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Roper v. Simmons and International Law

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ROPER V. SIMMONS AND INTERNATIONAL LAW

INTRODUCTION

There is a gap between the United States and the much of the world on the issue of capital punishment.[1] Legal systems across the globe have employed the death penalty since the beginnings of civilization, [2] and colonial America inherited the practice from its British forefathers.[3] Formerly, these multinational origins fostered concurrence on the ethicality of capital punishment. Hence, when the framers of the United States Constitution crafted the Eighth Amendment's[4] ban on "cruel and unusual punishments," the death penalty fell outside of the Amendment's ambit as capital punishment was deemed morally acceptable by both American society and international standards.[5] However, in the last few decades, this common path has split.[6] A global movement has emerged that rejects capital punishment, compelling much of the world to abolish its use.[7] The United States has not embraced this movement as fully; and the United States Supreme Court's slow abrogation of death penalty laws under the Eighth Amendment has not matched the enthusiasm of its international brethren.[8] Consequently, a significant disparity has arisen between the United States and the international community.[9] This disparity has played a volatile role in Supreme Court deliberations as the Court has struggled to define what part, if any, international law should have in the Court's decisions regarding capital punishment.

Recently, in *Roper v. Simmons*,[10] the United States Supreme Court abolished the juvenile death penalty.[11] The United States' use of the

1. *See* William A. Schabas, *International Law and the Abolition of the Death Penalty, in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 178, 210 (Stephen P. Garvey ed., 2003).

2. Jeffery M. Banks, Student Article, *In Re* Stanford*: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?*, 48 S.D. L. REV. 327, 338 (2003).

3. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1092 (2002).

4. U.S. Const. amend. VIII.

5. Koh, *supra* note 3, at 1091–92.

6. *See* Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment, in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 212, 213 (Stephen P. Garvey ed., 2003).

7. Koh, *supra* note 3, at 1093–95. The recent swell of international opinion against capital punishment flows from an "international human rights movement" triggered by the horrors of the Holocaust and World War II. *Id.* at 1092-93. This movement has realized abolition throughout Europe and much of the world. *See id.* at 1094–95. Currently, a total of 120 countries have abolished the death penalty in law or practice. Amnesty International, *Facts and Figures on the Death Penalty*, http://www.amnesty.org (follow "Campaigns" hyperlink; then follow "The Death Penalty" hyperlink; then follow "Facts and Statistics" hyperlink; then follow "Facts and Figures on the Death Penalty" hyperlink) (last visited Sept. 6, 2005) [hereinafter *Amnesty International Facts & Figures*].

8. Dana L. Bogie, Note, *Life or Death? The Death Penalty in the United States and the New Republic of South Africa*, 3 TULSA J. COMP. & INT'L L. 229, 245 (1996).

9. Schabas, *supra* note 1, at 196.

10. 125 S. Ct. 1183 (2005).

juvenile death penalty emphasized its isolation from the international community. The juvenile death penalty has been roundly condemned by the international community; and before *Roper*, the United States remained one of only seven countries in the world that continued the practice. [12] Thus, the Court's decision in *Roper* was made in the presence of an unavoidable tension between the United States and the world community.[13] In *Roper*, the Court not only acknowledged this tension but did so with a discussion of international law more extensive than any previous majority opinion regarding capital punishment.[14] Therefore, *Roper*'s significance extends beyond the fact it abolished the juvenile death penalty; *Roper* also marks a growing appreciation within the Court for the validity of international law.

This comment will explore the history of international law in Eighth Amendment analyses, its use in *Roper*, and the ramifications *Roper*'s use of international law could have for future Court decisions. Part I of this comment will explain the history of international law within Eighth Amendment analyses. Part II will review the cases that led up to *Roper*. Part III will discuss the *Roper* decision itself. Part IV will examine the Court's use of international law in *Roper* and argue why it was appropriate. Part V will analyze the effect international law might have on the Court's Eighth Amendment jurisprudence. Finally, Part VI will consider the implications *Roper* has for the use of international law in future Court decisions.

I. THE HISTORY OF INTERNATIONAL LAW IN EIGHTH AMENDMENT ANALYSES

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[15] The Eighth Amendment's omission of precisely what "cruel and unusual punishments" it forbids has obliged judges to more specifically define its parameters.[16] Through the Court's gradual refinement of the Eighth Amendment's criterions, it has established that to satisfy the Amendment a punishment must be deemed unacceptable by society's

11. *See Roper*, 125 S. Ct. at 1200.

12. *Id.* at 1198–99.

13. *See* Schabas, *supra* note 1, at 196 (stating that in 1999 the Sub-commission on the Promotion and Protection of Human Rights adopted a resolution that condemned the imposition of the death penalty for crimes committed by those under eighteen; this resolution specifically referred to the United States).

14. The majority's discussion of international law in *Roper* uses 1,183 words, *see Roper*, 125 S. Ct. at 1198–1200. The only other majority opinions that come close to having such a long discussion of international law are *Trop v. Dulles* at 153 words, *see* Trop v. Dulles, 356 U.S. 86, 99–100, 102–03 (1958), and *Stanford v. Kentucky* at 151 words, *see* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (word counts include footnotes).

15. U.S. Const. amend. VIII.

16. *See* Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (noting that the Constitution's Framers delegated the task of defining what constitutes cruel and unusual punishment to future generations of judges).

"evolving standards of decency."[17] The Court has consulted international law to determine where this "standard of decency" rests, and occasionally placed foreign sources of law alongside other indicia within a "national consensus."[18]

A. Evolving Standards of Decency and International Law

For eighty years, the Supreme Court looked backwards to try and attune its assessment of what was cruel and unusual with societal standards existing at the time of the Eighth Amendment's adoption.[19] The Court's antiquated perception limited the Amendment's power to prohibiting only "inhuman and barbarous" tortures such as beheading, quartering, and crucifixion.[20] Then, in *Weems v. United States*,[21] the Court declared that what is cruel and unusual should not be bound to archaic and "obsolete" ideas.[22] *Weems* established that what is cruel and unusual is not necessarily measured by a static standard, but rather can be altered by the public's shifting opinions of what is "humane justice."[23] This notion that what is cruel and unusual is perpetually changing was ensconced into Supreme Court jurisprudence by *Trop v. Dulles*.[24]

In *Trop*, the Court considered whether a statute that stripped the Petitioner of his United States citizenship as punishment for wartime desertion constituted "cruel and unusual" punishment.[25] Here, the Court reasoned that the Constitution's vitality was intertwined with society's contemporary attitudes.[26] Accordingly, what constitutes cruel and unusual punishment must be gauged by "the evolving standards of decency that mark the progress of a maturing society."[27] Moreover, this standard does not necessarily spring solely from American conceptions of "decency."[28] The Court concluded that the impugned law was unconstitutional after noting that statelessness is "a condition deplored in the international community of democracies," evidenced by a survey of eighty-four nations of whom only two "imposed denationalization as a penalty for desertion."[29] The Court's acknowledgement of international norms estab-

17. Richard Heisler, *The Kids Are Alright:* Roper v. Simmons *and the Juvenile Death Penalty After* Atkins v. Virginia, 34 SW. U. L. REV. 25, 31-32 (2004).

18. *See* Coker v Georgia, 433 U.S. 584, 596 n.10 (1977); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

19. Furman v. Georgia, 408 U.S. 238, 263–64 (1972).

20. *Furman*, 408 U.S. at 264–65 (citing to Wilkerson v. Utah, 99 U.S. 130, 135 (1878); *In re* Kemmler 136 U.S. 436, 446–47 (1890)).

21. 217 U.S. 349 (1910).

22. *Weems*, 217 U.S. at 378.

23. *Id. Weems* also set down another new test to guide Eighth Amendment analysis called the "proportionality test." Under the proportionality test a punishment must be proportional to the crime committed, or it is cruel and unusual. *See id.* at 367.

24. Heisler, *supra* note 17, at 32. *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

25. *Trop*, 356 U.S. at 87, 99.

26. *Id.* at 100–01, 103.

27. *Id.* at 101.

28. *See id.* at 102–03.

29. *Id.*

lished that an analysis of "standards of decency" is not limited to domestic indicia but can include foreign sources as well.

The idea that a punishment's "cruelty" must be judged in light of evolving standards of decency has guided the Court since *Trop*.[30] However, in death penalty decisions arising between *Trop* and *Roper v. Simmons*,[31] the Court has only intermittently sprinkled international law into this evolving standard of decency, often as little more than an afterthought.[32] Hence, until recently, international law's overall effect on Eighth Amendment jurisprudence has been minimal.

B. The National Consensus and International Law

After *Trop*, the Court aggregated various tests of society's "standards of decency" into a "national consensus."[33] National and state legislative activity is the foremost indicator of a national consensus.[34] However, the Court has considered other factors in determining the national consensus, and it is there that the Court has sometimes placed international law.[35]

II. THE CASES LEADING UP TO *ROPER V. SIMMONS*[36]

After World War II, societies in the United States and around the world began to seriously question the efficacy and morality of the death penalty.[37] In the United States, this movement raised doubts about the death penalty that resulted in a seemingly mercurial standard of decency. This standard urged the Court to abolish the death penalty in *Furman v. Georgia*, [38] but then compelled the Court to uphold the death penalty only four years later in *Gregg v. Georgia*.[39] Since *Gregg*, the Court has

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30. *See* Heisler, *supra* note 17, at 30-32.

31. 125 S. Ct. 1183 (2005).

32. *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

33. *See* Heisler, *supra* note 17, at 32-33.

34. *Roper*, 125 S. Ct. at 1192. This national consensus is central to the Court's interpretation of the Eighth Amendment; however, the Court has repeatedly stated that it retains the right to disagree with modern indicia if they do not comport with the underlying principles of the Eighth Amendment. *See id.* at 1185; *Atkins*, 536 U.S. at 313; *Enmund*, 458 U.S. at 801; *Coker*, 433 U.S. at 597.

35. *See Atkins*, 536 U.S. at 316 n.21; *Coker*, 433 U.S. at 596 n.10. In the national consensus the Court has also included (1) the frequency with which a punishment has been used within the States that permit it, *see Roper*, 125 S. Ct. at 1192–93; *Atkins*, 536 U.S. at 316; (2) the official opinions of professional organizations, *see Atkins*, 536 U.S. at 316 n.21; (3) the attitudes of various religious communities, *id.*; and, (4) public opinion polls, *id.*

36. 125 S. Ct. 1183.

37. *See* Koh, *supra* note 3, at 1093-94.

38. 408 U.S. 238 (1972) ("The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment . . . ." *Id.* at 299 (Brennan, J., concurring)).

39. 428 U.S. 153 (1976) ("[I]t is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction." *Id.* at 179.).

discerned a stabilization of the United States' standards of decency that reflects a crawling trend against capital punishment. Accordingly, the Court has moved with stuttering momentum to abolish the death penalty among various classes of criminals.[40]

Meanwhile, the international community has consistently outpaced the United States in abolishing death penalty practices,[41] and the consequential alienation of the United States[42] has stirred controversy within the Court.[43] Hence, the Court has vacillated as to whether the international community's stance is relevant: the Court has alternately cited international law as an affirmation of the Court's decisions,[44] overtly dismissed international law as an inappropriate element within Eighth Amendment analyses,[45] or ignored international law altogether.[46] The Court's inconsistent application has frustrated the potential of international law to become a significant and reliable factor in Eighth Amendment jurisprudence. Four of the Court's decisions since *Gregg* bear particular significance to *Roper* and reflect the Court's shifting attitudes towards international law.

A. Thompson v. Oklahoma

Fifteen year-old petitioner William Wayne Thompson first brought the question of the juvenile death penalty's constitutionality to the Court in *Thompson v. Oklahoma.*[47] Thompson was a convicted murderer who had been sentenced to die.[48] In *Thompson*, the Court found that eighteen States' bans on executions for juveniles under sixteen, and the scarcity of such executions during the twentieth century reflected a national consen-

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40. *See Atkins*, 536 U.S. at 321 (holding that the execution of the mentally retarded violates the Eighth Amendment); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the execution of offenders fifteen years-old and younger violates the Eighth Amendment); Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (holding that capital punishment of the criminally insane violates the Eighth Amendment); Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that capital punishment for felony-murder criminals violates the Eighth Amendment); *Coker*, 433 U.S. at 600 (holding that capital punishment for rape is a violation of the Eighth Amendment).

41. *See* Schabas, *supra* note 1, at 210.

42. Zimring, *supra* note 6, at 215.

43. The controversy within the Court over the United States' estrangement from the world in its death penalty practices dates as far back as *Rudolph v. Alabama*, 375 U.S. 889 (1963), when Justice Goldberg objected to the Court's denial of certiorari to hear the case of a Petitioner sentenced to death for rape. *Rudolph*, 375 U.S. at 889. Here, Justice Goldberg stated: "I would grant certiorari in this case . . . . [i]n light of the trend both in this country and throughout the world against punishing rape by death." *Id.* And the controversy has manifested as recently as 2002 when the Court denied a stay to a seventeen year-old Petitioner sentenced to death in *Patterson v. Texas*. Patterson v. Texas, 536 U.S. 984 (2002). Justice Stevens' dissent in *Patterson* echoes Justice Goldberg: "Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity." *Patterson*, 536 U.S. at 984 (Stevens, J., dissenting).

44. *Atkins*, 536 U.S. at 316; *Thompson*, 487 U.S. at 830.

45. Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989).

46. Penry v. Lynaugh, 492 U.S. 302 (1989).

47. *Thompson*, 487 U.S. at 822–23.

48. *Id.*

sus that objected to capital punishment of those fifteen and younger.[49] The Court affirmed this conclusion by recognizing it was "consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage."[50] *Thompson* abolished the death penalty for juveniles fifteen and younger, but its limited ruling did not encompass the execution of sixteen and seventeen year-olds; thus, the question lingered if *Thompson* would soon impel the Court to strike down this practice as well.[51]

B. Stanford v. Kentucky

The Court reaffirmed the constitutionality of capital punishment for sixteen and seventeen-year olds a year later in *Stanford v. Kentucky*.[52] Here, the Court found no indications that the practice offended evolving standards of decency.[53] Fifteen states had explicitly banned the practice, but this was not sufficient to demonstrate a national consensus that it was immoral.[54] Further, the Court explicitly dismissed the notion that international law had any bearing on its evolving standards of decency analysis.[55]

C. Penry v. Lynaugh[56] *and* Atkins v. Virginia

The same day it decided *Stanford*, the Court addressed whether capital punishment for the mentally retarded was cruel and unusual in *Penry v. Lynaugh*.[57] Like *Thompson*, the Court found no national consensus objecting to the practice and ruled it did not violate the Eighth Amendment.[58] In *Penry*, the Court's discussion of the Eighth Amendment did not mention international law.

Twelve years later, the Court reexamined the practice of executing the mentally retarded in *Atkins v. Virginia*.[59] Now, the Court held that evolving standards of decency did oppose executing the mentally retarded.[60] Eighteen states had banned capital punishment for the mentally retarded since *Penry*, signifying a new national consensus.[61] Moreover, the Court rejected *Stanford's* notion that international law was irrelevant and armored its national consensus with the posture of the world community who "overwhelmingly disapproved" of executing mentally re-

49. *See id.* at 826–29, 832-33.
50. *Id.* at 830.
51. *See id.* at 838.
52. 492 U.S. 361, 380 (1989).
53. *Id.* at 377.
54. *Id.* at 370–73.
55. *Id.* at 370 n.1.
56. 492 U.S. 302 (1989).
57. *Penry*, 492 U.S. at 340.
58. *Id.*
59. Atkins v. Virginia, 536 U.S. 304 (2002).
60. *Id.* at 316.
61. *Id.* at 314–15.

tarded offenders.[62] Hence, the Court declared the execution of the mentally retarded to be "cruel and unusual."[63] The Court's acknowledgment of international law in *Atkins* foreshadowed the approach it would take in *Roper*.

III. *ROPER V. SIMMONS*[64]

In *Roper v. Simmons*, the Court reversed *Stanford v. Kentucky*.[65] The Court found capital punishment for sixteen and seventeen year-old offenders unconstitutional and thereby abolished the juvenile death penalty.[66] This reversal, sixteen years after *Stanford*, was compelled by recent legislative enactments[67] and international law[68] from which the Court ascertained a new crest of modern decency.

A. Case History

Christopher Simmons was a seventeen year-old living in Missouri when, with two friends, he formulated a plan to rob and murder a selected victim.[69] On the morning of September 9, 1993, Simmons and an accomplice broke into the home of forty-six-year old Shirley Crook.[70] The two youths undressed Crook, bound her hands, and taped her eyes and mouth closed.[71] Crook was forced into her own mini-van, which the youths drove to a railroad trestle that crossed a river; there the youths placed a towel over Crook's head, hogtied her with cord, pushed her into the river, and left.[72] Later that day, fishermen found Crook's corpse.[73]

B. Procedural History

Simmons was arrested and confessed to killing Crook; a trial court found him guilty of first-degree murder and sentenced him to death.[74] Simmons appealed his sentence to the Missouri Supreme Court, and the Court was compelled to reconsider his case by *Atkins v. Virginia*'s[75] criteria.[76] In view of *Atkins*, the Court concluded that evolving standards of decency had shifted since *Stanford*; the new national consensus condemned the execution of juveniles.[77] This consensus was demonstrated

62. *Id.* at 316 n.21.
63. *Id.* at 316.
64. 125 S. Ct. 1183 (2005).
65. 492 U.S. 361 (1989).
66. *Roper*, 125 S. Ct. at 1197–98.
67. *See id.* at 1192–94.
68. *See id.* at 1198–99.
69. *Id.* at 1187.
70. Heisler, *supra* note 17, at 44–45.
71. *Id.* at 45.
72. *Id.* at 45–46.
73. *Id.* at 46.
74. *Id.*
75. 536 U.S. 304 (2002).
76. Heisler, *supra* note 17, at 47–48.
77. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 409 (Mo. 2003).

by recent legislation among states banning the juvenile death penalty and the fact that international opinion crushingly opposed the practice.[78] Accordingly, the Court declared the juvenile death penalty a violation of the Eighth Amendment and commuted Simmons' death sentence to life imprisonment without parole.[79] The Attorney General of Missouri appealed the decision to the United States Supreme Court.[80] The Court granted certiorari in January, 2005.[81]

C. The United States Supreme Court's Decision

The United States Supreme Court affirmed the Missouri Supreme Court's ruling and declared that modern standards of decency reject the juvenile death penalty.[82] The Court's conclusion hinged on the fact that thirty states had abolished the juvenile death penalty.[83] Also, as in *Atkins*, the Court bolstered its conclusion with a discussion of international law.[84] The Court noted that juvenile execution is prohibited by Article Thirty-Seven of the United Nations Convention on the Rights of the Child[85] and the practice defies the "overwhelming weight of international opinion."[86] Of particular importance was the experience of the United Kingdom: the Constitution's Framers modeled the Eighth Amendment after a provision in the United Kingdom's English Declaration of Rights; however, the United Kingdom had abolished the juvenile death penalty within its own borders fifty-seven years before *Roper*.[87] The Court fur-

78. Heisler, *supra* note 17, at 52–53.

79. *State* ex rel. *Simmons*, 112 S.W.3d at 413.

80. *Roper*, 125 S. Ct. at 1198, 1200.

81. *Id.*

82. *Id.* at 1200. The Court's independent proportionality review was also important to its decision in *Roper*. In its proportionality analysis, the Court found that juveniles' impulsive natures, undeveloped identities, and their inability to escape negative influences make them less likely than adults to posses an "irretrievably depraved character" incapable of reform. *Id.* at 1195–96. Facing this fact, the Court concluded that juveniles' circumstances result in a diminished level of moral culpability that was exceedingly likely to be disproportionate to the punishment of death. *Id.* Also, a juvenile's inherently volatile character minimized the probability of the death penalty's deterrence. *Id.* at 1196. In light of this proportionality analyses, the Court concluded that "a line must be drawn, and those under eighteen were ineligible for capital punishment." *Id.* at 1197–98.

83. *Id.* at 1192–93. To reach this conclusion the Court discarded *Stanford's* assumption that a national consensus was comprised only of the eighteen States that had explicitly rejected the death penalty for juveniles. *See id.* at 1193. Now, the Court included the twelve states that had abolished the death penalty altogether. This approach deduced that thirty states opposed the juvenile death penalty. *Id.* at 1193. However, of these States, only five had explicitly abolished the juvenile death penalty since *Stanford*. *Id.* The Court conceded these five States did not mark an overt change in the national consensus, but nevertheless found their abolition compelling because, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* (citing to *Atkins*, 536 U.S. at 315).

84. *See id.* at 1198–99.

85. *Id.* at 1199. The Court also noted that Article Thirty-Seven of the United Nations Convention on the Rights of the Child has been ratified by every country in the world except the United States and Somalia. *Id.* (citing to Convention on the Rights of the Child, art. 37, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) *available at* http://www.un.org/documents/ga/res/44/a44r025.htm).

86. *Id.* at 1199–1200.

87. *Id.* ("The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: '[E]xcessive bail ought not to be required nor excessive Fines

ther observed that the United States remained one of only seven countries that had executed juveniles since 1990, accompanied in its practice by Iran, Pakistan, Saudi Arabia, Yemen, the Democratic Republic of Congo, and China.[88] The length and depth of the Court's discussion of international law surpasses any previous Eighth Amendment case.[89]

D. The Dissenting Opinions

1. Justice O'Connor

Justice O'Connor, in her dissent, took issue with the majority's contentions that a national consensus rejected the juvenile death penalty and that juries were unqualified to deliver such a sentence.[90] However, Justice O'Connor did reaffirm the jurisprudence behind the majority's acknowledgment of international opinion, stating that the Eighth Amendment's "special character" justified the Court's use of international law.[91]

2. Justice Scalia, Justice Thomas, and Chief Justice Rehnquist

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist in his dissent, was less generous than Justice O'Connor. Justice Scalia belittled the methods the majority used to arrive at a national consensus.[92] He furthermore cast off the majority's acknowledgement of international opinion and declared, "The premise . . . that American law should conform to the laws . . . of the world ought to be rejected out of hand."[93] Nor did Justice Scalia approve of the majority's recognition of the United Kingdom's laws, warning that "if we took the Court's directive seriously," the Court might engage in absurdities such as curtailing a defendant's right to a jury trial because, like juvenile capital punishment, that too has been diminished in the United Kingdom.[94]

IV. THE COURT'S USE OF INTERNATIONAL LAW IN *ROPER V. SIMMONS*[95]

Justice Scalia's biting criticism of the majority's use of international law fails in two respects: first, it ignores the Court's venerated history of recognizing international law in its decisions; second, it overlooks the invaluable insight international law can provide in Eighth Amendment analyses.

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imposed; nor cruel and unusual Punishments inflicted.'") (citing to English Declaration of Rights, 1689, 1 W. & M., c. 2, § 10 (Eng.)).

88. *Id.* at 1199.
89. *See id.* at 1197–98.
90. *Id.* at 1207–17 (O'Connor, J., dissenting).
91. *Id.* at 1215–16.
92. *Id.* at 1217–20 (Scalia, J., dissenting).
93. *Id.* at 1226.
94. *Id.* at 1228.
95. 125 S. Ct. 1183 (2005).

A. The Tradition of International Law in Eighth Amendment Analyses

In fortifying *Roper v. Simmons'* evolving standards of decency analysis with the principles of the international community, the majority was following a long established tradition of Supreme Court jurisprudence. The Court has appreciated the validity of international law in rulings as far back as *Murray v. The Charming Betsy*,[96] in which the Court declared that if possible a court must never construe law of the United States in violation of "the law of nations."[97] Chief Justice Marshall supported *McCulloch v. Maryland*'s[98] landmark ruling with the weight of international opinion.[99] Marshall further declared in *The Nereide*[100] that lacking domestic statutory guidance the Court was "bound by the law[s] of [other] nation[s]."[101] And in *The Paquete Habana*,[102] the Court announced that "international law is part of our law, and must be ascertained and administered by the courts of justice."[103]

Underlying the Court's recognition of international law are the legal foundations the United States shares with other countries and the common realities they confront.[104] Fundamental to the Bill of Rights, the United States Constitution, and United States common law are ideas borrowed from foreign legislatures, judiciaries, and intellectuals.[105] At the country's inception, the ubiquitous nature of customary laws, like *lex mercatoria*,[106] precluded United States courts from distinguishing between international and domestic law; inevitably they often weaved in-

96. 6 U.S. (2 Cranch) 64 (1804).

97. *See The Charming Betsy*, 6 U.S. (2 Cranch) at 118.

98. 17 U.S. (4 Wheat.) 316 (1819).

99. *McCulloch*, 17 U.S. (4 Wheat.) at 405 ("If any one proposition could command the universal assent of mankind, we might expect it would be this-that the government of the Union, though limited in its powers, is supreme within its sphere of action.").

100. 13 U.S. (9 Cranch) 388 (1815).

101. *The Nereide*, 13 U.S. (9 Cranch) at 423.

102. 175 U.S. 677 (1900).

103. *The Paquete Habana*, 175 U.S. at 700.

104. *See generally* Justice Stephen Breyer, Keynote Address, *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003) (discussing how international law and foreign sources can assist interpretations of the United States Constitution by providing empirical data, insight from parallel rules, and a source of community standards).

105. *See Roper*, 125 S. Ct. at 1199 (stating that the Eighth Amendment was modeled after a provision of the English Declaration of Rights); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 109–13 (2d ed. 1985) (1973) (explaining how the United States' common law was strongly influenced by English common law); PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 20 (Penguin Books 2000) (1999) (implying that James Madison's construction of the U.S. Constitution was influenced by the governments of ancient Greece, the Swiss Confederation of independent cantons, and the United Provinces of the Netherlands); BERNARD SCHWARTZ & ROBERTO L. CORRADA, ADMINISTRATIVE LAW: A CASEBOOK 65 (5th ed., Aspen Publishers, Inc. 2001) (1923) (stating that British intellectual John Locke's ideas about legislative delegation of power heavily influenced the framers of the U.S. Constitution); Lord Gordon Slynn, *The Development of Human Rights in the United Kingdom*, 28 FORDHAM INT'L L.J. 477, 478–79 (2005) (stating that the English Magna Carta created the foundation for the U.S. concept of due process of law).

106. *Lex mercatoria* is "transnational common law." Jean R. Sternlight & Judith Resnik, Foreword, *Competing and Complementary Rule Systems: Civil Procedure and ADR.*, 80 NOTRE DAME L. REV 481, 485 (2005).

ternational law into their rulings.[107] Therefore, although each country matures in a way that reflects its unique circumstances, the United States legal system is anchored by many of the same legal concepts that sustain other societies.[108] Furthermore, as the United States and other civilized countries have progressed along their respective paths, they have been thrust into common realities by shared technologies, universal religions, transnational cultural movements, and converging military conflicts.[109] The Court has acknowledged the relevance of these familiar situations, consulted the international community for insight, and found its guidance particularly helpful with constitutional notions that implicitly suggest review within a societal context such as "due process of law" and "cruel and unusual punishment."[110]

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107. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004).

108. *See id.* at 45–46. Justice Scalia has argued that this fact does not justify the Court's use of international law. *See* Printz v. United States 521 U.S. 898, 921 n.11 (1997). Justice Scalia contends that while foreign sources influenced many of the concepts embedded within the United States Constitution, the system of government created under the Constitution is inimitable and inherently incompatible with foreign laws and experiences. *See id.* ("We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."). Scalia is correct that the United States enjoys a unique society and system of governance; however, he does not explain why the Court cannot consult international law for guidance while keeping the United States' unique qualities in view. *See Printz*, 521 U.S. at 977 (Breyer, J., dissenting). Nor does Scalia explain why the Court cannot learn from foreign experiences that parallel the United States', but dismiss foreign experiences that are incompatible with the United States'. *See id.* ("We are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.").

109. *See Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

110. *See* Koh, *supra* note 107, at 46. Some commentators argue that this "societal context" actually makes international law irrelevant as an interpretive tool in Eighth Amendment cases. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 59–60 (2004). These commentators cite the "international countermajoritarian difficulty" and contend that foreign sources are inappropriate to understanding the Eighth Amendment within a societal context because Eighth Amendment analysis hinges on a majoritarian paradigm–the national consensus. *Id.* This argument posits that by allowing international opinions into the national consensus, the Supreme Court is allowing foreign opinions to filter into what is intended to be an assessment of strictly domestic indicia of public opinion. *Id.* The "international countermajoritarian difficulty" argument fails in that it balances on the false perception that determining a "national consensus" is the sole factor in Eight Amendment analyses; and accordingly, an Eighth Amendment analysis is a simple majoritarian tally. The Court's emphasis on the "national consensus" in Eighth Amendment decisions implies that the national consensus is a substantial factor in the Court's considerations. However, the Court has explicitly stated that its "own judgment 'is brought to bear'" on whether the conclusions of the national consensus accord with Eighth Amendment principles; thus, in effect, the national consensus must be approved by the Court. *See* Atkins v. Virginia, 536 U.S. 304, 313 (2002) (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)). *See also Roper*, 125 S. Ct. at 1185; Enmund v. Florida, 458 U.S. 782, 801 (1982). Therefore, Eighth Amendment interpretation does not hinge on a majoritarian paradigm; rather, Eighth Amendment application is ultimately controlled by the Court's own assessments of evolving standards of decency; these assessments have embraced the relevancy of international law since *Trop*. Trop v. Dulles, 356 U.S. 86, 102–03 (1958). *Cf.* Koh, *supra* note 107, at 55 ("[T]his argument ["the international countermajoritarian difficulty"] assumes that the job of judges construing the Constitution is to give expression to majoritarian impulses, when their long settled role . . . has been to apply enduring principles of law to evolving circumstance without regard to the will of shifting democratic majorities.").

International opinion first emerged as an applicable factor in Eighth Amendment interpretation in *Trop v. Dulles*, where the Court looked to the "civilized nations of the world" to advise its appraisal of evolving standards of decency.[111] The Court echoed this practice in *Coker v. Georgia*, *Enmund v. Florida*, and *Thompson v. Oklahoma*.[112] But in *Stanford v. Kentucky*,[113] the Court eschewed the notion that international opinion was significant in Eighth Amendment analyses.[114] Justice Scalia, writing for the majority stated, "We emphasize that it is the *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant."[115] So, for over a decade, international opinion disappeared from the Court's considerations of the Eighth Amendment. Then, in *Atkins v. Virginia*, the Court reclaimed its prerogative to consult international opinion and recognized the world community's "overwhelming disapproval" of executing mentally retarded offenders.[116] Thus, Justice Scalia's disallowance of international law in *Roper* collapses in the face of precedent: the Court has acknowledged the benefit of using foreign authorities in constitutional interpretation since its beginnings and has employed international law within Eighth Amendment analyses as far back as *Trop*[117] and as recently as *Atkins*.[118]

B. Why Roper*'s Consideration of International Law Makes Sense*

Tradition itself does not imbue a rule with vitality; a relevant rule must retain efficacy in a contemporary application; therefore, it is worth putting aside precedent to consider the reasoning behind *Roper's* dissent.[119] In his dissent, Justice Scalia declared that the "premise . . . that American law should conform to the laws . . . of the world ought to be rejected out of hand."[120] This statement mirrors his dissent in *Thompson*: "The views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[121] Justice Scalia is correct that imposing the views of other nations upon the United States through the power of the Supreme Court would be a dangerous undertaking.[122] The Constitution and the Eighth Amendment were established to guide American society; accord-

111. *Trop*, 356 U.S. at 102–03.
112. 487 U.S. 815, 830–31(1988).
113. 492 U.S. 361 (1989).
114. *Stanford*, 492 U.S. at 369 n.1 (1989).
115. *Id.*
116. *Atkins*, 536 U.S. at 316 n.21.
117. *See Roper*, 125 S. Ct. at 1198 (citing *Trop*, 356 U.S. at 102–03).
118. *Atkins*, 536 U.S. at 316 n.21.
119. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is . . . revolting if the grounds upon which [a law] . . . was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").
120. *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting).
121. *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting).
122. *See Roper*, 125 S. Ct. at 1225–29 (Scalia, J., dissenting).

ingly, flexible concepts like evolving standards of decency take their cues from the American people.[123] If these concepts were infiltrated and modeled after an international opinion incongruent with America's own beliefs Justice Scalia would indeed be admonishing a significant threat to the United States' autonomy. However, Justice Scalia's contention that the *Roper* decision is a vehicle to inflict international law on the United States legal system shrugs off the majority's actual use of international opinion.[124] *Roper's* ruling is not the result of international coercion; rather, only after it conducted its own evolving standards and proportionality analyses, did the majority consult the world community.[125] Moreover, the majority realized it has an obligation to consider international law when interpreting "cruel and unusual punishment," an expression whose use predates the United States[126] and whose fundamental nature has long been reflected by the values of "the civilized nations of the world."[127] Absurd as a Court might be that "[imposes] the views of other nations . . . upon Americans through the Constitution,"[128] equally absurd would be a Court that eschews the legal acumen of foreign countries, but also pretends to thoroughly understand a concept whose modern application is informed by international notions of civility.[129]

Justice Scalia was further troubled by the majority's statement that the United Kingdom's ban on the juvenile death penalty "bears particular relevance here."[130] Justice Scalia pointed out that the United Kingdom has different laws than the United States regulating jury trials, thus, "If we took the Court's directive seriously, we would also . . . curtail our right to jury trial in criminal cases."[131] Here, Justice Scalia assumes the majority's rationale, if followed to its logical end, prescribes the haphazard incorporation of international law into United States jurisprudence.[132]

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123. *See* Weems v. United States, 217 U.S. 349, 373 (1910).

124. *See Roper*, 125 S. Ct. at 1198 (noting that world opinion is not controlling in its decision).

125. *Id.*

126. *See id.* at 1199 (stating that the Eighth Amendment was modeled after a provision in the English Declaration of Rights enacted in 1689).

127. *Trop*, 356 U.S. at 102–03.

128. *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting).

129. *See* Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind, Address*, *in* 88 AM. SOC'Y INT'L L. PROC. 383, 387 (1994). Justice Blackmun stated:

> Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with this Court's established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the 'evolving standards of decency' of the civilized world, there can be no justification for limited judicial inquiry to the opinions of the United States. Interpretation of the Eighth Amendment, no less than that of treaties and statutes, should be informed by a decent respect for the global opinions of mankind.

Id.

130. *Roper*, 125 S. Ct. at 1227-28 (Scalia, J., dissenting).

131. *Id.* at 1228.

132. *See id.*

Justice Scalia ignores the majority's actual use of international law.[133] By acknowledging international law, the majority did not advocate that the Court indiscriminately *embrace* legal concepts because they are favored by the international community any more than Justice Scalia, by his dismissal of international law, was contending that the Court indiscriminately *reject* legal concepts because they are favored by the international community.[134] Instead, the majority recognized that if an overwhelming number of countries with whom the United States shares basic mores disavow a particular practice, their rejections give rise to question whether that practice comports with America's own standards of decency.[135] Likewise, if the United States finds itself upholding a practice that is endorsed only by nations whose values are glaringly dissimilar to its own, that too is a reason to question whether that practice abides by American standards of decency.[136]

The issue of juvenile execution provided the majority with an ideal context to apply this reasoning. Not only did countries with whom the United States shares historic ties "overwhelmingly disapprove" of the juvenile death penalty, the United States' only international counterparts in the practice – Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China – are nations that hold many fundamental values strikingly different than the United States'.[137] This conspicuous association called into question whether the juvenile death penalty accorded with America's own moral principles.[138] Therefore, the majority soundly reasoned that it was compelled to find "confirmation" from members of the international community with whom the United States does share like values, not only to advise its own assessment of modern standards of decency, but to emphasize the universality of the fundamental rights that underlie America's convictions of justice and sustain its dignity.[139]

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133. *Id.* at 1198.

134. *See id.* at 1198-99. *See also* Koh, *supra* note 107, at 56. Koh notes that:

> What this claim misunderstands is that those who advocate the use of international and foreign sources in U.S. constitutional interpretation are not urging U.S. courts to defer automatically to some kind of global 'nose count.' Instead, they are suggesting that practices of other mature democracies–not those that lag behind developmentally–constitute the most relevant evidence of what Eight Amendment jurisprudence calls the 'evolving standards of decency that mark the progress of a maturing society.'

Id.

135. *See Roper*, 125 S. Ct. at 1199.

136. *See id.*

137. *See id.* at 1199–1200.

138. *See* Koh, *supra* note 107, at 51–52.

139. *Roper*, 125 S. Ct. at 1200 ("It 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.").

V. THE EFFECT OF *ROPER V. SIMMONS*[140] ON EIGHTH AMENDMENT JURISPRUDENCE

The Court's discussion of international law in *Roper v. Simmons* entails the lengthiest and most comprehensive discussion of international law ever to issue from the Court's majority in an Eighth Amendment decision.[141] This fact suggests that the reemergence of international law in *Atkins v. Virginia*[142] was not a fluke: international law is again a factor in Eighth Amendment jurisprudence. If the Court carries this trend forward and regularly employs international law within its "evolving standards of decency" analyses, international law may prove to be of increasing consequence in the Court's assessments of what is cruel and unusual.

Eventually, *Roper*'s most resounding after-effects could manifest in future cases challenging the constitutionality of capital punishment.[143] Abolitionists who seek to persuade the Court that the death penalty is "cruel and unusual" have invoked international law as a source of persuasive precedent,[144] and *Roper* demonstrates that international law can be an effective tool towards this end. However, the potential of international law to effectuate judicial abolition is tempered by two factors. First, the potency of international law has increased within Eighth Amendment jurisprudence, but it is still secondary to the Court's domestic national consensus. Given the popularity of capital punishment in the United States, a contemporary national consensus would likely reflect domestic approval for the death penalty.[145] Second, a notable number of

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140. 125 S. Ct. 1183 (2005).

141. *See Roper*, 125 S. Ct. at 1198–1200.

142. 536 U.S. 304 (2002).

143. Symposium, *Death Penalty and International Law*, 13 WM. & MARY BILL RTS. J. 305, 308 (2004).

144. *See* Koh, *supra* note 3, at 1129 ("The evidence strongly suggests that we do not currently pay decent respect to the opinions of humankind in our administration of the death penalty. For that reason, the death penalty should, in time, be declared in violation of the Eighth Amendment"); Geoffery Sawyer, Comment, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency*, 22 PENN ST. INT'L REV. 459, 459-60 (2004)("As more of the world looks upon the death penalty as unfair, or cruel and unusual, or as torture, arguably, a jus cogens norm prohibiting the death penalty has developed in international law, and will ultimately be the vehicle by which the death penalty will be abolished worldwide.").

145. This projected national consensus is based on the following facts: (1) currently thirty-eight states employ the death penalty; (2) fifty-nine prisoners were executed in the United States in 2004; (3) approximately 3,400 prisoners are currently sentenced to death, *Amnesty International Facts & Figures*, *supra* note 7; (4) A May, 2005 Gallup poll indicated seventy-four percent of Americans approved of the death penalty for offenders convicted of murder–this reflects an eight percent increase since 2000, Jeffrey M. Jones, *Americans' Views of Death Penalty More Positive This Year*, GALLUP POLL NEWS SERVICE, May 19, 2005, LEXIS, Gallup Poll News Service (on file with author); (5) there have been notable state death penalty reforms and state moratoriums in recent years, *see* Death Penalty Information Center, *Changes in Death Penalty Laws Around the U.S.: 2000-2005*, http://www.deathpenaltyinfo.org/article.php?did=236&scid=40 (last visited Sept. 23, 2005) (listing changes in several states' death penalty policy and statutes). However, these facts alone are not likely to demonstrate the "consistency of direction of . . . change" the Court requires to determine that a national consensus disapproves of the death penalty, *see Atkins*, 536 U.S. at 315-16.

countries reject capital punishment,[146] but this is not on balance with the world's "overwhelming" disapproval of the juvenile death penalty in *Roper*.[147] International sentiment seems to be culminating against the death penalty, and could eventually reach the point of "overwhelming" rejection.[148] But as it stands, world opinion on capital punishment does not carry the same weight as with the juvenile death penalty issue, and its effect would be nugatory. Nor has abolition of the death penalty become so common that it is clearly an international norm, or *jus cogens*, under which it could be argued that the United States' retention of the death penalty violates international law.[149] Thus, international law will likely effect future Eighth Amendment jurisprudence, and could ultimately prove a useful instrument for abolitionists; but *Roper* does not suggest that the current influence of international law alone can impel the Court to abolish capital punishment.

VI. INTERNATIONAL LAW AS A GROWING TREND

The significance of the majority's acknowledgement of international law in *Roper v. Simmons*[150] reverberates beyond the Eighth Amendment; *Roper* also represents the Court's growing acceptance of international law as a source of persuasive authority in its general approach to Constitutional interpretations. This controversial trend may be slowed by opponents in the Court and the United States Congress, but neither of these obstacles seems capable of stopping this trend altogether.

A. The Trend Towards Acknowledging International Law in the Court

1. The Rise of Transnationalist Jurisprudence

Until roughly fifty years ago, the United States judiciary was virtually the only legal system in the international community that undertook judicial review.[151] Accordingly, the United States Supreme Court looked inward for precedent.[152] Then, the global reconfigurations of the post World War II era created numerous constitutional courts that took notions of jurisprudence from the United States, among other sources, and

146. 120 countries have abolished the death penalty in law or practice, and seventy-six countries retain the death penalty. *Amnesty International Facts & Figures*, *supra* note 7.

147. *See Roper*, 125 S. Ct. at 1199.

148. The international trend against the death penalty is evidenced by the fact that over fifty countries have abolished the practice since 1985. *Amnesty International Facts & Figures*, *supra* note 7.

149. Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 555–56 (2004). *But see* Sawyer, *supra* note 144, at 470 (arguing that although the number of countries that have explicitly banned the death penalty do not establish a jus cogens norm, a jus cogens norm can be found in an "amalgamation of various non-derogable rights" present in "treaties and positive law sources" and "from that mixture make the conclusion that a jus cogens norm has been established prohibiting the death penalty internationally.").

150. 125 S. Ct. 1183 (2005).

151. William Rehnquist, *Constitutional Courts – Comparative Remarks, in* 14 GERMANY AND ITS BASIC LAW 411, 411–12 (Paul Kirchof & Donald P. Kommers eds., 1993).

152. *Id.* at 412.

rendered them into their own laws.[153] Over time, these courts produced a reserve of precedent and judicial contemplations that, until recently, has been largely ignored by the United States Supreme Court.[154] However, a rising "transnationalist jurisprudence" movement within the Court has recently begun to utilize these foreign precedents as well as other sources of foreign jurisprudence.[155] This movement invites international law into Court jurisprudence because: (1) it finds international law useful as a correlative canon of jurisprudence to advise the Court's own estimations of constitutional standards; [156] and (2) it regards the acknowledgment of international law as a means of maintaining international comity.[157] *Roper* is the latest in a procession of Court decisions indicating that the ideals of transnationalist jurisprudence are becoming increasingly accepted by the Court.

Roper's recognition of international law sprang from the Court's acknowledgment of the world community's "overwhelming disapproval" of executing mentally retarded offenders in *Atkins v. Virginia*.[158] Also, in 2003, international law played a role in two other notable Supreme Court cases: *Grutter v. Bollinger*[159] and *Lawrence v. Texas*.[160] In *Grutter*, the Court considered the constitutionality of affirmative action.[161] Justice Ginsburg, concurring, cited to the International Convention on the Elimination of All Forms of Racial Discrimination in her explanation of the constitutional standards for race-conscious programs.[162] Similarly, in *Lawrence*, the Court struck down Texas's sodomy law after recognizing that "the right the petitioners [sought] . . . [had] been accepted as an integral part of human freedom in many other countries."[163] *Lawrence* furthermore marked the first time the Court's majority cited to a Euro-

153. *Id. See also* Martha F. Davis, *Don't 'Gag' U.S. Courts*, NAT'L L.J., Aug. 23, 2004, at 19, 19 col. 2 ("The Supreme Court of Canada, the supreme courts of India, Israel and South Africa, the European Court of Justice and many other high courts have strong traditions of looking to U.S. precedents as they shape their own domestic law."), *available at* 8123104 Nat'l L. J. 19, (Col. 2) (Westlaw).

154. Rehnquist, *supra* note 151, at 412.

155. *Id.* Though Chief Justice Rehnquist showed little use for international law in recent Court decisions he foresaw its rise in 1989, stating, "The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world . . . that approach will be changed in the near future." *Id.*

156. Koh, *supra* note 107, at 56.

157. Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 555 (1987) (Blackmun, J., dissenting in part) ("Comity is not a vague political concern favoring international cooperation when it is in our interest to do so . . . When there is a conflict, a court should seek a reasonable accommodation . . . that considers . . . the mutual interests of all nations in a smoothly functioning international regime.").

158. *Roper*, 125 S. Ct. at 1198. (citing Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002)).

159. 539 U.S. 306 (2003).

160. 539 U.S. 558 (2003).

161. *Grutter*, 539 U.S. at 311.

162. *Id.* at 344 (Ginsberg, J., concurring).

163. *Lawrence*, 539 U.S. at 577.

pean Court of Human Rights case.[164] The Court recently revealed that its enthusiasm for transnationalist jurisprudence is limited when it dismissed certiorari in *Medellin v. Drake*,[165] a case that raised important issues regarding international comity.[166] Yet *Roper's* acknowledgment of international law, taken in conjunction with the Court's use of international law in *Atkins*, *Grutter*, and *Lawrence* signals that, overall, the Court's appreciation for transnationalist jurisprudence is ripening.

2. Nationalist Jurisprudence

Railing against the Supreme Court's recognition of international law are the Court's proponents of "nationalist jurisprudence": Justices Scalia and Thomas.[167] Nationalist jurisprudence recognizes the role antiquated international influences played in forming the United States legal system,[168] but views modern United States society as an exceptional paradigm incompatible with foreign experiences and international law.[169] This ideology regards the Court's consultation of international law as the infliction of foreign principles upon Americans,[170] and it further rejects the notion that the Court should consider international comity as a basis for its decisions.[171] Instead, nationalist jurisprudence insists that domestic authorities are the Court's only legitimate sources of judicial revelation.[172] However, the influence of nationalist jurisprudence has floundered recently and it seems unable to curtail the transnationalist jurisprudence trend.

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164. *See* Koh, *supra* note 107, at 50.

165. 125 S. Ct. 2088, 2089 (2005).

166. *Medellin* raises the issue of what the United States legal system's obligation is to Petitioner Medellin and other convicted foreign nationals in light of an International Court of Justice decision declaring that the United States' conviction of Medellin without consular access violates the Vienna Convention. *See* 125 S. Ct. at 2089-90 (discussing Avena and other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 128 (Mar. 31)). In *Medellin*, the Court's dismissal of certiorari was predicated on the presumption that Medellin's case would be retried in a Texas court, where it would emerge "unencumbered" of procedural issues and allow the Supreme Court to review the issues raised by the International Court of Justice. *Id.* at 2090 n.1. Thus, transnationalist jurisprudence may yet play a role in deciding the issues of *Medellin*.

167. Koh, *supra* note 107, at 52.

168. The admiration proponents of nationalist jurisprudence hold for international sources that pre-date the United States is demonstrated by Justice Scalia's dissent in the recent *Hamdi v. Rumsfeld* decision in which Justice Scalia quotes at length eighteenth century British jurist William Blackstone to establish the background of "due process." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2661 (2004).

169. *See* Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

170. *See* Thompson v. Oklahoma, 487 U.S. 815, 869 n.11 (1988) (Scalia, J., dissenting); *Lawrence*, 538 U.S. at 598 (Scalia, J., dissenting) ("'[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans.'") (quoting Foster v. Florida, 537 U.S. 990, 990 (2002) (Thomas, J., concurring))).

171. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 769-70 (1993) (stating that international comity is not a bar against using Sherman Act jurisdiction over a foreign claim).

172. Koh, *supra* note 107, at 52.

3. Chief Justice Roberts and the Departure of Justice O'Connor

Following the death of Chief Justice Rehnquist, the Senate has approved John Roberts, Jr. as the new Chief Justice of the United States Supreme Court.[173] Chief Justice Rehnquist opposed transnationalist jurisprudence while he served on the bench.[174] Chief Justice Roberts has similarly disparaged the Court's use of international law as a "misuse of precedent,"[175] indicating that he, like his predecessor, rejects transnationalist jurisprudence. Also, Justice O'Connor has announced her intention to retire subsequent to the confirmation of her successor.[176] Justice O'Connor generally accepted the use of international law in Court decisions,[177] so confirmation of a "nationalist" Justice to replace her could soften the impact of international law in future Court rulings. Yet, even in this scenario, there will remain five justices who either promote or accept the Court's use of international law making it unlikely that the Court will dismiss international law from its jurisprudence any time soon.[178]

B. Legislation Opposing the Court's Use of International Law

The amplified status of international law within the Court has offended some members of Congress, who have in turn proposed legislation to restrain its use. This backlash was sparked by the Court's recognition of international law in *Lawrence*[179] and further compounded by the *Roper* decision. Congressman Bob Goodlatte made a statement the day after the Court decided *Roper* that exemplifies the discontent of those in Congress who oppose transnationalist jurisprudence: "The opinions of foreign governments have no place in interpreting the original meaning of the Constitution, and it is high time that these justices be reminded that their duty is to interpret the Constitution, not to impose the will of

173. Sheryl Gay Stolberg & Elizabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, at A1.

174. Koh, *supra* note 107, at 52 n.62.

175. *Confirmation Hearing of John Roberts, Jr.*, 109th Congress (Sept. 13, 2005) (responding to a question from Sen. Kyl), *available at* 2005 WL 2214702.

176. President Bush recently nominated Harriet E. Miers to replace Justice O'Connor, but, as this article went to press, Ms. Miers withdrew. It remains to be seen who replaces Justice O'Connor.

177. *See id.* at 52 n.67.

178. Justices Breyer and Ginsberg are the Court's two most enthusiastic champions of transnationalist jurisprudence. *Id.* at 52. Justices Stevens and Souter are also "regular members of this camp." *Id.* at 52 n.67. Furthermore, Justice Kennedy has recently demonstrated an increasing acceptance of transnationalist jurisprudence, *id.*, underscored by his lengthy acknowledgement of international law in *Roper*. *See Roper*, 125 S. Ct. at 1198–99. These five judges make up a majority on the Court who accept the use of international law in Court decisions.

179. H.R. 568, 108th Cong. (2004) ("Whereas the Supreme Court has recently relied on the judgments, laws, or pronouncements of foreign institutions . . . in Lawrence v. Texas . . . inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States.").

foreign entities on the people of the United States."[180] Congress' dissatisfaction with *Roper* gave rise to two pieces of proposed legislation: (1) the Reaffirmation of American Independence Act,[181] an act intended to express the outrage of Congress; and (2) the Constitution Restoration Act,[182] an act structured to halt the Court's use of international law.

1. The Reaffirmation of American Independence Act

The Reaffirmation of American Independence Act, popularly known as "The Feeney Resolution," was originally introduced into Congress in 2004 by Congressman Tom Feeney;[183] there the Act was passed out of committee and debated on the House floor.[184] The Act resolves "to [express] the sense of the House of Representatives" that "judicial determinations should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions."[185] Two weeks after *Roper*, Feeney re-introduced this Act into Congress; it is currently in committee.[186] If passed, the Reaffirmation of American Independence Act notifies the Court of Congress's grievances; but its declaration is not binding and cannot oblige the Court to limit itself to domestic sources.[187] A more ambitious threat to the Court's use of international law arises from The Constitution Restoration Act.[188]

2. The Constitution Restoration Act

The Constitution Restoration Act is proposed legislation that forbids "a court of the United States . . . to rely upon any constitution, law, administrative rule, Executive order, directive, [or] judicial decision . . . of any foreign state or international organization or agency."[189] The penalty for violating the Act is considerable: a judge employing one of the aforementioned "foreign" resources in her decision has committed an impeachable offense.[190] However, the likelihood of this Act finding requisite support for passage into law remains uncertain[191] and if it is enacted, the Act will probably not survive judicial review.[192]

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180. Hadar Harris, *"We Are the World" – Or Are We? The United States' Conflicting Views On the Use of International Law and Foreign Legal Decisions*, 12 NO. 3 HUM. RTS. BRIEF 5, 7 (2005).

181. H.R. 568, 108th Cong. (2004), *available at* http://www.house.gov/feeney/downloads/reaffres.pdf.

182. S. 520, 109th Cong. (2005).

183. H.R. 568, *supra* note 181

184. Harris, *supra* note 180, at 7-8.

185. H.R. 568, *supra* note 181

186. The act was reintroduced as H.R. Res. 97. 109th Cong. (2005), *available at* http://www.house.gov/feeney/reaffirmation.htm.

187. Davis, *supra* note 153

188. Harris, *supra* note 180, at 8.

189. S. 520, *supra* note 182

190. *Id.*

191. *Congress Moves to Restrict Court Rulings on God,* VT. GUARDIAN, May 18, 2005, http://www.vermontguardian.com/dailies/0904/0518.shtml (stating that the Constitution Restoration

Ultimately, these acts alone do not present a significant threat to the transnationalist movement. Still Congress has the capacity to complicate the Court's use of international law: the presence of the aforementioned acts, combined with Congress' public criticisms of the Court and its power to impeach a sitting justice,[193] could create a political environment hostile to international law that will cause Justices to hesitate before turning to foreign sources.[194] This intimidation would be unlikely to coerce Justices away from international law completely, but it could decelerate the transnationalist jurisprudence movement.

Yet none of the forces aligned against this movement are likely to substantially undermine the Court's growing appreciation for foreign sources, and it is probable that international law will play an increasing role in Court rulings. Specifically, this trend could be significant in the forthcoming case of *Ayotte v. Planned Parenthood of Northern New England*,[195] set for oral argument before the Court in November, 2005.[196] *Ayotte* deals with the Constitutionality of New Hampshire's Parental Notification Prior to Abortion Act and has raised references to international law and foreign sources in support of the Petitioner's argument.[197]

CONCLUSION

In sum, the Court's lengthy acknowledgment of foreign sources in *Roper v. Simmons*[198] manifests a reemergence of international law within the "evolving standards of decency" analysis that may effect the Court's interpretation of the Eighth Amendment with greater potency than in the past.[199] This blossoming recognition of international law does not stem from the Court's enthusiasm to impress foreign beliefs on American citizens, but rather from its understanding that the views of all humanity are relevant when deciding what is cruel and unusual.[200] Furthermore,

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Act is sponsored by twenty-eight members of the U.S. House of Representatives and the U.S. Senate).

192. Harris, *supra* note 180, at 8.

193. For a discussion of Congress' power to impeach a sitting justice *see* David R. Fine, Opinion, *No Politics in Third Branch*, NAT'L L.J. Dec. 26, 2004, at 30 col. 2 *available at* 12/6/2004 NLJ 30, (Col.1) (Westlaw).

194. *See* Davis, *supra* note 153.

195. 125 S. Ct. 2294 (2005).

196. The Supreme Court of the United States, http://www.supremecourtus.gov (follow "Oral Aguments" hyperlink; then follow "Argument Calendars" hyperlink"; then follow "Session Beginning November 28, 2005" hyperlink).

197. *See* Brief of University Faculty for Life as Amici Curae in Support of Petitioner, Ayotte v. Planned Parenthood of Northern New England, 125 S. Ct. 2294 (2005) (No. 04-1144), 2005 WL 1912326, at *1 ("[R]esort to international law regarding abortion provides little guidance for this Court. To the extent such guidance does exist, it supports the right of parents to be involved in the care and treatment of their daughters, and thus supports the petitioner in this case."); Brief of the Association of American Physicians & Surgeons, and John M. Thorp, Jr., M.D. as Amici Curiae in Support of Petitioner, 125 S. Ct. 2294 (2005) (No. 04-1144), 2005 WL1902074, at *9 (citing studies done in Finland an England to support Petitioner's argument).

198. 125 S. Ct. 1183 (2005).

199. *See* Symposium, *supra* note 143, at 308.

200. *See Roper*, 125 S. Ct. at 1198.

Roper, taken in light of other recent decisions by the Court, signals the Court's rising awareness of the cogency of international law and its application beyond the Eighth Amendment. Staring down this trend are the Court's proponents of nationalist jurisprudence and dissatisfied members of Congress. However, despite the opposition of these groups, international law will likely continue to weigh into the Court's Constitutional interpretations, and could be significant to forthcoming Court cases.

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