 22 N.E. 188, 188-9 (1889).
example – but legal science itself, the enterprise of grappling with, untangling and resolving the rival rights and claims that come together in issues of this kind. Of course it is ultimately our decision: “it is a Constitution for the United States of America that we are expounding.” 56 But that does not preclude turning to the legal consensus of civilized nations for assistance, any more than the fact that the epidemic I imagined is a problem for Americans to solve precludes Americans’ paying attention to the experience of foreign scientists in this regard.

I have emphasized the point that referring to ius gentium treats the problems that arise in our courts as though they were questions for legal science. It does not simply look to various “foreign . . . fads and fashions.” 57 It relies instead on the idea that solutions to certain kinds of problem in the law might get established rather in the way that scientific theories get themselves established. They don’t get established as infallible, they change over the years, and there are always outliers in the matter of their acceptance – some cranky, some the stuff of which progress is made. But to ignore them, or to refrain from attending to them, because they are foreign, betokens not just an objectionable parochialism, but a sort of obtuseness as to the nature of the problems we face. On this account, we should not thinking of the appeal to foreign law as a piecemeal practice – as though our courts were taking some inspiration from Britain, some other inspiration from France, and so on. Some defenses of the citation of foreign law take this approach, as though it were a casual matter of getting a little bit of help here and a little bit of help there. 58 A lot of criticisms of the practice presuppose this model too. Critics react as though the Supreme Court had cited British law, forgetting that the United States declared its independence from Britain 240 years ago, 59 or as though we had deferred to Zimbabwean law forgetting about Mugabe’s human rights record. 60 Such piecemeal citation would be easy to discredit. Now it might be thought if it is not alright to cite any particular foreign law or precedent, then it is not alright to cite any consensus or accumulation of foreign authorities. But I think that commits the fallacy of composition. On the analogy I have been using, what distinguishes a consensus in biology or epidemiology is not just that it is an accumulation of authorities, but that it represents (as I said earlier) a dense network of checking and rechecking of results, experimental duplication, credentialing, mutual elaboration, and the building on one another’s work, which is characteristic of the scientific method. Similarly for the legal case: the ius gentium itself may not be “foreign” in the objectionable sense in which the constituent elements of it are foreign. It is more than the sum of its parts, and it may have a pertinence to our law that its individual constituents do not have. 61

57 Foster v. Florida, 537 U.S. 990, 992-93 (2002) at 991 (Thomas, J., concurring in denial of certiorari): “[T]his Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”
58 MARY ANNE GLENDON, RIGHTS TALK Also Stephen Breyer: “the enormous value in any discipline of trying to learn from the similar experience of others.” Keynote Address, 97 ASIL PROC. 265 (2003);
59 Thus Congressman Poe of Texas reminded us of all the patriots who “spilled their blood ... to sever ties with England forever. ... Now, justices in this land of America ... use British court decisions ... in interpreting our Constitution. What the British could not accomplish by force, our Supreme Court has surrendered to them voluntarily.” House of Representatives by Congressman Poe of Texas, in 2005: 151 Cong. Rec. H3105-01, at H3105.
60 See above, note 7, for the Zimbabwe citation.
61 Cf. Daniel Coquillette, Ideology and Incorporation: The Post-Restoration English Civilians, 1653-1735 67 BOSTON UNIVERSITY LAW REVIEW 289, at p. 294 (1987): “By Roman law definition, ius gentium was not ‘foreign’ law because it was an inherent part of the law of all, or most, countries.” See also supra text accompanying note __.
In the public health analogy, we would certainly expect our scientists to look only to the findings of those scientists in the world we had reason to trust; they would not look to the work of suspect or disreputable laboratories. And similarly a ius gentium enquiry may restrict itself similarly to consensus among “civilized” or “freedom-loving” countries. As I said earlier, discerning the normatively relevant consensus is a matter of interpretation or reflective equilibrium between the positive law experience and our sense of the right premises with which to approach this problem. Since ius gentium is not a purely descriptive consensus, an appeal to it need not be indiscriminate as to the quality of the laws on which it draws. Maybe we should not give weight to what is done by the courts in Zimbabwe or the Sudan. By analogy we might not expect our public health officials to look to North Korea for guidance in its response to a possible avian flu epidemic.

I don’t expect any of this to be convincing to those who see law as purely a matter of will. If you think that legal problems are ultimately solved in a simple Alexandrian fashion – just cutting through the Gordian knot with a determination to privilege this value or promote that policy – then you will be uninterested in the logic of a jurisprudence that talks about patient analysis, the untangling of issues, the ascertaining of just resolutions, and the learning and cooperation that is characteristic of a scientific approach to all that. For you it is just a matter of will, and the question is “Whose will should prevail?” And you will see in the citation of foreign law nothing much more than “the subjective views of five Members of this Court and like-minded foreigners.” I have presented law in a different light, as essentially a problem-solving enterprise. I am sure that if the invocation of foreign law is to be defended, then it has to be on grounds like this, and I think it is interesting how much this defense of the citation of foreign law in terms of ius gentium relies on a determination to view law and legal problems in the light of this particular analogy with science.

7. Conclusion

My aim in this Comment has been to present a theory, not a justification of the actual use that American courts have made of foreign law. What troubled me, at the outset of this paper, was that the Supreme Court in Roper failed to articulate any general ideas or any standard by which its use of foreign law might be evaluated. For reasons I have indicated, I think a pure theory of natural law does not really fit the bill, but a theory articulated in terms of the ius gentium may.

I am under no illusion, however, that the practice of the Supreme Court in Roper and in other cases (like Lawrence v. Texas, Atkins v. Virginia, Printz v. United States, and Thompson v. Oklahoma) where foreign law has been relied on, actually answers to the characterization I have given. Practice often falls short of theory -- particularly when the practitioners have not shown much awareness of the theory in question! And there are all sorts of pitfalls and temptations associated with a theory as loose as this. There is no crisp or precise litmus test for the sort of international consensus that makes up the ius gentium on any particular subject. It is, as we have seen, a matter of interpretation, and so there is always the prospect that a judge will invoke this theory opportunistically, picking and choosing the consensus he relies on, to reinforce conclusions that he

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62 I am grateful to Gerald Neuman for discussion on this point. A remarkable case of an appeal to a very restricted consensus is Reynolds v. United States 98 U.S. 145 (1878) at p. 164: “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”

63 Scalia J. dissenting in Roper.

might have wanted to reach without its guidance. For those who still see law as a matter of will, this sort of theory is at best just an opportunity for haphazard legitimation. But for those who do see legal decision as a matter of reasoning one’s way through problems, the account that I have given may help to explain why they turn naturally to foreign law for help. It seems to me, then, that the real contrast between those who oppose and those who defend the use of foreign law in American legal reasoning, is not that the first group are parochial and the second cosmopolitan. It is rather this contrast between law as will and law as reason. Those who approach it as a matter of will do not really see any reason why expressions of will elsewhere in the world should affect our expressions of will for America. But those who see it as a matter of reason may well be willing to approach it in a scientific spirit in which we rely on not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out.