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## THE DEATH PENALTY AND THE DEBATE OVER THE U.S. SUPREME COURT'S CITATION OF FOREIGN AND INTERNATIONAL LAW

*Yitzchok Segal\**

### BACKGROUND

Is it appropriate to use foreign and international law to interpret the United States Constitution? Should the United States Supreme Court be permitted to cite foreign and international law in interpreting the U.S. Constitution?<sup>1</sup> These questions have generated much interest and

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\* I would like to thank John Feerick, Professor and former Dean, Fordham University School of Law, and Daniel Richman, Professor, Fordham University School of Law, for their remarks on an earlier draft of this Comment. I would also like to thank Martin Flaherty, Professor, Fordham University School of Law, for some valuable suggestions that were incorporated into this Comment.

1. For the purposes of this Comment, “international law” may be understood as the law that binds nation-states; “foreign law” may be understood as the law of other sovereign nation-states; and “comparative law” may be understood as all non-U.S. legal materials, including both international and foreign law.

It is also critical to clarify the parameters of the issue. The debate over the Supreme Court’s use of comparative law has generally been limited to its use as persuasive evidence; most ardent proponents of citing comparative materials do not suggest that the Court may cite foreign and international law in purely domestic issues as controlling precedent. For example, Justice Breyer is perhaps the Court’s most vocal proponent of using comparative legal materials in U.S. constitutional interpretation, yet even he has stated that these materials are not controlling. *See, e.g., Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting) (stating “[o]bviously this foreign authority does not bind us”), *overruled by Moore v. Kinney*, 278 F.3d 774 (8th Cir. 2002); *see also, e.g., Vicki Jackson, Yes Please, I’d Love to Talk With You*, LEGAL AFF., July-Aug. 2004, at 44 (“[T]he Court’s recent references to foreign decisions and practice do not treat them as binding.”). *But see* Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT’L AFF. J. (forthcoming 2006). My thanks to the author for making this article available to me.

Further, both sides of this debate agree that in certain situations comparative materials are relevant. These situations include interpreting treaties, adjudicating a case involving a choice-of-law provision in a contract on which the U.S. suit is based, cases involving the constitutional provision authorizing Congress to “punish Offences against the Law of the Nations,” cases involving admiralty law, and asylum cases where a foreign decision reveals that a foreign nation persecutes members of an asylum-seeking ethnic group. *See, e.g., Richard Posner, No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July-Aug. 2004, at 40; Antonin Scalia, Keynote Address, *Foreign Legal Authority in*

controversy. While many justices and commentators endorse citations to foreign and international law, others have argued that it is inappropriate to interpret the U.S. Constitution based on non-U.S. law.<sup>2</sup>

Indeed, the appropriateness of using foreign and international law in interpreting the U.S. Constitution is arguably the most controversial jurisprudential issue in recent years. It has invoked impassioned rhetoric and violent death threats aimed at Justice Ginsburg and former Justice O'Connor<sup>3</sup> and has spawned an impressive, ever-growing body of literature comprised of articles by justices,<sup>4</sup> legal commentators,<sup>5</sup> and journalists.<sup>6</sup>

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*the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004) [hereinafter Scalia, Keynote Address]; Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423 (2004).

In sum, the issue is: is it appropriate for the Supreme Court to cite foreign and international law as persuasive evidence in purely domestic issues?

To a significant extent, this debate hinges on larger issues such as the purpose of the Constitution, the usefulness of comparative constitutional analysis, and the proper method of the interpretation of the Constitution. See, e.g., Louis J. Blum, Comment, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 200 n.15 (2002); Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003) (relating the differing judicial opinions in *Atkins v. Virginia*, 536 U.S. 304 (2002) to the interpretive posture of the justices); Jackson, *supra* at 46; Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999) (arguing that the receptiveness of a system of constitutional law to borrowings from other systems will depend on the constitutional model employed); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 241 (2003) [hereinafter Tushnet, *Transnational/Domestic Constitutional Law*] (relating the debate over the relevance of non-U.S. law to constitutional interpretation to the broader debates over the proper interpretation of the Constitution). A historical overview of several dominant interpretive theories is provided by PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). For a recent attempt to describe the debate over constitutional interpretive methods, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999).

2. See *infra* notes 3-4.

3. Former Judge Robert Bork, for example, has called the Court's recent citations to foreign and international law "risible," "absurd," and "flabbergasting." Robert H. Bork, *Whose Constitution is it Anyway?*, NAT'L REV., Dec. 8, 2003, at 37 [hereinafter Bork, *Whose Constitution?*]; Robert H. Bork, *Has The Supreme Court Gone Too Far?* (October 2003), available at [http://www.committeeforjustice.org/contents/news/news100103\\_commentary.shtml](http://www.committeeforjustice.org/contents/news/news100103_commentary.shtml) [hereinafter Bork, *Gone Too Far?*]. Both former Justice O'Connor and Justice Ginsburg have been threatened with death because of their comparative law citations. Posting of Mickey McLean to World Views blog, <http://www.worldmagblog.com/blog/archives/023255.html> (Mar. 16, 2006, 1:12 EST).

4. Judges who have written or spoken on this subject outside of judicial opinions include Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997); Harry A. Blackmun, *The Supreme Court and the Law of the Nations*, 104 YALE L.J. 39 (1994); Stephen Breyer, Keynote Address, 97 AM. SOC'Y INT'L L. PROC. 265 (2003) [hereinafter Breyer, Keynote Address];

Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Michael Kirby, *Think Globally*, 4 GREEN BAG 2D 287 (2001); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW. 20 (1998); Sandra Day O'Connor, Keynote Address: Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law, in 96 AM. SOC'Y INT'L L. PROC. 348 (2002) [hereinafter O'Connor, Keynote Address]; Claire L'Heureux-Dubè, Remark, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998); Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893 (2005); Posner, *supra* note 1; William H. Rehnquist, *Foreword to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, at vii, viii-ix (Vicki C. Jackson & Mark Tushnet eds., 2002); William H. Rehnquist, *Constitutional Courts—Comparative Remarks*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431 (2004); Wilkinson, *supra* note 1; Bork, *Whose Constitution?*, *supra* note 3; Bork, *Gone Too Far?*, *supra* note 3; Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": *The Value of a Comparative Perspective in Constitutional Adjudication* (Feb. 7, 2006), [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html) [hereinafter Ginsburg, *A Decent Respect to the Opinions of [Human]kind*]; Sandra Day O'Connor, Remarks to the Southern Center for International Studies (Oct. 28, 2003), available at [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf); Sandra Day O'Connor, *O'Connor Extols Role of International Law* (Oct. 27, 2004), <http://www.cnn.com/2004/LAW/10/27/scotus.oconnor.ap>; Scalia, Keynote Address, *supra* note 1; Antonin Scalia & Stephen Breyer, Discussion on the Constitutional Relevance of Foreign Court Decisions at the American University Washington College of Law (Jan. 13, 2005), available at <http://epstein.law.northwestern.edu/research/supctLawScaliaBreyer.pdf> [hereinafter Scalia & Breyer, Discussion on the Constitutional Relevance of Foreign Court Decisions].

5. Articles discussing the debate over citations to foreign and international law as well as the value of comparative sources in U.S. constitutional interpretation include Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); T. Alexander Aleinkoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003) [hereinafter Alford, *Federal Courts*]; Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT'L L. 913 (2004) [hereinafter Alford, *Postscript on Lawrence*]; Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) [hereinafter Alford, *Misusing*]; Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695 (2006); Blum, *supra* note 1; Childress, *supra* note 1; Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance*, 11 WIDENER L. REV. 59 (2004); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Flaherty, *supra* note 1; David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445 (2004) [hereinafter Fontana, *The Next Generation*]; David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the*

Outside the pages of the Court's official reporter, several Justices have spoken publicly about the proper role of comparative legal materials in U.S. constitutional interpretation.<sup>7</sup> For instance, in a rare public debate, Supreme Court Justices Stephen Breyer and Antonin Scalia argued the merits of citing foreign and international law in the Court's opinions.<sup>8</sup> Recently, at the nomination hearings of Justices John Roberts and Samuel Alito, senators fired questions at the candidates regarding the role of comparative legal materials, probing them to publicly announce their views on this explosive issue.<sup>9</sup>

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*Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003); Jackson, *supra* note 1; Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Mark W. Janis, *Dred Scott and International Law*, 43 COLUM. J. TRANSNAT'L L. 763 (2005); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345 (2005); Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT'L L. 43 (2004) [hereinafter Koh, *International Law*]; Kreimer, *supra* note 1; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004); Matthew S. Raalf, Note, *A Sheep in Wolf's Clothing: Why the Debate Surrounding Comparative Constitutional Law is Spectacularly Ordinary*, 73 FORDHAM L. REV. 1239 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329 (2005); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Tushnet, *Transnational/Domestic Constitutional Law*, *supra* note 1.

6. Articles discussing this issue in the popular press are legion. See, e.g., Ann Althouse, *Innocence Abroad*, N.Y. TIMES, Sept. 19, 2005, at A25; Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24; Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES, Apr. 2, 2005, at A10; Charles Lane, *Thinking Outside The U.S.*, WASH. POST, Aug. 4, 2003, at A13; Felix G. Rohatyn, Op-Ed, *Dead to the World*, N.Y. TIMES, Jan. 26, 2006, at A23; Jeffrey Toobin, *Swinging Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, available at [http://www.newyorker.com/printables/fact/050912fa\\_fact](http://www.newyorker.com/printables/fact/050912fa_fact).

7. Presentations by Supreme Court Justices include Breyer, Keynote Address, *supra* note 4; O'Connor, Keynote Address, *supra* note 4; Scalia, Keynote Address, *supra* note 1; Ginsburg, *A Decent Respect to the Opinions of [Human]kind*, *supra* note 4; Scalia & Breyer, Discussion on the Constitutional Relevance of Foreign Court Decisions, *supra* note 4.

8. Scalia & Breyer, Discussion on the Constitutional Relevance of Foreign Court Decisions, *supra* note 4.

9. A complete transcript of the Roberts hearings may be found at <http://www.post-gazette.com/pg/05257/571043.stm> (last visited Oct. 12, 2006); a complete transcript of the Alito hearings may be found at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html> (last visited Oct. 12, 2006).

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Perhaps most strikingly, citations to foreign and international law by U.S. courts have provoked the proposal of a congressional resolution stating that “judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions . . . .”<sup>10</sup> Similarly, the Court’s citations to comparative legal materials have provoked the proposal of a bill by several senators stating that in interpreting the Constitution, a court may not rely on “any constitution, law, administrative rule, Executive Order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.”<sup>11</sup>

The Supreme Court’s use of foreign and international law in interpreting the Constitution is not itself revolutionary; throughout its history, the Court has freely drawn on supranational law.<sup>12</sup> Thus, it is not the Court’s mere

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10. H.R. Res. 568, 108th Cong. (2004); Press Release, Rep. Tom Feeney, Reaffirmation of American Independence Resolution Approved (May 13, 2004), *available at* [http://www.house.gov/apps/list/press/fl24\\_feeney/ResConstitutionSubPassage.shtml](http://www.house.gov/apps/list/press/fl24_feeney/ResConstitutionSubPassage.shtml). The Resolution states:

Resolved, That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.

H.R. Res. 568.

The preface to the resolution states that inappropriate judicial reliance on foreign laws threatens the separation of powers. *Id.* The resolution’s sponsor has even suggested that a Justice’s failure to comply with the resolution may constitute grounds for impeachment. Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, MSNBC, Mar. 11, 2004, <http://www.msnbc.msn.com/id/4506232/>. Regarding the resolution, see *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 67 (2004), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_house\\_hearings&docid=f:92673.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:92673.wais); Hadar Harris, “*We Are the World*”—or Are We? *The United States’ Conflicting Views on the Use of International and Foreign Legal Decisions*, 12 NO. 3 HUM. RTS. BRIEF 5 (2005), *available at* <http://www.wcl.american.edu/hrbrief/12/123.pdf?rd=1>; Jeffrey McDermott, *Citation to Foreign Precedent: Congress vs. The Courts*, 51 FED. LAW. 20 (2004). A related congressional bill threatening to prohibit any reference to foreign materials has also been introduced. See H.R. Res. 3799, 108th Cong. (2004).

11. This bill is called the Constitution Restoration Act of 2004. S. 2323, 108th Cong. (2004).

12. See, e.g., Alan A. Levasseur, *The Use of Comparative Law by Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS* 315, 325-31 (Ulrich Drobing & Sjeff van Erp eds., 1997); Connell, *supra* note 5, at 69; Glensy, *supra* note 5, at 361-73; Neuman, *supra* note 5, at 82-84.

use of comparative legal sources that has sparked the recent debate, it is the *context* of these references. The Court has recently cited foreign and international law to support key positions in high-profile cases dealing with hyper-sensitive domestic issues, including the death penalty.<sup>13</sup> The Court has more than once abrogated its holdings in prior decisions, in part due to foreign and international law.<sup>14</sup> These references seem to indicate a conscious movement toward a transnational adjudication model and have impelled the dramatic controversy over the relevance of foreign and international law in U.S. constitutional interpretation.<sup>15</sup>

The Supreme Court is sharply divided into two opposing factions regarding the function of comparative legal sources in the U.S. legal system.<sup>16</sup> Within the past two decades alone, the relevance of comparative legal sources in U.S. constitutional interpretation has been contested, at times quite heatedly, in eight Supreme Court cases.<sup>17</sup>

The split among the Supreme Court Justices has primarily occurred along the liberal/conservative ideological divide—liberal-minded Justices tend toward the internationalist camp while conservative-minded Justices tend toward the nationalist camp. For example, in the highly contentious *Lawrence v. Texas* decision, Justice Kennedy led a majority of the Court in holding that a Texas statute making it a crime for two persons of the same

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13. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 604 (2005); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

14. See *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. at 304; *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. at 551; *Bowers v. Hardwick*, 478 U.S. 186 (1986), *abrogated by Lawrence*, 539 U.S. at 558.

15. See, e.g., Janet Koven Levitt, *Going Public with Transnational Law: The 2002-2003 Supreme Court Term*, 39 TULSA L. REV. 155, 155 (2003) (“The Court’s international and foreign law citations were not, in and of themselves, revolutionary or ‘breakthrough.’ It was the Court’s decision to use such citations in the highest profile, potentially most controversial cases . . .”). During the last twenty years, the Court has used comparative materials in Eighth Amendment cases, substantive due process cases, federalism cases, and equal protection cases. See Glensy, *supra* note 5, at 373-87 (cataloging these cases). The Court’s recent use of comparative legal sources has been more extensive than in the past. See, e.g., Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004); Tushnet, *Transnational/Domestic Constitutional Law*, *supra* note 1, at 245 (“[R]eferences to non-U.S. constitutional law have become more frequent in recent years . . .”).

16. See Tushnet, *Transnational/Domestic Constitutional Law*, *supra* note 1, at 245 (“Four Justices—Stevens, Kennedy, Ginsburg, and Breyer—have adverted to non-U.S. law in their opinions, while three—Rehnquist, Scalia, and Thomas—have written opinions expressly criticizing references to non-U.S. law.”); see also *supra* note 4.

17. *Roper*, 543 U.S. 551; *Lawrence*, 539 U.S. 558; *Foster v. Florida*, 537 U.S. 990 (2002); *Atkins*, 536 U.S. 304; *Knight v. Florida*, 528 U.S. 990 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); see also *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting).

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sex to engage in certain sexual conduct was unconstitutional as applied to two adult males who had privately engaged in consensual sodomy.<sup>18</sup> The *Lawrence* holding overruled the Court's prior decision in *Bowers v. Hardwick*.<sup>19</sup> In support of its decision, the majority noted that the European Court of Human Rights has not followed *Bowers* and that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."<sup>20</sup> Countering Kennedy's majority opinion, Justices Scalia, Rehnquist, and Thomas filed a dissenting opinion vigorously objecting to the majority's citations of comparative law.<sup>21</sup> The dissent denigrated the majority's citation of foreign law, labeling it "meaningless and dangerous dicta."<sup>22</sup> In support of its opinion, the dissent proclaimed that "this Court . . . should not impose foreign moods, fads, or fashions, on Americans."<sup>23</sup>

This Comment examines the role that foreign and international law has played in the Court's death penalty cases. Part I of this Comment provides background and explains the relevance of foreign and international law in Eighth Amendment jurisprudence. Part II forms the core of this Comment and argues that, the sensational degree of controversy notwithstanding, foreign and international law have been peripheral to the Court's death penalty decisions. It demonstrates that in capital punishment jurisprudence, comparative materials function, if at all, merely as a minor consideration in a multifaceted analysis. It further argues that the Court develops, adopts, and sustains a "national consensus" analytical paradigm in its death penalty decisions and that this calculated paradigm severely constrains the judicial impact of these comparative materials. Part III of this Comment presents the position of death penalty abolitionists that the Court should grant foreign and international law supremacy over the national consensus and argues that this position runs counter to the Court's consistently sustained national consensus paradigm. Finally, Part IV of this Comment presents the view of several commentators that the judicial impact of foreign and international law on the Court has been exceptionally limited in all jurisprudential areas, a view that dovetails with the conclusions of this Comment.

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18. *Lawrence*, 539 U.S. at 578.

19. *Bowers*, 478 U.S. at 186.

20. *Lawrence*, 539 U.S. at 576.

21. *Id.* at 598 (Thomas, J., dissenting).

22. *Id.*

23. *Id.* (citing *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring)).



### I. EIGHTH AMENDMENT JURISPRUDENCE AND COMPARATIVE LEGAL SOURCES

Eighth Amendment jurisprudence constitutes an area of law in which foreign and international legal materials have been invoked with great frequency. Indeed, citations to comparative legal materials have become a hallmark of Eighth Amendment jurisprudence.

The suitability of comparative legal materials to Eighth Amendment jurisprudence derives from the Court's interpretation of that Amendment. The Eighth Amendment prohibits the imposition of "cruel and unusual punishment."<sup>24</sup> In two critical cases, *Weems v. United States* and *Trop v. Dulles*, the Court molded the Eighth Amendment, making it ripe for comparative legal analysis and prone to the citation of comparative legal materials.<sup>25</sup>

Early in the twentieth century, the case of Paul A. Weems confronted the Supreme Court.<sup>26</sup> Weems falsified public records and was sentenced to twelve years of hard and painful labor, deprived of many basic rights, and subjected to a perpetual state of surveillance.<sup>27</sup> In a trail-blazing decision, the Court maintained that the constitutional clause "cruel and unusual punishment" must be defined in a dynamic manner based on society's ever-developing perceptions of civility.<sup>28</sup> The Court eschewed a static perception of "cruel and unusual punishment," stating that its definition is "not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice."<sup>29</sup> Under this interpretation of the Eighth Amendment, the Court held that Weems's severe penalty

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24. U.S. CONST. amend. VIII.

25. *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349 (1910). In *Thompson v. Oklahoma*, 487 U.S. 815, 822-23 n.7 (1988) (plurality opinion), the Court explained that the underlying rationale of using national objective indicators in Eighth Amendment jurisprudence is rooted in the very language of the Constitution. The Court stated:

Our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of the legislatures and the juries, provide an important measure of whether the death penalty is "cruel and unusual." Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is "unusual" depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.

*Id.*

26. *Weems*, 217 U.S. at 349.

27. *Id.* at 363-64.

28. *Id.* at 378.

29. *Id.*

amounted to cruel and unusual punishment and was unconstitutional.<sup>30</sup>

The Court built on its progressive holding in *Weems* in the landmark case of *Trop v. Dulles*.<sup>31</sup> Albert L. Trop, an American soldier serving in North Africa during 1944, was caught deserting the army and forced to stand trial.<sup>32</sup> A general court-martial convicted Trop of desertion and sentenced him to three years of hard labor, forfeiture of all pay and allowances, and a dishonorable discharge.<sup>33</sup> As a result of his dishonorable discharge, Trop was refused a passport and was thus effectively denied American citizenship.<sup>34</sup> Trop sought a declaratory judgment granting him citizenship and brought his case up the judicial ladder to the Supreme Court.<sup>35</sup>

Chief Justice Warren led a plurality opinion holding that the imposition of denationalization for army desertion constitutes cruel and unusual punishment and is unconstitutional.<sup>36</sup> Citing *Weems* as precedent, the Court maintained that the scope of “cruel and unusual punishment” is subject to change and encompasses punishments considered cruel and unusual by mankind’s newfound sensitivities.<sup>37</sup> In *Trop’s* oft-cited phrase, the contours of “cruel and unusual punishment” are determined by “the evolving standards of decency that mark the progress of a maturing society.”<sup>38</sup> The Court found that the imposition of denationalization as a punishment violates society’s evolving standards of decency and is therefore barred by the Eighth Amendment.<sup>39</sup> *Trop* thus firmly cemented the progressive interpretive principle that was launched and outlined in *Weems*: the meaning of the Eighth Amendment hinges on the standards of civility in contemporary society.

Yet *Trop* did more than merely cement this progressive interpretive principle, it licensed the use of comparative legal materials in Eighth Amendment jurisprudence. In illustrating that the imposition of denationalization violates the Eighth Amendment, the Court invoked comparative legal materials as an index of society’s standards of decency.<sup>40</sup> The *Trop* Court noted that virtually all the civilized nations of the world

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30. *Id.* at 381.

31. 356 U.S. 86 (1958) (plurality opinion).

32. *Id.* at 87.

33. *Id.* at 88.

34. *Id.*

35. *Id.*

36. *Id.* at 101.

37. *Id.* at 100-01.

38. *Id.* at 101.

39. *Id.* at 100-01.

40. *Id.* at 102-03.

disallow the imposition of denationalization as a punishment and that only two countries impose denationalization as a penalty for desertion.<sup>41</sup> The Court cited these sources in a blithe, matter-of-fact manner, as if it were only natural to look to these sources for judicial guidance. Nevertheless, by employing comparative materials to measure society's decency standards, the Warren plurality tacitly recognized that these sources represent reliable indicators of society's decency norms, lending the Court's imprimatur to comparative legal citations. Quietly yet unambiguously, *Trop* authorized the citation of comparative legal materials in Eighth Amendment jurisprudence.<sup>42</sup>

*Trop*'s license to cite foreign and international law has been well-used. In particular, liberal-minded justices have seized upon this license and have frequently cited foreign and international legal materials in their capital punishment opinions. For example, in *Atkins v. Virginia*, Justice Stevens filed the majority opinion for the Court and ruled that the execution of mentally retarded criminals constitutes cruel and unusual punishment as defined by the evolving standards of decency of a maturing society.<sup>43</sup> In support of its decision, the Court noted that "[w]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>44</sup> Similarly, in the celebrated *Roper v. Simmons* case Justice Kennedy filed the majority opinion for the Court, holding that the execution of individuals under the age of eighteen at the time of their capital crimes entails cruel and unusual punishment as defined by the evolving standards of decency of a maturing society.<sup>45</sup> As in *Atkins*, the Court in *Roper* cited international opinion against the juvenile death penalty in support of its decision.<sup>46</sup>

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41. *Id.*

42. In his dissenting opinion in *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting), the late Chief Justice Rehnquist argues that in *Stanford v. Kentucky*, 492 U.S. 361 (1989) (plurality opinion), the Court rejected the view of *Trop* that comparative legal sources are relevant in Eighth Amendment jurisprudence. Justice Rehnquist emphasized that the *Trop* opinion represents a mere plurality of the Court and that the *Trop* plurality failed to justify its use of comparative materials. *Atkins*, 536 U.S. at 325. This position is difficult to sustain for two reasons. First, *Stanford* is the only authority that Justice Rehnquist cites in support of his position—yet even *Stanford* did not reject the citations of comparative materials altogether; it merely consigned them to a confirmatory role. See discussion *infra* pp. 20-21. Also, though the *Trop* opinion was signed by a mere plurality of the Court, the part of the Court's decision in *Stanford* that downplays the role of comparative legal materials was also signed by a mere plurality of the Court, a point Justice Rehnquist fails to mention. See *Stanford*, 492 U.S. at 370 n.1.

43. *Atkins*, 536 U.S. at 321.

44. *Id.* at 316 n.21.

45. *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

46. *Id.*

## II. THE MARGINALITY OF COMPARATIVE MATERIALS IN DEATH PENALTY CASES

A careful analysis of the way in which the Court uses comparative materials in its death penalty cases illustrates their marginal role. While death penalty cases have provoked much of the controversy over the citation of foreign and international legal materials, the Court has never regarded these sources as judicially significant indicators of society's decency standards. Because the Court accords only minimal judicial value to comparative legal materials, these materials have not been pivotal in the Court's death penalty decisions.

In death penalty cases, comparative materials function, if at all, merely as a single consideration in a multidimensional analysis to determine the meaning of cruel and unusual punishment—and a highly attenuated consideration at that. Death penalty case law illustrates that the Court has consciously erected a carefully calibrated hierarchy of sources functioning as objective indicators of society's decency standards. The Court deliberately, meticulously, and consistently sustains this hierarchal structure. This calculated hierarchical structure is comprised of a mosaic of sources, including national legislative enactments, national jury sentencing determinations, and foreign and international law. The Court ascribes the greatest degree of reliability to national sources and a lesser degree of reliability to foreign and international legal sources.

The national sources that the Court recognizes as highly reliable objective indicators of society's decency standards are U.S. legislative enactments and U.S. jury sentencing determinations. The Court terms the results of its analysis of these national sources “the national consensus”<sup>47</sup> and considers the “national consensus” of paramount importance. Where national legislative enactments and national jury determinations allow for a given punishment, the “national consensus” does not deem this punishment cruel and unusual. Conversely, where national legislative enactments and national jury sentencing determinations disallow a given punishment, the “national consensus” deems this punishment cruel and unusual. Thus, there is always a national consensus, allowing the Court to conduct its evaluation of society's decency standards in its self-crafted national majoritarian analytical paradigm.<sup>48</sup>

The national majoritarian paradigm ensures that the national consensus

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47. See, e.g., *id.* at 562; *Atkins*, 536 U.S. at 314; *Stanford*, 492 U.S. at 371; *Thompson v. Oklahoma*, 487 U.S. 815, 848-49 (1988) (O'Connor, J., concurring).

48. Alford, *Federal Courts*, *supra* note 5, at 776, 778-80, 782-86; Alford, *Misusing*, *supra* note 5, at 59-61; see also Alford, *Postscript on Lawrence*, *supra* note 5, at 914, 920.

is determinative of the Court's holding. Because the national consensus represents the most reliable indicator of society's decency standards, and occupies the uppermost part of the hierarchal structure of society's decency standards indicia, the Court pinpoints society's decency standards using the national consensus as its yardstick. By rendering comparative legal sources subsidiary to the national consensus, the national majoritarian paradigm severely restricts their judicial value. The Court invokes comparative legal materials only in a confirmatory capacity, to corroborate the national consensus: comparative legal materials that accord with the national consensus merely confirm the national consensus and comparative sources that collide with the national consensus, necessarily yield it.<sup>49</sup> So long as the Court adheres to stare decisis principles and continues to evaluate society's decency standards within a national majoritarian analytical framework, the national consensus will invariably trump contrary foreign and international legal sources.<sup>50</sup>

**A. The Hierarchal Structure of Objective Indicators of Society's  
Decency Standards, the Primacy of the National Consensus, and the  
Sub-Primacy of National Legislative Enactments Within the  
National Consensus**

U.S. legislative enactments and U.S. jury sentencing determinations form the apex of the hierarchal structure of society's decency standards indicia. *Woodson v. North Carolina* made this point explicitly, classifying U.S. legislative enactments and U.S. jury sentencing determinations as the "two crucial indicators of evolving standards of decency."<sup>51</sup> The Supreme Court unequivocally ascribes primacy to the national indicia of society's

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49. Alford, *Misusing*, *supra* note 5, at 59-61; *see also* Alford, *Federal Courts*, *supra* note 5, at 778, 782-86; Alford, *Postscript on Lawrence*, *supra* note 5, at 914 ("The Court has never considered international law particularly relevant. At most it has considered the actual practice of other countries as potentially relevant to the constitutional inquiry."). Alford argues that a similar dynamic is at work in areas of substantive due process: "[S]imilar to Eighth Amendment, references to global standards under the conception of ordered liberty provides an additional check on substantive due process, to be utilized if it already has been established that a right is part of our own history and tradition." Alford, *Postscript on Lawrence*, *supra* note 5, at 921; *see also* Alford, *Misusing*, *supra* note 5, at 59 n.17.

50. It should be noted that the Court has repeatedly reserved the option to rule contrary to the objective indicators of society's decency standards. *See, e.g., Roper*, 543 U.S. at 564; *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Compare, however, the views of the plurality opinion and dissenting opinion in *Stanford*, 492 U.S. at 380, 382 (indicating the analysis of constitutionality of cruel and unusual punishment should be a two-part test).

51. 428 U.S. 280, 293 (1976).

decency standards.

Several cases highlight the prominence of national jury sentencing determinations in the hierarchal structure of society's decency standards indicia. For example, in *Witherspoon v. Illinois*, the Court relied heavily on national jury sentencing determinations in assessing society's decency standards.<sup>52</sup> The Court explained that jury sentencing determinations are essential to the Court's evaluation of society's decency standards because the jury serves "as a link between contemporary community values and the penal system."<sup>53</sup> Likewise, in *Furman v. Georgia*, national jury sentencing decisions served as a prime factor in the Court's holding restricting various arbitrary procedures in the imposition of the death penalty.<sup>54</sup>

Much as the Court highly values national jury sentencing determinations, it values national legislative enactments even more. The national consensus is comprised of a two-tiered hierarchal structure consisting most importantly of national legislative enactments and less importantly of national jury sentencing determinations. This painstakingly nuanced bifurcation between the two national indicators is telling; it is reflective of the great importance of the highly-calibrated hierarchal structure of objective indicators. The Court is eminently serious about the varying reliability values it ascribes to the objective indicators.

It is readily apparent that the Court assigns the greatest degree of reliability to national legislative enactments. Language indicating the primacy of national legislative enactments litters Eighth Amendment jurisprudence: national legislative judgments "weigh heavily," while national jury sentencing decisions merely represent a "significant and reliable objective index of contemporary values."<sup>55</sup> The Court further indicates, "[t]he *clearest and most reliable* objective evidence of contemporary values is the legislation enacted by the country's legislatures," though "[w]e have *also* looked to data concerning the actions of sentencing juries."<sup>56</sup> Additionally, as Justice Rehnquist recognized, while "we ascribe primacy to legislative enactments," national jury sentencing determinations are "entitled to less weight than legislative judgments."<sup>57</sup> National legislative enactments are "the primary and most

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52. 391 U.S. 510, 519 (1968).

53. *Id.* at 519 n.15.

54. 408 U.S. 238 (1972); *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 831-34 (1988) (plurality opinion).

55. *Gregg v. Georgia*, 428 U.S. 153, 175, 181 (1976).

56. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *overruled by* *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (emphasis added).

57. *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2005).

reliable indication of consensus.”<sup>58</sup> Finally, as Justice Blackmun characterized the Court’s position, the country’s legislation provides “the best evidence” of society’s decency standards.<sup>59</sup> While the decisions of state legislatures are “*first* among” the indicia that reflect the public attitude toward a given sanction, “[w]e have *also* been guided by the sentencing decisions of juries.”<sup>60</sup>

The order in which the Court analyzes the national indicators of society’s decency standards further reflects both the primacy of the national consensus and the nuanced bifurcation between the two national indicators. For example, the plurality opinion in *Thompson v. Oklahoma* set the agenda for its review by stating: “we *first* review relevant legislative enactments . . . *then* refer to jury determinations.”<sup>61</sup> This order of review set by *Thompson* serves as a model for other death penalty cases: they first review national legislative enactments and only then proceed to review national jury sentencing determinations.<sup>62</sup>

#### **B. Indications and Illustrations of the Marginal and Confirmatory Role of Comparative Legal Sources in Death Penalty Cases**

While the Court considers national legislative enactments and national jury sentencing determinations the two crucial indicators of society’s decency standards, the Court regards foreign and international law with far less deference. The primacy of the national indicia consigns comparative legal sources to the periphery. The Court does not accord independent judicial value to comparative legal materials; rather, it values supranational materials only as corroboratory of the national consensus.

Case law reflects the marginal role of comparative legal sources in the Court’s death penalty cases in several ways. These include: the patent omission of comparative materials in some of the Court’s death penalty decisions;<sup>63</sup> the minimal degree of attention the Court expends on comparative sources as compared with national decency standards

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58. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) (plurality opinion).

59. *Campbell v. Wood*, 511 U.S. 1119, 1119-20 (1994) (Blackmun, J., dissenting).

60. *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (emphasis added); *see also* *Tison v. Arizona*, 481 U.S. 137, 154 (1987) (“[S]ubstantial and recent legislative authorization of the death penalty for the crime of felony murder . . . *powerfully suggests* that society does *not* reject the death penalty as grossly excessive under these circumstances.”) (first emphasis added).

61. 487 U.S. 815, 822 (1988) (plurality opinion).

62. *Stanford*, 492 U.S. 361; *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

63. *See infra* notes 68-69 and accompanying text.

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indicia;<sup>64</sup> the Court's recurrent tendency to relegate comparative sources to footnotes;<sup>65</sup> the conspicuous omission of comparative sources from the Court's agenda list of decency standards indicia it plans on considering;<sup>66</sup> and the Court's revealing characterizations of comparative sources as merely confirming and supporting the national consensus.<sup>67</sup>

Perhaps the starkest indication of the non-centrality of foreign and international law in death penalty cases is the total absence of these materials in some of the Court's decisions. In several cases, the Court grapples to pinpoint society's decency standards and fails to reference comparative legal materials, even in a cursory fashion. For example, in both *Roberts v. Louisiana*<sup>68</sup> and *Gregg v. Georgia*,<sup>69</sup> the Court assesses society's decency standards by referring exclusively to national legislation and national jury determinations; neither decision troubles to reference foreign and international sources. It is apparent that the Court does not view these materials as important indicators of objective societal standards.

Yet even in cases where the Court does invoke foreign and international legal materials as objective indicia of society's decency standards, these comparative materials are inessential to the Court's decisions. This is manifest in the highly asymmetrical degree of attention the Court expends on comparative legal materials as compared with national decency standards indicia. National consensus indicators almost invariably occupy the bulk of the discussion, while foreign and international law occupy only a minor part.<sup>70</sup> For example, in *Atkins v. Virginia*, the Court's analysis of national legislative enactments occupies over two full pages.<sup>71</sup> Following this comprehensive analysis, the Court referenced the view of the world community;<sup>72</sup> this reference, the only reference to foreign and international law in *Atkins*, occupies less than a single sentence.<sup>73</sup> The degree of attention the Court expends on each objective indicator is commensurate with its degree of reliability; while the great degree of attention the Court

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64. See *infra* notes 70-73 and accompanying text.

65. See *infra* note 74 and accompanying text.

66. See *infra* notes 75-80 and accompanying text; see also Benvenuto, *supra* note 5, at 2711-12, 2744-45.

67. See *infra* notes 81-85 and accompanying text.

68. 428 U.S. 325 (1976).

69. 428 U.S. 153 (1976).

70. The sole exception to this pattern is *Roper v. Simmons*, 543 U.S. 551 (2005), where the Court devotes substantial attention to comparative materials. *But see* discussion *infra* at pp. 15-16 (arguing that even in *Roper* the role of comparative materials is merely confirmatory).

71. 536 U.S. 304, 314-17 (2002).

72. *Id.* at 316 n.21.

73. *Id.*



lavishes on the national decency standards indicia reflects their prominence in the Court's analyses, the often nominal mention of comparative sources reflects their unimportance.

Equally reflective of the non-centrality of comparative legal materials is the Court's recurrent tendency to relegate these sources to a footnote. In several death penalty cases the Court placed comparative sources in footnotes, underscoring their minimal significance.<sup>74</sup>

Another manifestation of the marginal role of comparative legal materials in the Court's death penalty cases is the conspicuous omission of these sources from the Court's agenda list of decency standards indicia it plans on considering. *Thompson v. Oklahoma* instantiated this bizarre trend.<sup>75</sup> Near the outset of *Thompson*, the Court set out its agenda of review, listing the sources it planned on using as objective indicators of society's decency standards.<sup>76</sup> The Court listed only national legislative enactments and national jury determinations; it noticeably omitted comparative legal materials.<sup>77</sup> In the substantive analysis section of its opinion, the Court unexpectedly broke out of the mold it set for its analysis by adding a single paragraph that cites the death penalty practices of several other countries alongside the views of professional organizations.<sup>78</sup> These comparative sources are nestled in a brief, isolated paragraph amongst extensive discussion of national legislative enactments and jury determinations.<sup>79</sup> The structure employed in *Thompson* generates the discrete impression that the Court referenced comparative materials as an afterthought. National legislative enactments and national jury sentencing decisions governed the judgment in *Thompson*; the references to foreign law are far from pivotal in the Court's multifaceted calculus.<sup>80</sup>

Like the omission of comparative legal materials from the Court's agenda list, the Court's diffident terminology in discussing supranational legal materials also reflects their minimal role in capital punishment

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74. *Id.*; *Enmund v. Florida*, 458 U.S. 782, 797 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977).

75. 487 U.S. 815 (1988) (plurality opinion); *see also* Benvenuto, *supra* note 5, at 2714-16, 2747-48.

76. *Thomson*, 487 U.S. at 822-23.

77. *Id.*

78. *Id.* at 830-31.

79. *Id.*

80. *See The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2067-68 (2001) [hereinafter *International Judicial Dialogue*] (noting that the *Thompson* Court did not include comparative materials in its agenda of review and only referenced these materials after a detailed survey of national sources); *see also* Benvenuto, *supra* note 5, at 2711-12, 2744-45.

jurisprudence. In *Atkins v. Virginia*, the Court conducted a comprehensive analysis of national legislative enactments to ascertain whether a national consensus exists to prohibit the execution of mentally retarded persons as cruel and unusual punishment.<sup>81</sup> After finding that a consensus exists, the Court added a footnote referencing the views of the world community, reports of professional organizations, and American opinion polls.<sup>82</sup> The Court considered these sundry sources “[a]dditional evidence . . . that this legislative judgment reflects a much broader social and professional consensus.”<sup>83</sup> The Court concluded its footnote by adding: “Although these factors are *by no means dispositive*, their consistency with the legislative evidence *lends further support* to our conclusion that there is a consensus among those who have addressed the issue.”<sup>84</sup> The Court did not suggest that the views of the world community are controlling; on the contrary, the Court distanced itself from this position. After establishing a national consensus based on national legislative enactments, the Court referred to the views of the world community as *additional evidence* that *lends further support* to the national consensus.<sup>85</sup>

In *Roper v. Simmons* the Court employed terminology similar to *Atkins* in discussing comparative legal materials.<sup>86</sup> *Roper* prohibited the execution of individuals who were under eighteen years of age at the time of their capital crimes.<sup>87</sup> As in *Atkins*, the Court in *Roper* first set out to determine whether a national consensus existed on this issue.<sup>88</sup> Finding a national consensus against the execution of offenders under eighteen, the Court turned to the world community for corroboration of the national consensus.<sup>89</sup> The Court opened its discussion of international opinion by stating that its holding “*finds confirmation* in the stark reality that the United States is the only country in the world that continues to give official

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81. 536 U.S. 304, 313-16 (2002).

82. *Id.* at 316 n.21.

83. *Id.* (emphasis added).

84. *Id.* (emphasis added).

85. See Alford, *Misusing*, *supra* note 5, at 60 (“[T]he Court in *Atkins* found a national consensus and then concluded that this consensus was consistent with a much broader consensus among others who have considered the matter.”); see also Alford, *Federal Courts*, *supra* note 5, at 779-80, 780 n.395; Alford, *Postscript on Lawrence*, *supra* note 5, at 920; *cf.* *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (stating that in *Atkins* the Court found a national consensus based on national legislative enactments and national jury sentencing determinations).

86. *Roper*, 543 U.S. at 578.

87. *Id.* at 578-79.

88. *Id.* at 564-75.

89. *Id.* at 575-78.

sanction to the juvenile death penalty.”<sup>90</sup> After analyzing the international opinion on the issue, the Court stated: “The opinion of the world community, while *not controlling our outcome*, does provide respected and significant *confirmation* for our own conclusions.”<sup>91</sup> Though *Roper* engaged in an extensive discussion of comparative legal materials, the Court nevertheless expressly valued these sources only inasmuch as they confirmed the national consensus. In fact, the Court included four detailed appendices relating to national legislative enactments to corroborate its finding of a national consensus.<sup>92</sup> As in *Atkins*, the *Roper* Court disclaimed any intent to regard international opinion as controlling. Also as in *Atkins*, the Court in *Roper* first established a national consensus and referred to international opinion only to *find confirmation* for the national consensus.

*Coker v. Georgia*<sup>93</sup> furnishes a neat illustration of the hierarchal structure of objective indicators of society’s standards and the minimal value the Court assigns to comparative materials in its evaluation of these decency standards. Ehrlich Anthony Coker was convicted of rape and sentenced to death in Georgia.<sup>94</sup> In a plurality opinion, the Court ruled that the imposition of the death penalty for the crime of rape constitutes cruel and unusual punishment.<sup>95</sup>

Toward the beginning of its analysis, *Coker* stated that Eighth Amendment judgments should not be rooted in the “subjective views of individual justices”; rather, “judgment should be informed by objective factors to the maximum possible extent.”<sup>96</sup> *Coker* continued, “[t]o this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”<sup>97</sup> In support of choosing these objective indicators in making its Eighth Amendment determinations, *Coker* pointed to *Gregg*, which based its decision largely on national legislative attitudes and national jury sentencing decisions.<sup>98</sup>

Having meticulously set the agenda for its assessment, *Coker* launched into an extensive analysis of national legislative enactments.<sup>99</sup> This

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90. *Id.* at 575 (emphasis added).

91. *Id.* at 578 (emphasis added).

92. *Id.* at 579-86.

93. 433 U.S. 584 (1977) (plurality opinion).

94. *Id.* at 586.

95. *Id.* at 592.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 593-97.

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analysis occupies over two full pages of the Court's opinion.<sup>100</sup> The Court summed up its analysis by stating that "[t]he current judgment with respect to the death penalty for rape . . . obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."<sup>101</sup>

Then, inexplicably deviating from the agenda the Court set for itself, *Coker* followed its review of legislative enactments with an isolated footnote, stating:

In *Trop v. Dulles* . . . the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus *not irrelevant* here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.<sup>102</sup>

This lone statement, consigned to a footnote and based on a single survey, represents the sole reference to comparative legal sources, one in which the Court noted that it considered international opinion "not irrelevant" to its assessment of cruel and unusual punishment.<sup>103</sup>

Returning to its agenda, *Coker* proceeded to review the sentencing decisions of U.S. juries, arguing that it is "important to look to the sentencing decisions that [American] juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried."<sup>104</sup> The Court then reviewed jury sentencing decisions and inferred that in the vast majority of cases, U.S. juries have not imposed the death sentence for the crime of rape.<sup>105</sup> *Coker's* review of national jury sentencing decisions marked the conclusion of the Court's inquiry into society's decency standards.

*Coker* is instructive. The Court referenced three objective indicators of society's decency standards: national legislative enactments, national jury sentencing decisions, and international opinion. As in *Atkins*, the Court expended the overwhelming part of its inquiry on national legislative enactments and national jury sentencing determinations.<sup>106</sup> The Court also considered legislative enactments before jury sentencing determinations. This is consistent both with the Court's oft-proclaimed view that national legislative enactments constitute the most important objective indicator of

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100. *Id.*

101. *Id.* at 596.

102. *Id.* at 596 n.10 (emphasis added).

103. *Id.*

104. *Id.* at 596.

105. *Id.* at 595-98.

106. *See supra* p. 13.

society's decency standards,<sup>107</sup> and with the trajectory of review set forth in *Thompson v. Oklahoma*.<sup>108</sup> The Court omitted international opinion from its list of the objective indicators it intended to review, first mentioning international opinion in a footnote of its decision,<sup>109</sup> a pattern seen in *Thompson v. Oklahoma*.<sup>110</sup> As in *Atkins*, when the Court factored international opinion into its equation, it allotted international opinion a single, isolated footnote.<sup>111</sup> In fact, the Court justified its use of comparative materials by stating that they are "not irrelevant here"—a far cry from the critical value of the sources comprising the national consensus.<sup>112</sup>

Like *Coker*, *Enmund v. Florida* also illustrates the minimal value the Court assigns to non-U.S. legal sources in assessing society's decency standards. *Enmund* presented an Eighth Amendment proportionality issue: whether the Eighth Amendment permits the imposition of the death penalty on a defendant who merely aids and abets a felony during which a murder is committed by another, but who does not commit murder, attempt to commit murder, or even intend that the murder take place.<sup>113</sup> The Court held that the Eighth Amendment prohibits the imposition of the death penalty in these circumstances.<sup>114</sup>

As *Coker* modeled its agenda of review after *Gregg*, *Enmund* modeled its agenda of review after *Coker*.<sup>115</sup> *Enmund* thus purposefully followed *Coker*'s trajectory. It opened with a thorough analysis of national legislative enactments, concluding that the majority of national legislative enactments reject capital punishment in the circumstances presented in the case.<sup>116</sup> Following its several-page review of national legislative enactments, *Enmund* focused on the sentencing decisions of U.S. juries, noting that "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as [the] petitioners."<sup>117</sup>

Before concluding its inquiry into society's standards of decency,

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107. *See supra* pp. 10-11.

108. 487 U.S. 815, 822, 830 (1988) (plurality opinion). *See supra* p. 11.

109. *Coker*, 433 U.S. at 596 n.10.

110. *Thompson*, 487 U.S. at 822 n.4. *See discussion supra* pp. 13-14. This pattern is also found in *Atkins v. Virginia*, 536 U.S. 304, 313, 316 n.21 (2002).

111. 536 U.S. at 316 n.21 (2002). *See supra* p. 14.

112. *See International Judicial Dialogue, supra* note 80, at 2090 n.105.

113. *Enmund v. Florida*, 458 U.S. 782, 783-88 (1982).

114. *Id.* at 788.

115. *Id.* at 788-89.

116. *Id.* at 789.

117. *Id.* at 794.

however, the Court added one footnote.<sup>118</sup> The footnote cited *Coker*, stating that international opinion is “not irrelevant” and proceeded to state: “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”<sup>119</sup>

*Enmund* yields a picture identical to *Coker*. *Enmund* first considered national legislative enactments and then considered national jury sentencing decisions. These national indicators form the linchpin of the Court’s rationale, and the Court naturally expended the overwhelming part of its inquiry into society’s decency standards analyzing these sources. Only then, in a lone footnote, did the Court turn to international opinion, since international opinion is “not irrelevant” to the inquiry.<sup>120</sup>

### C. The Inability of Comparative Legal Sources to Trump the National Consensus

The preceding sections of this Part demonstrated that the primacy of the national consensus in the Court’s hierarchal structure of objective indicators of society’s decency standards ensures that comparative legal materials carry little judicial weight. Where comparative legal sources are congruent with the national consensus, they merely serve to confirm the Court’s perception of society’s decency standards, a perception molded by an evaluation of national legislative enactments and national jury determinations. This section demonstrates the converse ramification of the national majoritarian paradigm: because the Court ascribes the greatest value to national indicators of society’s decency standards, contrary comparative legal materials cannot trump the national consensus.<sup>121</sup>

The Court’s national majoritarian paradigm incapacitates foreign and international law from overruling the national consensus. In some cases, the Court finds it unnecessary to articulate this position. For example, in *Gregg v. Georgia* the Court did not even consider foreign and international law in evaluating society’s evolving decency standards.<sup>122</sup> This is hardly accidental. In *Gregg*, the Court held that the imposition of capital punishment is not per se unconstitutional; in other words, *Gregg* legitimized the imposition of the death penalty in the United States.<sup>123</sup> In

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118. *Id.* at 794 n.22.

119. *Id.*

120. See *International Judicial Dialogue*, *supra* note 80, at 2090 n.105.

121. See Alford, *Misusing*, *supra* note 5, at 59-61; see also Alford, *Postscript on Lawrence*, *supra* note 5, at 914, 920.

122. 428 U.S. 153 (1976).

123. *Id.* at 187.

this context, foreign and international law would likely show that the broader society's decency standards disallow the imposition of the death penalty, contrary to the national consensus. Operating within a national majoritarian paradigm, the Court naturally considered supranational materials irrelevant.

In other cases, however, a dissenting opinion prompted the Court to verbalize its position that the national consensus, not comparative legal sources, determines society's decency standards. The plurality opinion in *Stanford v. Kentucky* offers the clearest articulation of the absolute ascendancy of the national consensus over foreign and international law.<sup>124</sup> In *Stanford*, the dissenting opinion considered comparative materials in assessing society's decency standards.<sup>125</sup> Responding to the dissent, the Court stated:

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* (accepted by the dissent) that the sentencing practices of other countries are relevant. While "the 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.<sup>126</sup>

As Roger P. Alford notes, *Stanford v. Kentucky* provides a graphic example of the national majoritarian dynamic disallowing comparative legal materials from superceding the national consensus.<sup>127</sup> According to the *Stanford* plurality, Eighth Amendment jurisprudence requires that a threshold national consensus be established before it considers foreign law

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124. 492 U.S. 361, 370 n.1 (1989) (plurality opinion).

125. *Id.* at 389-90 (Brennan, J., dissenting). Note that even the dissent first looks to national indicators of society's decency standards before turning to the legislation of foreign countries. *Id.* at 383-87; see also Benvenuto, *supra* note 5, at 2713-14, 2746 (discussing the dissenting opinion of Knight v. Florida, 528 U.S. 990, 993-99 (1999) (Breyer, J., dissenting)); Blackmun, *supra* note 4, at 48 ("If the substance of the Eighth Amendment is to turn on the evolving standards of decency of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.").

126. *Stanford*, 492 U.S. at 370 n.1 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J. dissenting)) (citations omitted). Based on *Stanford*, the confirmatory role of comparative legal materials serves as an additional check on the Eighth Amendment in ensuring that the national consensus is not simply accidental but that the prohibition is implicit in the concept of ordered liberty. Alford, *Misusing*, *supra* note 5 at 60.

127. Alford, *Misusing*, *supra* note 5, at 60; see also Alford, *Federal Courts*, *supra* note 5, at 779-80, Alford, *Postscript on Lawrence*, *supra* note 5, at 919-20.

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relevant to its decisions.<sup>128</sup> As Alford states, *Stanford* illustrates that “[t]he practice abroad is relevant only after uniformity has been established at home.”<sup>129</sup> Supranational law contrary to the national consensus is banished from the calculus.<sup>130</sup>

Justice Thomas’s concurring opinion in *Knight v. Florida* further demonstrates that comparative legal sources cannot trump a divergent national consensus.<sup>131</sup> In *Knight*, petitioners Knight and Moore argued that execution after having languished twenty years on death row constitutes cruel and unusual punishment.<sup>132</sup> In support of their position, Knight and Moore cited foreign law.<sup>133</sup> Though the Court denied certiorari, Justice Breyer filed a dissenting opinion arguing that the Court should grant certiorari based in part on the foreign law cited by the petitioners.<sup>134</sup> Justice Thomas countered Justice Breyer’s dissenting opinion by stating:

I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.<sup>135</sup>

Justice Thomas maintained that citations consisting exclusively of foreign law demonstrate a “negative” national consensus, i.e. a consensus that execution following twenty years on death row is not cruel and unusual punishment.<sup>136</sup> Once this “negative” national consensus is established, foreign law becomes impotent; it cannot override a contrary national consensus.<sup>137</sup>

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128. See *International Judicial Dialogue*, *supra* note 80, at 2068 (commenting on *Stanford* that “[t]he Court’s previous capital punishment cases support the claim that the Court must first establish a basis for its decision in American practice and precedent”).

129. Alford, *Federal Courts*, *supra* note 5, at 778 (arguing based on *Stanford* that society’s evolving standards “are determined based on a national consensus” and “[t]he practice of other nations is relevant only after uniformity has been established within the United States”); see also Alford, *Postscript on Lawrence*, *supra* note 5, at 920.

130. See *International Judicial Dialogue*, *supra* note 80, at 2067-68.

131. *Knight v. Florida*, 528 U.S. 990, 990-93 (1999) (Thomas, J., concurring).

132. *Id.* at 990.

133. *Id.*

134. *Id.* at 993-99 (Breyer, J., dissenting).

135. *Id.* at 990 (Thomas, J., concurring).

136. *Id.*

137. Even Justice Breyer does not argue that comparative legal sources should control the Court’s decision. *Id.* at 996 (Breyer, J., concurring) (“Obviously this foreign authority does



In *Foster v. Florida* the Court revisited the issue presented by *Knight*.<sup>138</sup> Following his death sentence, Charles Kenneth Foster languished over twenty-seven years in prison.<sup>139</sup> He petitioned the Court for a writ of certiorari, arguing that execution following twenty-seven years on death row constituted cruel and unusual punishment.<sup>140</sup> Once again, the Court denied certiorari; once again, Justice Breyer filed a dissenting opinion arguing that the Court should grant certiorari based in part on foreign law; and once again, Justice Thomas responded to Justice Breyer's dissent.<sup>141</sup> Justice Thomas referenced his concurring opinion in *Knight* and added that "[t]his Court's Eighth Amendment jurisprudence should not *impose* foreign moods, fads, or fashions on Americans."<sup>142</sup> In effect, Justice Thomas maintained that, absent a prerequisite national consensus, foreign law is irrelevant in Eighth Amendment jurisprudence.<sup>143</sup> Foreign law cannot *impose* its views on Americans; it cannot supercede a conflicting national consensus.

Another line of cases that demonstrates the inability of foreign and international law to trump the national consensus begins with *Thompson v. Oklahoma* and continues through *Atkins v. Virginia* and *Roper v. Simmons*.<sup>144</sup> In these cases, it is the dissenting opinion that demonstrates the primacy of national sources over supranational sources. This line of cases contains the following distinctive pattern. The leading opinion argues that a national consensus considers a given punishment cruel and unusual.<sup>145</sup> It confirms this national consensus by citing comparative legal materials.<sup>146</sup> The leading opinion prompts a vituperative dissenting opinion—headed by Justice Scalia—arguing that the Court has failed to establish a national consensus.<sup>147</sup> The dissent opens by challenging the

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not bind us."); see also Blum, *supra* note 1, at 180-83 (arguing that Justice Breyer uses foreign materials merely to illustrate the need to consider the propriety of delayed executions, and does not use these sources in constitutional interpretation).

138. *Foster v. Florida*, 537 U.S. 990 (2002).

139. *Id.* at 991 (Breyer, J., dissenting).

140. *Id.* at 992.

141. *Id.* at 990-95.

142. *Id.* at 990 (citing *Atkins v. Virginia*, 536 U.S. 304, 324-25 (2002) (Rehnquist, C.J., dissenting)) (Thomas, J., concurring) (emphasis added).

143. *Id.* at 991.

144. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion).

145. *Roper*, 543 U.S. at 564-68; *Atkins*, 536 U.S. at 313-16; *Thompson*, 487 U.S. at 826-31.

146. *Roper*, 543 U.S. at 575-78; *Atkins*, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830.

147. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 337-38 (Scalia, J., dissenting); *Thompson*, 487 U.S. at 859 (Scalia, J., dissenting).

leading opinion's rationale in interpreting the statistical data underlying its alleged national consensus.<sup>148</sup> In dismantling the leading opinion's "national consensus" disallowing the punishment in question, the dissent argues that in fact the national consensus permits the punishment in question.<sup>149</sup> Having established a "negative" national consensus, the dissent turns to the comparative legal materials cited by the leading opinion.<sup>150</sup> The dissent then duly discards these materials as irrelevant since dissonant comparative materials cannot trump the national consensus.<sup>151</sup> In the words of Justice Scalia, "where there is not first a settled consensus among our own people, the views of other nations . . . cannot be imposed upon Americans through the Constitution."<sup>152</sup>

### III. IMPLICATIONS OF THE MARGINALITY OF COMPARATIVE LEGAL SOURCES FOR THE KOH/ALFORD DEBATE: SHOULD COMPARATIVE MATERIALS TRUMP THE NATIONAL CONSENSUS IN EIGHTH AMENDMENT JURISPRUDENCE?

As is well-known, a majority of the world's nations disallows the imposition of the death penalty.<sup>153</sup> In particular, the Western world has vehemently condemned capital punishment.<sup>154</sup> This strong opposition to capital punishment has become a cornerstone of the European human rights movement.<sup>155</sup>

Opponents of the United States' continued imposition of the death penalty exploit the almost universal condemnation of capital punishment.<sup>156</sup> They argue that the Court should be more receptive of

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148. *Roper*, 543 U.S. at 609-15; *Atkins*, 536 U.S. at 342-48; *Thompson*, 487 U.S. at 867-72.

149. *Roper*, 543 U.S. at 609-15; *Atkins*, 536 U.S. at 342-48; *Thompson*, 487 U.S. at 867-72.

150. *Roper*, 543 U.S. at 622; *Atkins*, 536 U.S. at 347-48; *Thompson*, 487 U.S. at 868 n.4.

151. *Roper*, 543 U.S. at 622-28; *Atkins*, 536 U.S. at 347-48; *Thompson*, 487 U.S. at 868 n.4.

152. *Thompson*, 487 U.S. at 868 n.4.

153. See, e.g., sources cited in Alford, *Federal Courts*, *supra* note 5, at 776 n.373; Nora V. Demleitner, *The Death Penalty in the United States Following European Lead?*, 81 OR. L. REV. 131 (2002); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) [hereinafter Koh, *Paying Decent Respect*]; James H. Wyman, Comment, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543 (1997).

154. See, e.g., Alford, *Federal Courts*, *supra* note 5, at 776 n.373; Demleitner, *supra* note 153; Koh, *Paying Decent Respect*, *supra* note 153; Wyman, *supra* note 153.

155. See, e.g., Alford, *Federal Courts*, *supra* note 5, at 776 n.373; Demleitner, *supra* note 153; Koh, *Paying Decent Respect*, *supra* note 153; Wyman, *supra* note 153.

156. Koh, *International Law*, *supra* note 5, at 56; see also Blackmun, *supra* note 4; Koh, *Paying Decent Respect*, *supra* note 153.

foreign and international law in deciding death penalty cases.<sup>157</sup> In effect, they maintain that foreign and international law should trump a national consensus allowing the death penalty.<sup>158</sup> For example, Harold Hongju Koh, an ardent death penalty abolitionist and chief spokesperson for the internationalists, has expressly stated the practices of other democratic nations should “constitute *the most relevant* evidence of what Eighth Amendment jurisprudence calls the ‘evolving standards of decency that mark the progress of a maturing society.’”<sup>159</sup>

Roger P. Alford has countered the position of the international majoritarians.<sup>160</sup> Alford maintains that the predominance of national sources arises from the Court’s deep-seated respect for principles of federalism and American sovereignty.<sup>161</sup> He warns that “[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty.”<sup>162</sup> Recognizing that the Court employs a national majoritarian framework in its death penalty cases, Alford insists that global sources inconsistent with the national consensus cannot prevail.<sup>163</sup> Alford argues that granting primacy to foreign and international legal sources will wrongfully undermine the Court’s well-settled precedent and unjustly thwart the sovereign will of the American people.<sup>164</sup> Alford

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157. Blackmun, *supra* note 4; *see also* Koh, *International Law*, *supra* note 5, at 56; Koh, *Paying Decent Respect*, *supra* note 153.

158. Blackmun, *supra* note 4; *see also* Koh, *International Law*, *supra* note 5, at 56; Koh, *Paying Decent Respect*, *supra* note 153.

159. Blackmun, *supra* note 4; *see also* Koh, *International Law*, *supra* note 5, at 56 (quoting *Trop v. Dulles*, 365 U.S. 86, 101 (1958) (plurality opinion)) (emphasis added); Koh, *Paying Decent Respect*, *supra* note 153.

160. Alford, *Federal Courts*, *supra* note 5, at 772-91; *see also* Alford, *Misusing*, *supra* note 5, at 58-61. For Koh’s response to Alford, *see* Koh, *International Law*, *supra* note 5, at 55; for Alford’s reply to Koh’s response, *see* Alford, *Misusing*, *supra* note 5, at 61 n.30.

161. Alford, *Federal Courts*, *supra* note 5, at 785-86; Alford, *Misusing*, *supra* note 5, at 59-61; *cf.* *Atkins v. Virginia*, 536 U.S. 304, 322-28 (2002) (Rehnquist, C.J., dissenting).

162. Alford, *Misusing*, *supra* note 5, at 58; *see also* Benvenuto, *supra* note 5, at 2697, 2711-20, 2742-51 (arguing that the Supreme Court’s use of foreign precedent has been rhetorical rather than substantive); Raalf, *supra* note 5, at 1260-63 (arguing that comparative materials have had little or no influence in constitutional jurisprudence). Several commentators have also stated that the Court does not view comparative law as inherently significant but rather as a mere source for empirical data. *See, e.g.*, Paolo G. Carozza, “*My Friend Is a Stranger*”: *The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1086-87 (2003); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE. L.J. 223, 226, 247 (2001); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 526 (2000).

163. Alford, *Misusing*, *supra* note 5, at 59-61; *see also* Alford, *Federal Courts*, *supra* note 5, at 784-85.

164. Alford, *Misusing*, *supra* note 5, at 59-61.

concludes:

In short, the international countermajoritarian difficulty severely limits the degree of respect that can be shown to the global opinions of humanity when doing so shows disrespect to our own national experience . . . . Reliance on global standards of decency undermines the sovereign limitations inherent in federalist restraints, limitations born out of respect for the reserved powers of the states to assess which punishments are appropriate for which crimes. To the extent that international majoritarians argue that global standards are relevant notwithstanding their inconsistency with American standards, this view reflects far less respect for federalism concerns than required by the Court.<sup>165</sup>

This Comment's analysis of death penalty cases supports Alford's contention that granting supremacy to comparative legal sources over the national consensus runs counter to the Court's death penalty decisions. Because the Court consistently operates within a national majoritarian paradigm in evaluating society's decency standards, allowing foreign and international law to override the national consensus negates the U.S. common law tradition.<sup>166</sup>

#### IV. THE MARGINALITY OF COMPARATIVE LEGAL SOURCES IN SUPREME COURT DECISIONS RELATING TO ALL AREAS OF JURISPRUDENCE

Several commentators emphasize the limited utility that the Supreme Court has derived from comparative legal sources in all areas of jurisprudence. They maintain that, in general, comparative legal sources have been immaterial to the Court's decisions. For example, Mark Tushnet forcefully states that "[p]rior to *Lawrence v. Texas*, no recent Supreme Court decision relied on non-U.S. constitutional or para-constitutional law to support a proposition that was material to the majority's analysis."<sup>167</sup> Similarly, Sarah K. Harding surveyed the cases between 1993-2003 in which the Court cited laws of the United Kingdom, Canada, Austria, and New Zealand.<sup>168</sup> Harding makes the sweeping observation that "in all of these cases, the foreign law appeared as nothing more than a polite reference," and that "there was no extended discussion of the foreign law

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165. *Id.* at 60-61.

166. On the consistency of the Court regarding the role of comparative legal materials in death penalty decisions, see, for example, Alford, *Federal Courts*, *supra* note 5, at 779.

167. Tushnet, *Transnational/Domestic Constitutional Law*, *supra* note 1, at 241; *see also id.* at 244 ("The current Court's first use of non-U.S. law to support a position relevant to its disposition came in *Lawrence v. Texas* . . .").

168. Harding, *supra* note 5, at 419-20.

being cited.”<sup>169</sup> Harding concludes, “[i]n short, the U.S. Supreme Court and U.S. courts in general seldom cite foreign law.”<sup>170</sup>

Recently, Louis J. Blum analyzed the purposes for which the Court has invoked foreign and international law.<sup>171</sup> Blum concludes that in recent cases comparative legal materials were never central to the Court’s decisions and that unfailingly the Court’s interpretation of the Constitution stands independent of any supranational support.<sup>172</sup> Blum maintains that “[f]oreign materials are used only to clarify, or lend support to, the reasoning behind discrete steps in the interpretive process.”<sup>173</sup>

Blum corroborates his argument with numerous cases.<sup>174</sup> For example, Blum analyzes the Court’s use of comparative legal materials in *Culombe v. Connecticut*.<sup>175</sup> Blum argues that the Court’s decision is ultimately grounded in U.S. precedent and that the Court used foreign law in *Culombe* merely to support the threshold necessity of the constitutional analysis.<sup>176</sup> Likewise, Blum argues that the Court’s decision in *Washington v. Glucksberg* rests firmly on U.S. precedent and that the Court used foreign legal materials merely to facilitate its determination that deviation from U.S. precedent is unwarranted.<sup>177</sup>

Blum goes a step further, however. According to Blum, it is not *incidental* that foreign and international law are peripheral to the Court’s decisions; rather, the impact of the comparative materials on constitutional interpretation is *necessarily* limited.<sup>178</sup> Blum explains that because the

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169. *Id.* at 420-21.

170. *Id.* at 420. Glensy argues with these commentators and maintains that the Court integrates comparative references within its broader analysis. Glensy, *supra* note 5, at 372-73. Even if Glensy is correct, however, the Court’s integration of comparative materials within the broader analysis does not mean that these sources contributed significantly to the Court’s decision. A similar error is made by David Fontana in his reply to Tushnet. See generally Fontana, *The Next Generation*, *supra* note 5. Tushnet argues that “[p]rior to *Lawrence v. Texas*, no recent Supreme Court decision relied on non-U.S. constitutional or para-constitutional law to support a proposition that was material to the majority’s analysis.” Tushnet, *Transnational/Domestic Constitutional Law*, *supra* note 1, at 241. In response, Fontana points to many cases where the Court’s majority opinion cited comparative materials. Fontana, *The Next Generation*, *supra* note 5, at 451-57. Again, the majority opinion’s citation of comparative materials does not per se render these materials essential to its analysis or decisions.

171. See generally Blum, *supra* note 1.

172. *Id.* at 171.

173. *Id.*

174. *Id.* at 173-94.

175. 367 U.S. 568 (1961); Blum, *supra* note 1, at 173-79.

176. Blum, *supra* note 1, at 175-79.

177. 521 U.S. 702 (1997); Blum, *supra* note 1, at 187-92.

178. Blum, *supra* note 1, *passim*.

Court operates within an interpretive framework based on precedent, its prior decisions are necessarily central, while the decisions of supranational legal sources are necessarily ancillary.<sup>179</sup> Blum elaborates:

Comparative materials, when used within the common law framework, and in the manner that courts have employed them, may be thought of as a lens and nothing more. Comparative materials do not act on the Constitution or the domestic experience. . . . Because comparative materials do not alter the interaction between the Constitution and the American people, our understanding of the Constitution remains rooted in purely domestic sources.<sup>180</sup>

Thus, since the Court engages in comparative analysis only within the context of an interpretive framework grounded in precedent, Blum argues that the judicial impact of foreign and international law is limited from the outset; the common law framework itself suppresses the influence of foreign experiences.<sup>181</sup>

To a limited extent, this Comment's narrow analysis of the Court's death penalty cases supports the broad argument of these commentators. It marshals additional cases—indeed the entirety of capital punishment jurisprudence—where foreign and international law are peripheral to the Court's decisions.

### CONCLUSION

Perhaps the most controversial jurisprudential issue of recent years concerns the United States Supreme Court's use of foreign and international law to interpret the United States Constitution. Citations to foreign and international law in death penalty cases have contributed greatly to this stormy controversy. Nevertheless, an analysis of the High Court's capital punishment cases demonstrates that the sensational degree of controversy belies the judicial significance of these citations.

The Court maintains that the scope of "cruel and unusual punishment" depends on society's evolving standards of decency. The Court thus marshals objective indicators of society's decency standards to determine

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179. *Id.* at 166.

180. *Id.* at 199.

181. *Id.* at 197-98. Arguably, *Lawrence v. Texas*, 539 U.S. 558 (2003), represents the Court's most aggressive use of non-U.S. legal materials in recent years. Yet some scholars downplay the judicial significance of the non-U.S. legal materials even in *Lawrence*. For example, after meticulously analyzing the *Lawrence* decision, Gerald L. Neuman maintains that comparative legal materials did not govern the Court's decision but functioned "as merely one element of a complex inquiry into constitutional meaning." Neuman, *supra* note 5, at 89-90.

the constitutionality of a given punishment. These objective indicators include national legislative enactments, national jury sentencing determinations, and foreign and international law.

Though the Court cites foreign and international law in its death penalty decisions, the judicial impact of these materials has been exceptionally limited. In the Court's death penalty cases, comparative legal materials function, if at all, as a minor consideration in a multifaceted analysis. The Court considers the objective indicators of society's decency standards of unequal degrees of reliability and, accordingly, grants them varying degrees of judicial weight. In determining the meaning of "cruel and unusual punishment," the Court consistently employs the national consensus analytical paradigm. The national consensus consists of national legislative enactments and national jury sentencing determinations. As the case law reflects in a multiplicity of ways, the Court considers the national consensus dominant and regards supranational legal sources as subsidiary. In the constellation of objective indicators, comparative legal sources are the least important. By ascribing primacy to the national consensus, the Court severely restricts the judicial utility of foreign and international law, for the Court's decision must ultimately hinge on the national consensus. Where foreign and international law accord with the national consensus, these comparative materials merely confirm the national consensus; conversely, where foreign and international law collide with the national consensus, these comparative materials yield to the national consensus.

Because the Court consistently sustains the national majoritarian paradigm in its death penalty cases, arguments by death penalty abolitionists advocating the supremacy of supranational law over the national consensus negate the Court's tradition. The conclusions of this Comment's narrow analysis of the Court's death penalty cases comport with the conclusions of several commentators who emphasize the limited impact of comparative legal materials on the Court's decisions in all areas of jurisprudence.