2005

Roper v. Simmons and Our Constitution in International Equipoise

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ROPER V. SIMMONS AND OUR CONSTITUTION IN INTERNATIONAL EQUIPOISE

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In Roper v. Simmons, *the Court unequivocally affirms the use of comparative constitutionalism to interpret the Eighth Amendment. It does not, however, provide an obvious theoretical basis to justify the practice. This Article searches for a theory to explain the comparativism in* Roper *using the theories advanced in the author's previous scholarship. It concludes that of the colorable candidates, natural law constitutionalism is the most plausible explanation, with the attendant problems associated therewith. The Article concludes with an analysis of the possible ramifications of the Court's comparative approach, suggesting that it may be pursuing a Constitution that is in international equipoise, with international values distributed liberally throughout our jurisprudence to ensure foreign and domestic equilibrium.*

INTRODUCTION

Earlier this year in the pages of this journal, I searched for a theory to justify constitutional comparativism.[1] Recognizing that this methodology is gaining currency, the Article contended that the use of comparative and international material must be deemed appropriate or inappropriate based on whether it comports with a particular judge's interpretive mode of

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1. Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005).

constitutional analysis. It presented four classic constitutional theories—originalism, natural law, majoritarianism, and pragmatism—and addressed the question of the propriety of constitutional comparativism under each theory.

As outlined in that Article, each classic theory presents unique problems for constitutional comparativism. Originalism will not embrace contemporary comparativism because it does not advance the fundamental objective of interpreting constitutional text based on the framers' moral perceptions. A natural law theory of constitutionalism might justify appeals to foreign experiences to establish universality or fundamentality, but apart from the due process construct of "implicit ordered liberty," this theory is discredited out of fears for judicial hegemony and substantive indeterminacy. Structural majoritarianism, with its strong emphasis on judicial deference to the political branches, offers few opportunities for courts to rely upon foreign experiences. Interpretive majoritarianism is a better candidate, with its infusion of politics into law through malleable interpretations of the Constitution that bring the text in line with the times, but the longstanding tradition of the Court has been to cabin community standards to values reflected in our own national experience. Pragmatism is perhaps the leading candidate for comparativism, and transnational empiricism likely will continue to grow in importance under this theory. But pragmatic decisions that enhance civil liberties are rare, and pragmatism is inconsistent with the comparative currents that espouse a summum bonum.

Because all of the classic constitutional theories outlined above do not fully capture a thoroughgoing theory for constitutional comparativism, the Article concluded with an outline of what proponents might advance as an inchoate comparative constitutional theory. Such a theory, however, struggles for legitimacy based on established criteria for any constitutional theory, including promotion of the rule of law, protection of political democracy, and advancement of a morally defensible set of individual rights.

Which brings us to the Supreme Court's death penalty decision in *Roper v. Simmons*.[2] The Eighth Amendment's proscription on cruel and unusual punishment is a particularly useful vehicle to test theories of constitutional comparativism. In this debate, one finds all the major theories competing for prominence. With the Eighth Amendment, the Court at various times invokes original meaning, legislative deference, community standards, universal norms, and pragmatic empiricism. Accordingly, the death penalty breathes life into different modalities

2. 125 S. Ct. 1183 (2005).

of constitutional comparativism, and the true mettle of the movement thus is tested.

The Supreme Court's decision in *Roper* thus offers a prism to view constitutional comparativism afresh. The Court in many respects plows no new ground in embracing evolving standards of decency and defining those standards based on the majoritarian paradigm of a national consensus. But unlike any previous Eighth Amendment decision in history, it devotes a substantial part of the decision to a rigorous defense of constitutional comparativism.[3] While the plot in *Roper* is the death of a callous adolescent, the subplot is the birth of a new comparative jurisprudence. The Court is not simply deciding a case; it also is defining and defending a movement: a movement that has the potential to change the course of constitutional law.[4]

Part I of this Article outlines the Supreme Court's decision in *Roper*, with particular emphasis on its references to comparative experiences. Part II examines *Roper* in light of classic constitutional theories that might justify recourse to constitutional comparativism. It concludes that originalism, pragmatism, and majoritarianism offer little support for the Court's comparativism, and that appeals to natural law are the best explanation for the Court's comparative references. Part III concludes with an exploration of the Court's extravagant salute to constitutional comparativism in *Roper*'s conclusion, and it posits that such language may introduce a constitutional theory of international equipoise. Such a theory is the logical conclusion of a constitutional approach that seeks confirmation abroad for rights we deem central at home. Under such an approach, an effort to place our jurisprudence in its international context underscores the degree to which the *Roper* paradigm might open for reconsideration constitutional rights based on their disequilibrium with international values.

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3. *See infra* notes 36–40 and accompanying text.

4. *See* Paolo G. Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global* Ius Commune *of Human Rights*, 81 TEX L. REV. 1031, 1033 (2003) ("[T]he U.S. Supreme Court is on the threshold of participating more fully in a substantial transnational normative community that could, in principle, have a significant impact on U.S. law."); Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 819 (2000) (discussing expansion of the traditional "canon of authoritative materials from which constitutional common law reasoning might go forward"); Diarmund E. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893, 1909 (2005) (stating that judges who disregard differences in legal systems run the risk of "profoundly altering their legal system by incorporating incompatible foreign values"); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 203 (2003) (discussing potential change to the course of American law resulting from constitutional cross-fertilization).

I. *ROPER V. SIMMONS*

The Supreme Court began its decision in *Roper* by emphatically reaffirming the use of "evolving standards of decency that mark the progress of a maturing society"[5] to determine which punishments are cruel and unusual under the Eighth Amendment. It began its cursory review of its death penalty jurisprudence with the 1988 plurality decision in *Thompson v. Oklahoma*,[6] noting that the *Thompson* plurality recognized that executing juveniles less than sixteen years old would "offend civilized standards of decency," a conclusion "consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[7]

The Court then summarized the 1989 "baseline" decisions of *Stanford v. Kentucky*[8] and *Penry v. Lynaugh*.[9] In *Stanford*, the Court failed to find a national consensus that executing juveniles was cruel and unusual.[10] The Court also noted that a plurality in *Stanford* (actually a five-justice majority)[11] quite "emphatically reject[ed] the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty."[12] On the same day *Stanford* was decided, *Penry v. Lynaugh* was also decided and likewise held that a national consensus did not exist to ban execution of the mentally retarded.[13] These decisions in 1989 thus became the benchmark for subsequent reconsideration of the emergence of an evolving standard for executing both classes of persons.

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5. *Roper*, 125 S. Ct. at 1190 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

6. 487 U.S. 815 (1988) (plurality opinion).

7. *Id.* at 830.

8. 492 U.S. 361 (1989), *overruled by* Roper v. Simmons, 125 S. Ct. 1183 (2005).

9. 492 U.S. 302 (1989).

10. *Roper*, 125 S. Ct. at 1191 (citing *Stanford*, 492 U.S. at 370–71).

11. The Court in *Stanford* rejected reliance on its own conceptions of decency in both the five-justice majority and the four-justice plurality portions of the opinion:

> In determining what standards have "evolved," however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole. As we have said, "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."

Stanford, 492 U.S. at 369 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

12. *Roper*, 125 S. Ct. at 1191 (citing *Stanford*, 492 U.S. at 377–78 (alteration in original)). Justice O'Connor refused to join the final sections of *Stanford* for reasons independent from those cited by the Court in *Roper*. *See id.* at 382 (O'Connor, J., concurring in part and concurring in judgment).

13. *Roper*, 125 S. Ct. at 1191 (citing *Penry*, 492 U.S. at 334).

Thirteen years later, the standards had evolved sufficiently for the Court to reconsider *Penry* in *Atkins v. Virginia*.[14] *Atkins* "returned to the rule"[15] predating *Stanford*: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[16] Finding the retribution and deterrence arguments less defensible for persons with mental impairments, and recognizing the existence of a national consensus against executing the mentally retarded, the Court in *Atkins* ruled that the death penalty for such persons offends the Eighth Amendment.[17] In a footnote, the Court recognized that its conclusions were consistent with those of the "world community."[18] *Atkins* thus set the stage for reconsideration of the death penalty as applied to juveniles.

Most significant in *Roper* was the methodology emphasized in determining whether a punishment is cruel and unusual. The Court found:

> The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.[19]

This approach highlights the subjective, independent appraisal of the Court in defining what human dignity requires, with objective indicia simply factors for consideration in that analysis. Objective inputs are factors that inform subjective outputs.

Turning to the national consensus, the Court focused on the number of states that had abandoned the death penalty altogether, combined with those that maintained it but excluded juveniles from its reach. By the Court's calculation, thirty states prohibit the juvenile death penalty, with twelve rejecting the death penalty outright and an additional eighteen

14. 536 U.S. 304 (2002).
15. *Id.*
16. *Roper*, 125 S. Ct. at 1191–92 (quoting *Atkins*, 536 U.S. at 312).
17. *Atkins*, 536 U.S. at 318–21.
18. *Id.* at 317 n.21. The Court further noted:
> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. . . . [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. . . . Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.

Id. at 316–17 n.21.
19. *Roper*, 125 S. Ct. at 1192.

prohibiting it only for juveniles. These raw numbers were deemed "similar" and "parallel" to the numbers in *Atkins*.[20] The most significant objective difference between the two cases was in the pace of change. As Justice O'Connor noted in dissent, "[T]he extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause."[21] The Court found this difference insignificant, in part because it now deemed *direction*, rather than pace, as most significant. Also significant was the fact that many states already prohibited the death penalty prior to when *Stanford* was decided, thereby precluding the possibility of a steep legislative trend.[22]

The Court also diminished the importance of a federal consensus on avoiding preemption of state juvenile death penalty laws, discounting the Senate's reservation of a clause prohibiting the juvenile death penalty when ratifying the International Covenant on Civil and Political Rights (ICCPR) in 1992. It did so because the federal government had not affirmatively imposed the juvenile death penalty in enacting the Federal Death Penalty Act and because a handful of states had abandoned the practice since the reservation was signed.[23] Thus, the Court discounted a consensus on allowing the juvenile death penalty at the state level because there was no consensus to impose it at the federal level.

The Court was at pains in *Roper* to find a national consensus against the juvenile death penalty, but did not clearly conclude that one existed. The Court indicated there was no national consensus *in favor* of capital punishment for juveniles, but that consensus existed that juveniles are "categorically less culpable than the average criminal."[24] The former conclusion shifts the burden to death penalty proponents, as though a practice is presumed unusual unless proven otherwise. The latter

20. *Id.*

21. *Id.* at 1211 (O'Connor, J., dissenting).

22. *Id.* at 1193 (majority opinion).

23. The Court focused on the congressional decision not to extend the federal death penalty to juveniles, rather than the Senate's reservation to retain each state's prerogative to do so.

> [The Senate treaty] reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

Id. at 1194 (citations omitted).

24. *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

conclusion supplants one consensus for another, as though a common numerator would suffice for a common denominator. However, a consensus on diminished fault is not a consensus to diminish punishment. Unlike in *Atkins*, the Court never expressly concluded that "[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it."[25] The most it could say was that "[a] *majority* of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."[26]

The Court's conclusion that this penalty was cruel and unusual was bolstered by subjective analysis of the diminished culpability of juveniles. The Court set forth three factors to support its conclusion: juveniles' lack of maturity, greater susceptibility to peer pressure, and undeveloped and transitory character.[27] "These differences," the Court concluded, "render suspect any conclusion that a juvenile falls among the worst offenders"[28] for whom the death penalty is reserved. Having found juveniles to be of diminished culpability, the Court then analyzed the policies that sustain the death penalty. The Court concluded that the two most common justifications—retribution and deterrence—applied with lesser force to juveniles. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability . . . is diminished . . . by reason of youth and immaturity."[29] As for deterrence, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."[30]

The Court then rejected the argument that these general conclusions with regards to juveniles do not provide a sufficient basis for categorical prohibitions. Much of petitioner's argument rested on the contention that a categorical rule was arbitrary and unnecessary in a system already considering aggravating and mitigating circumstances.[31] The Court concluded that the risk was simply too great to trust juries with the task of discerning which juvenile falls into this special category of sufficient culpability.[32] Bringing its "independent judgment to bear" on the subject, the Court concluded that "the death penalty cannot be imposed upon juvenile

25. *Atkins*, 536 U.S. at 316.
26. *Roper*, 125 S. Ct. at 1194 (emphasis added).
27. *Id.* at 1194.
28. *Id.*
29. *Id.* at 1196.
30. *Id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).
31. *Id.* at 1197.
32. *Id.*

offenders,"[33] reasoning that "when a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[34]

The Court could have concluded its decision without further discussion. Had it done so, *Roper* would have been consistent with a line of Eighth Amendment cases that offer mere passing references to comparative practice.[35] But for the first time in history, the Supreme Court devoted an entire section of an Eighth Amendment opinion—six paragraphs and just under four pages of the slip opinion—to constitutional comparativism. Something new clearly was afoot.

The Court began its reference to constitutional comparativism by noting that its own determination "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[36] This fact, the Court emphasized, was not "controlling," but it was "instructive" for its interpretation of the Eighth Amendment. As the Court put it, "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[37] The indicia of constitutional comparativism the Court relied upon were international treaties, near uniform state practice, and the United Kingdom's twentieth-century experience.[38] In summarizing the comparative analysis, the Court concluded that "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."[39]

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33. *Id.* at 1198.

34. *Id.* at 1197.

35. *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Stanford v. Kentucky, 492 U.S. 261, 369 n.1 (1989); *Thompson*, 487 U.S. at 830; Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); *see also* Diane Marie Amann, *"Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597, 605 (2004) ("Foreign law has tended to appear as an expendable after-thought, a gratuitous remark on alien practice.").

36. *Roper*, 125 S. Ct. at 1198.

37. *Id.* at 1200.

38. *Id.* at 1199–200. The Court noted that, at least since *Trop*, it has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment. *Id.* at 1198. It then noted that the Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, "contains an express prohibition on capital punishment for . . . juveniles under 18." *Id.* at 1199. It also noted "parallel prohibitional" contained in other significant international covenants, including the International Covenant on Civil and Political Rights (ICCPR). *Id.* As for state practice, it concluded that only seven countries have executed juveniles since 1990 and that the United Kingdom, in particular, abolished the juvenile death penalty in 1948. *Id.* at 1199–200.

39. *Id.* at 1199.

Finally, the Court concluded with a statement that forcefully justified the practice of constitutional comparativism. Few, if any, statements in constitutional history have asserted as strongly the legitimacy of this approach:

> Over time, from one generation to the next, the Constitution has come to earn the high respect and even . . . the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; . . . separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. *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.*[40]

II. IN SEARCH OF A THEORY IN *ROPER*

Roper is the latest of many decisions in which the Court has referenced comparative experiences to interpret constitutional guarantees without articulating a theoretical basis to justify the reference. This pregnant negative beckons one to identify the theory that gives birth to the Court's comparativism. A brief review of theoretical candidates suggests a number of plausible justifications.

A. Originalism

In *Roper* there are no grand allusions to the Magna Carta or other historical invocations of our deeply rooted Anglo-American traditions.[41] One might say that with *Roper* we do not have a Constitution of our Founding Fathers, but rather a Constitution of our Modish Brothers.

A jurisprudence that embraces evolving standards of decency has little occasion to invoke originalism to discern whether a prohibition is cruel and unusual. The Court in *Roper* was no exception, categorically rejecting the appropriateness of originalism by affirming the "necessity" of "evolving

40. *Id.* at 1200 (emphasis added) (citation omitted).

41. *Compare* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion), *with* Harmelin v. Michigan, 501 U.S. 957, 973–74 (1991).

standards of decency."[42] Justice O'Connor was most explicit in dissent, opining that it is "now beyond serious dispute that the Eighth Amendment's prohibition . . . is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions . . . that civilized society had already repudiated in 1791."[43]

But if traditional originalism was rejected, there were two references in the opinion that faintly adverted to aspirational originalism. First, the Court gave special emphasis to genealogical comparativism in relying on Britain's evolving experience with the death penalty. The Court emphasized that "[t]he United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."[44] The suggestion is not a novel one, for Anglo-American traditions are a common reference point in Eighth Amendment jurisprudence.[45] But what is novel is to suggest that the evolving, contemporary practices of Britain deserve special consideration because of our common heritage. Comparative reference to Britain is encouraged, not to understand our common roots,[46] but to follow her lead in rejecting them. This version of originalism suggests that our shared foundation includes a shared understanding that constitutional principles must evolve.

Echoing this theme is the less subtle appeal to originalism offered by Justice Stevens's brief concurrence. In defending the long heritage of an evolving Constitution, Justice Stevens remarked:

> That our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice Kennedy's opinion for the Court.[47]

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42. *Roper*, 125 S. Ct. at 1190 (quoting *Trop*, 356 U.S. at 100–01).

43. *Id.* at 1206–07 (O'Connor, J., dissenting); *see also id.* at 1205 (Stevens, J., concurring) ("If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today.").

44. *Id.* at 1199 (majority opinion).

45. Alford, *supra* note 1, at 688–90.

46. *See, e.g.*, Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1323–24 (2005) (discussing comparative analysis to understand original meaning).

47. *Roper*, 125 S. Ct. at 1205 (Stevens, J., concurring).

Far from turning in their graves,[48] Justice Stevens suggests that the enrobed ghosts of our Founding Fathers would heartily concur with the divinations of the Court's current occupants. This is a rather blatant appeal to originalism in the Dworkinian theory, that the Framers intended to enact general principles that would evolve with the times and the present-day Court is respecting those originalist intentions.[49] Under this originalist view, the Framers required what posterity desired.

Such originalism, of course, is counter to traditional understandings of the term. Although these justices may attempt to pour new wine into old wineskins, most who read *Roper* readily would concur with Justice Scalia in that the "Court has . . . long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today."[50]

B. Pragmatism

For a pragmatist, experience, not logic, is the life of the law.[51] That experience "embraces the totality of the cultural encounters that an objective and fair-minded judge brings to the decisionmaking process."[52] With increasing frequency, certain pragmatic judges will

48. Needless to say, Justice Scalia's understanding of what Alexander Hamilton would require is quite different. *See id.* at 1217 (Scalia, J., dissenting). Hamilton's views on capital punishment undoubtedly were less sanguine than Justice Stevens suggests. During the American Revolution, Hamilton was a Lieutenant Colonel and aide-de-camp serving directly under George Washington, who would discipline deserting young soldiers under pain of death. *See* RON CHERNOW, ALEXANDER HAMILTON 151 (2004); JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 27, 80 (2004). When Washington's personal guard, Thomas Hickey, was executed in 1776 for plotting to murder Washington, Hamilton applauded Washington's "swift justice" and stated that he "hoped the remainder of those miscreants now in our possession will meet with a punishment adequate to their crimes." CHERNOW, *supra*, at 75–76. In the Benedict Arnold affair of 1780, Hamilton and Washington had bitter disagreements over whether Arnold's British contact, Major John André, should hang as a common criminal or be shot as a gentleman, with Hamilton fully recognizing that André's execution was an indispensable act of *rigid justice*. *Id.* at 143–44; ELLIS, *supra*, at 129. And of course, Hamilton viewed death by dueling as an appropriate remedy for political insult. For Hamilton, dueling was a "custom which has ... received the sanction of public opinion in the refined age and nation in which we live, by which it is made the test of honor or disgrace." *Id.* at 685. Both Hamilton and his nineteen-year-old son, Philip, were mortally wounded in duels. Following his son's death by dueling, he commented that whatever voices of public opinion may be raised against the custom, outlawing the practice is a matter for "legislative interference." *Id.* at 655.

49. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–9 (1996).

50. *Roper*, 125 S. Ct. at 1228 (Scalia, J., dissenting).

51. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co., 42d prtg. 1948) (1881).

52. Alford, *supra* note 1, at 693.

allow foreign experiences to inform their understanding of possible constitutional solutions to common contemporary problems.[53]

But the comparativism of *Roper* offers scant support for a pragmatic theoretical justification. As discussed below, *Roper* concerns itself with the "precept of justice" that grants citizens the right against excessive sanction.[54] It invokes the discernment of what human dignity requires as the basis for the Eighth Amendment prohibition.[55] And finally, it relies upon majoritarian impulses at home and abroad as objective indicators of contemporary standards of cruelty.[56]

If there is a strain of pragmatism in *Roper*, it is with reference to the "empirical" analysis of juveniles' diminished culpability. The Court suggests that psychology confirms what any parent knows: that juveniles are less mature, more prone to peer pressure, and yet to develop their fixed character.[57] From this, the Court draws the syllogism that juveniles are less culpable, and therefore not among the worst offenders.[58] Thus, they cannot be subject to the severest penalties.[59]

As for recourse to comparativism, although the Court offers other justifications elsewhere, it does suggest that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."[60] In other words, foreign countries' experience with emotionally unstable youth and violent crime is consistent with our own experience. To this extent at least, one might say that the Court's appeal to comparativism is justified by pragmatic understandings that we all recognize the root psychological causes that factor into the violent tendencies of troubled teens—and that we, like they, must be more accommodating in meting out punishment.

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53. *Id.* at 696–97.

54. *Roper*, 125 S. Ct. at 1190 (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting Weems v. United States, 217 U.S. 349, 367 (1910))).

55. *Id.*

56. *Id.* at 1192–94, 1198–200.

57. *Id.* at 1195.

58. *Id.* at 1195–96.

59. *Id.*

60. *Id.* at 1200. It is worth noting that the Preamble to the Convention on the Rights of the Child, although primarily addressing grand themes of inherent dignity and inalienable rights, also justifies the protections embodied therein as premised on a shared recognition that "the child, by reason of his physical and mental immaturity, needs special safeguards and care." *See* Convention on the Rights of the Child, G.A. Res. 44/25, at pmbl., U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (Nov. 20, 1989), *available at* http://www.un.org/documents/ga/res/44/a44r025.htm.

The problem, of course, is that we do not all recognize these root psychological causes as a factor for all juvenile crime. The science of human development is hardly capable of claiming inescapable empirical conclusions. For example, there is debate as to whether innate stages of human development even exist. The "epigenetic principle"[61] developed by Freud's disciple, Erik Erikson, whom the Court expressly relied upon,[62] is highly controversial, and many psychologists espouse developmental theories that emphasize incremental phases rather than predetermined stages.[63] Even assuming that stages do exist, the American Psychological Association concedes the inexact line between them when it demarcates adolescence as the seven-to-nine year period "beginning at age 10 or 11 and continuing until age 18 or 19."[64] Moreover, virtually any introductory college textbook on human development will divide the human experience into periods, but underscore that the normal range of behavior includes a wide spectrum of individual differences. As Justice O'Connor put it, "Adolescents *as a class* are undoubtedly less mature. . . . But [there is] no evidence impeaching the . . . conclusion . . . that at least *some* 17 year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case."[65]

Consistent with this debate, twenty state legislatures—representing over one-third of the U.S. population—have reached the conclusion that immaturity is a highly probable, but not ineluctable, personality trait in juveniles. Therefore, diminished culpability should be a mitigating factor considered on a case-by-case basis. Majorities in these states believe that, in rare instances, some older juveniles are mature enough to fall within the category of worst offenders who deserve the harshest of punishments. For

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61. The epigenetic principle states:

> [A]nything that grows has a ground plan, and that out of this ground plan the parts arise, each part having its time of special ascendancy, until all parts have arisen to form a functioning whole. . . . Personality, therefore, can be said to develop according to steps predetermined in the human organism's readiness . . . to interact with a widening radius of significant individuals and institutions.

ERIK ERIKSON, IDENTITY YOUTH AND CRISIS 92–93 (1968).

62. *Roper*, 125 S. Ct. at 1195.

63. The amicus brief of the American Psychological Association avoided this debate by consistently referring to the general tendencies of adolescents as a group, recognizing that there will be individualized deviations from the norm. It conceded that "individualized capital sentencing does allow the presentation of mitigating evidence, including that related to youth, which, of course, may be relevant in certain cases of young adults as well" but discounted the reliability of such sentencing based on the methodology employed. Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent 4–16, Roper v. Simmons, 125 S. Ct. 1183 (2005) (No. 03-633).

64. *Id.* at 4.

65. *Roper*, 125 S. Ct. at 1206 (O'Connor, J., dissenting).

these twenty states at least, the Court has invoked countermajoritarian comparativism to deny their citizens the distinctive choices they have made regarding root causes and just punishment.

C. Majoritarianism

As discussed in my previous article, at least since *Coker* the principal approach in death penalty jurisprudence has been one of synthesizing structural and interpretive majoritarianism.[66] Structural majoritarianism limits the role of constitutional review by recognizing that any declaration of unconstitutionality thwarts majoritarian preferences reflected in legislative and executive pronouncements. Interpretative majoritarianism "concerns the infusion of politics into law through malleable interpretations of the Constitution that bring the text in line with the times."[67] Applied to the Eighth Amendment, the Court accepts the notion that the Constitution should be read in light of evolving standards of decency but then cabins that broad notion within the majoritarian paradigm of the national consensus. Such synthetic majoritarianism permits the Court to adopt an evolving standard of decency, while remaining somewhat deferential to the majoritarian decisions of state legislatures.[68]

In many respects, *Roper* repeats this theme with its reliance on the national consensus as instructive of whether the punishment is cruel and unusual. The Court says that the Constitution must evolve, but that its evolution must reflect the majoritarian views of the state legislatures.[69] But there are three great weaknesses of *Roper*'s majoritarian paradigm. First, under the baseline established in *Stanford*, one presumably would need to show some significant movement to establish a new national consensus. Yet there was no such significant movement in the time between *Stanford* and *Roper*.[70] Second, the federal government expressly reserved the right of the states to continue the practice of the juvenile death penalty when the Senate ratified the International Covenant on Civil and Political Rights in 1992.[71] This reflects a federal consensus that the propriety of this practice

66. Alford, *supra* note 1, at 689–92.
67. *Id.* at 674.
68. *Id.* at 688–92.
69. *Roper*, 125 S. Ct. at 1192–94.
70. As Justice O'Connor noted, the pace of change in *Atkins* was significantly greater than in *Roper*. Only four states have reversed course since *Stanford*, while sixteen had done so since *Penry*. *Id.* at 1211 (O'Connor, J., dissenting).
71. International Covenant on Civil and Political Rights, art. 6, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2, at 23, 25 (1978), 999 U.N.T.S. 171, 173 (entered into force

should be left to state legislatures. If over two-thirds of the Senate voted to retain state power to execute juveniles, and over one-third of the states exercise this prerogative, it is exceedingly difficult to argue that a national consensus against the practice exists. Third, the limited number of states that actually have executed juveniles since *Stanford* was used by the Court to suggest a consensus against the practice.[72] However, this evidence could just as easily establish that states are judiciously reserving this punishment for only the worst subset of juvenile offenders. That is, the evidence may show only a national consensus that juveniles as a whole are less mature, and that states recognize that the juvenile death penalty should be used sparingly and for only the most extreme deviations from the norm.

Does majoritarianism explain the constitutional comparativism in *Roper*? As with past Eighth Amendment cases, it is quite clear that *Roper* does not justify recourse to comparativism out of a broad conception of community standards. The Court referenced the national consensus as instructive to the Court's ultimate judgment on the propriety of the punishment,[73] and thus held that the juvenile death penalty was cruel and unusual punishment.[74] Only then did it confirm the correctness of its conclusion by reference to international experience.[75] *Roper* does not change the conclusion that "the global consensus does not provide content to the national consensus and the global consensus is of no relevance in the absence of a national consensus."[76] The Court emphasized that it was relying on comparative experiences only to *confirm* what it already had decided was required. "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[77] Justice O'Connor's dissent is even more explicit in this regard, finding it wholly inappropriate to seek international confirmation of a national consensus that in her view does

Mar. 23, 1976) (ratified by the United States on June 8, 1992); U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 4781, 4781–84 (Apr. 2, 1992).

72. *Roper*, 125 S. Ct. at 1192.

73. *Id.* at 1192–94.

74. *Id.* at 1192–98.

75. *Id.* at 1198–200.

76. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 60 (2004) (footnote omitted).

77. *Roper*, 125 S. Ct. at 1200.

not exist.[78] *Roper*, therefore, lends no support for the conclusion that community standards should be based on a real or imagined global village.

But what *Roper* does clarify is that, from the Court's perspective, comparative reference is anything but superfluous.[79] When the objective indicators of a national consensus are weak, the strong global consensus fortifies the Court's independent judgment. It emboldens the Court to do what is "right"—weak domestic indicators be damned. One might say that the Court recognizes that exotic suspenders take on increasing importance when one's trusty belt is threadbare. Indeed, so weak are the domestic indicators and so strong are the global indicators that one wonders whether majoritarianism fully captures the theoretical justification for the Court's decision in *Roper*. It appears that in *Roper* the Court has begun to elevate the importance of natural law to a status above majoritarianism, and has resorted to foreign practice as one benchmark for the correctness of its conception of what human dignity requires.

D. Natural Law

Much of *Roper* echoes natural law themes. The Court emphasized that the Eighth Amendment flows from basic precepts of justice that fundamentally affirm respect for human dignity.[80] It finds in the Constitution a restriction on the State's ability to extinguish a juvenile's life, thereby granting him the "potential to attain a mature understanding of his own humanity."[81] Most significant, it emphasized that evolving standards of decency of a maturing society are the constitutional test, and that objective indicators of that standard are simply inputs that the Court must factor into its ultimate analysis. But in the end, the Court's own moral judgment of what the Constitution requires is dispositive.[82]

The Court's references to comparative experiences are best understood as objective signposts in the Court's search for constitutional limits grounded in

78. Justice O'Connor would refrain from a comparative analysis of evolving standards of decency in the absence of a national consensus of the question:

> [B]ecause I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court.

Id. at 1215 (O'Connor, J., dissenting).

79. Alford, *supra* note 1, at 709 ("To the extent that international norms reflect contemporary majoritarian preferences within the national experience, the added value of their consistency with international norms is limited.").

80. *Roper*, 125 S. Ct. at 1190.

81. *Id.* at 1197.

82. *Id.* at 1192; *id.* at 1206 (O'Connor, J., dissenting); *id.* at 1217 (Scalia, J., dissenting).

natural law. First, the Court starts with a philosophical construct it denominates "human dignity." This, it concludes, is what the Constitution must uphold. It then reasons that its own understanding of that concept is dispositive. All citizens must abide by the Court's own understanding of constitutional anthropology. But recognizing that such subjective conclusions are fraught with institutional and normative risks, it recoils from free-floating constitutionalism by seeking instruction from objective indicators. The objective indicators it chooses are those most likely to coincide with its own collective intuition, which is the evolving standard of decency reflected in the contemporary national consensus and confirmed by enlightened global affirmations. Competing objective indicia, such as text, history, tradition, precedent, or even Judeo-Christian principles, are all but ignored. The dictates of contemporary moral sense designate the practice as disreputable, and the truth of this sentiment is evinced by the fact that it has gone into general disuse.[83] Comparativism thus provides a particular moral valence to the Court's independent judgment of what our Constitution requires.

But of course, the great risk of this approach is judicial hegemony and substantive indeterminacy.[84] If the Constitution simply imposes moral abstractions, such as "human dignity" that the Court is to divine by searching its inner conscience, then "judges of the law" truly do risk becoming a "committee of philosopher-kings."[85] Indeed, in *Roper*, Justice Scalia's strongest vitriol is reserved for the Court's "usurpation of the role of moral arbiter" by which "nine lawyers presume to be the authoritative conscience of the Nation."[86] A natural law decision such as *Roper* may have strong moral and legal legitimacy, but it is suspect in terms of its sociological legitimacy, which depends on the public perception that the Court is adhering to principled legal norms.[87]

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83. To paraphrase an historical natural law decision. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 255 (1790) (Paterson, J., concurring).

84. Alford, *supra* note 1 at 668.

85. Stanford v. Kentucky, 492 U.S. 361, 379 (1989); *see also* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 665 (2004) (conceding that the Constitution does not explicitly address many contentious social issues, contributing to the "erosion of the legitimacy of constitutional interpretation" and forcing the constitutional adjudicator to take sides on social issues and undermine societal harmony).

86. *Roper*, 125 S. Ct. at 1221–22 (Scalia, J., dissenting).

87. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1802, 1841 (2005) (stating that legal legitimacy recognizes that a ruling is to be followed as the law; moral legitimacy asks whether a decision is morally justifiable; and sociological legitimacy considers whether the public regards a decision as justified and worthy of support for reasons other than fear of sanction or hope of reward).

The Court historically recognized the strength of this criticism, and whenever it has displayed natural law leanings it has recognized the potential for judicial overreaching.[88] As such, it has sought to rein in this subjective risk with objective limitations. In the substantive due process context, Justice Harlan emphasized that "judicial 'self-restraint' is an indispensable ingredient of sound constitutional adjudication" and that it is achieved "by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[89] These objective checks are manifested in the *Washington v. Glucksberg*[90] test for substantive due process, which limits fundamental rights to those that are "implicit in the concept of ordered liberty"[91] and "deeply rooted in [our] history and tradition."[92]

The Eighth Amendment displays similar concerns for objective ballast, with the national consensus serving as the paradigm for contemporary understandings of human decency. In the past, the Court has suggested that foreign practice might be useful as an additional indicator of what ordered societies require, but rarely has it given any real credence to foreign practices.[93] *Roper* is significant in that it elevates foreign practice to a confirmatory role of what human decency requires.[94] If *Glucksberg* defines the objective limitations on substantive due process, *Roper* defines the objective limitations on cruel and unusual punishment. It prohibits excessive sanctions based on the "objective indicia of [a national] consensus" confirmed by "fundamental rights" affirmed by "other nations."[95] Both of these are objective benchmarks instructive to the Court's ultimate conclusions of what the Constitution requires.[96]

88. Alford, *supra* note 1, at 667–69.
89. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).
90. 521 U.S. 702 (1997).
91. *Id.* at 721 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
92. *Id.* (citing Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).
93. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).
94. Thus far, the Court has not gone so far as some have suggested and used an overwhelming international consensus as the basis to refrain from following the considered judgment reached by our citizenry and its legislators. *See* SARAH H. CLEVELAND, OUR INTERNATIONAL CONSTITUTION (forthcoming 2005) (suggesting overwhelming international consensus could provide reason to disagree with national consensus); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1129 (2002) ("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.") (emphasis added).
95. Roper v. Simmons, 125 S. Ct. 1183, 1192, 1200 (2003).
96. *Id.* at 1192, 1198–200.

The difference of course is that *Glucksberg* looks backward and inward, while *Roper* looks forward and outward.[97] Both have clear visions of how the world should be ordered, but what guides one could not be more different than what guides the other. For *Glucksberg*, what is natural is immutable; for *Roper*, what is in desuetude is unnatural. *Roper* adheres to a variation of moral relativism that denies the immutability of truth and finds a constitutional right of generational sovereignty, echoing *Lawrence v. Texas*'s[98] conception that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[99] *Roper*'s benchmark for natural law is the shifting current of the enlightened present, not the abiding wisdom of the blinkered past.

What gives one pause about *Roper* is that it is unclear whether the objective indicators proffered impose any significant limitations on the Court. Objectivism is invoked, but it has no purchase. To borrow Justice Harlan's

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97. The difference in terms of democratic legitimacy cannot be ignored. As Kenneth Anderson has noted:

> The Constitution derives its legitimacy from the people who are governed thereby and not because it is the enactment of some body of universal law. . . . If that interpretation be so—and it seems to be the ordinary understanding of Americans, including their elites—then the invocation of foreign constitutional law, no matter how persuasive its content, is fundamentally at odds with democratic constitutional self-government.

Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1309 (2005); *see also* Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 29 (arguing that American constitutional rights claim authority not from universal rights but from democratic authority); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1997–99 (2004) (distinguishing between European "international constitutionalism" based on universal rights and American "democratic constitutionalism" based on democratic self-governance).

98. 539 U.S. 558 (2003).

99. *Id.* at 579. In this regard, *Roper* follows Justice Brennan's earlier view of generational sovereignty. Justice Brennan stated:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.

Speech of Justice William J. Brennan, Jr. to the Text and Teaching Symposium, at Georgetown University (Oct. 12, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 17 (The Federalist Soc'y 1986); *see also* DWORKIN, *supra* note 49, at 82 (The Constitution commands that "our judges do their best . . . to construct, reinspect, and revise, generation by generation, the skeleton of liberal equal concern that the great clauses, in their majestic abstraction, demand").

thoughts in *Griswold v. Connecticut*,[100] there is little evidence that the Court in Eighth Amendment jurisprudence respects the teachings of history, recognizes the basic values that underlie our society, or fully appreciates the role that federalism plays in establishing and preserving American freedoms.[101] Failure to appreciate such factors has liberated the Court to "roam[] at large in the constitutional field."[102] Instead of applying these factors, it has relied on the imperfect medium of an ill-defined national consensus coupled with strong support from abroad based on best practices that the United States has expressly eschewed.[103] If the Court continues on its current path, it has all but set the stage for a finding that the death penalty itself is unconstitutional,[104] based on halting legislative trends toward abolition, the infrequency of state practice, and a general consensus abroad of what dignity requires.[105] The Court could rely on such objective indicia to

100. 381 U.S. 479 (1965).

101. *Id.* at 501 (Harlan, J., concurring).

102. *Id.* at 502.

103. For a discussion of the United States as a persistent objector to developing international law norms on the juvenile death penalty, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 516–35 (2002) and Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 564–68 (2004).

104. Justice Blackmun anticipated just this possibility over ten years ago. *See* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) ("I am confident, however, that at some point the court, and the country will come to appreciate that . . . the imposition of the death penalty generally . . . is no more tolerable than other violations of international law.").

105. International precedent has addressed whether the death penalty violates international norms. *See, e.g.*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); Inter-American Comm. on Human Rights [Inter-Am. C.H.R.], *Recommendation of the Inter-American Commission on Human Rights for the Promotion and Protection of the Rights of the Mentally Ill* (Apr. 4, 2001), *available at* http://www.cidh.org/annualrep/2000eng/chap.6e.htm; The Question of the Death Penalty, Comm'n on Human Rights Res. 2001/68, ¶ 4 (Apr. 25, 2001), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.68.En?Opendocument; The Question of the Death Penalty, Comm'n on Human Rights Res. 2000/65, ¶ 3 (Apr. 26, 2000), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.65.En?Opendocument; The Question of the Death Penalty, Comm'n on Human Rights Res. 1999/61, ¶ 3 (Apr. 28, 1999), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.1999.61.En?Opendocument; Inter-American Comm. on Human Rights [Inter-Am. C.H.R.], *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 (Oct. 1, 1999), *available at* http://www.cidh.org/migrantes/seriea_16_ing.doc; *see also* State v. Makwanyane & Another, 1995 (3) SA 391 (CC) at 412–39 (S. Afr.) (summary of international tribunal decisions pertaining to death penalty); David Heffernan, Comment, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 518–39 (1996) (summarizing cases). Moreover, according to Amnesty International, 97 percent of all known executions in 2004 took place in four countries: China, Iran, Vietnam, and the United States. The international trend is clearly in the direction of abolition, with fifty countries abolishing the death penalty since 1985 and only four reintroducing it during that period. Amnesty International, Facts and Figures on the Death Penalty, http://web.amnesty.org/pages/deathpenalty-facts-eng (last visited July 4, 2005).

make its own independent judgment of what the Constitution requires, notwithstanding the firm textual,[106] historical,[107] and popular[108] support for capital punishment.

Although natural law is a useful prism through which to understand the comparativism in *Roper*, it may not capture fully the Court's reference to foreign experiences. The Court may be signaling something more than simply a test for Eighth Amendment decisionmaking. The final conclusions in *Roper* merit close scrutiny, for they may suggest an even more searching role for comparativism, in which constitutional liberties can be confirmed or denied based on their affirmation or rejection abroad. In short, the Court may be introducing a constitutional theory of international equipoise.

III. INTERNATIONAL EQUIPOISE

The Court, in its concluding embrace of comparativism, boldly proclaimed that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the

106. U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life . . . without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life . . . without due process of law . . . .").

107. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 146–58 (1986). Even admitting that history cannot serve as a straightjacket to prevent the growth necessary to allow for the constitutional capacity of adaptation, as Alexander Bickel has noted, one of the functions of the Court is to use history to maintain continuity in the midst of change.

> Change should be a process of growth . . . [and] should not come about in violent spasms. Government under law is a continuum, not a series of jerky fresh departures. And so the past is relevant. Around it cluster settled ways of doing and settled expectations which, for the sake of both stability and fairness to the individual, should often, as a matter of principle, control the rate of change in society.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 107–09 (1962). Writing in the early 1960s, Bickel prophetically asserted that the absence of a "colloquy" on the death penalty suggested that the "moment of judgment" for abolishing the death penalty was "a generation or more away." *Id.* at 242.

108. *See* James H. Wyman, *Vengeance Is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543, 553 (1997) (noting that in the 1990s, 76 percent of the American public "believe[d] that when one human being kills another, it is appropriate for the state to execute that human being"). It is the national ethos that perhaps best explains how the Court could conclude that lesser punishments (such as denationalization or political death) are unconstitutional, while greater punishments (such as death) are constitutional. *See also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 104 (1982) (noting that although loss of citizenship is not a fate worse than death, the justification for *Trop* is the "American constitutional ethic that representative government . . . could not begin slicing off parts of the Polity without the consent of the people").

centrality of those same rights within our own heritage of freedom."[109] This proclamation advances the cause of comparativism in bold and florid strokes, and one can only faintly imagine the substantive ends these means will bring.

If our fundamental rights are to be confirmed abroad, one wonders whether comparative confirmation will be used when certain rights central to our own heritage are *not* affirmed by other nations, or when fundamental rights affirmed by other nations are *not* central to our own system. In short, one wonders whether this methodology will pursue a constitution in international equipoise, with international values distributed liberally throughout our jurisprudence to ensure foreign and domestic equilibrium.

Justice Scalia demanded as much when in dissent he challenged:

> The Court should either profess its willingness to reconsider [other constitutional] matters in light of the views of foreigners, or else . . . cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.[110]

Likewise, Justice Ginsburg conceded the strength of this criticism in her keynote address to the American Society of International Law, when she advocated reference to foreign decisions as indicators of "common denominators of basic fairness governing relationships between the governors and the governed."[111] Significantly, when asked whether constitutional comparativism was appropriate for questions such as abortion, she conceded that here too we should "look abroad for negative examples."[112] This may signal the advancement or curtailment of liberties in fidelity to the common denominators of basic fairness in the social compact of governed societies. As Justice Blackmun put it, the Court's approach should be one that tries to "reconcile the dissonance between domestic and international practice."[113] Our

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109. Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).

110. *Id.* at 1228 (Scalia, J., dissenting).

111. Ruth Bader Ginsburg, "A Decent Respect for the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Address at the American Society of International Law Annual Meeting (Apr. 1, 2005) (quoting Judge Patricia M. Wald), *at* http://www.asil.org/events/AM05/ginsburg050401.html (last visited Sept. 15, 2005).

112. *Id.*

113. Blackmun, *supra* note 104, at 48. Or as one commentator put it, according to this view, international law would thus become a global "law of lawmaking." Oliver Gerstenberg, *What International Law Should (Not) Become, A Comment on Koskenniemi*, 16 EUR. J. INT'L L. 125, 128 (2005). That is, international law would serve as a rule for the conduct of constitutional lawmaking, conformity to which may be sufficient to endow the resulting product with a strong presumptive moral claim to public support. *Cf.* Frank I. Michelman, *A Reply to Baker and Balkin*, 39 TULSA L. REV. 649, 650 (2004); Melissa A. Waters, *Mediating Norms Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 570

Constitution could thus become homogenized with others, resulting in a generic constitutional doctrine.[114]

What would such an approach demand? A constitution in international equipoise would recognize that rights affirmed at home are denied abroad and rights affirmed abroad are denied domestically. That is, if foreign affirmation of fundamental rights underscores the centrality of rights within our own heritage, then contrary foreign perspectives may undermine the centrality of existing constitutional rights, or underline the centrality of those fundamental rights in other nations that are peripheral within our own.

The beginnings of such an analysis are presented in Table A. This table plots representative cases based on whether or not they are in international equipoise. The rows are individual rights that are affirmed, contested, or denied domestically.[115] The columns are individual rights that in general are affirmed, contested, or denied abroad.[116]

TABLE A

	Rights Affirmed Abroad	**Rights Contested Abroad**	**Rights Denied Abroad**
Rights Affirmed Domestically	*Atkins, Roper, Brown, Harper*	*Lawrence, Dale, Miranda*	*Roe, Stenberg, Mapp, Skokie, Sullivan*
Rights Contested Domestically	*Knight, Rasul, Harris*	*Ashcroft v. ACLU, Goodridge*	*U.S. v. Miller, McConnell*
Rights Denied Domestically	*Gregg, Lemon, Lucas, Burnham, Dandridge*	*Glucksberg, Reynolds, Plyler, Nebbia*	*Whitney, Ferber, Wainwright*

(2005) (stating that international norms are useful not only when they confirm the reasonableness of domestic norms, but also when they conflict with domestic norms).

114. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 659 (2005).

115. By rights affirmed or denied domestically, I mean that the courts have opined that a particular right should or should not be granted constitutional protection. By rights contested domestically, I mean that the jurisprudence appears to be in flux regarding the status of the particular right, or in certain cases, such as the Second Amendment right to bear arms, there is a legal vacuum of reliable authority.

116. By rights affirmed or denied abroad, I mean that based on my research there is a general practice throughout the world that appears consistently to grant or deny the right. For example, the overwhelming majority of countries prohibit the death penalty and restrict the right to abortion on demand. There are dissenting countries, but a general consistency of practice prevails. By rights contested abroad, I mean that there is no general consistent practice among the overwhelming majority of nations. For example, there is no general consensus throughout the world on the right to practice polygamy, with a strong cultural tradition permitting it in African and Islamic countries, while western countries prohibit it. In certain cases, the right is identified as contested because it appears to be in a state of flux in many countries, such as the right to practice homosexual sodomy or physician-assisted suicide.

Plotting the table using landmark cases shows the disequilibrium of our constitutional jurisprudence. Only the top left cell (cases such as *Roper*,[117] *Atkins*,[118] *Harper*,[119] and *Brown*[120]) and the bottom right cell (cases such as *Whitney*,[121] *Ferber*,[122] and *Wainwright*[123]) represent examples in which there is a high degree of equilibrium, with individual rights affirmed or denied both at home and abroad. Beyond those two cells there are varying degrees of disequilibrium. This is most stark in the top right cell, with cases such as *Roe*,[124] *Stenberg*,[125] *Mapp*,[126] *Skokie*,[127] and *New York Times v. Sullivan*[128] exemplifying rights that we guarantee at home that in general are denied abroad, and the lower left cell with cases such as *Gregg*,[129] *Lemon*,[130] *Lucas*,[131] *Burnham*,[132] and *Dandridge*[133] exemplifying rights that we deny at home that in general are guaranteed abroad. Beyond these four corners there are (1) cases such as *Lawrence*,[134] *Dale*,[135] and *Miranda*,[136] in which rights are guaranteed at home but contested abroad; (2) cases such as *Glucksberg*,[137] *Reynolds*,[138] *Plyler*,[139] and *Nebbia*,[140] in which rights are denied at home but contested abroad; (3) cases such as *Knight*,[141] *Rasul*,[142] and *Harris*,[143] in which rights are contested at home but affirmed abroad; (4) cases such as *McConnell*[144] and *United States v.*

117. Roper v. Simmons, 125 S. Ct. 1183 (2005) (death penalty prohibition for juveniles).
118. Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty prohibition for the mentally retarded).
119. Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) (equal protection and voting).
120. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (equal protection and race).
121. Whitney v. California, 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (prohibitions on incitement).
122. New York v. Ferber, 458 U.S. 747 (1982) (prohibitions on child pornography).
123. Wainwright v. Stone, 414 U.S. 21 (1973) (prohibitions on deviant sex).
124. Roe v. Wade, 410 U.S. 113 (1973) (abortion).
125. Stenberg v. Carhart, 530 U.S. 914 (2000) (partial birth abortion).
126. Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule for unlawfully seized evidence).
127. Nat'l Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977) (Nazi speech).
128. 376 U.S. 254 (1964) (stringent requirement for defamation of public figures).
129. Gregg v. Georgia, 428 U.S. 153 (1976) (no prohibition on the death penalty).
130. Lemon v. Kurtzman, 403 U.S. 602 (1971) (rights pertaining to establishment of religion).
131. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (compensation for regulatory takings).
132. Burnham v. Superior Court, 495 U.S. 604 (1990) ("tag" jurisdiction).
133. Dandridge v. Williams, 397 U.S. 471 (1970) (welfare rights).
134. Lawrence v. Texas, 539 U.S. 558 (2003) (privacy and antisodomy laws).
135. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (associational rights to discriminate).
136. Miranda v. Arizona, 384 U.S. 436 (1966) (pre-interrogation rights against self-incrimination).
137. Washington v. Glucksberg, 521 U.S. 702 (1997) (physician-assisted suicide).
138. Reynolds v. United States, 98 U.S. 145 (1878) (polygamy).
139. Plyler v. Doe, 457 U.S. 202 (1982) (education as fundamental right).
140. Nebbia v. New York, 291 U.S. 502 (1934) (property rights).
141. Knight v. Florida, 528 U.S. 990 (1999) (prolonged detention on death row).
142. Rasul v. Bush, 124 S. Ct. 2686 (2004) (prolonged detention of enemy combatants).
143. Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) (no prohibition on life without parole).
144. McConnell v. FEC, 540 U.S. 93 (2003) (campaign contributions as protected political speech).

Miller,[145] in which rights are contested at home but denied abroad; and (5) cases such as *Ashcroft v. ACLU*[146] and *Goodridge*,[147] in which rights are contested both at home and abroad.

Plotting constitutional rights based on their international disequilibrium shows how this new interpretive medium offers something for everyone. Social conservatives no doubt will be intrigued by an interpretive device that undermines *Roe v. Wade*, chips away at the wall of separation between church and state, and offers only halting support for gay marriage. Libertarians will welcome an approach that makes greater room for personal choice on issues such as polygamy, euthanasia, and property rights. Law and order conservatives will welcome a rethinking of the exclusionary rule, the need for a *Miranda* warning, and the freedoms we grant neo-Nazis to spread their hate. Plaintiffs' lawyers will delight in possible new causes of action for defamation, while defendants will thrill at a curtailment on tag jurisdiction. Liberals will embrace the abolition of the death penalty, enhanced protections for welfare and education rights, greater limits on associational rights to discriminate, and firm support for gun control.

A constitution in international equipoise has the potential to become a great political anodyne, offering soothing hope for past constitutional failures. Virtually every group can benefit from robust constitutional comparativism. But, of course, it also risks becoming a great political irritant, upsetting settled expectations of constitutional doctrine. Virtually every group can lose from constitutional comparativism, although at present its patrons are from the left as the protesters howl from the right. But if *Roper* portends the loss of *Roe*, the left will rue this day.[148] If there is a constant law in constitutional comparativism, it may be the law of unintended consequences.

One may quibble with the placement of one or more cases based on one's expert knowledge of a particular comparative experience. A detailed survey of the comparative plane for all fundamental rights does not exist, and I present these preliminary conclusions as good faith simplifications. But this effort to place our jurisprudence in international context underscores the degree to which the *Roper* paradigm might open for reconsideration constitutional rights based on their disequilibrium with international values.

145. 307 U.S. 174 (1939) (right to bear arms).

146. 535 U.S. 564 (2002) (online pornography as protected speech).

147. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (gay marriage).

148. One could almost see the pain on Justice Ginsburg's face when, with great hesitation, she admitted at the ASIL annual meeting on April 1, 2005 that we should look "abroad for negative examples" on questions such as abortion. *See supra* note 111.

Of course, one doubts that the Court will (indeed hopes the Court will *not*) seriously undertake this project.[149] There are principled reasons why robust comparativism is suspect. As I have indicated elsewhere, constitutional comparativism is simply a type of "values comparativism" in which international experiences "offer delocalized, independent moral and political arguments that serve as an index of the correctness of competing claims about essentially contestable concepts embodied in aspirational provisions of the Constitution."[150] As such, these comparative values will be relegated under most constitutional theories to a status at the bottom of the hierarchy of the interpretive canon: below text, structure, history, and national experience.[151] But when these interpretive sources are equivocal (as they often will be with contested claims regarding aspirational rights), it would appear the Court in *Roper* is suggesting that international equipoise may be invoked to confirm the Court's independent judgment of what the Constitution requires.

It may be that the Court is embarking on the dangerous path[152] of a constitutional theory that, at least on discrete matters, is truly comparative, with international values used as a benchmark of what our Constitution requires. While the Court is confident that comparative references do not lessen fidelity to the Constitution, it is by no means certain that other Americans share this confidence.[153] This is no trifling matter, for "a crucial aim of constitutional theorizing is to identify interpretive principles that others can reasonably be asked to accept."[154] If the Court is introducing a jurisprudence

149. Significantly, in the recent case of *Kelo*, the Supreme Court made no reference to international or comparative law in determining what constituted "public use" under the Fifth Amendment. *See* Kelo v. City of New London, 125 S. Ct. 2655 (2005). This is despite clear international law principles on the subject, *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 n.4 (1987), and an amicus brief that addressed the relevance of international law in understanding the Fifth Amendment. *See* Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners 9–10, 22, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

150. Alford, *supra* note 76, at 63–64.

151. *Id.* at 64.

152. I say "dangerous" for the reasons outlined in my previous article addressing a comparative theory. Such a theory is problematic from the perspective of upholding the rule of law, promoting political democracy, and respecting a morally defensible set of individual rights. *See* Alford, *supra* note 1, at 709–12.

153. For example, confidence in the Court among certain congressional leaders has waned in the wake of *Roper*, with some going so far as to call for retaliation against and impeachment of Justice Kennedy. *See, e.g.*, Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3; Dahlia Lithwick, *Needles and Threats: More Tough Talk About Pulverizing the Judiciary State*, SLATE, Apr. 5, 2005, http://www.slate.com/id/2116256. This in turn led to a remarkable letter sent to all members of Congress by 140 law school deans urging them to stop the "irresponsible" and "harmful" statements implying "that judges may be impeached or otherwise punished because of their rulings." Statement by Law School Deans, *at* http://www.nyu.edu/public.affairs/releases/detail/647 (last visited Sept. 12, 2005).

154. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 572 (1999).

of international equipoise, then we are on a constitutional journey to destinations we can scarcely imagine. One wonders if the Court has calculated the difficulty of attaining broad acceptance from others to journey along this unfamiliar road.[155] Undoubtedly many Americans will be quite reluctant to take the path of comparative constitutionalism, sharing the recent skepticism of Justice O'Connor: "Those who would renegotiate the boundaries . . . must . . . answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"[156]

155. As Richard Fallon has stated:

> [T]he project of implementing the Constitution . . . is inherently a shared one, which requires coordinated action based on mutually acceptable premises. All else being equal, one theory should therefore be preferred to another if it is more consonant with widely shared values or has better prospects of attaining broad acceptance.

Id. at 577–78; *see also* Richard H. Fallon, Jr. *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997). Fallon also asserts:

> [A] Justice's job is not just to reach a personal judgment about how the Constitution, viewed in light of correct moral principles, would best be read. . . . The Justices' role is also, at least as importantly, one of taking into account and sometimes accommodating the reasonable views of others. The Justices' role, moreover, is not exclusively one of truth-telling about the meaning of the Constitution . . . but is also one, sometimes predominantly, of participating in a necessarily cooperative project of implementing the Constitution. . . . The Justices would be unfaithful to their roles if, trying to do too much too fast with inadequate resources, they prematurely spoke the truth as they personally saw it and crafted bad doctrine that frustrated reasoned debate and democratic experiment.

Id. at 147–48.

156. McCreary County v. ACLU, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring); *see also id.* at 2748 (Scalia, J., dissenting) (contrasting European and American approaches to church-state relations).

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