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Constitutional Comparativism: The Emerging Risk of Comparative Law as a Constitutional Tiebreaker

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CONSTITUTIONAL COMPARATIVISM: THE EMERGING RISK OF COMPARATIVE LAW AS A CONSTITUTIONAL TIEBREAKER

I. INTRODUCTION

During Justice Samuel Alito's confirmation hearings on January 1, 2006, following his nomination to the Supreme Court, Senator Jon Kyl asked him what he believed the proper role is for foreign laws in Supreme Court decisions.¹ Leading up to this question, Senator Kyl discussed the case of *Roper v. Simmons*, which ruled unconstitutional any state law that provided for the execution of minors.² The central question in *Roper* was whether the Eighth Amendment of the Constitution barred capital sentences against juveniles under its standard that forbids cruel and unusual punishments.³ The traditional test used by the Supreme Court to determine the constitutionality of human rights issues such as the death penalty was to identify an overwhelming national consensus, signified by state laws, that marks evolving standards of decency in America.⁴

However, as pointed out in Senator Kyl's question, the *Roper* opinion devoted approximately twenty percent of its text to a discussion of how foreign laws dealt with the juvenile death penalty.⁵ Senator Kyl stated that he believed reliance on foreign law is contrary to America's constitutional traditions, undermines democratic self-government, is "utterly impractical," and is needlessly disrespectful to the American people.⁶ Justice Alito responded by voicing his opinion that foreign law is not helpful in interpreting the Constitution, and provided multiple reasons why he believed so.⁷ Specifically, Justice Alito argued that the

¹ U.S. Senate Judiciary Committee Hearing on Justice Samuel Alito's Nomination to the Supreme Court; Part I of III, Washingtonpost.com, Jan. 10, 2006, available at 2006 WLNR 689847 [hereinafter Alito Hearings]. Senator Kyl informed Justice Alito that he was just repeating the same question that he had asked then Judge Roberts only a few months before he was confirmed as the Chief Justice of the Supreme Court. *Id.*

² 125 S. Ct. 1183 (2005).

³ *Id.* This standard is discussed more fully *infra* Parts II.C.2-II.C.3.

⁴ *Roper*, 125 S. Ct. at 1192.

⁵ Alito Hearings, *supra* note 1. Senator Kyl noted that the Court referenced foreign laws from the countries of Great Britain, Saudi Arabia, Yemen, Iran, Nigeria and China. *Id.* He also noted that Justice Breyer's opinion in *Knight v. Florida* similarly referenced the laws of Zimbabwe, India, Jamaica, and Canada in arguing that the Constitution considers a delay caused by a convicted murderer's repeated appeals a cruel and unusual punishment. *Id.*; see *Knight v. Florida*, 528 U.S. 990 (1999).

⁶ Alito Hearings, *supra* note 1.

⁷ *Id.* Justice Alito also mentioned that some references, such as when a case deals with treaty interpretation, are acceptable, but foreign law should not be used to interpret the

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United States Constitution should be independent from foreign law because it has unique traditions, and precedents, and that courts should consider those factors exclusively.⁸

This controversial issue presented to Justice Alito is not new to the Supreme Court.⁹ As Senator Kyl stated, the main question concerns which foreign sources are appropriate for American legal interpretation. The three main conflicts leading to foreign law references are in cases involving treaty law, cross-border issues, and purely domestic issues.¹⁰ Most of the controversy centers around decisions like *Roper*, which concern domestic issues only, and the multiple criticisms look to history, tradition, and constitutional theory for support.¹¹ In the end, many scholars agree with Senator Kyl—that United States courts should not use foreign law to interpret the Constitution because it threatens democracy by thwarting the will of the American people.¹² Others argue that using foreign law to interpret the Constitution risks erroneous rulings through selective and haphazard use of foreign authority.¹³ Still, other critics defend the practice, arguing that comparative references are similar to citing a treatise, an individual's speech, or looking to the effects of a particular state law.¹⁴ These scholars also argue that generally citing foreign law helps foreign policy by demonstrating comity with other nations.¹⁵

As can be seen from these arguments, many important issues must be reconciled. The Court needs a methodology to separate the potentially harmful cases from the harmless cases. Once singled out, only a few cases represent a potential threat to American jurisprudence. Specifically, the class of cases involving purely domestic issues that cite to foreign law simply to support the Court's value judgments present a slippery slope that risks circumventing the democratic process, whereas the majority of the cases utilizing comparative law are no different from any other persuasive source.

Constitution. *Id.* For a more in-depth discussion of this and other arguments against this practice, see *infra* Part II.D.2.

⁸ Alito Hearings, *supra* note 1.

⁹ See *infra* Part II.C for a synopsis of the Courts' history with foreign legal references.

¹⁰ See *infra* Parts II.A-II.B.

¹¹ All of these theories are discussed *infra* Part II.D.

¹² See *infra* Part II.D.2.

¹³ See *infra* Part II.B.

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.A.

This Note first provides a background to comparative judicial practice in Part II.¹⁶ It identifies the decisions that are generally uncontroversial, and further distinguishes the most controversial decisions.¹⁷ Second, Part II provides a history of Supreme Court comparative references, and summarizes the contemporary arguments surrounding the issue.¹⁸ Part III provides a careful analysis of the issues arising from Part II, while Part IV lays out Model Judicial Reasoning for determining when comparative analysis is appropriate.¹⁹

II. A HISTORY OF COMPARATIVE JUDICIAL INTERPRETATION

The fundamental principle guiding comparative law is that the laws of all nations are comparable on one level or another.²⁰ It follows that comparative reasoning exists where any domestic legal reasoning refers to a foreign legal concept.²¹ This may occur in all forums, from scholarly writings to a nation's legislature.²² This Note focuses on the numerous instances where comparative reasoning occurs in American legal interpretation by the judiciary.²³ Scholars often refer to this practice as "judicial internationalism."²⁴ Recently, in *Roper v. Simmons*,²⁵ this practice raised considerable controversy, where the Supreme Court referenced multiple sources of international law to determine the constitutionality of the juvenile death penalty.²⁶ However, cases like

¹⁶ See *infra* Part II.

¹⁷ See *infra* Parts II.A-II.B.

¹⁸ See *infra* Parts II.C-II.D.

¹⁹ See *infra* Parts III-IV. In Part III.A, this Note asserts that many arguments for and against comparative judicial practice can be satisfied by simply separating the issues of the particular case and viewing the case in its correct context. Part III.B then looks at cases involving purely domestic issues, while Part IV provides a solution to the issues and problems that arise in Part III.

²⁰ H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 1002 (2001). Comparative law is "[t]he scholarly study of the similarities and differences between the legal systems of different jurisdictions, such as between civil-law and common-law countries." BLACK'S LAW DICTIONARY 300 (8th ed. 2004).

²¹ Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 519 (2002).

²² *Id.* at 520-22 (analyzing the various ways in which the legal community uses comparative law).

²³ See *infra* Parts II.A-II.B.

²⁴ Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185, 216 (2005). "Judicial Internationalism" has multiple titles. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (referring to judicial internationalism as "transjudicial communication").

²⁵ 125 S. Ct. 1183 (2005).

²⁶ See *infra* Part II.C.3.b for an in-depth discussion of *Roper v. Simmons*, and *infra* Part II.C.2 for a greater explanation of the controversy behind this type of decision. For other, more recent articles discussing *Roper*, see Marcia Coyle, *Foreign Law is Key in Juvenile Capital*

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Roper are unique, and after distinguishing between the three classes of cases that use comparative analyses—those involving treaties, international law, and purely domestic issues—it becomes apparent that only a small class of cases pose any new threat to American jurisprudence.²⁷ Specifically, the class of cases involving purely domestic issues that cite to foreign law simply to support the Court's value judgments represent a slippery slope that risks potential circumvention of the democratic process.²⁸

Part II.A of this Note looks at the two non-disputed classes of cases where the Court invokes comparative reasoning, followed by an explanation of a third area, purely domestic law, that has recently raised substantial controversy.²⁹ Next, Part II.B engages in a historical analysis of the Court's use of comparative reasoning.³⁰ Finally, Part II.C lays out the contemporary arguments for and against judicial internationalism.³¹

A. Two Non-Disputed Classes of Cases

The Supreme Court has historically used foreign legal sources in three types of cases: (1) cases involving treaties; (2) cases under American domestic law that involve cross-border issues; and (3) cases dealing with purely domestic issues.³² In all three types of cases, the judiciary may only use foreign legal sources as persuasive authority or it

Case Justices Split over Non-U.S. Law's Role, 27 NAT'L L.J., Oct. 2004, at 6; Jonathan Gurwitz, *If It Pleases the Court, Law by Consensus*, SAN ANTONIO EXPRESS, Mar. 13, 2005; Donna Walter, *Law Professors Dissect U.S. Supreme Court's Recent Term*, DAILY RECORD, July 13, 2005.

²⁷ See *infra* Part II.B.

²⁸ See *infra* Parts II.A-II.B; see also Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV. NO. 131, June & July 2005, at 1 n.2, available at <http://www.policyreview.org/jun05/anderson.html> (noting that only the notes dealing with constitutional questions pose a real controversial question).

²⁹ See *infra* Part II.A-II.B. These three scenarios are primarily borrowed from Sanchez, *supra* note 24.

³⁰ See *infra* Part II.B; see also *infra* notes 74-75 (explaining these time periods further).

³¹ See *infra* Part II.C.

³² See *supra* note 24. Scholars use many classifications for explaining judicial comparative analysis. One such classification frequently referenced is public versus private international law. See Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 362 (2005). Public international law, or simply international law, is law dealing with a pure international dispute between nations, whereas private international law is law dealing with the conflict of laws. *Id.* The result in this case is the same—public international law is comparable to law over treaties and any direct issue of international law. *Id.* Private international law is equivalent to laws that have international implications or conflicting interests. *Id.* Further, some categories focus on utility of judicial internationalism, such as empirical or expository. These classifications are discussed in detail *infra* Part II.B.

risks circumventing the democratic system.³³ Thus, the risk behind judicial internationalism increases when the judiciary puts foreign sources on an equal footing with other mandatory authority.³⁴ The level of controversy varies depending on the jurisdictional implications behind each particular case, and the amount of influence the source has on a court's decision.³⁵ As a result, the third line of cases, those citing foreign law in purely domestic deliberations, raises considerable controversy simply because the foreign sources receive undue weight when the case lacks a tangible international significance.³⁶ Although the first two types of cases do not generally raise controversy for their foreign references, it is important to distinguish them because they are often confused with the purely domestic cases.³⁷

1. Cases Involving Treaties

One commonly referenced Supreme Court case looking to foreign legal principles to interpret treaties is *Air France v. Saks*.³⁸ *Air France* involved a dispute over the interpretation of certain terms in the Warsaw

³³ See *infra* Part II.D.2. Persuasive authority is authority that has no binding legal precedent on the court; rather, the judges use it as an aid in interpreting a legal standard of the United States. BLACK'S LAW DICTIONARY, *supra* note 20, at 795. Mandatory authority (or imperative authority) is that which the courts must follow, such as the Constitution. *Id.*

³⁴ See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 199 (2003) (tracing the increasing use of international law as persuasive authority in a section titled "The Rise of Persuasive Authority"). Although the Court has not done this explicitly, recent decisions have arguably used comparative references as more mandatory authority. See *infra* Part II.B.3.

³⁵ Dammann, *supra* note 21, at 520-22.

³⁶ See *infra* Part IV.

³⁷ See *infra* Parts II.A-II.B. As an example, one report printed in the *Chicago Daily Bulletin* confused the issue considerably. Steve Lash, *High Court Cites to Foreign Law Irk Scalia*, CHIC. DAILY BULL., July 22, 2004, at 1. After a brief synopsis of Scalia's "scold[ing] [of] the [C]ourt" in his dissent, the journalist incorrectly accused him of being hypocritical. *Id.* As proof, the journalist pointed out how in the past term Scalia had "[i]ronically . . . reproached his colleagues for their refusal to defer to the rulings of foreign courts in one case." *Id.* That case, *Olympic Airways v. Husain*, 541 U.S. 1007 (2004), involved a liability claim against an air carrier under the Warsaw Convention, a treaty in which the United States is a signatory. *Id.* In short, by using a case dealing 100% with a treaty issue as an example of the Court's comparative practice, this journalist attempts to justify further comparative practice in purely domestic constitutional questions. Thus he asserts that there is no difference between using comparative legal materials to interpret a treaty that actually involves a foreign signatory, and using those same materials to interpret the Constitution.

³⁸ 470 U.S. 392 (1985). A woman sued Air France under the Warsaw Convention alleging that she became permanently deaf because of the negligent maintenance and operation of aircraft's pressurization system. *Id.* at 391.

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Convention.³⁹ Because no American case or other reference to the Convention existed on point, the majority looked to France's and other signatories' interpretations of the disputed terms in their translation of the treaty.⁴⁰ The Court stated that when interpreting treaties, not only is it appropriate to refer to the treaties' drafting records and negotiations, but also to grant considerable weight to the interpretations of "sister signatories."⁴¹

Since it is the "sister signatories" that courts reference in treaty disputes, little controversy exists because of the obvious interest those signatories share.⁴² Also, because treaties are laws shared with foreign countries, United States courts should necessarily look to those countries' interpretations to assure a fair application of the treaty and provide deference to all signatories.⁴³ In contrast to disputes that involve purely domestic constitutional issues, a court's treaty interpretation must be in step with interpretations of other nations in order to assure a fair application of the treaty, a task solely in the federal government's jurisdiction, which poses no threat to American democracy.⁴⁴ The next line of cases is similarly situated.⁴⁵

³⁹ Convention for Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, T.S. 876, reprinted at 49 U.S.C. § 40105 (2000) [hereinafter Warsaw Convention]. The Warsaw Convention makes air carriers liable for injuries sustained by a passenger "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." *Air France*, 470 U.S. at 394-95. The case turned on the definition of the word "accident." *Id.* at 395. The discovery process revealed that the airplane's pressure system was working properly the entire flight, thus the airline was not negligent. *Id.* The plaintiff asserted that any injury occurring on the plane should be considered an accident, and the airline maintained that it was not liable for accidents when it was not negligent. *Id.* Thus, in its deliberations the Court looked at the interpretations that other signatories gave to the word "accident" to find that the carrier was not at fault. *Id.*

⁴⁰ *Air France*, 470 U.S. at 398-401.

⁴¹ *Id.* at 404.

⁴² Sanchez, *supra* note 24, at 10-11, 13.

⁴³ *Id.* Even Justice Scalia, the Court's foremost critic of judicial internationalism, agrees that judges should look to the treaty interpretation of other signatories. See Full Written Transcript of Scalia-Breyer Debate on Foreign Law, <http://www.freerepublic.com/focus/f-news/1352357/posts> (last visited Mar. 31, 2007) [hereinafter Scalia-Breyer Debate]. Other cases invoking treaty issues where the Court uses comparative analysis include *Olympic Airways v. Husain*, 541 U.S. 1007 (2005); *El Al Airlines v. Tsui Yuan Tseng*, 525 U.S. 155 (1999); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991).

⁴⁴ Sanchez, *supra* note 24, at 10-11, 13.

⁴⁵ See *infra* Part II.A.2

2. Questions of International Law

One famous case concerning a dispute under American law, but invoking cross-border interests, is *The Paquete Habana*.⁴⁶ Here, the Court had no statute, treaty, or case law on point, so it turned to the rules of customary international law.⁴⁷ As justification, the Court noted that international law is America's law, and it is worth tracing the laws through history, not only as applied in the United States, but also throughout the "civilized" world.⁴⁸ The Court proceeded to quote statements made by King Henry IV, French writers during the American Revolutionary War, and Japan.⁴⁹ In the end, these diverse sources did not directly govern *The Paquete Habana* decision, but rather served as a persuasive guide for identifying a relevant customary international law practice as it applies in the United States.⁵⁰ Again, because international law issues are solely the federal government's task, and because of the large impact these decisions have on international law, state rights are not abrogated by looking abroad, and democracy is not threatened.⁵¹ As shown in the next line of cases, some decisions that lack this international legal significance face a more serious risk because of their potential infringement on state's rights.⁵²

⁴⁶ 175 U.S. 677 (1900). In *The Paquete Habana*, the plaintiffs sued for compensation after the war-time seizure of their fishing vessels. *Id.* at 679. The American government considered the boats a "prize of war," but the owners of the boats sued for the cost of the ships because they were not involved in the war. *Id.* The two vessels were auctioned off for \$490 and \$800 respectively, thus the plaintiff only sought money damages for the loss of the ship and cargo. *Id.*

⁴⁷ *Id.* at 694. Customary international law is analogous to common law, but on an international scale. It is somewhat elusive, but is generally defined by the customary international practices of states and their acceptance to be legally bound by those practices. For an in-depth discussion of customary international law, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

⁴⁸ *The Paquete Habana*, 175 U.S. at 686. The Court also noted that international law is part of America's law, and must be ascertained by American courts. *Id.* at 700. "For this purpose[.]" the Court wrote, "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of [c]ivilized nations, and, as evidence of these, to the works of jurists and commentators" of foreign nations. *Id.* at 700 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64, 214-15 (1895)).

⁴⁹ *Id.* at 687-700.

⁵⁰ See Sanchez, *supra* note 24, at 16.

⁵¹ See *Holmes v. Jennison*, 39 U.S. 540 (1840) (finding that U.S. Const. art. 1, § 10 prohibited states from entering into agreements with foreign governments).

⁵² See *infra* Part II.B.

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B. *The Controversy: Cases Involving Purely Domestic Issues*

Professor Joan Larsen has separated cases concerning purely domestic issues into three categories: expository, empirical, and substantive.⁵³ Expository references are those that use comparative legal materials to explain a domestic law in America.⁵⁴ Empirical references are used to examine the practical effect of a law on a certain situation.⁵⁵ A substantive reference seeks international guidance to define the content of a domestic rule.⁵⁶ Larsen further splits substantive references into “moral fact-finding” or “reason borrowing” decisions, which occur when the Court looks simply to the fact that a country has adopted a specific rule to justify conformity to that rule.⁵⁷ All of these references can be positive, upholding foreign law as applied to American law, or negative, rejecting the application of, or distinguishing a foreign law.⁵⁸

⁵³ Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283 (2004).

⁵⁴ Larsen, *supra* note 53, at 1288. One example Larsen gives is in *Raines v. Byrd*, where the Court discusses that many foreign laws reached a contrary result to the Supreme Court’s finding that members of Congress lacked standing to challenge the dilution of their votes brought by the Line Item Veto Act. 521 U.S. 811 (1997).

⁵⁵ Larsen, *supra* note 53, at 1289. In *Washington v. Glucksberg*, the Court used empirical references by analyzing the practical effect that laws enforcing physician assisted suicide had on the Netherlands. 521 U.S. 702 (1997); *see also* *Maine v. Taylor*, 477 U.S. 131 (1986) (involving a state’s importation of live baitfish); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (rejecting the state’s suggestion that subjecting peremptory challenges to equal protection standards would create serious administrative difficulties); *Smith v. California*, 361 U.S. 147, 152-55 (1959).

⁵⁶ Larsen, *supra* note 53, at 1291.

⁵⁷ *Id.* at 1291-94. One example of the reason-borrowing approach is illustrated in *Smith v. California*, 361 U.S. 147 (1959). Moral fact-finding is very similar to a consensus, where the Court looks to a world consensus on an issue in order to reach a decision. Larsen, *supra* note 53, at 1291. For a discussion of multiple cases invoking the moral fact-finding approach, see *infra* Part II.C.3. The other type of substantive reference Larsen refers to is called “reason-borrowing,” where the Court looks to foreign judicial opinions that address similar questions of law, and uses the reasoning to shape domestic law. Larsen, *supra* note 53, at 1287-88. The “reason-borrowing” approach was not used during the Rehnquist Court. *Id.*

⁵⁸ Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 84-89 (2004). Neuman explains that the positive use of foreign law involves: (1) a consensual “positive” basis of a right; (2) a “suprapositive” aspect, of a right independent from other law; and (3) an institutional aspect that facilitates compliance within the relevant legal system. *Id.* at 84-85. This is comparable to instances where the courts use negative inferences to international law. *Id.* Negative inferences are those which distinguish American law from foreign law and does not follow its example. *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 698-99 (2005) [hereinafter Alford, *In Search of a Theory*] (citing to multiple cases that “used comparative empiricism negatively to warn against extreme responses of totalitarian regimes to curtail civil liberties”).

Thus, the controversy of a particular case depends on the role a particular source plays in the Court's decision.⁵⁹ Although criticism of constitutional comparativism in these cases is fairly modern, the issue is not new.⁶⁰

One early example is the 1884 case of *Hurtado v. California*,⁶¹ involving a challenge to the indictment process as violating Due Process Clause.⁶² The Court looked to the *Magna Carta* in its opinion, stating that a characteristic practice of common law was to draw inspiration from all

⁵⁹ *Supra* notes 53-58.

⁶⁰ See *infra* Part II.C for a detailed analysis of constitutional comparativism throughout America's history. The Declaration of Independence shows one of America's earliest recorded references encouraging the use of comparative law where it states that the new republic would exhibit a "decent respect for the opinions of mankind." THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776). As will be discussed in Part III.A, scholars and judges alike frequently cite to this quotation in their support for judicial internationalism. See Justice Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), <http://www.asil.org/events/AM05/ginsburg050401.html> [hereinafter Ginsburg's Address] (speech to The American Society of International Law); see also Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 421 (2004).

The Declaration of Independence does not indicate which country's laws count, or whether foreign law should influence the judiciary as well as the legislature. Glensy, *supra* note 32, at 364. Nevertheless, it does suggest that the Drafters indicated a positive attitude towards the laws of foreign nations on a policy basis. *Id.* The controversy surrounding judicial internationalism has slowly emerged as the Court tests these issues by using foreign sources as authority to help decide cases involving no implications outside of America's domestic law. See *infra* Part II.C (providing contemporary criticisms of Constitutional Comparativism). The most disputed occurrences of judicial internationalism are when the Court uses comparative sources to interpret the Constitution. Anderson, *supra* note 28 (arguing against comparative constitutionalism). Anderson defines comparative constitutionalism as adjudication that "invites the deployment of a sweeping body of legal materials from outside U.S. domestic law into the process of interpreting the U.S. Constitution—and, moreover, invites it into American society's most difficult and contentious 'values' questions." *Id.* Anderson points out the most controversial element to comparative constitutionalism—defining the fundamental rights provided by the Constitution. *Id.*

⁶¹ 110 U.S. 516 (1898).

⁶² In *Hurtado*, the defendant challenged California's indictment process as violating the Due Process Clause of the Fifth and Fourteenth Amendments. *Id.* at 519. The Court looked at the constitutionality of a California statute providing that a defendant could be indicted by information and did not require indictment from a grand jury. *Id.* at 517. The provision stated that "[o]ffences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." *Id.* Information was filed against the defendant without prior review by a grand jury; he was tried, and then sentenced to death for first-degree murder. *Id.* at 518.

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bodies of justice.⁶³ The law of England is acceptable for interpreting the Constitution, the Court held, as is the law from all “lands where other systems of jurisprudence prevail.”⁶⁴ Although rare in the late 1800s, this attitude has gained prevalence in recent years, but not without considerable criticism.⁶⁵ The central critique is that the Constitution is unique to the United States, and that a change in its interpretation by the Supreme Court often alters the effect of state law relying on earlier interpretations, thus abrogating state rights and potentially weakening the democratic process.⁶⁶ A look at past Supreme Court decisions throughout history will help to understand this development, and provide a basis for understanding the various arguments for and against constitutional comparativism.⁶⁷

C. *A Historical Look at the Supreme Court’s Judicial Internationalism*

The judicial use of comparative law in the United States has undergone multiple changes throughout history.⁶⁸ From the nation’s beginning to the Supreme Court’s most recent decision in *Roper*, United

⁶³ *Id.* at 523. This was in response to the defendant’s use of the Magna Carta to make his argument. *Id.* at 521. The defendant asserted:

[T]he phrase “due process of law” is equivalent to “law of the land,” as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning . . . and [was] . . . introduced into the Constitution of the United States as a limitation upon the powers of the government . . .”

Id. The Court responded:

There is nothing in Magna Charta . . . which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.

Id. at 531.

⁶⁴ *Id.*

⁶⁵ See *infra* Part II.C for a complete summary of the criticisms of constitutional comparativism.

⁶⁶ See *infra* Part III.B.3 for an analysis of where this “potential” exists more specifically.

⁶⁷ See *infra* Part II.D for a complete summary of these arguments.

⁶⁸ See Glensy, *supra* note 32, at 361-63 (discussing the patterns and methods of comparative law usage in the American courts); see also David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 575-83 (2001) (comparing the period following the founding of America to the more hesitant courts of the twentieth- and twenty-first centuries); Glensy, *supra* note 32, at 361-62 (quoting *Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 77 (2004)) [hereinafter *The Feeney Resolution*]. Glensy points out that the “use of international sources in cases involving purely domestic concerns is alien to the American legal system, historically[.]” which dispels the very premise of the Feeney Resolution. Glensy, *supra* note 32, at 361-62. The Feeney Resolution was the first attempt by some members of Congress to make judicial comparativism illegal. *Id.*

States courts have referenced foreign legal sources in a variety of cases.⁶⁹ Although the practice is relatively infrequent, it appears in nearly every period of America's history.⁷⁰ In surveying Supreme Court opinions throughout history, various trends become apparent.⁷¹ In consideration of this history, it also becomes obvious that only in the most recent decisions does the Court risk traveling down the slippery slope that threatens democracy by elevating foreign sources above persuasive authority status.⁷² Three time periods provide an adequate framework for understanding the major attitude shifts toward judicial use of comparative law: (1) the period surrounding America's change from colonialism to statehood up until the late 1800s;⁷³ (2) the period between the conclusion of World War II and throughout most of the Cold War;⁷⁴ and (3) the period from the end of the Cold War to the present.⁷⁵

⁶⁹ Glensy, *supra* note 32, at 361 ("United States courts have, from the founding of the nation to the present day, referenced foreign legal sources in a variety of different contexts.").

⁷⁰ *Id.*

⁷¹ *Id.* at 362.

⁷² *See infra* Part II.C.3.

⁷³ *See* Bodansky, *supra* note 60, at 421 (discussing the attitude of our founding fathers toward comparative law); Glensy, *supra* note 32, at 364 (discussing the early use of comparative law by the Founders and early Supreme Court Justices). Most references to this period indicate that the courts referred to foreign legal concepts in a positive way. *See* Fontana, *supra* note 68, at 575-83 (discussing how many early judges had an interest in natural law, and that this interest caused them to often look outside the Constitution in deciding cases); Larsen, *supra* note 53, at 1309-15 (discussing the Founder's belief in a natural law common to all nations); Neuman, *supra* note 58, at 82-83 ("... after the Civil War had vindicated the Union's claim to nationhood, the Supreme Court repeatedly invoked international law doctrines and writers").

⁷⁴ This period is the least definite of the three for picking out the attitude of judges toward comparative law, but nevertheless, the impact that this era had on comparative law in the United States in general is important because it provides an explanation for the opposition to judicial internationalism in the present day. *See generally* Glensy, *supra* note 32.

⁷⁵ Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 222 (1999) ("The American courts . . . have begun to consider the value of comparative materials in decision-making[,] and that "[o]ne source of newfound interest in comparative law from outside the traditional sub-discipline is usually understood to be the new, or at least newly realized, condition of so-called globalization."); *see also* Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 310-12 (noting that "the remarkable globalization of human freedom . . . marks the most profound social revolution of our time"); Slaughter, *supra* note 34, at 205 (noting that judicial comity is "a presumption of recognition that is something more than courtesy but less than obligation").

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1. The Founders and Early Decisions of the Court

The expansive period following America's colonialism until the late 1800s shows the greatest level of tolerance toward judicial internationalism in the American legal community.⁷⁶ In the early years of the American republic, before the United States had developed much law of its own, "America was fundamentally a law-taker and a law-borrower."⁷⁷ Thus, little doubt exists whether the Founders supported the use of comparative law when framing the Constitution.⁷⁸ For example, James Madison rhetorically asked how much gain America would have if its questions had "been previously tried by the light in which they would probably appear to the unbiased part of mankind."⁷⁹ This passage shows that the framers were very aware that judicial decisions in all countries had an international significance and that foreign decisions might be helpful for issues "tried" in America.⁸⁰ At a minimum, these writings show an adherence to the universal truths of natural law principles in Constitutional interpretation.⁸¹ This Part illustrates how the Court's adherence to natural law resulted in frequent

⁷⁶ Glensy, *supra* note 32, at 364. Interestingly, this period also has the fewest references outside of English common law. *Id.* Glensy discusses how United States courts in America's formative years did not use many international legal sources because the practical communication difficulties at the time limited its access to those sources. *Id.* He states: "Other than English common law, from which American common law was a direct descendent, there simply was not much foreign law available to the judges of those early years from which to derive comparative reasoning." *Id.*

⁷⁷ Koh, *supra* note 75, at 308-09. Koh suggests that early American lawyers and judges of this time were educated on international legal rules and their relation to domestic legal rules from the beginning. *Id.*

⁷⁸ *Id.* at 309.

⁷⁹ Bodansky, *supra* note 60, at 421 (quoting THE FEDERALIST NO. 63 (James Madison) (noting how attention to the judgment of other nations is important to every government)). This concept is further supported in *The Paquete Habana*. Additionally, *Federalist No. 63* asks:

What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?

Id.

⁸⁰ Bodansky, *supra* note 60, at 421.

⁸¹ Fontana, *supra* note 68, at 577. Fontana asserts that for American judges in the late eighteenth century, the sources of fundamental law were as open-ended as they were in English opposition theory. "The colonists inherited a tradition that provided not only a justification for judicial review but also guidelines for its exercise . . . [and] judges were to look to natural law and the inherent rights of man, as well as to the written constitution, in determining the validity of a statute." *Id.*

comparative inquiries in issues concerning international law, while leaving considerable ambiguity as to domestic constitutional issues.⁸²

Since America had next to no indigenous law of its own, the sources of fundamental law were considerably open-ended in the late eighteenth and early nineteenth centuries.⁸³ Thus, the colonists inherited their traditions and guidelines for judicial review.⁸⁴ When the Constitution did not deal with a problem directly, the judges looked to natural law.⁸⁵ Thus, at least in some instances, references to foreign laws were customary in constitutional interpretation, but the Court lacked definition as to exactly when these references were appropriate.⁸⁶ The main factor for consideration, however, was that these references could be a legitimizing factor within the international community.⁸⁷

Chief Justice John Jay acknowledged this legitimizing trait in *Chisholm v. Georgia*,⁸⁸ when he wrote, “the United States . . . , by taking a

⁸² See *infra* Part II.C.1.

⁸³ Fontana, *supra* note 68, at 577. Fontana asserts that the number of citations to international law was very low during that period, but the main explanations were that there were very few functioning constitutional courts and the amount of available comparative materials was next to none. *Id.* at 581 n.199. These reasons, he explains, make it very surprising that the courts cited to foreign sources at all. *Id.* In fact, given the ratio of comparative constitutional law citations to the available materials, especially considering the communication difficulties in obtaining those materials, the courts made a great deal of use out of comparative materials in the early Republic, in relative terms. *Id.*; Koh, *supra* note 75, at 308.

⁸⁴ Fontana, *supra* note 68, at 577.

⁸⁵ *Id.* Fontana notes that:

Comparativist inquiry under natural law helped reveal these universalist truths by looking to the thoughts of others. These “inherent rights of man” could be revealed through comparativist inquiry either at the time of constitutional drafting or of constitutional interpretation by looking to the revealed truths of natural law and reason as others had discovered them.

Id. In contrast, when the Constitution dealt with a problem in an affirmative fashion, such as in governmental structure cases and those providing a clear protection for individual rights, it was controlling. *Id.*

⁸⁶ *Id.* It is important to note that Fontana somewhat promptly equates the readiness of the founders to use foreign laws in constitutional interpretation, with the acceptability of American judges to use those laws in constitutional interpretation. *Id.* at 578. This Note does not attempt to make this equation, but rather aims at setting a general foundation for the attitude towards comparative law during that time period.

⁸⁷ Glensy, *supra* note 32, at 365.

⁸⁸ 2 U.S. 419, 474 (1793). *Chisholm* dealt with a suit brought against the American Attorney General, who claimed immunity under the state’s sovereign status. *Id.* at 429. The Court concluded that such immunity did not exist under Article III of the Constitution, which provides for jurisdiction by the Court when a state was a party to a controversy between a state and citizens of another state. *Id.* at 479.

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place among the nations of the earth, [became] amenable to the laws of nations."⁸⁹ The laws of other nations served as an advisory pool for the Supreme Court.⁹⁰ Another example of this attitude is demonstrated in *Talbot v. Seeman*,⁹¹ where Chief Justice John Marshall opined that judges should not construe laws of the United States as to infract common principles of other nations.⁹² These decisions never declared a standard governing when an inquiry into foreign legal sources was appropriate, but rather followed a subjective standard, illustrated in *Thirty Hogsheads of Sugar v. Boyle*.⁹³ There the Court wrote that United States courts should receive the decisions of the courts of every country, as long as they are founded in law common to the United States, not as authority, but with respect.⁹⁴

Next, in *Hilton v. Guyot*,⁹⁵ the Court stated that when it lacked domestic legal guidance in an international dispute, it should show comity to the laws of other nations.⁹⁶ The Court stated that in order to

⁸⁹ *Id.* at 474.

⁹⁰ Glensy, *supra* note 32, at 365.

⁹¹ 5 U.S. 1 (1801). *Talbot* involved the presidential seizure of a French war vessel. *Id.* The captain was ordered to seize the ship, claimed he was entitled to the salvage value of the ship after the court ordered him to deliver the proceeds, and he sued. *Id.* at 6. In the suit, the Court engaged in interpreting various acts that the Government made with regards to its relationship with France. *Id.* at 27-30.

⁹² Glensy, *supra* note 32, at 365 (quoting *Talbot*, 5 U.S. at 43).

⁹³ 13 U.S. 191 (1815). In *Thirty Hogshead of Sugar v. Boyle*, the Supreme Court reviewed a lower court's decision to condemn the claimant's sugar as enemy property. *Id.* The Danish claimant's sugar was captured by the United States while raiding a British vessel that had docked on an island, which was a newly acquired territory of the British. *Id.* The Court concluded that once the island, which was originally Danish-owned, was acquired by the British, the soil and the product that came from the soil became British property as a result. *Id.* Although the claimant, a Danish man, was at war with Britain, his incorporation in a British territory qualified his land as enemy territory. *Id.* at 197.

⁹⁴ *Id.* at 198 (emphasis added). Thus, although these foreign decisions were never binding, the Court did receive them and advisory aid in order to show respect to other nations. Glensy, *supra* note 32, at 366.

⁹⁵ 159 U.S. 113 (1895) (considering the extent to which the United States should recognize foreign decisions in a contract case involving French plaintiffs and American defendants).

⁹⁶ *Id.* at 162-64. Comity means that courts owe respect "to the laws and acts of other nations by virtue of common membership in the international system." Slaughter, *supra* note 34, at 205. Another good example of the Court's subscription to comity is *The Schooner Exchange v. McFaddon*, where Chief Justice Marshall expressed his concern that America would violate its good faith abroad if it acted in a manner inconsistent with the rest of the world. 11 U.S. 116, 137 (1812). This effort to find consistency with the rest of the world came down to an issue of comity for the laws of other nations. Perhaps an even clearer example is *Martin v. Hunter's Lessee*, which involved an inquiry into whether the appellate power of the Supreme Court extended to the state court of appeals. 14 U.S. 304 (1816). The Court stated that "[i]t would... be perilous to restrain [the Court] in any manner

preserve American sovereignty, while comity carried no obligation, it should still provide more than simple courtesy and good will.⁹⁷ The Court thus balanced the priority of recognizing foreign laws with the obligation to preserve America's sovereignty.⁹⁸ This goal was very clear in the line of cases that began with *Chisholm* in 1793 and capsulated with *Hilton* in 1894, but all of those cases concerned an international dispute of some sort.⁹⁹ As a result, although the Court's goal of comity to other nations was clear, it was equally clear that the direct international consequences carried by these cases demanded a greater level of respect.¹⁰⁰ The Court left open the issue of how comity could justify following foreign precedents for domestic constitutional questions, and only in a few later cases did the Court address this question.¹⁰¹

In *Worcester v. Georgia*,¹⁰² Chief Justice Marshall looked to the laws of other nations to help define the status of Indian tribes under the Constitution.¹⁰³ Later, in *Holmes v. Jennison*,¹⁰⁴ Chief Justice Roger Taney looked to the foreign interpretation of various words in the Constitution

whatsoever, inasmuch as it might hazard the national safety." *Id.* at 335. When dealing with a question of which "the principles of the law and comity of nations often form an essential inquiry," i.e., those that involve matters in which other nations are "deeply interested," comity towards those nation's laws is essential. *Id.* For further reference into the contextual background of *Martin v. Hunter's Lessee*, see Sanchez, *supra* note 24, at 14.

⁹⁷ *Hilton*, 159 U.S. at 113.

⁹⁸ For a full analysis of the *Hilton* decision, see Sanchez, *supra* note 24, at 16-18.

⁹⁹ See *supra* notes 91, 93, 95 and accompanying text. *Talbot* and *Thirty Hogsheads* involved an international maritime dispute, whereas *Hilton* dealt with an international tort conflict.

¹⁰⁰ See *supra* notes 91, 93, 95 and accompanying text.

¹⁰¹ See *infra* notes 102, 105.

¹⁰² 31 U.S. 515 (1832).

¹⁰³ *Id.* at 560-61. In this case, the State of Georgia prosecuted missionaries for residing on the Cherokee reservation which violated a state law prohibiting whites from residing in Cherokee territory without a license. *Id.* at 529, 532. The missionaries appealed to the Supreme Court, arguing that the federal rights of the Cherokee Nation invalidated the Georgia statute. *Id.* at 525. Citing *Vattel*, Justice Marshall held America to the principles of foreign law, finding that the weak states do not surrender their right to self-government and independence when under protection of a stronger state. For more discussion of this case, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 40 (2002).

¹⁰⁴ 39 U.S. 540 (1840). The issue in *Holmes* was whether a state had power under the Constitution to deliver an individual found within its territory to a foreign government to be tried for offences alleged to have been committed against that government. *Id.* at 561. The court answered the question in the negative, noting that U.S. Const. art. 1, § 10 prohibited states from entering into agreements with foreign governments. *Id.* at 570. The constitutional prohibition applied, not only to a continuing agreement embracing classes of cases, or a succession of cases, but to any agreement whatever. *Id.* at 572. Thus, the governor lacked authority to issue the warrant, and petitioner was entitled to his release. *Id.* at 579.

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in order to understand why the framers used those words.¹⁰⁵ In both *Holmes* and *Worcester*, the Court used foreign sources of law to determine issues that were, in effect, purely domestic.¹⁰⁶ These decisions faced little opposition to their foreign references, most likely because of their mere expository nature, but a clear dispute would later develop against similar cases with a purely domestic application, particularly with regard to human rights issues.¹⁰⁷

Specifically, two main cases reveal an opposition to the use of international legal sources during that time period.¹⁰⁸ In *Chisholm*, Justice Blair argued that the European Confederation was not sufficiently close to justify an analogical application to American law.¹⁰⁹ Similarly, the majority opinion of *Dred Scott v. Sandford*¹¹⁰ rejected comparative arguments that discredited its decision.¹¹¹ The Court declared that changes in public opinion in Europe, or even in America, should never induce the Court to give the Constitution a more liberal construction.¹¹² These opinions show that although the Court was willing to accept foreign legal references in areas concerning international law, it sought

¹⁰⁵ *Id.* at 569-73 (using foreign law when deciding whether the Constitution would allow a state governor to extradite a guilty defendant to Canada). The Court wrote:

A few extracts from an eminent writer on the laws of nations, showing the manner in which these different words have been used, and the different meanings sometimes attached to them, will, perhaps, contribute to explain the reason for using them all in the Constitution; and will prove that the most comprehensive terms were employed in prohibiting to the States all intercourse with foreign nations.

Id. at 572.

¹⁰⁶ For additional references of judges citing to purely domestic sources, see Fontana, *supra* note 68, at 582-83, who looks to quotations of Roman law, civil law, and English common law extensively.

¹⁰⁷ *Infra* notes 109-13.

¹⁰⁸ *Infra* notes 109-13.

¹⁰⁹ *Chisholm v. Georgia*, 2 U.S. 419, 450 (1793). Justice Blair stated that European precedents are "utterly destitute of any binding authority . . ." *Id.* Likewise, in his dissent, Justice Iredell contended in the same decision that no part of foreign law could apply to the case, and that the decision should rely on constitutional authority alone. *Id.* at 449.

¹¹⁰ 60 U.S. 393 (1856) (holding that descendants of Africans who were sold as slaves could never become citizens of the United States).

¹¹¹ *Id.* at 426.

¹¹² *Id.* The Court declared that:

No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the [Supreme Court] to give to the words of the constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.

Id.

independence in areas of law that did not directly concern other nations – a divergence that carried well into the twentieth century.¹¹³

2. Post World War II Decisions

The attitudes toward comparative law in the American legal community following World War II provide a partial explanation of the present attitudes toward judicial internationalism.¹¹⁴ Natural law principles that transcend all borders, those relied on by the Court throughout the eighteenth and nineteenth centuries, faded from legal scholarship during that period.¹¹⁵ Likewise, the Cold War and America's global hegemony largely paralyzed positive comparative thought in America's legal community.¹¹⁶ As a result, the United States adopted a much more exclusive view of national membership and human rights.¹¹⁷ As shown below, this attitude had little effect on the judges on the bench at the time, but created hesitancy in the judges who were being educated during that period.¹¹⁸ Part II.C.2 describes the internationally unfettered decisions made by the Court at the very end of World War II until the early 1960s.¹¹⁹

¹¹³ See *infra* Part II.C.2.

¹¹⁴ Alford, *In Search of a Theory*, *supra* note 58; see also Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1909 (1992) (showing the similarities between nations during the Cold War); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 206 (1983) (referring to the peace achieved between states since World War II); Koh, *supra* note 75, at 308-09 (explaining that the days of American global hegemony brought an obsession with America and the "domestic legal agenda largely drove out the international"). Koh also mentions that the dark days of the Cold War paralyzed comparative law in America. Koh, *supra* note 75, at 309; see also Fontana, *supra* note 68, at 544-45 (2001) (addressing the Cold War changes).

¹¹⁵ Alford, *In Search of a Theory*, *supra* note 58, at 662 ("The decline of natural law interpretations of the Constitution in the nineteenth century is well documented."). For further references, Alford cites to Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 65-68 (1989); and William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). Contributing to this decline was the growing idea that reality is not fixed, but disjointed and open to many interpretations. Riles, *supra* note 75, at 254.

¹¹⁶ Koh, *supra* note 75, at 309.

¹¹⁷ Cleveland, *supra* note 103, at 283-84.

¹¹⁸ Koh, *supra* note 75, at 309. Koh contends that the lack of emphasis on international laws in legal scholarship resulted in a generation of judges with little education as to the influence of international law on United States law. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2364 (1991) (demonstrating that a generation of lawyers and judges reached maturity unaware of America's rich judicial history of using international law).

¹¹⁹ See *infra* Part II.C.2.

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Justice Frankfurter's decisions provide the most comprehensive use of comparative reasoning during that period.¹²⁰ He quoted foreign law frequently using both positive references, following the precedents of other countries, and negative references, distinguishing foreign precedents from American law.¹²¹ Most significant were Justice Frankfurter's decisions pertaining to individual liberties under the Constitution.¹²² For example, in *Smith v. California*,¹²³ Justice Frankfurter found that it was acceptable to allow expert testimony to show evolving standards of decency, borrowing his reasoning from recent debates from the House of Commons.¹²⁴ In *Culombe v. Connecticut*,¹²⁵ Justice Frankfurter substantially discussed foreign materials to exemplify the world's unanimity on the belief that personal liberty mandates a guarantee that little time pass between arrest and appearance in court.¹²⁶

¹²⁰ Fontana, *supra* note 68, at 583 (noting that Justice Frankfurter is "perhaps the most active comparativist in the history of the Court").

¹²¹ *Id.* at 583-84. ("Frankfurter would treat the answers of other constitutional systems . . . as relevant, sometimes . . . treating those comparative sources as precedents. At other times, [he] would use negative comparativism, claiming that American commitments were defined by our constitutional differences from other federal structures."). Cases using both positive and negative sources are found in Fontana, *supra* note 68, at 584 nn.211-12. Compare, e.g., *New York v. United States*, 326 U.S. 572, 583-84 n.5 (1946) (noting that "[a]ttempts . . . to solve kindred problems arising under the Canadian and Australian Constitutions have also proved to be a barren process" when deciding whether Congress had the right to tax the State of New York on sale of mineral water); *O'Malley v. Woodrough*, 307 U.S. 277, 281 nn.6 & 8, 282 (1939) (using foreign precedent to determine whether the imposition of an income tax on judges' salaries was constitutional); *Graves v. New York*, 306 U.S. 466, 90-91 n.1 (1939) (Frankfurter, J., concurring) (using other federal systems to argue for the abandonment of tax immunity doctrine), with *Irvin v. Dowd*, 359 U.S. 394, 408 (1959) (Frankfurter, J., dissenting) (comparing other countries' systems of federal judicial review with America's); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 361 (1959) (distinguishing federal maritime jurisdiction from other federal systems, noting "[s]uch a system is not an inherent requirement of a federal government"); *Williams v. North Carolina*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring) (rejecting other countries' federal systems that do not uphold the states' rights to regulate marriage and divorce).

¹²² Fontana, *supra* note 68, at 583-84.

¹²³ 361 U.S. 147, 166-67 (Frankfurter, J., concurring).

¹²⁴ Frankfurter noted that these debates "impressively" explained "[t]he importance of this type of evidence." *Smith*, 361 U.S. at 166 (citing 597 Parliamentary Debates, H. Comm., No. 36 (Dec. 16, 1958)). Some scholars have referred to this approach to comparative reasoning among judges as "reason-borrowing." See Larsen, *supra* note 53, at 1291-92.

¹²⁵ 367 U.S. 568, 583-84, n.25 (1961).

¹²⁶ *Id.* For further decisions by Frankfurter, see *Shaughnessy v. United States*, 345 U.S. 206 (1953) (dissenting); *Freeman v. Hewitt*, 329 U.S. 249, 251 n.1 (1946) (majority opinion); *New York v. United States*, 326 U.S. at 573, 580 n.4 (majority opinion); *United States v. County of Allegheny*, 322 U.S. 174, 198 (1944) (dissent); *Williams*, 317 U.S. at 304-05 (concurrence) (upholding the states' ability to regulate marriage and divorce, despite foreign federal systems to the contrary); *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 184 (1942) (concurrence);

Following his lead, subsequent judges referenced international legal sources in multiple other cases involving individual liberties such as the cruel and unusual punishment standard addressed in *Trop v. Dulles*,¹²⁷ the Fifth Amendment protection for criminals in *Miranda v. Arizona*,¹²⁸ and the right to abortion in *Roe v. Wade*.¹²⁹

In *Trop*, in order to interpret the scope of the Eighth Amendment, the Court “[drew] . . . meaning from the evolving standards of decency that mark the progress of a maturing society”; a test used in later Eighth Amendment decisions.¹³⁰ With the help of an international consensus, the Court found that depriving an individual of his citizenship is a cruel and unusual punishment.¹³¹ Similarly, in *Miranda v. Arizona*, the Court cited four commonwealth nations to help justify requiring police to read a criminal his rights before arrest.¹³² Finally, unlike in *Trop*, the Court in *Roe v. Wade* did not discriminate between civilized democracies, as it did in *Trop*, when it looked to Roman, Persian, Greek, and English laws alike to show that abortion is a historically accepted practice.¹³³ These decisions show a clear policy of looking to the “standards of decency” not only in America, but also throughout the world, to define individual liberties under the Constitution.¹³⁴ On the surface, the Court gave more deference to foreign precedents than it did to all state laws to the

Graves, 306 U.S. at 487 n.1 (concurrence) (involving a decision on intergovernmental tax immunity).

¹²⁷ 356 U.S. 86 (1958) (ruling that depriving an individual of his citizenship violated the Eighth Amendment as a cruel and unusual punishment).

¹²⁸ 384 U.S. 436 (1966) (requiring procedural safeguards to protect the privilege of self-incrimination).

¹²⁹ 410 U.S. 113 (1973) (legalizing abortion).

¹³⁰ *Trop*, 356 U.S. at 101.

¹³¹ *Id.* at 102-03. Noting that out of eighty-four countries surveyed, all but two were in unanimity that statelessness is unacceptable as punishment for crime. *Id.* The Court stated: “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime” and that a “United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries . . . impose denationalization as a penalty for desertion.” *Id.*

¹³² *Miranda*, 356 U.S. at 486-90. The Court found from these sources that “lawlessness will not result from warning an individual of his rights or allowing him to exercise them.” *Id.* at 489. For nearly five pages of the decision, the majority examined the protection given to citizens in England, Scotland, and India, pertaining to custodial interrogation. *Id.* at 486-90. The Court noted that where foreign jurisdictions have such protection absent Constitutional provisions, the United States should “give at least as much protection to these rights as is given in [these] jurisdictions” because of the extra protection under the Fifth and Fourteenth Amendments of the Constitution. *Id.* at 489-90.

¹³³ *Roe*, 410 U.S. at 129-33.

¹³⁴ *Glensy*, *supra* note 32, at 372. *But see also* Anderson, *supra* note 28, at 34-37 (criticizing the notion of universal rights, and attributing the Court’s references to “universal” as merely meaning “international”).

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contrary.¹³⁵ Thus, this period marks the beginning of a slippery slope, where the Court began to use foreign laws to overturn state laws concerning issues that had no real foreign significance, while ignoring foreign laws to the contrary.¹³⁶ Since then, the Court has looked to the international arena in almost every decision involving individual liberties cases.¹³⁷

3. Comparative Constitutionalism from the 1980s to the Present

Although many scholars currently downplay the significance of comparative references, their impact should not be underestimated.¹³⁸ For one, the notion of “universal rights” that transcend borders has resulted in more comparative references in constitutional questions than ever before.¹³⁹ Additionally, the references carry great significance through wide implications pertaining to how America should view future jurisprudence.¹⁴⁰ Yet another change in the significance of these decisions during this period is in the universality of references to foreign laws, including cases implicating the Eighth Amendment,¹⁴¹ Substantive

¹³⁵ See *supra* notes 130-34.

¹³⁶ See Alford, *In Search of a Theory*, *supra* note 60, at 670 (“It should be noted that the reasoning and holding in [Roe] have been rejected elsewhere.”). But the Court has not viewed and likely will not view international sources as “emphatically relevant” in determining the scope of reproductive freedoms in this country.

¹³⁷ See *infra* Part II.C.3.

¹³⁸ Glensy, *supra* note 32, at 373. Glensy looks to Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 419-20 (2003), which concludes that out of the rare instances of comparative references, they were nothing more than “references.” See also Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 171 (2002) (noting that comparative references in recent years are “not central to any conclusion reached, and that the resulting interpretation of the Constitution could stand independently of foreign support”).

¹³⁹ See Harding, *supra* note 138, at 410-11. Harding comments, “Comparativists have traditionally focused on private rather than public law, and one would expect judges to reflect this practice by thinking about foreign law in private law issues before incorporating it in constitutional cases.” *Id.*

¹⁴⁰ Glensy, *supra* note 32, at 373. Glensy noted that “given the increasing use of comparative analysis, one should not minimize the doctrinal impact of foreign materials on Eighth Amendment and Due Process jurisprudence, or the fact that the Supreme Court sees fit to engage in this type of analysis in these contexts.” *Id.*

¹⁴¹ Since *Trop v. Dulles*, discussed *supra* part II.C.2, the Court has used comparative analysis in many cases besides *Roper*. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (determining whether execution of mentally retarded is cruel and unusual by reference to a national consensus against the practice); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding death penalty for those 16 and older); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (banning the death penalty for murderers 15 and younger); *Enmund v. Florida*, 458 U.S. 782, 796 (1982) (banning the death penalty for those convicted of felony murder); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (banning the death penalty for rape offenders).

Due Process,¹⁴² Federalism,¹⁴³ and Equal Protection.¹⁴⁴ These cases show a clear “diversification” of the contexts where the Court finds it proper to expand its jurisprudence with comparative analysis in purely domestic issues.¹⁴⁵

The phenomenon of globalization offers significant explanation for this diversification because of the incomparable level of access it provides to foreign domestic laws.¹⁴⁶ However, globalization can carry significant problems.¹⁴⁷ This “problem of globalization” is best summarized by Professor Koh, who stated “[a] major challenge currently facing global policymakers is deciding, as we marketize globally and democratize locally, how best to promote human rights *without sacrificing cultural values[.]*” most importantly, democracy.¹⁴⁸ Multiple members of

¹⁴² *Lawrence v. Texas*, 539 U.S. 558 (2003) (upholding rights for homosexuals); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (assisted suicide); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 945 (1992) (abortion); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting rights for homosexuals).

¹⁴³ Some cases using comparative analysis for issues of federalism include *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (looking to foreign court decisions on First Amendment issues); *Printz v. United States*, 521 U.S. 898 (1997) (striking portions of the Brady Bill, dealing with gun control); and *Raines v. Byrd*, 521 U.S. 814 (1997) (striking down the Line Item Veto statute).

¹⁴⁴ The most significant comparative equal protection ruling is *Grutter v. Bollinger*, 539 U.S. 306 (2003), which looked to international legal precedent in upholding the University of Michigan Law School's affirmative action program.

¹⁴⁵ Glensy, *supra* note 32, at 373-87.

¹⁴⁶ See generally Koh, *supra* note 75. The increase in use of comparative references during the World Wars and especially in the late twentieth- and early twenty-first centuries makes sense as communication and the number of democratic nations exponentially increased worldwide. *Id.* at 310. Professor Koh, in his article *The Globalization of Freedom*, shows that only three decades ago, there were fewer than twenty-five democracies in the world. *Id.* Presently, approximately 120 nations out of more than 190 total governments qualify (either in form or in substance) as governments with stated commitments to the preservation of freedom and democratic self-governance. *Id.* This results in approximately 64% of the world's population now living under some form of democratic rule. *Id.*

¹⁴⁷ See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (looking to international legal precedent in upholding the University of Michigan Law School's affirmative action program); *infra* note 148; see also Glensy, *supra* note 32 and accompanying text.

¹⁴⁸ Koh, *supra* note 75, at 311 (emphasis added). In his article, Koh discusses how scholars have largely overlooked the globalization of human freedom that, to his mind, marks the most profound social revolution of our time. *Id.* at 310. Koh opines that, in the world of foreign policy in the government, the politicians that have innovative ideas have too little influence, while those with influence have too few ideas. *Id.* “In the policy world, what academics write about is usually scorned, and more often, utterly ignored.” *Id.* Koh uses this analysis to lead into his statement quoted above, that it is the threat of sacrificing cultural values that causes people to object to new ideas, both at home and abroad. *Id.* at 311. Then, perhaps most importantly, he ties this into the context of American education, stating that, “We must teach others how to perpetuate their new and frightening freedom through the construction of wise restraints, the teaching of cultural understanding and

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the Supreme Court have also recognized this problem.¹⁴⁹ Although six Justices from the Rehnquist Court, including Justice O'Connor, accepted comparative jurisprudence, Justices Scalia, Thomas, and Chief Justice Rehnquist rejected comparative jurisprudence.¹⁵⁰ The two areas where these Justices have criticized judicial internationalism the most are cases involving the constitutionality of anti-sodomy statutes and the death penalty.¹⁵¹ It is in these decisions that the Court traveled furthest down the slippery slope, putting states' rights at risk.¹⁵²

a. *Anti-Sodomy Decisions*

In *Bowers v. Hardwick*,¹⁵³ a conservative Supreme Court upheld a state's anti-sodomy statute, and analyzed proscriptions against homosexual conduct throughout world history.¹⁵⁴ The Court rejected the contention that homosexuality is implicit in the concept of ordered liberty and passed it off as "facetious."¹⁵⁵ Sixteen years later, a more liberal Court used the same comparative reasoning from *Bowers* to overturn the decision.¹⁵⁶ In *Lawrence v. Texas*,¹⁵⁷ the Court overturned *Bowers*, rendering unconstitutional all laws prohibiting homosexual conduct.¹⁵⁸ From the onset of the decision, the *Lawrence* Court suggested

tolerance, the development of self-sustaining social, political and economic institutions, and the acceptance of human dignity and human rights as genuinely universal values." *Id.* It is the acceptance of the "genuinely universal" nature of human rights and dignity that lawmakers and judges need to promote. *See generally* Part III.

¹⁴⁹ *Infra* notes 150-52 and accompanying text.

¹⁵⁰ Anderson, *supra* note 28, at 4. *See generally* *Roper v. Simmons*, 125 S. Ct. 1183 (2005). It is important to note that the new Roberts Court has yet to speak on this subject; however, Chief Justice Roberts voiced an opinion similar to Justice Alito's in his confirmation hearings, that constitutional comparativism "allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they're finding precedent in foreign law—and use that to determine the meaning of the Constitution." Larisa Epatko, *John Roberts, Chief Justice of the United States*, PBS ONLINE NEWS HOUR (2005), http://www.pbs.org/newshour/indepth_coverage/law/supreme_court/justices/index.html (last visited Mar. 31, 2007).

¹⁵¹ *See infra* Parts II.C.3.a-II.C.3.b.

¹⁵² *See infra* Part III.

¹⁵³ 478 U.S. 186 (1986).

¹⁵⁴ *Id.* at 192.

¹⁵⁵ *Id.* at 194. In his concurrence, Justice Burger utilized comparative analysis even more by looking to Roman, English, and early American law, reasoning that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, J., concurring).

¹⁵⁶ *Infra* note 157.

¹⁵⁷ 539 U.S. 558 (2003).

¹⁵⁸ *Id.* at 558. Specifically, the decision declared unconstitutional a Texas statute prohibiting two adult persons of the same sex from voluntarily engaging in intimate sexual conduct. *Id.*

that *Bowers* had always been wrong to hold that prohibitions on homosexual sodomy reflected values shared with a “wider civilization.”¹⁵⁹ As evidence, the Court pointed out that the European Court of Human Rights has always held that anti-sodomy laws violate the European Convention on Human Rights.¹⁶⁰ In addition, the Court relied heavily on the English precedent in *Dudgeon v. United Kingdom*.¹⁶¹ The Court offered no reasoning or justification for its references; thus, the mere fact that other nations accepted the individual’s right to engage in homosexual sodomy seemed important enough for the Court’s constitutional analysis.¹⁶² The Court utilized comparative analyses just as freely in its most recent death penalty decisions.¹⁶³

b. Death Penalty Cases

The three most significant death penalty cases invoking the Courts’ comparative reasoning are *Thompson v. Oklahoma*,¹⁶⁴ *Atkins v. Virginia*,¹⁶⁵ and *Roper v. Simmons*.¹⁶⁶ Decided in 1988, the *Thompson* decision looked to whether “cruel and unusual punishments” under the Constitution forbade the execution of juveniles ages fifteen and younger.¹⁶⁷ All nine Justices agreed that the governing standard for separating cruel and unusual punishments was “evolving standards of decency that mark the progress of a maturing society.”¹⁶⁸ Where they disagreed was in choosing which societies counted.¹⁶⁹ After a brief discussion of a

¹⁵⁹ *Id.* at 576. On respect for “the Opinions of [Human]kind,” the *Lawrence* Court emphasized that “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.” *Id.* at 577.

¹⁶⁰ *Id.* at 573-77. The Court mentioned that many other nations act consistently with the protected rights of homosexual adults to engage in consensual conduct, and that there is no proof that America’s governmental interest in circumscribing personal choice is more legitimate than the interests of other nations. *Id.* at 577. The Court announced, “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.” *Id.*

¹⁶¹ 45 Eur. Ct. H.R. (scr.A) (1981). Specifically, this case held that a Northern Ireland law criminalizing consensual adult sodomy violated the right to respect private lives under Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. *Id.* This was the first time in history that the Supreme Court relied on an international tribunal decision to interpret individual liberties embodied in the Constitution. Alford, *In Search of a Theory*, *supra* note 58, at 640.

¹⁶² See Larsen, *supra* note 53, at 1297.

¹⁶³ See *infra* Part II.C.b.

¹⁶⁴ 487 U.S. 815 (1988).

¹⁶⁵ 536 U.S. 304 (2002).

¹⁶⁶ 125 S. Ct. 1183 (2005).

¹⁶⁷ 487 U.S. 815 (1988).

¹⁶⁸ *Id.* at 821 (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁶⁹ *Id.* at 865.

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national consensus, Justice Stevens turned to the views expressed by the leading members of the Western European community.¹⁷⁰ However, Justice Scalia dissented, arguing that where there is not first a settled consensus among Americans, the views of other nations cannot be imposed upon Americans through the Constitution.¹⁷¹ This statement is significant because even though Justice Scalia is opposed to constitutional comparativism, he evinces that it might be more acceptable if a national consensus existed.¹⁷²

The Court enlisted similar arguments in *Atkins v. Virginia*.¹⁷³ Writing for the majority, Justice Stevens indicated a significant national consensus against the practice of executing the mentally retarded.¹⁷⁴ He then supported the national consensus by acknowledging that the

¹⁷⁰ *Id.* at 830-31, 865. Justice Stevens listed those countries that impose the death penalty but exclude minors, listing the United Kingdom, New Zealand, and the Soviet Union, which all retain the death penalty generally, but forbid the execution of minors. *Id.* He also listed those countries that abolished the death penalty altogether, noting that West Germany, France, Portugal, the Netherlands, and all of the Scandinavian countries completely abolished the penalty, and that it is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. *Id.* at 831. In addition, Stevens reported that “three major human rights treaties explicitly prohibit juvenile death penalties.” *Id.* at 831 n.34.

¹⁷¹ *Id.* at 868 n.4 (Scalia, J., dissenting). Justice Scalia concluded:

In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Id. at 868-69 n.4 (internal citations omitted). A year later, Scalia mirrored this argument in another death penalty case by pointing out that, although the views of other countries may sometimes be relevant, it is the “American conceptions of decency that are dispositive.” *Stanford v. Kentucky*, 492 U.S. 361, 369-70 n.1 (1989). He clarifies this statement by explaining that:

While “[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,” they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Id.

¹⁷² Namely, Scalia notes that “where there is not first a settled consensus among” Americans, foreign law should not be used for comparison. 487 U.S. at 868 n.4.

¹⁷³ See *infra* note 174.

¹⁷⁴ 536 U.S. 304, 314-15 (2002). The consensus consisted of a list of nineteen states (plus the federal government) that all passed enactments banning the death penalty for the mentally retarded within an eleven year period. *Id.* Two additional states had legislation pending at the time. *Id.* at 315.

imposition of the death penalty for the mentally retarded was “overwhelmingly disapproved” within the world community, providing multiple examples.¹⁷⁵ But *Atkins* did not settle the issue and the debate continued in the Court’s recent death penalty decision of *Roper v. Simmons*.¹⁷⁶

Justice Kennedy wrote the *Roper* decision, and as in *Atkins*, he first attempted to pinpoint a “national consensus” in America against the punishment; however, the consensus was much weaker than in *Atkins*.¹⁷⁷

¹⁷⁵ *Id.* at 317 n.21. It is important to note that in *Atkins*, a group of American diplomats filed an amicus brief arguing that the execution would “strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase American isolation and impair other United States foreign policy interests.” *Id.* This argument, that ruling a certain way would strain our relations with other countries, is frequently raised to offer justification for constitutional comparativism. See *supra* Part II.D.1 for a complete summary of arguments supporting constitutional comparativism. Justice Scalia again dissented, repeating verbatim his arguments from *Thompson*, but with less consideration for constitutional comparativism than in *Thompson*. *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting). Justice Scalia added that “[t]he Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . the so-called ‘world community.’” *Id.* He continued by adding: “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.” *Id.*

¹⁷⁶ See *infra* notes 177-84.

¹⁷⁷ 125 S. Ct. 1183 (2005). The *Roper* Majority overturned *Stanford v. Kentucky* and banned the death penalty for all offenders under the age of eighteen. *Id.* at 1192-98. Justice Scalia commented on this finding of a national consensus by reciting:

the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States—or 47% of States that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of four States have adopted such legislation since *Stanford*. Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time.

Id. at 1218 (Scalia, J., dissenting). Also, although she agreed with the Court’s use of comparative constitutional analysis, Justice O’Connor dissented from the Court’s holding precisely because she did not believe that the Court found a genuine national consensus.

Id. at 1206 (O’Connor, J., dissenting). She stated:

Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford v. Kentucky*. Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender.

Id.

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Justice Kennedy then turned to confirm the majority's opinion by noting that the United States was essentially alone in its sanction of the juvenile death penalty.¹⁷⁸ As support, Justice Kennedy cited treaties that rejected the juvenile death penalty such as the International Covenant on Civil and Political Rights¹⁷⁹ and Article 37 of the United Nations Convention on the Rights of the Child.¹⁸⁰ But Justice Scalia again dissented with strong criticism of the Court's use of comparative analysis.¹⁸¹ In all of these decisions – *Bowers*, *Lawrence*, *Thompson*, and *Atkins* – the majority first looked to a national consensus to make its decision; however, in *Roper* and *Lawrence*, the Court placed considerable weight on the foreign sources where a national consensus was less than “overwhelming.”¹⁸² Thus, these recent decisions followed the decisions in the early twentieth century that started down a slippery slope that gives more deference to

¹⁷⁸ *Id.* at 1198 (majority). Justice Kennedy wrote: “Our determination that the death penalty is disproportionate punishment for offenders under 18 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 punishment. *Id.* Although citations to foreign sources in Eighth Amendment cases had become the standard since the *Trop* opinion, this reference was partly in response to the multiple amicus briefs filed by European Union representatives, Nobel Peace Prize laureates, former United States diplomats, and human rights organizations, asking the Court to ban the juvenile death penalty. *See respectively* Brief of Amici Curiae The European Union, *Roper v. Simmons*, 2004 WL 1619203 (July 12, 2004) (No. 03-633); Brief of Amici Curiae President James Earl Carter, Jr., *Roper v. Simmons*, 2004 WL 1636446 (July 19, 2004) (No. 03-633); Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz et al., *Roper v. Simmons*, 2004 WL 1636448 (July 19, 2004) (No. 03-633); Brief of Amici Curiae Human Rights Comm. of the Bar of England and Wales, *Roper v. Simmons*, 2004 WL 1628523 (July 15, 2004) (No. 03-633). These briefs presented arguments contending that foreign laws should influence the Court's decision, and made showings that virtually every country in the world had abolished the practice of sentencing juveniles to death. *Roper*, 125 S. Ct. at 1198.

¹⁷⁹ Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹⁸⁰ Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). Although the United States had not ratified either, Justice Kennedy noted that Congress had since banned the death penalty for juveniles under the Federal Death Penalty Act. 18 U.S.C. § 3591 (2000).

¹⁸¹ *Roper*, 125 S. Ct. at 1225 (Scalia, J., dissenting). Scalia began his dissent stating that “[t]hrough the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.” *Id.* It is important to note that although Justice O'Connor dissented from the opinion, she did so separately from Scalia because she approved of the Court's comparative reasoning in theory. *Id.* at 1215 (O'Connor, J., dissenting). However, O'Connor does state that, in the present circumstance, the Court's comparative reasoning was inappropriate because it did not first find a true national consensus. *Id.* at 1216. “The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.” *Id.*

¹⁸² Namely, these sources did not borrow the reasoning from other countries, or observe the practical results that followed foreign enactments, but the majority cited those sources simply because they were consistent with the alleged consensus in America, and they confirmed the Court's value judgment. *See infra* Parts II.B.3.a-II.B.3.c.

foreign laws than it does to state laws.¹⁸³ *Roper* has since sparked renewed discussion on both sides of the debate.¹⁸⁴

D. Contemporary Arguments Surrounding Constitutional Comparativism

This line of decisions, beginning with *Lawrence* and concluding with *Roper*, has resulted in vast debate over the validity of constitutional comparativism, especially in the highlighted cases that cite international law for the sole reason that it is in accordance with the majority's view.¹⁸⁵ Just prior to the decision in *Roper*, Justices Scalia and Breyer held a public debate at American University, discussing constitutional comparativism's relevancy in the various judicial philosophies.¹⁸⁶ Shortly after the debate, Justice Ginsburg gave a speech before The American Society of International Law, supporting constitutional comparativism based on her interpretation of history and her personal philosophies.¹⁸⁷ Also in response, a bill was introduced called the Constitution Restoration Act of 2005, which would make constitutional comparativism an impeachable offense for all federal judges engaging in the practice.¹⁸⁸ Part II.D summarizes the best arguments for constitutional comparativism, and then looks at the arguments against it.¹⁸⁹

1. Arguments Defending Constitutional Comparativism

Arguments supporting the use of constitutional comparativism begin with the underlying principle that the body of American judges is very small compared to the global "judicial enterprise," which has the

¹⁸³ See *supra* note 136 and accompanying text.

¹⁸⁴ See *infra* Part II.D.

¹⁸⁵ Larsen, *supra* note 53, at 1301-02.

¹⁸⁶ See Scalia-Breyer Debate, *supra* note 43. Justice Scalia admits that comparative references are sometimes needed in cases that require the interpretation of treaties; however, when interpreting the Constitution as applied to domestic American affairs, Scalia said the Court should stick strictly to domestic inquiry. *Id.*

¹⁸⁷ Ruth Bader Ginsburg, Remarks for the American Constitution Society, Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003), <http://www.americanconstitutionsociety.org/pdf/Ginsburg%20transcript%20final.pdf>.

¹⁸⁸ The Constitution Restoration Act of 2005, H.R. 1070 § 302, 109th Cong. (2005). This was not the first piece of legislation to this effect. Following the decision in *Lawrence v. Texas*, Congressmen introduced the Feeney Resolution, which declared that the federal courts should not rely on foreign sources in their Constitutional interpretation. See *supra* note 68 (discussing the Feeney Resolution).

¹⁸⁹ See *infra* Parts II.D.1-II.D.2.

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task of finding consistency in the realm of human rights.¹⁹⁰ According to this view, fundamental rights are universal by definition, and global courts have an obligation to learn from each other when defining those rights under the Constitution.¹⁹¹ Perhaps the most general justification for this lies in the notion of comity.¹⁹² Expanding upon this notion, some scholars argue that failure to use comparativism could damage foreign policy by making the United States look hypocritical in the realm of human rights.¹⁹³ Another argument is that the founders intended for the courts to interpret the Constitution with “community standards” by leaving it relatively open-ended.¹⁹⁴ Professor Larsen provides justification for those instances where the Court uses international legal sources for their benefits as empirical and expository aids.¹⁹⁵ Another

¹⁹⁰ Slaughter, *supra* note 34, at 193. Judge Posner, one of present day’s leading pragmatists, has criticized this argument heavily. Posner asserts that to cite “foreign law as authority is to . . . suppose fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.” Richard A. Posner, “No Thanks, We Already Have Our Own Laws,” 40 LEG. AFF. (July–Aug. 2004).

¹⁹¹ Glensy, *supra* note 32 (noting that human rights issues have universal importance that transcends national borders); *see also* Randall R. Murphy, *The Framers’ Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 457-59 (1991) (discussing the Founder’s view of universal rights of individuals by looking at a court decision called *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360), written by Justice John Jay before he became Chief Justice).

¹⁹² Slaughter, *supra* note 34, at 205; *see also* Ginsburg’s Address, *supra* note 60, at 7 (justifying comity because “projects vital to [the Court’s] well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over”).

¹⁹³ *See* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 825-27 (1990) (“If the courts chose not to embrace international human rights norms as a source of guidance concerning fundamental rights . . . [t]he immediate effect would be that the United States would lose the high moral ground when citing human rights violations by other nations.”); *see also* Richard B. Lillich, *The United States Constitutional and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 76-77 (1990); Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz et al., *Roper v. Simmons*, 2004 WL 1636448 (July 19, 2004) (No. 03-633); Brief of Amici Curiae Mary Robinson et al., *Lawrence v. Texas*, 2003 WL 164151 (Jan. 16, 2003) (No. 02-102); *see also* Bodansky, *supra* note 60, at 427 (arguing that constitutional comparativism is pragmatic because it helps avoid friction with the rest of world).

¹⁹⁴ Bodansky, *supra* note 60, at 425. Bodansky points out how many provisions invoke “community standards” such as the “cruel and unusual punishment” standard in the Eighth Amendment, the notion of “due process of law” in the Fifth Amendment, and the prohibition on “unreasonable searches and seizures” in the Fourth Amendment. *Id.*

¹⁹⁵ Larsen, *supra* note 53, at 1297-1301. However, Professor Larsen rejects any reference based purely on moral fact-finding. *See infra* notes 203-04; *see also* Neuman, *supra* note 58, at 87 (supporting the empirical use of international references based on the assumption that the doctrines of regional and global human rights systems are less likely to depend on the individual characteristics of foreign legal systems).

argument promoted by Justice Breyer takes the position that foreign case law is simply information like any other source—the same as treatises, law journals, or academic lectures—and it should not receive any different treatment.¹⁹⁶ The arguments against constitutional comparativism mirror these arguments in part, but diverge in many critical ways.¹⁹⁷

2. Arguments Against Constitutional Comparativism

Arguments against constitutional comparativism are much more serious than Justice Breyer's light-hearted approach.¹⁹⁸ Although not exclusively the case, the most recent decisions invoking constitutional comparativism have primarily advanced a liberal agenda, whereas much of the criticism has come from the conservative right.¹⁹⁹ However, arguments against constitutional comparativism do not necessarily take a conservative form as they reveal serious concerns for individuals on all sides of the political spectrum.²⁰⁰

¹⁹⁶ Scalia-Breyer Debate, *supra* note 43. Under this assertion, Breyer contends that surely one does not want to make a judge increase his or her ignorance of how things work in other places. *Id.* It is this light-hearted approach, perhaps, that causes a more serious stance by the opposition.

¹⁹⁷ *See infra* Part II.D.2.

¹⁹⁸ *Supra* note 196 and accompanying text.

¹⁹⁹ These agendas include areas such as gay rights, death penalty restrictions, abortion, and upholding affirmative action. *See supra* Part II.B.3 for a discussion of these decisions. *See also* Anderson, *supra* note 28, at 45. (cautioning that the issue does not necessarily turn on the distinction of conservative versus liberal); *supra* note 188 (discussing the Constitutional Restoration Act brought by the conservative party).

²⁰⁰ *See* Anderson, *supra* note 28, at 45 (noting that the debate is not necessarily a matter of "conservative" versus "liberal"). Although constitutional comparativism has advanced the liberal agenda for the most part lately, it has an equal potential to aid the conservative agenda as well. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 67 (2004) [hereinafter Alford, *Misusing International Sources*]. Anderson points to individual rights such as property rights, establishment of religion, abortion, procedural due process, and free speech as areas that would be restricted if America followed the majority of the rest of the world. *Id.* Similarly, Professor Larsen also points out how following the rest of the world's majority would result in the suppression of abortion or reproductive rights in America, noting that the Center for Reproductive Rights published statistics that the United States is 1 of only 6 countries in the world that allows abortion, without requiring a reason, until the point of viability. *See* Larsen, *supra* note 53, at 1320 (quoting Center for Reproductive Rights, *The World's Abortion Laws* (June 2004), http://www.reproductiverights.org/pub_fac_abortion_laws.html). Furthermore, 187 out of the world's 197 countries forbid abortion after 12 weeks gestation, and 141 of those countries require that the woman make some argument of a "good reason" to terminate her pregnancy. *Id.* Half of the countries of the world either forbid abortion altogether or only allow abortions to save the mother's life or prevent physical injury, or in cases of rape or incest. *Id.* Similarly, the world consensus over

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Roger P. Alford, for example, looks to constitutional theory.²⁰¹ With this method, Alford analyzes constitutional comparativism in light of originalism, pragmatism, majoritarianism, and natural law theories of interpretation and concludes that serious problems exist no matter what theory one follows.²⁰² In comparison, Professor Larsen takes a more moderate approach, and rejects only those decisions that engage in a moral fact-finding methodology.²⁰³ She argues that without further explanation or justification, moral fact-finding results in judicial subjectivity and contradictory rulings that are inconsistent with original intent or understanding and will not necessarily aid foreign policy or produce good results.²⁰⁴ Another commonly voiced criticism is that constitutional comparativism violates the Supremacy Clause²⁰⁵ by rendering foreign law source material for, but not subject to, the Constitution.²⁰⁶ A fourth argument, and perhaps the most significant, is

homosexual rights potentially disapproves of the idea of special rights for homosexuals. See Alford, *Misusing International Sources*, *supra*, at 65-66. For an exhaustive analysis of how constitutional comparativism of contemporary legal issues can both satisfy and scare almost every section of the political spectrum, see Roger P. Alford, *Roper v. Simmons and our Constitution in International Equipose*, 53 UCLA L. REV. 1, 23-26 (2005).

²⁰¹ See generally Alford, *In Search of a Theory*, *supra* note 58. See Alford, *Misusing International Sources*, *supra* note 200, for Alford's constitutional analysis applied to *Roper v. Simmons*.

²⁰² Alford, *Misusing International Sources*, *supra* note 200, at 2 (summarizing his conclusions made in his earlier article mentioned *supra* note 58). Originalism does not work because it does not advance the objective of interpreting the Constitution based on the framers' moral perceptions. *Id.* Natural law theory lends itself slightly, but falls short out of fear of judicial hegemony and substantive indeterminacy. *Id.* Majoritarianism puts too much emphasis into the legislature and national experience. *Id.* Finally, pragmatism is inconsistent with the comparative currents that espouse a summum bonum, or greatest good. *Id.*; see also Scalia-Breyer Debate, *supra* note 43.

²⁰³ Larsen, *supra* note 53, at 1302.

²⁰⁴ *Id.* These policy concerns emerge in various contexts in many scholarly writings. Notable are Alford's concerns about "elevated use," "haphazard use," and "selective use" of international sources. Alford, *Misusing International Sources*, *supra* note 200, at 61-69. Sanchez also expresses these concerns in his article, *supra* note 24.

²⁰⁵ U.S. CONST. art. VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

²⁰⁶ Alford, *Misusing International Sources*, *supra* note 200, at 57-58. Alford finds that using foreign sources "fundamentally destabilizes the equilibrium of constitutional decision making. Using international law as an interpretive aid also ignores the Supremacy Clause, which renders all of our laws subject to, and not source material for, our Constitution." *Id.*

that constitutional comparativism impedes national sovereignty and the democratic process by abrogating states' rights.²⁰⁷ The basic difficulty here mirrors that of the countermajoritarian difficulty,²⁰⁸ where the Court uses the Constitution to thwart democratic will evident in legislative enactments.²⁰⁹ Finally, critics of judicial comparativism argue that it goes against the grain of America's history, culture, and the framers' intent.²¹⁰

Judicial internationalism has an expansive history in the United States.²¹¹ Although a few early criticisms, such as in *Chisholm*, are apparent, no consistent trend in opposition appears until the emergence

The same problem exists when the Court interprets the Constitution in light of state legislation. *See id.* at 61-62.

²⁰⁷ Anderson, *supra* note 28, at 47-49; *see also* *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 72, 77 (2004) (testimony of Prof. Jeremy Rabkin, Cornell University) (arguing that comparative practice is "subversive of the whole concept of sovereignty"); Alford, *In Search of a Theory*, *supra* note 58, at 709-10 (arguing that comparativism is inconsistent with political democracy); Alford, *Misusing International Sources*, *supra* note 200, at 58-61 (discussing the countermajoritarian difficulty).

²⁰⁸ The countermajoritarian difficulty summates the concern that when a court declares a legislative or executive act unconstitutional, it thwarts the will of the people, undermining the values of the prevailing majority. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 17-21 (1962). Constitutional review serves as a countermajoritarian check on the legislature and the executive. *Id.*

²⁰⁹ Alford, *Misusing International Sources*, *supra* note 200, at 58-59. This is particularly troublesome in constitutional questions that invite judicial discretion. *Id.* If the political branches do not express international majoritarian values through the political branches, advocates resort to the courts. *Id.* at 59. But the only way for the courts to overcome sovereign values reflected in legislative enactments is through constitutional supremacy. *Id.* When the Court invokes domestic majority values tests to interpret the Constitution, such as in the death penalty cases test of "national consensus," the argument contends that international majoritarian values should have deference over domestic values. *Id.*

²¹⁰ Judge O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893 (2005). Judge O'Scannlain provides the most comprehensive support for this argument, demonstrating the manner in which colonial and founding-era Americans consciously strove to develop a legal system that was tailored to the unique conditions of America at the time. *Id.* at 1905. He contends that these efforts "fostered a norm cautioning American jurists not to place reliance upon foreign legal authorities because they may be inapposite to American conditions." *Id.* He gives two reasons why this applies in the modern day. First, the intentions of the Framers hold a privileged position in American jurisprudence. *Id.* at 1906. Secondly, certain indelible differences such as culture, politics, and economics distinguish all countries from each other. *Id.*; *see also* Neuman, *supra* note 58, at 86 ("the U.S. Constitution, unlike some twentieth-century constitutions, does not express a textual preference for alignment of its rights provisions with the positive law of the modern international human rights regime"); Sanchez, *supra* note 24, at 40. At least one scholar has rejected this argument by distinguishing human rights law from other laws. Neuman, *supra* note 58, at 87. Neuman hints that individual rights are inherent in the individual and *should not* depend on independent characteristics of a countries' legal system. *Id.*

²¹¹ *See supra* Part II.C.

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of the most recent decisions involving individual liberties.²¹² On one hand, individual liberties in America are intimately tied to the Bill of Rights of the Constitution; on the other hand, human rights are inherent in the individual's right, which begs an inquiry into standards applied to all individuals across the globe.²¹³ Part III balances these two interests by analyzing the unique characteristics of the various Supreme Court decisions.²¹⁴

III. A CONTEXTUAL ANALYSIS OF CONSTITUTIONAL COMPARATIVISM

The interactions America has had with foreign nations offers an important explanation for why opposition to judicial internationalism did not appear until recently.²¹⁵ Constitutional comparativism is a product of, or at least made possible by, the phenomenon of globalization.²¹⁶ The earliest decisions concentrated on instances where Americans interacted with people of other nations on a tangible level, invoking customary international law or treaties, whereas the recent flood of communication made possible by technological advancements has created greater transparency and accountability between nations on all levels.²¹⁷ As mentioned, this can create problems when reconciling conflicting global human rights standards with American cultural values.²¹⁸

²¹² See *supra* Part II.C.3.

²¹³ See *supra* note 210.

²¹⁴ See *infra* Part III.

²¹⁵ See *supra* Part II.

²¹⁶ See Koh, *supra* note 75 and accompanying text (recognizing the impact that globalization has had in this area); see also Anderson, *supra* note 28 ("the [issue] depends less on pragmatism than on a view about globalization"); Fontana, *supra* note 68, at 568 ("globalization plus advanced social science means that the data from law in action abroad might make comparative constitutional law a helpful source of constitutional fact"); Glensy, *supra* note 32, at 400 ("comparative analysis furthers the globalization of human rights"). See generally Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 591 (2002); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 828 (1999); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 33-34, 37-39 (1998).

²¹⁷ See *supra* Part II.B.1. Organizations such as the United Nations did not exist, communication in general was meek, and a world consensus on issues such as individual liberties would have been difficult to find conclusively. See Fontana, *supra* note 68, at 568 (recognizing that globalization makes comparative analysis in constitutional questions both possible and desirable); see also *supra* note 146.

²¹⁸ See *supra* note 148 and accompanying text.

When judges use international sources to interpret the Constitution, they risk undermining elements of America's unique identity—especially considering its democratic system.²¹⁹ The most obvious elements of America's identity stem from the cultural, political, and economic factors that are unique to America and differentiate its laws.²²⁰ No matter where America's legal system draws the line, it must reconcile two questions: (1) how the particular method of comparativism acts to optimize the benefits of a globalized society; and (2) how these benefits are compatible with America's identity.²²¹

Considering all cases invoking comparative analyses, the only cases that risk the slippery slope by posing a threat to democratic governance are those that address purely domestic constitutional issues and change the law without clear support at home.²²² Thus, this analysis first looks at the need for distinguishing these cases from those that deal with international law or treaty concerns.²²³ Next, Part III analyzes the appropriateness of the three main types of constitutional comparativism and discusses the narrow circumstances where the moral fact-finding references cannot work.²²⁴

A. *Context Matters*

In analyzing constitutional comparativism, it is essential to understand the obvious difference between comparative references in a

²¹⁹ See *supra* notes 207-09 and accompanying text (discussing the concern that constitutional comparativism will undermine America's national sovereignty and the democratic process, primarily through the counter-majoritarian difficulty). Perfect examples of this hostility are already apparent in the legislature's introduction of the Feeney Resolution and the Constitutional Restoration Act of 2005 mentioned *supra* note 188. Justice Scalia's dissent in *Roper* is further evidence of this notion. See also *supra* note 181.

²²⁰ See *supra* note 210 and accompanying text. Judge O'Scannlain used these differences to justify his opinion that Courts should refer to foreign law only in cases that involve treaties, international law disputes, or in areas where Congress provides for an international inquiry. He wrote this with the assumption that these factors cannot be reconciled, and that it is difficult, if not impossible, to understand the cultural contexts behind foreign laws. However, this Note does not infer that the imposition of such a strict rule is necessary to avoid the cross-cultural or globalization problem. Rather, this Note only maintains that these concerns should be the first and foremost while utilizing the benefits derived from a globalized world to the greatest extent.

²²¹ See *infra* note 221 and accompanying text. This inquiry is an essential theme for advocates of constitutional comparativism. See *supra* notes 148-51 (discussing the importance of utilizing the benefits of globalization with preserving our cultural values).

²²² See *infra* Part III.B.

²²³ See *infra* Part III.A.

²²⁴ See *infra* Parts III.B-III.C.

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treaty or international law issue on the one hand, and domestic issues on the other.²²⁵ There is little dispute whether comparative inquiry is a desirable practice in issues involving treaties or matters bearing cross-border consequences.²²⁶ Even Justice Scalia, passionately opposed to comparative judicial references, indicates that he is not opposed to references in treaty interpretation.²²⁷ Since the only cases leading to the slippery slope are those invoking constitutional comparativism in domestic law cases, it is essential to distinguish these cases from all others because different issues are at stake.²²⁸

Cases involving cross-border issues have a subtle ability to create confusion with domestic law cases.²²⁹ One example is in Justice Ginsburg's speech at The American Society of International Law.²³⁰ Interestingly, Justice Ginsburg cited the standard set forth in *The Paquete Habana*, that "international law is part of our law . . .," and immediately turned to a discussion of the *Dred Scott* decision to say that opposition to comparative practice prolonged the institution of slavery in America.²³¹ Her comparison is problematic in that the criticisms of comparative law expressed by the author of the *Dred Scott* decision do not apply to the positive view of international law expressed in *The Paquete Habana* opinion. The former dealt with a constitutional question on individual rights in America, whereas the latter dealt with an admiralty dispute between the United States and foreign nationals.²³² The debate does not

²²⁵ See generally Larsen, *supra* note 53 (categorizing the various references to foreign law in order to better understand the issue at hand); Sanchez, *supra* note 24 (focusing on the differences between domestic constitutional issues and others).

²²⁶ See Scalia-Breyer Debate, *supra* note 43. Justice Scalia, making an important distinction, commented:

I will use it in the interpretation of a treaty . . . in a recent case I dissented from the Court, . . . because this treaty had been [sic] interpreted a certain way by every [sic] foreign court of a country that was a signatory, and that way was reasonable . . . But I thought that the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies.

Id.

²²⁷ See *supra* note 43. Scalia gives concessions that it is necessary to look to other country's interpretations of treaties for the Court's deliberations. Scalia-Breyer Debate, *supra* note 43.

²²⁸ See generally Sanchez, *supra* note 24.

²²⁹ See *infra* notes 230-41 and accompanying text.

²³⁰ See *supra* note 60.

²³¹ See Ginsburg Address, *supra* note 60, at 2. See also *supra* notes 46-50 and accompanying text for a discussion of the Court's decision in *The Paquete Habana*. For a discussion of *Dred Scott*, see *supra* notes 110-14 and accompanying text.

²³² *Supra* notes 46-49, 110-12.

question whether foreign law deserves deference when defining customary international law, but rather it questions whether global opinions should sway the constitutional interpretation absent a domestic legal standard.²³³ Nevertheless, Justice Ginsberg implied that foreign sources of law should have the same weight in domestic constitutional issues as they do in international law issues.²³⁴ As a result, the importance of accurately identifying the type of case before determining the appropriateness of a comparative analysis is essential because the only cases that pose a real threat to democracy in the United States are cases dealing with domestic Constitutional issues.²³⁵ Since not all comparative references in these cases pose a threat, they require further justification.²³⁶

B. *Justifications for Constitutional Comparativism*

After sifting through the relevant cases involving constitutional comparativism, a significantly small number used foreign sources of law to aid in exclusively domestic issues.²³⁷ Even more insignificant in number are those cases engaging in moral fact-finding, citing foreign law simply to support the Court's value judgment.²³⁸ Thus, within the category of cases dealing exclusively with domestic issues, if one concedes that it is acceptable to cite to foreign laws as persuasive authority for their utility in ways such as empirical or expository aids,

²³³ See Alford, *Misusing International Sources*, *supra* note 200, at 61-64 for an in-depth discussion of the obvious problems inherent in reading the Constitution in light of international laws, let alone federal statutes.

²³⁴ *Supra* notes 231-38. This assertion goes subtly beyond the context of *The Paquete Habana* and Founders' statements. For an interesting discussion of *The Paquete Habana*, see generally Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of The Paquete Habana*, 40 WM. & MARY L. REV. 1395 (1999).

²³⁵ See generally Larsen, *supra* note 53. There is a separate debate as to whether the United States courts should look to the foreign laws in international legal disputes. See Jonathan H. Adler, *Sosa Justice, The Supreme Court Cuts Off International-law Suits – This Time*, NRO (2004), <http://www.nationalreview.com/adler/adler200407210842.asp> (last visited Mar. 31, 2007). The debate surrounding this issue, however, does not center on whether the Court should use foreign sources, but rather which sources are appropriate for defining customary international law. *Id.* Some of the justices believe that customary international law changes, whereas other justices believe that it was frozen at the time of the Constitution's framing. *Id.*

²³⁶ See *infra* Part III.B.

²³⁷ See generally *supra* Part II.B (revealing that most cases using international law as persuasive authority for constitutional questions, which are few in number, have a short history in American jurisprudence). What this does in effect is narrow the standards by which the Court may justify their comparative references in constitutional questions.

²³⁸ Larsen, *supra* note 53, at 1299 (mentioning the recent emergence of these types of cases in constitutional questions).

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only the handful of cases using a moral fact-finding approach remain in dispute.²³⁹ This Part analyzes expository and empirical inquiries to show that they pose no greater threat to the judicial system than any other persuasive source.²⁴⁰ It then analyzes the Court's moral fact-finding decisions, arguing contrary to Professor Larsen's position, that many of these have valid justifications.²⁴¹

1. Expository

Expository references are more beneficial than detrimental to American jurisprudence.²⁴² This is due to the fact that expository inquiries allow Americans to look to laws abroad in order to contrast and help explain laws in America.²⁴³ For example, when Chief Justice Rehnquist could not find either precedent or history to support the claim that the dilution of Congress's votes under the Line Item Veto Act created standing, he was able to use this lack of precedent to show that the Constitution intended a much more restricted role of the courts than that of other nations.²⁴⁴ Expository practice is easily justifiable because none of the contemporary criticisms can reasonably show how it challenges America's identity or when it maximizes the benefits derived from globalization.²⁴⁵

From the perspective of America's culture, politics, and economics, expository references to foreign legal standards merely distinguish American standards from the rest of the world.²⁴⁶ In other words, expository references positively highlight the uniqueness of America's culture and legal system, and support its legitimacy by explaining its

²³⁹ See *supra* Part II.C.3 for a discussion of these decisions and *supra* notes 132-35 for a list of other similar decisions. Recall that the Court's empirical use looks at the practical effect of a law on a certain situation, and the Court's expository references are those that use comparative legal materials to explain a domestic law in America. Larsen, *supra* note 53, at 1288.

²⁴⁰ See *infra* Parts III.B.1-III.B.2.

²⁴¹ See *infra* Part III.B.3.

²⁴² Larsen, *supra* note 53, at 1299. The basic argument that Larsen makes is that, after considering the many advantages that an expository inquiry can make, there really are no harms left that compare in scope. *Id.* She does not explicitly express this, but she integrates Justice Breyer's argument that as long as the sources are only used as an expository aid, they are no different from any other persuasive source. *Id.*

²⁴³ See Breyer-Scalia Debate, *supra* note 43; see also Larsen, *supra* note 53, at 1316-17 nn.145-46.

²⁴⁴ *Raines v. Byrd*, 521 U.S. 814, 828 (1997) (finding that members of Congress lacked standing to challenge the dilution of their votes brought by the Line Item Veto Act); see *supra* note 54 (summarizing *Raines*).

²⁴⁵ See *infra* notes 246-56.

²⁴⁶ See *supra* note 54 and accompanying text.

meaning in the context of other practices.²⁴⁷ The use of expository references as a threat to sovereignty should not be of concern either.²⁴⁸ Rather, the most substantial concern for sovereignty comes from the fear that the Court will rule against America's majority and these expository references are arguably not even true examples of constitutional comparativism because they add no additional meaning to the Constitution's text.²⁴⁹ Finally, any argument about the framers' intent is highly speculative because the framers frequently looked to foreign laws when drafting the Constitution.²⁵⁰

Several policy based justifications exist that support expository references as well.²⁵¹ First, expository references to foreign laws show comity to the laws of other nations by recognizing the legitimacy of those laws.²⁵² Even given that the Court is not a venue to promote foreign policy, little harm can be done by recognizing the fact that other countries intelligently handle the same issue, especially when America is a model of democracy for the rest of the world to follow.²⁵³ This comity goes to the heart of many foreign policy considerations by simply recognizing the existence of different views, not necessarily for promoting a common judicial enterprise, but from a more general notion recognizing alternate views in a common democratic enterprise.²⁵⁴ The

²⁴⁷ See Larsen, *supra* note 53, at 1299. This characteristic actually promotes the uniqueness of America's culture and politics. *Id.* Thus, if one's only concern is preserving America's history and culture, expository references should not raise a flag, because they do not really result in any direct change to constitutional standards. *Id.*

²⁴⁸ See *supra* note 242-43 and accompanying text.

²⁴⁹ See *supra* notes 207-13 (discussing the countermajoritarian difficulty in international law). The countermajoritarian difficulty arises when a court, generally the Supreme Court, interprets the Constitution in a way that invalidates multiple state laws. Alford, *Misusing International Sources*, *supra* note 200, at 58-59. If the foreign citation results in no real change in the Court's conclusion, then no difficulty arises from that source. *Id.*

²⁵⁰ See *supra* notes 77-81 and accompanying text for a discussion of the Framers' intentions. The result would be different if the foreign sources were a sole authority for the Court's conclusion, but simple recognition of the sources of law abroad is consistent with the limited writings we have from the Framers. *Id.*

²⁵¹ See *infra* notes 252-60.

²⁵² Although the Court does not follow these foreign laws, it is still able to show comity towards them by referencing them, recognizing their existence, and respectfully going the other way. See Glensy, *supra* note 32, at 386. Glensy, although not using the term "comity," argues for it in effect by discussing how many nations have modeled their constitutions according to the United States Constitution, and that the United States should not hesitate to "learn from their children." *Id.* By distinguishing the law in America from laws in other nations, the judiciary in effect learns from the laws of America's children.

²⁵³ *Id.* (noting that foreign countries across the globe draw their inspiration from the American model).

²⁵⁴ See *supra* notes 252-59.

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Court's empirical references promote comity and foreign policy considerably more than expository references, while avoiding the slippery slope that risks circumventing the democratic process.²⁵⁵

2. Empirical References

Today, information technology allows the Court to observe the laws of other nations in real time and draw expository observations accordingly.²⁵⁶ Not only does an empirical inquiry into foreign practice provide greater utility than an expository one, but it is equally as justifiable in light of the criticisms against constitutional comparativism.²⁵⁷

Because the history, politics, and culture that define America's identity are different from many foreign nations, courts should approach empirical references with caution, and only after considerable research into the context of a particular law in a given culture.²⁵⁸ But this fact alone should not force America's judicial system to sacrifice the benefits that empirical inquiries can provide.²⁵⁹ Contrary to the argument that constitutional comparativism results in subjective decisions, empirical research into foreign laws can eliminate a considerable amount of the speculation that often occurs in constitutional analysis by allowing the

²⁵⁵ See *supra* Part II.B.2.

²⁵⁶ See Fontana, *supra* note 68, at 568. Fontana asserts that "globalization plus advanced social science means that the data from law in action abroad might make comparative constitutional law a helpful source of constitutional fact." *Id.* See *supra* note 55 and accompanying text for a general definition of the Court's empirical references.

²⁵⁷ Larsen, *supra* note 53, at 1299.

²⁵⁸ *Id.* at 1300-01; see also Alford, *Misusing International Sources*, *supra* note 200, at 63-64.

Alford cautions against value comparisons because of the values reflected in contemporary international laws are independent of those other interpretive categories. . . . At most under this approach . . . international sources 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.

Id.

²⁵⁹ Larsen, *supra* note 53, at 1300-01. Larsen admits that there might be practical reasons to object to such evidence. *Id.* at 1300. As an example, she explains how judges may lack the expertise to properly research, understand, and evaluate foreign legal materials. *Id.* But this threat alone should not bar all comparative inquiries. *Id.* She states: "from a constitutional theory perspective, looking to foreign legal systems to gather the factual information necessary to decide a particular constitutional question seems no less legitimate than looking to the consequences of a law adopted in one of the fifty states." *Id.*; see also Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 268-71 (2001).

courts to see how other democracies react to specific legislation.²⁶⁰ Also, as with the expository references, any argument against empirical references on the grounds that the practice is against the founders' intent would be speculative given that the founders simply did not have the opportunity to examine the legal consequences of foreign laws in a timely fashion.²⁶¹

The greatest criticism is that empirical inquiries into foreign laws might circumvent the Supremacy Clause by interpreting the Constitution in light of those laws, but this is a weak argument.²⁶² Regardless of the many theories for constitutional interpretation, the courts should always interpret laws of the United States according to the Constitution, and not the other way around.²⁶³ However, many of the Court's constitutional tests, such as whether a law is "rationally related" or "necessary" in order to satisfy the Constitution, require the Court to engage in an empirical analysis.²⁶⁴ From an empirical viewpoint, no considerable difference exists between considering the operation of a law in a state, or in a foreign country, when the only goal is to understand the effect of the law.²⁶⁵ Thus, when constitutional tests use subjective standards for constitutional interpretation, such as defining an evolving standard of decency, foreign practice may prove useful without risking a compromise of America's culture, values, or history.²⁶⁶ This inquiry into

²⁶⁰ *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). Justice Breyer looks to the laws of multiple European nations in order to "cast an empirical light on the consequences of different solutions to a common legal problem." *Id.*

²⁶¹ *See supra* Part II.B (discussing the Founders' intent); *see also* text accompanying notes 78-81.

²⁶² *See supra* note 206 and accompanying text (comparing the similarities between comparative references and state law references in light of the Supremacy Clause).

²⁶³ *See supra* note 206 and accompanying text.

²⁶⁴ *See Larsen, supra* note 53, at 1299-1300 (discussing various cases where the Court uses tests such as whether a law is "necessary" or "rationally related" to fulfill a goal).

²⁶⁵ Fontana, *supra* note 68, at 570. Fontana is a strong supporter of the idea that "[t]he past experience of other countries can help an American court determine if the legislative means used in a piece of legislation before the court really helps achieve the desired end." *Id.* Fontana asserts that observing experiences of other countries can help a court determine how successful a certain program will be. *Id.*; *see also Larsen, supra* note 53, at 1300.

²⁶⁶ Larsen, *supra* note 53, at 1300. A good example of an instance where looking abroad was more useful than any domestic legal source is in *Washington v. Glucksberg*, 521 U.S. 702 (1997), where the Court looked at the effect the laws that accommodated physician assisted suicide in the Netherlands. America had no precedents on assisted suicide, and an inquiry into the effects of the law in the Netherlands revealed considerable injustice. Larsen, *supra* note 53, at 1300.

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the nature of a particular test provides both an explanation and a framework for the cases involving moral fact-finding.²⁶⁷

3. A Critique of Moral Fact-Finding Decisions

As previously discussed, most comparative references can serve a highly useful purpose, whether they are expository or empirical, without endangering the history, culture, or values that make the American legal system unique.²⁶⁸ The most simple reasoning mirrors Justice Breyer's argument—that international law merely constitutes another category of persuasive authority, such as a law review article or historical record.²⁶⁹ Unfortunately, the reasoning is not as simple in cases engaging in moral fact-finding, where the Court searches for value choices reflected in foreign legal regimes.²⁷⁰ Nevertheless, the unique nature of the constitutional tests used in questions of individual rights partially justifies moral fact-finding in some decisions.²⁷¹

a. A Unique Constitutional Test

American conceptions of decency are dispositive for defining “evolving standards of decency,” but the Court uses a consensus standard to determine those standards.²⁷² Although the Court must follow what it objectively determines is a national consensus, it is important to keep in mind that the individual rights that the Court defines are universal in nature.²⁷³ Thus, it makes sense that the recent decisions engaging in moral fact-finding look for a worldwide consensus

²⁶⁷ See *infra* Part III.C.

²⁶⁸ See *supra* Parts III.A-III.C.

²⁶⁹ See Scalia-Breyer Debate, *supra* note 43.

²⁷⁰ Larsen, *supra* note 53, at 1293-94 (“The ‘moral fact-finding’ variant of the substantive use of comparative and international law is much more sweeping and perhaps more problematic than any of the [other] approaches.”).

²⁷¹ See *infra* Part III.B.3.a.

²⁷² See *supra* notes 131, 177 and accompanying text.

²⁷³ For an opposing view of this assertion, see generally Alford, *Misusing International Sources*, *supra* note 200. Alford argues that:

In the death penalty context, the Court does not attach importance to international sources in undertaking a constitutional analysis because in adopting a majoritarian paradigm, whether a punishment is unusual or cruel should depend on a national consensus that gives expression to the sovereign will of the American people. Sovereign expressions of decency give voice to the constitutional standard, and while nonbinding treaty norms may echo those expressions, they are not part of the chorus.

Id. at 60.

to confirm a consensus at home.²⁷⁴ Although these references communicate value judgments abroad, they serve an empirical purpose because they answer the Court's test directly by showing evidence of evolving standards of decency of people worldwide.²⁷⁵ In this light, the very nature of the constitutional test justifies a comparative inquiry because of the empirical benefit it produces.²⁷⁶ For example, just as observing the application of a law abroad can show that it is "rationally related" to the fulfillment of a particular government objective, so can the mere fact that many other countries have accepted a human rights standard shed an empirical light on whether or not that standard constitutes an "evolved standard of decency."²⁷⁷

Furthermore, when used simply as confirmation, the moral fact-finding approach avoids the many risks created by constitutional comparativism, and encapsulates many of the advantages.²⁷⁸ Just like empirical and expository references to international law, citations using the moral fact-finding approach promote comity by recognizing the existence of other foreign legal systems, and exalting those systems in their similarities to that of the United States.²⁷⁹ Similarly, observing a world consensus aids foreign policy by openly accepting similarities between the United States and other nations.²⁸⁰ It also moves toward the

²⁷⁴ This is precisely what Justice Kennedy argued in *Roper v. Simmons*—that the opinion of the world community provides "respected and significant confirmation for the Court's determination." 125 S. Ct. 1183, 1186 (2005). Whether the world community actually offers confirmation, as opposed to independent justification, in this specific case is subject to debate. See *supra* note 177 and accompanying text. As compared to its predecessor cases, the national consensus shown in *Roper* was at best not obvious, and was arguably not existent at all. See *supra* note 177 for a discussion of the controversy over the existence of a true national consensus.

²⁷⁵ See *supra* note 130. However, this is not to mean that whatever insight the world may provide may rank above domestic majoritarian judgments. See Alford, *Misusing International Sources*, *supra* note 200, at 58 ("To the extent that value judgments are a source of constitutional understandings of community standards, in the hierarchical ranking of relative values domestic majoritarian judgments should hold sway over international majoritarian values").

²⁷⁶ See generally Blum, *supra* note 138 (supporting the use of comparativism as an empirical guide).

²⁷⁷ See Larsen, *supra* note 53, at 1299-1300 (discussing various cases where the Court uses tests such as whether a law is "necessary" or "rationally related" to fulfill a goal).

²⁷⁸ Shirley S. Abrahamson and Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 285 (1997) ("[T]he risks inherent in exploring different legal systems are risks that American lawyers and state court judges take every day.").

²⁷⁹ See Glensy, *supra* note 32, at 392-93.

²⁸⁰ See Larsen, *supra* note 53, at 1317-18. Larsen purports that many scholars believe that the Court's embrace of comparative or international law norms has the potential of helping

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support of a world consensus on human rights issues, a task that the United States has previously attempted.²⁸¹ Finally, perhaps the most simple justification is that the requirement of a national consensus itself necessitates a survey of value judgments within the United States.²⁸² Thus, a world consensus simply provides confirmation of already existing principles of law and fact within the United States that are no different from any other non-binding source.²⁸³

The nature of a constitutional test seeking a national consensus evincing “evolving standards of decency” considerably reduces the risks involved with constitutional comparativism as well.²⁸⁴ Regardless of the constitutional theory one adheres to, the fact that these foreign references directly further the constitutional test as persuasive authority by adding substance to a national consensus makes them no different from any other persuasive source.²⁸⁵ For this reason, any risk that a judge will cite to an international source of law haphazardly or selectively is no greater than the risk that a judge will cite to any other persuasive texts with the same inaccuracies.²⁸⁶ Furthermore, this provides no contradiction to the limited documents concerning our founders’ intent.²⁸⁷ Due to concerns over democracy and states’ rights, however, this is only the case if the Court uses the global consensus as it would any other persuasive source: as an aid to understand and confirm a fair application of legally binding principles of law.²⁸⁸ The most recent decision of *Roper v. Simmons* highlights this difficulty because the decision arguably went beyond mere confirmation; it acted as a constitutional tiebreaker.²⁸⁹

foreign policy where the political branches have refused fully to embrace international human rights norms. *Id.*

²⁸¹ Such as with the U.S. involvement in drafting the International Covenant on Civil and Political Rights, Dec. 16, 1966. *See supra* note 183.

²⁸² *See supra* note 177 and accompanying text (showing the close national consensus in *Roper v. Simmons*).

²⁸³ *Supra* notes 279-88 and accompanying text.

²⁸⁴ *Infra* notes 285-94 and accompanying text. For example, by using a subjective test to interpret the Constitution, the Court is already subject to many risks that naturally accompany subjective tests. Introducing foreign legal sources into the mix will not do anything to influence the intensity of this risk.

²⁸⁵ *See* Justice Breyer’s arguments in the Scalia-Breyer Debate, *supra* notes 43, 186, 196 and accompanying text.

²⁸⁶ *See* Justice Breyer’s arguments in the Scalia-Breyer Debate, *supra* note 196 and accompanying text. *See also* Abrahamson, *supra* note 278, at 285.

²⁸⁷ *See supra* Part II.D.2.

²⁸⁸ *See supra* note 33.

²⁸⁹ *See infra* Part III.3.b.

b. Foreign Law as a Constitutional Tiebreaker

Decisions that engage in moral fact-finding provide confirmation of a true national consensus, but may threaten democracy if the foreign sources receive greater weight than the national consensus.²⁹⁰ It is acceptable to conclusively find that a consensus exists in America and then provide support with a similar consensus worldwide. However, it is dangerous for the Court to use the presence of a global consensus to justify changing the Constitution's scope when a national consensus lacks finality.²⁹¹ For the first time ever, the *Roper* majority opinion included the states that have banned the death penalty altogether in order to make the number of states sanctioning juvenile death penalty appear less significant.²⁹² This Court further embellished its skewed statistics when it completely disregarded the fact that the number of jury verdicts imposing juvenile death sentences has actually increased since *Stanford* last challenged and found the juvenile death penalty constitutional.²⁹³

The lack of a national consensus creates great speculation behind the Court's true motivation for citing foreign law, especially because the Court in the past has required overwhelming proof of a true national consensus.²⁹⁴ The Court has little, if any, justification to disregard the traditional requirement of an overwhelming national consensus in order

²⁹⁰ See *supra* Part III.3.a.

²⁹¹ See *supra* note 177 and accompanying text. Justice Breyer explained that particularly when dealing with issues of general principles such as "liberty" or determinations of "cruel and unusual punishment," these concepts have similar application and understandings in many countries around the world. Scalia-Breyer Debate, *supra* note 196. Breyer admits that he does not try to figure out the meaning of particular words in the Constitution such as "cruel and unusual"; he just tries to deal with their application, "[a]nd it isn't some arcane matter of contract law, where a different legal system might have given the same words totally different application . . . you're trying to get a picture how other people have dealt with it." *Id.*

²⁹² *Roper v. Simmons*, 125 S. Ct. 1183, 1192-94 (2005).

²⁹³ *Id.* at 1221 (Scalia, J., dissenting).

²⁹⁴ *Id.* at 1218. "Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977)). Likewise, Justice O'Connor pointed this out in her separate 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.

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

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to broaden the scope of individual rights under the Constitution.²⁹⁵ Regardless of this fact, the Court turned to the strong international consensus in order to supplement the lack of a consensus at home.²⁹⁶ The international consensus thus acted as a tiebreaker where the Court could not conclusively show a national consensus in its favor.²⁹⁷ This precedent travels too far down the slippery slope toward threatening a democratic legal system.²⁹⁸

By utilizing an international consensus where no clear national consensus existed, the Court imposed its own value judgment on the Constitution.²⁹⁹ The countermajoritarian difficulty does not justify this adequately because the Court did not find conclusive justification for its decision under the Constitutional test: a national consensus indicating evolving standards of decency.³⁰⁰ Countermajoritarian theory only works when the Constitution itself contradicts the will of the people.³⁰¹ For this reason, the decision sends the Court down a slippery slope that risks thwarting the democratic will in the United States, because the international consensus is the only clear justification supporting the Court's decision.³⁰² By using the international consensus as a tiebreaker, it had a conclusive effect on the Court's decision.³⁰³ Not only does it threaten democracy, it is a harmful precedent in Constitutional decision-making—namely, the decision contradicts the United States' history and tradition of providing deference to states' rights.³⁰⁴ Finally, policy concerns such as the risk of haphazardly choosing sources, or selectively

²⁹⁵ In its ruling, the Court made it considerably easier to impose its independent value judgment on the Constitution by ignoring the past requirement of an overwhelming consensus. See Alford, *Misusing International Sources*, *supra* note 200, at 59.

²⁹⁶ See *supra* note 177 and accompanying text.

²⁹⁷ *Supra* note 177.

²⁹⁸ See *supra* notes 212-13 and accompanying text (discussing the countermajoritarian difficulty).

²⁹⁹ See Alford, *Misusing International Sources*, *supra* note 200, at 59.

³⁰⁰ See *supra* notes 212-13 and accompanying text.

³⁰¹ See *supra* notes 212-13 and accompanying text. The countermajoritarian difficulty only works when the Constitution itself contradicts the will of the people. Thus, if the only solid basis for interpreting the Constitution a certain way is because of foreign laws, the Court is trumping the democratic will with these foreign laws.

³⁰² See *supra* note 202 and accompanying text (discussing the Supremacy Clause).

³⁰³ See Anderson, *supra* note 28, at 47.

³⁰⁴ See *id.* at 1 (criticizing the *Roper* opinion).

choosing sources, become vital where the Court uses persuasive authority to bind the Constitution.³⁰⁵

After weighing the risks and benefits of constitutional comparativism among the various types of cases, the only cases that represent a true threat to democracy are the few that involve purely domestic issues and cite to foreign law simply to support the Court majority's independent value judgment, whereas the majority of the references are no different from any other persuasive source. Although relatively insignificant in number, the Court needs to utilize a methodology to avoid the slippery slope apparent in cases like *Roper*.³⁰⁶

IV. A PROPOSED APPROACH TO CONSTITUTIONAL COMPARATIVISM

The line between cases that may potentially cause harm or good by constitutional comparativism is thin, and the numerous arguments surrounding this issue often disregard it.³⁰⁷ Many proponents of constitutional comparativism fail to see any problem with the Supreme Court's decision in *Roper*, whereas opponents are equally as reluctant to see the benefits that constitutional comparativism can provide.³⁰⁸ The main difficulty in developing a test or Model Judicial Reasoning for policing these cases is that the comparative analysis is generally not the object of a particular case's controversy, and it is not a constitutional theory.³⁰⁹ Thus, Model Judicial Reasoning must administer the implementation of comparative analysis across all cases, rather than establish a process for analyzing a particular issue at the heart of a case's controversy. In most Court decisions, references to international legal sources appear trivial and have no substantive effect on the Court's decision, or as Justice Scalia asserts, are simply "meaningless dicta."³¹⁰ That is, of course, until decisions like *Roper* and *Lawrence*. For example, *Roper* was the first individual rights case in Court history to devote an entire section of the opinion to comparative analysis, and in both cases,

³⁰⁵ For a discussion about the risks of using "elevated use," "haphazard use," and "selective use" of international sources, see Alford, *Misusing International Sources*, *supra* note 200, at 61-69. Sanchez also iterates these concerns in his article *supra* note 24.

³⁰⁶ See *infra* Part IV.

³⁰⁷ See *supra* Part III.A for two examples where this line is completely disregarded.

³⁰⁸ See *supra* Part III.

³⁰⁹ See Alford, *In Search of a Theory*, *supra* note 58, at 641 ("Comparativism is not a constitutional theory; it is a methodology that is employed depending on a judge's particular theory.").

³¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

the comparative analysis served as an essential authority justifying the Court's decision without a clear domestic standard.³¹¹

Another difficulty in developing a test or model reasoning for these decisions is that the issue is three-dimensional. This means that the appropriateness of using a comparative analysis not only depends on the type of case and the constitutional standard or test, but also the role, positive or negative, that foreign law analysis plays.³¹² For example, the dissent in *Roper* probably would have been more reluctant to criticize the majority's comparative analysis if it merely distinguished foreign laws from United States domestic law and found them contrary to it. This Part proposes Model Judicial Reasoning that provides clarity to the issue of constitutional comparativism and concludes with a solution to avoid the specific problem posed in *Roper*.

A. *Model Reasoning for Judicial Internationalism*

All courts should consider three major inquiries before utilizing foreign sources of law in their decision-making:

- (1) *Does the issue involve a question over a treaty or international law, or is it a domestic constitutional question?*
- (2) *If it is a domestic constitutional law issue, does the court intend to use it to support its value judgment in a moral fact-finding analysis, or does it intend to use the source as an expository or empirical aid?*
- (3) *If the issue requires a moral fact-finding approach, does it merely support the results of a constitutional test, or does it supplement the test where a local inquiry is unclear?*

The most common and simple mistake that people in the legal community make is in failing to distinguish the issue of the case at hand.³¹³ Thus, the first and most essential step in determining whether a comparative analysis is appropriate is to determine whether the case concerns a treaty, an issue of international law, or whether it involves purely domestic law with purely domestic consequences. As Justice

³¹¹ See *supra* Part II.C.3.a for a discussion of the *Lawrence* decision, and *supra* Part II.C.3.b for a discussion of the decision in *Roper*.

³¹² See *supra* note 58 and accompanying text for an explanation of positive and negative analyses.

³¹³ See *supra* Part IV.A.

Ginsburg demonstrated in her speech to the American Society of International Law, criticisms of some forms of comparative judicial reasoning do not necessarily apply across the board.³¹⁴ For example, not even Justice Scalia would agree with the assertion that citing foreign sources in a treaty issue “threatens America’s sovereignty and violates the Supremacy Clause.” Similarly, few would argue that the Court should view all constitutional questions in light of foreign laws simply because the practice is acceptable in treaty interpretation. The implications behind using comparative reasoning in situations involving treaties and international law are not comparable on a critical level to the implications behind comparative references in purely domestic issues.³¹⁵ If determined that a case involves purely domestic issues, the next step is to determine what the Court attempts to do with its reference to foreign sources.

The goal of this step and subsequent steps is to ensure that the foreign legal sources are no more binding than other forms of persuasive authority. Justice Scalia wrote that the Court should either admit to reconsidering all matters of individual freedom under the Constitution in light of the views of foreigners, or stop using foreign views as part of the Court’s reasoned basis of its decisions altogether.³¹⁶ However, this view is too exclusionary. If the Court uses a comparative analysis as an expository aid, it is acceptable because it merely helps explain the law in America. Likewise, if the Court intends to reference foreign law as an empirical aid, then it is also acceptable because it provides useful information much like scientific research or sociology studies. These references are equal to any other source of persuasive authority and should receive equal treatment. Next, if the Court wishes to use foreign law simply to confirm the Court’s individual value judgment, it should refrain from doing so absent special circumstances.

In particular, the Court should avoid using international references as independent grounds to reach a particular value judgment, including instances such as in *Roper* where foreign laws provided the Court with a

³¹⁴ See *supra* Part IV.A.

³¹⁵ See *supra* Part IV.A (discussing confusions between cases invoking comparative analysis in domestic issues versus cases involving treaty or international law questions).

³¹⁶ Justice Scalia stated:

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should 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.

Roper v. Simmons, 125 S. Ct. 1183, 1228 (2005) (Scalia, J., dissenting).

last vote, or a tiebreaker. The only time the Court should proceed with referencing foreign sources to confirm a value judgment is when the respective constitutional test is such that it requires a value judgment of some kind, and the foreign law will help understand the application of that test. For example, if the test is to determine the existence of a national consensus for or against a particular issue, the court may compare evidence of a national consensus at home to similar evidence abroad in order to assure that its conclusion based on that evidence is as accurate as possible. If a comparative analysis confirms the result of a constitutional test that is conclusive by American legal standards, or if it is simply used to distinguish the test, then it remains no different from other forms of persuasive authority and should be acceptable.³¹⁷

By using this methodology, the Court will be able to utilize the advantages provided by the technological advances in communication. It weakens the effect and overall utility that these sources can provide, but this is intentional because it defends against the temptation to use these sources selectively in order to justify a judge's personal position on an issue that is less than clear by domestic standards.³¹⁸ More technically, this weakened effect assures that international legal trends remain persuasive authority and nothing more.

B. *The Real Problem*

In reality, only a narrow line of cases contribute to the slippery slope of constitutional comparativism. This is because the constitutional test searching for evolving standards of decency begs for an inquiry into the opinions of the rest of the world—especially concerning issues such as human rights that span all borders, and in light of the increased

³¹⁷ It is important to note that even the majority opinion of *Roper* did not use its foreign references as confirmation. *Id.* at 1193 (majority opinion). In fact, the majority admitted that the consensus was less conclusive and less dramatic, and then relied on the slow change that was occurring in the United States. *Id.* The Court never equated this change with a national consensus, but instead shifted the burden immediately in the next paragraph by saying that the dissent could not find a consensus *for* a juvenile death penalty. *Id.* at 1194. When shifting its focus to the international consensus, the Court further admitted that it only adds confirmation to the Court's decision that a juvenile death penalty violates the Eighth Amendment, not that it confirms a consensus at home. *Id.* at 1198.

³¹⁸ Roger Alford has expressed concern that this "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." Alford, *Misusing International Sources*, *supra* note 200, at 3; *see also* Blum, *supra* note 138, at 197 ("Unconstrained use of comparative materials can lead to abuse and misuse.").

knowledge Americans possess about the rest of the world.³¹⁹ The test is terribly ambiguous, as the national consensus surrounding juvenile death penalty demonstrates, because a national consensus is not always clear.³²⁰ The logical treatment of an unclear consensus should be to simply wait until it becomes clear and then change the law. Nonetheless, as *Roper v. Simmons* demonstrates, it is rather easy to convince a court's majority to change the law with an unclear national consensus when the rest of the world is overwhelmingly clear. Two plausible solutions exist: either the Court must exercise control by adopting a methodology similar to the one mentioned above, or change its test to provide a clearer, more objective standard.

By adopting the Model Judicial Reasoning, the Court will avoid the slippery slope that is terribly close to threatening America's democratic ideals. Furthermore, although this methodology reduces foreign sources of authority to the same level as any other form of persuasive authority, it does not mean that these citations are wholly meaningless. The methodology encourages negative comparative inquiries in all cases, and positive inquiries in almost all cases. This helps U.S. foreign policy by providing comity to the laws of other nations, while making the United States more accountable and transparent to the rest of the world. Adopting a more objective standard will likely accomplish this goal.

In the past, the Court never required an overwhelming national consensus in the letter of its test; it only required one in practice. The Court should incorporate "overwhelming" into the letter of its test in order to set a clear policy that avoids a change in constitutional standards when no real change in American standards of decency exist. Furthermore, the Court should develop a standard to define overwhelming—which should be defined by a decline of thirty percent of the states that originally sanctioned juvenile death penalty since its inception. Thus, if twenty states allowed juvenile death penalty at its inception, an overwhelming consensus against it would trigger once that number dropped to twelve. Regardless of whether the Court chooses a new methodology, or amends its test for individual rights under the Constitution, it will require a considerable amount of compromise on both ends of the spectrum.

³¹⁹ See *supra* Part IV.

³²⁰ See *supra* note 177.

V. CONCLUSION

Judicial internationalism has an expansive history in the United States spanning from the nation's birth to the present. Except for a few cases, criticisms of judicial internationalism have occurred almost exclusively in the last twenty years. America's global hegemony following World War I provides some explanation for this timing. More importantly the increase in democracies following the two World Wars and globalization generally have contributed to the increase in interaction with other nations by providing common goals abroad, and easing the flow of communication respectively. As a result, not only are there more comparative references, but the references span more issues than in the past. Where early references settled mainly on issues involving treaties and cross-border issues, the more recent decisions engage in constitutional questions, especially in the area of human rights. While many critics see this as a threat to democracy, others see it as an opportunity to promote comity to other nations by referencing foreign law as persuasive authority. Still, the most recent decisions push the notion of persuasive authority by acting as a tiebreaker where issues are not clear by domestic American standards. The result is a slippery slope that moves towards thwarting the democratic will of Americans where foreign law is the only clear confirmation of the Court's individual value judgment. When singled out, very few of the individual rights cases that cite to foreign law simply to confirm the Court's value judgment represent any threat to democracy in the United States, whereas the majority of those references are no different from any other persuasive authority. The Court needs a methodology in order to avoid the few situations where the rest of the world may trump the democratic system. Most importantly, the Court needs to exercise control and resist that temptation. Although comity to other nations is important, comity to American citizens is absolute.

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