

## FOREIGN LAW AND THE DENOMINATOR PROBLEM

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Before *Roper v. Simmons*,<sup>1</sup> American states split thirty to twenty on the legitimacy of the juvenile death penalty. On the international plane, however, the United States stood alone in condoning the practice.<sup>2</sup> The question is the appropriate significance of the latter fact for American constitutional doctrine. Although this issue falls within a much broader debate over references to foreign law by American courts,<sup>3</sup> I want to focus on the narrow question that arises when such law is used to bolster claims of “consensus” against (or in favor of) a particular practice.

The Court’s jurisprudence of “cruel and unusual” punishments has both objective morality and practice components.<sup>4</sup> The latter determines whether a consensus rejects a challenged practice by canvassing the practices of other relevant jurisdictions.<sup>5</sup> Such an inquiry requires choices about which other jurisdictions are relevant. One might envision this universe of relevant jurisdictions as the denominator of a fraction, with the jurisdictions actually pursuing the challenged practice supplying the numerator. If the numerator is small relative to the denominator then the Court will condemn the practice as an outlier, out of step with “evolving standards of decency.”<sup>6</sup>

*Roper*’s “denominator problem” concerned whether foreign jurisdictions should count in Eighth Amendment cases.<sup>7</sup> Justice Kennedy’s

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<sup>1</sup> 125 S. Ct. 1183 (2005).

<sup>2</sup> *Id.* at 1198.

<sup>3</sup> See, e.g., *Agora: The United States Constitution and International Law*, 98 AM. J. INT’L L. 42 (2004) (articles by T. Alexander Aleinikoff, Roger P. Alford, Harold Hongju Koh, Gerald L. Neuman, and Michael D. Ramsey).

<sup>4</sup> See, e.g., *Roper*, 125 S. Ct. at 1192; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

<sup>5</sup> See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (finding no consensus against the death penalty for sixteen-year-olds because twenty-two out of thirty-seven death penalty states permitted it).

<sup>6</sup> *Roper*, 125 S. Ct. at 1190 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>7</sup> This was not the only “denominator problem” in *Roper*. A second concerned whether to include American states that had abolished the death penalty entirely. Compare *id.* at 1192 (“30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but . . . exclude juveniles from its reach.”), with *id.* at 1219 (Scalia, J., dissenting) (“Consulting States that bar the death penalty concerning the necessity of making an exception to the death penalty for offenders under 18 is rather like including old-order

claim that a *domestic* consensus rejected the juvenile death penalty was profoundly implausible given that twenty states retained the practice.<sup>8</sup> But by shifting focus from the domestic to the international plane — where the United States stood as one jurisdiction against all the rest — the *Roper* majority made an implausible claim of “consensus” into a plausible one. Defenders of looking to foreign law typically describe that practice as a search for “persuasive authority” — an attempt, in Justice Breyer’s words, to “learn something” from a “judge in a different country dealing with a similar problem.”<sup>9</sup> I argue here, however, that creating consensus by including foreign jurisdictions in the Eighth Amendment denominator goes considerably further and, in fact, gives the practices of those jurisdictions authoritative legal weight.

I have two objectives in this brief Comment. The first is to clarify how foreign law is used in cases like *Roper* and, consequently, the stakes in the debate over sources. The second is to sketch some cautions about expanding the denominator in such cases, although space will not permit much elaboration of these normative claims.

### I. FOREIGN LAW’S INFLUENCE

The Supreme Court’s use of foreign law in constitutional interpretation is hardly new.<sup>10</sup> Neither is political opposition to foreign legal influence.<sup>11</sup> This longstanding debate would benefit, however, from a more systematic effort to distinguish the different ways the Court has used foreign law. Such law may apply of its own force,<sup>12</sup> or domestic

Amishmen in a consumer-preference poll on the electric car.”). Excluding such jurisdictions would also exclude many of the foreign jurisdictions cited in *Roper*.

<sup>8</sup> The Court also emphasized that few of the jurisdictions that retained the juvenile death penalty on the books had actually executed anyone recently for a crime committed as a juvenile. *Id.* at 1192 (majority opinion). I discuss this argument *infra* p. 165.

<sup>9</sup> Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://domino.american.edu/AU/media/mediaref.nsf/01F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

<sup>10</sup> See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. (forthcoming 2005). But see Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”: International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005) (demonstrating that internationalists’ invocation of the Declaration of Independence as support for foreign influence on constitutional interpretation is misplaced).

<sup>11</sup> In the early Republic, for example, several states enacted statutes forbidding their courts even to cite to English common law decisions. See *Seminole Tribe v. Florida*, 517 U.S. 44, 135 n.32 (1996) (Souter, J., dissenting) (arguing against interpreting the Eleventh Amendment in accord with English common law notions of sovereign immunity). James Madison was one of many who inveighed against the tyrannical influence of English law. See *id.* at 139–42.

<sup>12</sup> The Court’s immigration cases, for instance, have derived Congress’s power over immigration from international law principles of sovereignty rather than from any enumerated power in Article I. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); Sarah H. Cleve-

legal rules may incorporate foreign law in various ways.<sup>13</sup> *Roper* and similar cases — most prominently, *Atkins v. Virginia*<sup>14</sup> and *Lawrence v. Texas*<sup>15</sup> — invoked foreign principles to influence the interpretation of wholly domestic legal provisions.<sup>16</sup>

Within the category of influence, one may further distinguish between looking to foreign law to prove or disprove certain *factual* propositions and looking abroad for *normative* guidance. *Washington v. Glucksberg*,<sup>17</sup> for example, looked to Dutch experience with physician-assisted suicide to ascertain whether recognizing that practice as a fundamental right might encourage related forms of euthanasia or undermine medical ethics. Use of foreign experience to resolve factual disputes like this is relatively (but not completely) uncontroversial.<sup>18</sup> *Roper*, however, did not look to foreign experience to assess the consequences of abandoning the juvenile death penalty in the United States. Rather, the Court used foreign law to “confirm” a proposition of *value*, that is, “that the death penalty is disproportionate punishment for offenders under 18.”<sup>19</sup>

Normative influence comes in at least two flavors. Those Justices who believe in foreign citation have typically defended it as a form of persuasive authority: American judges look abroad for different or innovative ways of approaching common issues, but the foreign law has no force beyond the persuasiveness of its reasoning. When a court takes account of foreign legal practice as part of a search for “consensus,” by contrast, it typically looks to the mere fact of the foreign jurisdiction’s position on a particular issue. The process is one of counting

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land, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 130–32 (2002).

<sup>13</sup> In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761–62 (2004), the Court recognized a federal common law cause of action, associated with the Alien Tort Statute, 28 U.S.C. § 1350 (2000), to redress certain violations of customary international law. See also Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(b), 106 Stat. 73, 73–74 (1992) (incorporating the customary international law definition of torture). More prosaically, domestic choice of law rules may call for the application of foreign law. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 592 (1953).

<sup>14</sup> 536 U.S. 304 (2002).

<sup>15</sup> 123 S. Ct. 2472 (2003).

<sup>16</sup> Some of the amici in *Roper* insisted that the prohibition of the juvenile death penalty is a *jus cogens* norm that controls the interpretation of the Eighth Amendment. See Brief for the Human Rights Committee of the Bar of England and Wales, et al., as Amici Curiae in Support of Respondent at 23–24, *Roper* (No. 03-633). I would be surprised to see many domestic lawyers take that contention seriously.

<sup>17</sup> 521 U.S. 702, 734 (1997).

<sup>18</sup> At their recent public debate on the use of foreign law, for example, Justices Scalia and Breyer seemed to agree on the propriety of using foreign examples to resolve factual disputes. See Scalia & Breyer, *supra* note 9. I raise some concerns in *infra* section II.C, pp. 165–67.

<sup>19</sup> *Roper*, 125 S. Ct. at 1198.

noses, with little regard to the reasons that led to the adoption or rejection of a practice in any particular jurisdiction.<sup>20</sup>

I argue in the next two sections that the Supreme Court's practice in *Roper* and similar cases has considerably more to do with nose counting than with assessing the reasons underlying a particular foreign practice. I want to stress that including foreign jurisdictions in the denominator of noses that count accords *authoritative* weight to their choices. In this situation, those choices — for example, to adopt or reject the juvenile death penalty — have legal significance *without regard to the reasons for the choice*. When a legal rule has force whether or not we agree with the reasons used to justify it, is that not the very definition of binding legal authority?<sup>21</sup>

#### A. *Persuasive Authority*

The Justices who support foreign citation have often downplayed its importance. Justice Ginsburg argued recently that the issue is simply one of “sharing with and learning from others.”<sup>22</sup> For Justice Breyer, the “enormous value” of “the similar experience of others” springs from the fact that “[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances, for example with respect to multiracial populations, growing immigration, economic demands, environmental concerns, modern technologies, and instantaneous media communication.”<sup>23</sup> And Justice O'Connor recently insisted that public criticism of the Court's use of foreign law is “much ado about nothing. . . . [I]t doesn't hurt to be aware of what other countries are doing.”<sup>24</sup>

It seems positively anti-intellectual and hubristic to say that we can learn nothing from foreign jurisdictions, and this fact probably

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<sup>20</sup> See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 250 (2001) (distinguishing between the influence of constitutional reasoning and constitutional practices of other nations).

<sup>21</sup> See JOSEPH RAZ, *THE AUTHORITY OF LAW* 3–27 (1979); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1986); see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 84 (1999) (observing that Raz's conception of authority is “standardly accepted among legal philosophers at the moment”).

<sup>22</sup> Justice Ruth Bader Ginsburg, Remarks to the American Society of International Law: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005) (transcript available at <http://www.asil.org/events/AM05/ginsburg050401.html>).

<sup>23</sup> Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003).

<sup>24</sup> Justice Sandra Day O'Connor, Remarks at the National Constitution Center et al. Constitutional Conversation (Apr. 21, 2005) (transcript available at LEXIS, News Library, Fednew file); see also Justice Sandra Day O'Connor, Remarks to the Southern Center for International Studies 1–2 (Oct. 28, 2003) [hereinafter O'Connor, 2003 Remarks] (transcript available at [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf)) (arguing that “conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts”).

accounts for the broad support for foreign citation in the academy.<sup>25</sup> *Roper*, however, does not read like a case in which the Court looked abroad hoping to “learn something.” The hallmark of persuasive authority is engagement with the *reasons* for a practice or a decision rather than the counting of noses. There is no imperative to choose the most widespread practice or rule, for example, if the minority position seems better thought out. But Justice Kennedy’s discussion of foreign law is all about noses, not reasons. It begins with “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”;<sup>26</sup> invokes the prohibition of this punishment in the Convention on the Rights of the Child,<sup>27</sup> “which every country in the world has ratified save for the United States and Somalia,” and to which “[n]o ratifying country has entered a reservation” on juvenile death;<sup>28</sup> and observes that “only seven countries other than the United States have executed juvenile offenders since 1990.”<sup>29</sup> The only country discussed in any detail is the United Kingdom. Again, the point is simply the *fact* of abolition; no inquiry is made into *why* the United Kingdom might have taken such a step. Only at the end is there a conclusory statement that this universal disavowal of the juvenile death penalty has “rest[ed] in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.”<sup>30</sup> That understanding, of course, mirrors precisely the judgment that the Court had already reached in its “independent” evaluation of the morality of the penalty. So what did we “learn,” exactly?

This lack of interest in the reasons underlying foreign practice is characteristic of the Court’s employment of foreign law.<sup>31</sup> In *Atkins*,

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<sup>25</sup> For example, Sanford Levinson refers to Justice Scalia’s “embarrassing” “militant provincialism.” Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 358 (2004). Professor Levinson ends up agreeing with much of Justice Scalia’s critique, but it obviously pains him greatly to do so. For my own effort to “learn something” from foreign law, see Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1730–35 (2002), which discusses the relevance of European law to questions of American federalism.

<sup>26</sup> *Roper*, 125 S. Ct. at 1198.

<sup>27</sup> *Adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>28</sup> *Roper*, 125 S. Ct. at 1199.

<sup>29</sup> *Id.* Even worse, the United States’s seven colleagues in this practice are the presumably benighted realms of Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. And even these countries have since (*said* that they have) abolished the practice. *See id.*

<sup>30</sup> *Id.* at 1200.

<sup>31</sup> *See* Jackson, *supra* note 20, at 251 (noting that “the United States Supreme Court differs markedly from many other constitutional courts, which not only manifest awareness of the constitutional practices of other nations, but also cite and consider the reasoning of foreign constitutional courts’ decisions”).

the Court cited the practice of foreign jurisdictions without examining the whys and wherefores underlying those practices.<sup>32</sup> Likewise, in *Lawrence*, the Court merely noted the *fact* that the European Court of Human Rights had struck down an antisodomy law without examining the reasoning in the European court's opinion.<sup>33</sup> One might tellingly contrast the Court's practice with that of the South African Constitutional Court, for example, which engages in extensive analyses of the reasoning of foreign practice.<sup>34</sup>

I submit that the Court's neglect of the reasoning behind foreign practices is not simply sloppy opinion writing. The Justices are not searching foreign court opinions for innovative doctrinal formulae or new arguments not found in the American discourse (even though we might well find such if we looked). There is none of Vicki Jackson's "engagement" with the foreign sources in *Roper*, nor did the Court use foreign law as a repository of common wisdom in the manner of Jeremy Waldron's "*ius gentium*."<sup>35</sup> Rather, it is precisely the *fact* of foreign practice that is most relevant for the Court's analysis. The *Roper* Court's method thus was not simply an effort to approximate some form of persuasive influence that fell a little short in terms of analytical rigor. It was a different method, with an entirely different focus.

#### B. Nose-Counting Authority

Decisions like *Roper* cite foreign law in order to corroborate the impression that the domestic practice under attack is an outlier, contrary to contemporary conceptions of morality. The practice component of the Court's inquiry asks how many jurisdictions continue to execute people for acts committed as juveniles, expressed as a fraction of the relevant jurisdictions overall. Including foreign practice shifts the question from whether places like Texas and Missouri — states maintaining the juvenile death penalty — are unusual out of the fifty-one American jurisdictions, to whether those states are unusual considered against the world as a whole (or perhaps some subset of countries with values similar to our own). The foreign jurisdictions, in other words, swell the denominator against which the set of jurisdictions retaining the benighted practice is measured.

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<sup>32</sup> See *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

<sup>33</sup> See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

<sup>34</sup> See, e.g., *Minister of Fin. v Van Heerden* 2004 (11) BCLR 1125 (CC) at 1138–39 (S. Afr.) (considering, and rejecting, the rationale of American decisions on racial discrimination).

<sup>35</sup> See Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

The point of swelling the denominator is that it is not big enough without these foreign practices. Justice Kennedy sought “evidence of national consensus against the death penalty for juveniles,”<sup>36</sup> but what he found was a nation deeply divided on the question. Twenty states retained the practice, while thirty had abolished it.<sup>37</sup> The retaining states represented 123,438,384 persons, out of a national population of 293,655,404, or over forty-two percent of the nation.<sup>38</sup> Such an even split hardly fits the common understanding of “consensus” as “[g]eneral agreement or concord” or “the collective unanimous opinion of a number of persons.”<sup>39</sup> This substantial minority position on the domestic plane becomes an aberrational practice, however, when judged against the backdrop of *world* opinion. Used in this way, foreign legal rules become dispositive of domestic law; without them, after all, there would be insufficient “consensus” to void state practice. So far, the Court has only used foreign practice to resolve an ambiguous domestic picture. But at least in theory, “extending the sphere” to the rest of the world could turn even a practice of a solid majority of states into an eccentric outlier.<sup>40</sup>

Justice Kennedy’s opinion in *Roper* purported to accord a more limited role to foreign law; such law, he said, “provide[s] respected and significant confirmation for our own conclusions.”<sup>41</sup> It is unclear exactly what “confirm” means in this context. Would a domestic conclusion that is *not* confirmed by foreign practice be insufficient to strike down a state law? If not, then what work is foreign practice doing in the opinion? Some foreign citations are no doubt purely ornamental, or perhaps meant as a “shout out” to express the Court’s respect for

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<sup>36</sup> *Roper*, 125 S. Ct. at 1192.

<sup>37</sup> *See id.* The retaining states were Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia. This count elides the difficult question of whether to count states that have abolished the death penalty altogether. *See supra* note 7.

<sup>38</sup> These figures reflect estimated populations as of July 1, 2004. *See* POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2004 (2004), <http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf>. Of course, one can hardly assume that every person within a state retaining the juvenile death penalty agrees with that decision — but one cannot assume that every person within a state that has abolished it agrees with that decision either.

<sup>39</sup> 3 THE OXFORD ENGLISH DICTIONARY 760 (2d ed. 1989).

<sup>40</sup> The parallel to Madison’s *The Federalist No. 10* should be obvious. The point of geographic scale in that essay was to prevent majority tyranny by turning local majorities into national minorities. *See* THE FEDERALIST NO. 10, at 83–84 (James Madison) (Clinton Rossiter ed., 1961).

<sup>41</sup> *Roper*, 125 S. Ct. at 1200.

foreign opinion or to enhance the prestige of the cited court.<sup>42</sup> But there are several reasons to take the Court's "confirmatory" discussion seriously: the extensiveness of Justice Kennedy's foreign law discussion and his description of its influence as "significant and respected"; the exceptionally weak evidence of domestic consensus and the Court's close division on the objective morality component; and the willingness of several Justices, in their extrajudicial statements, to defend and promote the practice of looking to foreign law.<sup>43</sup> In any event, it seems best forthrightly to debate the legitimacy of foreign citation *before* the significance of such citations is firmly established.<sup>44</sup>

One should not overstate the difference between persuasive and nose-counting authority. The most appealing account of the consensus test is that the Court looks to practice — both domestic and foreign — to confirm its own intuitions out of an appropriate sense of the limits of its own wisdom.<sup>45</sup> The Court might feel strongly, based on its own moral reasoning, that the juvenile death penalty is immoral but be unwilling to override democratic processes unless it finds its intuitions shared by a large majority of respected legislators and jurists. This majority does not exist, of course, until the foreign jurisdictions are counted. Foreign practice thus "persuades" the Court, but it is persuasion of a particular kind. The Court is not persuaded by new rationales, but rather by the mere fact that foreign jurisdictions take a particular view.<sup>46</sup> It has not "learned" anything from looking abroad other than to find out that others agree with what the Court already believed. It is deferring to numbers, not reasons.

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<sup>42</sup> See O'Connor, 2003 Remarks, *supra* note 24, at 2 (asserting that foreign citation "will create that all-important good impression," and noting that "when U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced"); Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://slate.msn.com/id/2098559> ("Judges are not unlike rappers and bloggers: They like to pay their respects."). Justice Breyer acknowledged this function in his remarks at American University. See Scalia & Breyer, *supra* note 9, at 7.

<sup>43</sup> See, e.g., Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June–July 2005, at 33, 34 (arguing that *Roper* "puts paid to the conceit that this is all just a bit of fluff"); Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4–5 (discussing extrajudicial efforts by several Justices to promote comparative analysis).

<sup>44</sup> Cf. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 818–21 (2000) (suggesting that citations to comparative materials should be viewed — and debated — as proposals to expand the canon of authoritative constitutional materials).

<sup>45</sup> Cf. Edmund Burke, Reflections on the Revolution in France 1790, in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 138 (L.G. Mitchell ed., 1989) ("We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.")

<sup>46</sup> Cf. RAZ, THE AUTHORITY OF LAW, *supra* note 21, at 21–22 (discussing the authoritative aspects of advice).

The crucial point is that, in this analysis, foreign practice carries weight that is independent of the underlying reasons for that practice. The Court thus chooses to treat foreign law as *authoritative* in Joseph Raz's sense: It treats the mere fact that foreign jurisdictions condemn the juvenile death penalty as a reason to condemn that practice in the United States.<sup>47</sup> Foreign practice is not the *only* reason, of course, and it remains to be seen what the internationalist Justices will do in a case about, say, hate speech or libel law when international authorities point in an opposite direction from their own views about domestic law.<sup>48</sup> But an honest Court would have to admit that it is according some degree of authoritative weight to foreign practice.

### C. *Judicial Networks and Indirect Normative Influence*

All this talk about numerators, denominators, and persuasive force requires a certain suspension of disbelief: We must accept the Court's assertions that the weight of practice or the arguments of foreign judicial opinions actually matter for purposes of decision, and suspend our suspicion that what is really driving cases like *Roper* is the Justices' own moral predilections. But what if we open the door, at least a bit, to that suspicion? Even if we think that the Court is just imposing its own moral preferences through the Eighth Amendment, we should not necessarily dismiss the foreign law issue as a red herring. Rather, I suspect that foreign practices and jurists play an important role in influencing our Justices' moral predilections through what Anne-Marie Slaughter has described as "global networks" of judges.<sup>49</sup>

Professor Slaughter has noted that meetings and exchanges between the judiciaries of various nations — including ours — have become increasingly institutionalized in recent years. These exchanges not only "serve to educate and to cross-fertilize" by "broaden[ing] the perspectives of the participating judges," but also "socialize their

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<sup>47</sup> See RAZ, THE MORALITY OF FREEDOM, *supra* note 21, at 35 (observing that "[a]uthoritative utterances" have "no direct connection between the reason and the action for which it is a reason" but instead "[t]he reason is in the apparently 'extraneous' fact that someone in authority has said so"). I do not say that the Court is necessarily preferring foreign authorities to the American Constitution; rather, the Court interprets the Eighth Amendment as authorizing it to accord authoritative weight to external sources. That interpretation is hardly inevitable, and it must be defended.

<sup>48</sup> See generally Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57, 67–69 (2004) (identifying several areas where foreign practice is likely to cut against broad American notions of civil liberties). Because foreign authorities are not necessarily dispositive, they are not "preemptive" of other reasons in the sense that Professor Raz's account generally demands. See RAZ, THE MORALITY OF FREEDOM, *supra* note 21, at 46. But neither is prior precedent, which may be overruled for sufficiently good reasons. We generally have little trouble recognizing precedent as "authority" in our common sense of the term.

<sup>49</sup> See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004).

members as participants in a common global judicial enterprise.”<sup>50</sup> The result “is an increasingly global constitutional jurisprudence, in which courts are referring to each other’s decisions on issues ranging from free speech to privacy rights to the death penalty.”<sup>51</sup> In effect, Slaughter’s theory of global judicial networks provides a relatively sophisticated institutional account to bolster the perception — common in grumpier conservative circles — that Justice Kennedy has been brainwashed on his summer trips to Europe.<sup>52</sup>

The existence — perceived or real — of a moral “consensus” among the Justices’ peers may well influence not only the doctrinal analysis discussed in the last section, but also the formation of the Justices’ underlying preferences. Interactions between legal elites on a global scale make it increasingly likely that the views of lawyers and jurists abroad will form part of the reference set for our own Justices as they formulate their own moral views.<sup>53</sup> Ryan Goodman and Derek Jinks have thus identified “acculturation” as a key mechanism by which international norms influence domestic actors.<sup>54</sup> I am neither a psychologist nor a sociologist, and it would be extremely difficult for even someone trained in those fields to evaluate the effects of such dynamics on individual judges with respect to particular issues. But a substantial empirical literature supports the general phenomenon of acculturation,<sup>55</sup> and it seems plausible to speculate that, at least on an issue like the juvenile death penalty on which the United States is a clear outlier, the existence of a global consensus may exert sociological as well as doctrinal pressure. Notably, such influence would take approximately the same form in each mode: The inclusion of foreign practices and

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<sup>50</sup> *Id.* at 99; see also Sandra Day O’Connor, *Keynote Address*, 96 AM. SOC’Y INT’L L. PROC. 348, 352 (2002) (urging “travel to foreign nations and a dialogue with foreign jurists and lawyers”).

<sup>51</sup> SLAUGHTER, *supra* note 49, at 66; see also Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 42, 48 (reporting, based on interviews with Justice Kennedy, that he “regards the use of foreign law by the Supreme Court as an inevitable effect of an increasingly interconnected world”).

<sup>52</sup> See Toobin, *supra* note 51, at 44, 50 (reporting the views of Representatives Steve King and Tom Feeney). For a more approving but otherwise similar view, see Michael C. Dorf, *The Hidden International Influence in the Supreme Court Decision Barring Executions of the Mentally Retarded*, WRIT, June 26, 2002, <http://writ.news.findlaw.com/dorf/20020626.html>, which discusses the “Strasbourg Effect” of attendance by several American Justices at conferences with their counterparts on the European Court of Human Rights.

<sup>53</sup> See Toobin, *supra* note 51, at 48 (quoting Justice Kennedy’s observation that as a result of “informal exchanges, like in Salzburg[,] . . . [y]ou can’t help but be influenced by what you see and hear”). See generally SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 264–73 (2004) (discussing the “[d]enationalization” of American elites, including internationally oriented lawyers).

<sup>54</sup> See Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638–56 (2004).

<sup>55</sup> See *id.* at 640–41 (collecting studies).

opinions reinforces — or even creates — the impression that U.S. practice is aberrant and improper.

This is not the place for a comprehensive discussion of judicial socialization. The important point is that debates about that form of influence and the more doctrinal inclusion of foreign jurisdictions in the practice denominator are (or ought to be) linked in at least three senses. First, Professors Goodman and Jinks have shown that acculturation is, like counting noses, distinct from persuasion: What counts is not the reasons underlying the consensus of one's peers, but simply the fact that they have adopted a particular view.<sup>56</sup> Second, the propriety of both nose-counting influence and socialization may turn on whether the moral values embodied in a constitutional norm are thought to be universal or particular: If the Eighth Amendment's "standards of decency" are unique to America, then it is appropriate neither to count foreign jurisdictions when considering practice nor to allow oneself to be influenced by foreign peers. Finally, debating the doctrinal denominator problem may itself influence the process of socialization. If American courts were to conclude that only domestic practice is relevant, then their judges might feel pressure to distinguish American mores concerning punishment from the views they encounter on their European sabbaticals.

Some degree of socialization may be inevitable as courts and judges interact across borders. But like everything else in this debate, it will be less objectionable to the extent that judges candidly pin down and defend the factors influencing their moral judgments. To see clearly how much foreign law may matter, it may help to turn to an area where the denominator problem has always been at the forefront of doctrinal controversy.

#### *D. The Denominator Problem in Obscenity Law*

The foreign law question is hardly the only instance of a "denominator problem" in American constitutional law. The most sustained consideration of this sort of question has occurred in obscenity cases, which have always required that the offensiveness of a particular work be measured against some "community standard." Judge Learned Hand's seminal articulation of the community standards test made clear that it is predicated on evolving notions of decency similar to those at issue in Eighth Amendment cases. Judge Hand opined that "the word 'obscene' . . . indicate[s] the present critical point in the compromise between candor and shame at which the community may

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<sup>56</sup> See *id.* at 643 ("Acculturation occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure — the relations between individual actors and some reference group.").

have arrived here and now . . . . [T]he vague subject-matter is left to the gradual development of general notions about what is decent.”<sup>57</sup>

The original version of the denominator problem in obscenity law concerned what sorts of persons should be included in the relevant community. English law evaluated putatively obscene material by its effect on the most sensitive or susceptible persons, but the U.S. Supreme Court rejected that approach in *Roth v. United States*<sup>58</sup> as “unconstitutionally restrictive of the freedoms of speech and press.” Instead, courts were to ask “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>59</sup> Since those early cases, questions about who should be included in the community have consistently remained important considerations.<sup>60</sup>

Most controversy, however, has concerned the proper *geographic* scope of the relevant community. In *Jacobellis v. Ohio*,<sup>61</sup> Justice Brennan wrote, “the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.” A majority of the Court squarely rejected that position, however, in *Miller v. California*.<sup>62</sup> In that case, Chief Justice Burger observed that while “fundamental First Amendment limitations . . . do not vary from community to community, . . . this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the ‘prurient interest’ or is ‘patently offensive.’”<sup>63</sup> As a result, “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”<sup>64</sup> Later cases accorded flexibility to the States as to whether the precise standard should be local, statewide, or even ambiguous. As Justice Rehnquist wrote in *Jenkins v. Georgia*,<sup>65</sup> “[a] State may choose to

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<sup>57</sup> *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913).

<sup>58</sup> 354 U.S. 476, 489 (1957). For the English rule, which had been adopted in some American jurisdictions, see *The Queen v. Hicklin*, (1868) 3 L.R.Q.B. 360.

<sup>59</sup> *Roth*, 354 U.S. at 489.

<sup>60</sup> See, e.g., *Pinkus v. United States*, 436 U.S. 293, 297–98 (1978) (reversing a federal obscenity conviction because the jury was instructed to include children as part of the relevant “community”); *Mishkin v. New York*, 383 U.S. 502, 508 (1966) (holding that, for some materials, the relevant community may be confined to “a clearly defined deviant sexual group”).

<sup>61</sup> 378 U.S. 184, 195 (1964) (plurality opinion) (footnote omitted).

<sup>62</sup> 413 U.S. 15, 30–34 (1973).

<sup>63</sup> *Id.* at 30.

<sup>64</sup> *Id.* at 32.

<sup>65</sup> 418 U.S. 153, 157 (1974); see also Patrick T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 144 (1996) (noting that “state courts have applied standards using the state, county, city, and local community as the basis for community size” (footnotes omitted)).

define an obscenity offense in terms of ‘contemporary community standards’ . . . without further specification, . . . or it may choose to define the standards in more precise geographic terms.”

The post-*Miller* cases have considered a number of subsidiary questions concerning the application of community standards in obscenity cases.<sup>66</sup> In each of these cases, questions concerning whether a court may look to community practices, how those practices are to be defined, and what practices are relevant took center stage. More fundamentally, the obscenity cases have featured important debates about whether a coherent community standard can even be identified at a broad level of generality. Chief Justice Burger argued in *Miller* that “our Nation is simply too big and too diverse for this Court to reasonably expect that . . . standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.”<sup>67</sup> Justice Stevens suggested in *Smith v. United States*<sup>68</sup> that “[t]he most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards,” and he worried that because “the geographic boundaries of the relevant community are not easily defined,” they may be “subject to elastic adjustment to suit the needs of the prosecutor.” Notwithstanding their different conclusions, both Justices agreed that in order to employ *any* community standard, one must first consider whether a coherent consensus can be identified within the proposed frame of reference.<sup>69</sup>

My point here is simple: No one is confused in these obscenity cases about whether the size of the denominator matters. Of course it does, and it may affect not only the analysis but also the result. Convictions can be reversed because the jury was instructed to consider a frame of relevant practice that was either too large or too small. And because the Justices are clear about the importance of the choice, their opinions feature a forthright debate about whether coherent community standards can exist at a given level of generality and which frame of

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<sup>66</sup> See, e.g., *Pope v. Illinois*, 481 U.S. 497 (1987) (restricting consideration of community standards to certain aspects of the *Miller* test); *Smith v. United States*, 431 U.S. 291 (1977) (considering whether, for purposes of a federal obscenity prosecution, a particular state could define its own community standards as a matter of positive law); *Hamling v. United States*, 418 U.S. 87 (1974) (featuring a sharp debate over whether instructing the jury to consider a national rather than a more narrow community was reversible error).

<sup>67</sup> *Miller*, 413 U.S. at 30.

<sup>68</sup> 431 U.S. 291, 313, 314–15 (Stevens, J., dissenting).

<sup>69</sup> The community standards debate has, if anything, intensified now that the primary battleground of obscenity law has moved to the Internet. See *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (considering whether Congress’s use of *Miller*’s non-national community standard to identify indecent material on the Internet as “harmful to minors” was unconstitutional on its face).

reference best suits the constitutional command that is being enforced. That is the sort of debate that we need to have about foreign law.

## II. KEEPING THE DENOMINATOR SMALL

The size of the denominator *matters* in constitutional cases, and therefore the Court's inclusion of foreign jurisdictions in that denominator matters as well. Whether one ultimately concludes that domestic practices should be measured against a national or an international "consensus," the Court's foreign citations should not be defended by downplaying their significance. In this Part, I sketch some arguments for keeping the denominator relatively small. Space will not permit detailed argument on these points, but they may suggest productive lines for future inquiry.

### A. *Arguments from Democracy*

Whether courts consult foreign law for merely persuasive purposes or for purposes of establishing a broader "consensus," such consultation presupposes that the foreign jurisdictions considered are, in some relevant way, similar to our own. Yet when we look to "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community,"<sup>70</sup> we see divergence rather than convergence on many aspects of values and political culture.<sup>71</sup> These divergences tend to undermine, in a variety of ways, our national democratic commitments.

Jed Rubinfeld has recently demonstrated that Americans and Europeans subscribe, for the most part, to fundamentally different conceptions of constitutionalism. American law grounds constitutional rights in popular sovereignty, while European constitutionalism, and the international rhetoric of human rights, "is based on . . . universal rights and principles that derive their authority from sources outside of or prior to national democratic processes."<sup>72</sup> European legal rules governing the death penalty, for instance, do not have the same relation to popular opinion or "norms of decency" that American rules have; in fact, polls suggest that European nations abolished the death penalty notwithstanding broad popular support for the practice.<sup>73</sup> The Court's

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<sup>70</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

<sup>71</sup> See generally ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003); GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* (2005).

<sup>72</sup> Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1999 (2004).

<sup>73</sup> See Joshua Micah Marshall, *Death in Venice: The European Death-Penalty Myth*, NEW REPUBLIC, July 31, 2000, at 12, 12; Andrew Moravcsik, *The New Abolitionism: Why Does the U.S. Practice the Death Penalty While Europe Does Not?*, PUBLICATIONS (Council for Eur.

Eighth Amendment jurisprudence is meant to ground constitutional doctrine in evolving democratic commitments, but foreign conceptions of rights are not necessarily democratic in the same sense that ours are.

We likewise lack a common *demos* in which different nations can engage in democratic debate over the morality of a given practice. Europeans have grappled with whether constitutionalism can flourish at a supranational level of governance that lacks a meaningful democratic community, or whether the member states of the EU, with their well-developed national communities, must remain the primary sites for the articulation and maintenance of constitutional values.<sup>74</sup> This “No Demos” problem becomes even more pronounced at the international level; as Michael Ramsey has observed, “terms like ‘international opinion’ or opinions of ‘humankind’ or the ‘world community’ . . . disguise[] the fact that there is no unified ‘world community’ with a simple and easily accessible opinion to be had for the asking.”<sup>75</sup> The problem is not simply a lack of a common discourse but also the absence of supranational institutions that, through the legitimating force of representation and deliberation, could transform the Court’s nose counting into a meaningful democratic conclusion.<sup>76</sup>

Finally, the divergence between European nations and our own, particularly on issues associated with capital punishment, may simply be too great to sustain the basic commonality of values necessary to identify “the evolving standards of decency that mark the progress of a maturing society.”<sup>77</sup> The relatively trivial sentence imposed by a German court on a man found to have conspired in the September 11 attacks, for instance, suggests a fundamental disparity in notions of appropriate punishment.<sup>78</sup> And European laws on the death penalty

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Studies at Columbia Univ., New York, N.Y.), Sept. 2001, [http://www.columbia.edu/cu/ces/pub/Moravcsik\\_sep01.html](http://www.columbia.edu/cu/ces/pub/Moravcsik_sep01.html).

<sup>74</sup> See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (F.R.G.), translated in [1994] 1 C.M.L.R. 57, 89–91 (upholding the Maastricht treaty against constitutional challenge, but asserting the final authority of the German Constitutional Court to judge the validity of acts of EU institutions due to the lack of a meaningful democratic community at the European level); J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995) (discussing the “No Demos” argument).

<sup>75</sup> Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 79 (2004).

<sup>76</sup> See generally WALDRON, *supra* note 21, at 86 (“[F]air representation of diversity . . . requires attention to the conditions under which diverse representatives can deliberate together coherently.”).

<sup>77</sup> *Roper*, 125 S. Ct. at 1190 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>78</sup> In 2003, a German court convicted Mounir Motassadeq of over 3000 counts of accessory to murder as a conspirator in the September 11 attacks on the World Trade Center. Motassadeq was sentenced to fifteen years in prison, which was the maximum allowed under German law. See Craig Whitlock, *Friend of 9/11 Hijackers Convicted in Germany*, WASH. POST, Aug. 20, 2005, at

derive from a backlash against historical misuse of the penalty by autocratic regimes and, perhaps, the peculiar dynamics of European integration<sup>79</sup> — neither of which has much purchase in the United States. These divergences increase the utility of foreign references for advocates: Opponents of the death penalty who have striven in vain to persuade their fellow Americans to abandon the measure will find more support by extending their sphere of argument to take in foreign opinions and practices.<sup>80</sup> Appeals to foreign law are thus a symptom not of convergence of values at the international level but rather of *divergence* at the national level. As American political life becomes increasingly polarized, it is not surprising that partisans of one view or another find that they have more in common with groups outside the domestic society.<sup>81</sup> In any event, it is surely odd to take worldwide condemnation of U.S. practice, as the *Roper* Court did, as confirmation that our own values have evolved.

### B. Arguments from Constitutional Structure

The Court's inclusion of foreign jurisdictions in its "consensus" calculus alters the ordinary allocation of power between institutions in our constitutional structure. The political branches — the Executive and Congress — are generally the primary actors in foreign affairs.<sup>82</sup> Yet importing foreign law into the domestic legal system through constitutional interpretation circumvents the institutional mechanisms by which the political branches ordinarily control the interaction between the domestic and the foreign. The sense that the President and Congress have lost some control over American accession to international norms may have contributed to the political outrage that followed the

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A12 (noting that the German courts overturned the conviction and sentenced Motassadeq to seven years on retrial). A fifteen-year *maximum* for over 3000 deaths can only bespeak an extraordinary faith in rehabilitation as a purpose of punishment — a faith that American law does not seem to share with respect to most homicides.

<sup>79</sup> See Stephen J. Silvia & Aaron Beers Sampson, *The New Abolitionism: American or European Exceptionalism Regarding the Death Penalty?*, PUBLICATIONS (Council for Eur. Studies at Columbia Univ., New York, N.Y.), Jan. 2002, [http://www.columbia.edu/cu/ces/pub/Silvia-Sampson\\_jano2.html](http://www.columbia.edu/cu/ces/pub/Silvia-Sampson_jano2.html) (noting that the EU imposed abolition as a condition on states seeking to enter the Union).

<sup>80</sup> See, e.g., Paul L. Hoffman, *The "Blank Stare Phenomenon": Proving Customary International Law in U.S. Courts*, 25 GA. J. INT'L & COMP. L. 181, 181 (1995/1996) (noting, as a practicing civil rights lawyer, "[t]he attraction of international human rights law to me is simple: [it] promises more for my clients than U.S. domestic legal standards in many instances").

<sup>81</sup> See, e.g., Caryle Murphy, *Nigeria's Top Anglican Proposes U.S. Parishes*, WASH. POST, Oct. 6, 2004, at A16 (reporting that, in the wake of the U.S. Episcopal Church's ordination of an openly gay bishop, "three traditionalist parishes in the Diocese of Los Angeles announced that they were aligning with the Anglican Church of Uganda").

<sup>82</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 412 (1964).

Court's citation of foreign sources in cases like *Roper*, *Atkins*, and *Lawrence*.<sup>83</sup>

One way to illustrate this problem is to take seriously the notion that the judgments of courts around the world on common questions of human rights amount to customary international law. Opponents of the juvenile death penalty have long argued that it offends customary norms that bind the United States on the international plane.<sup>84</sup> But even if such norms would trump state law capital punishment regimes,<sup>85</sup> Congress could override such norms simply by enacting a statute permitting the practice. And while the matter is not quite as clear, the Executive would most likely have similar authority to nullify any binding effect that such customary norms would have within the domestic legal system.

A decision like *Roper*, however, uses exactly the same foreign legal materials — the decisions of foreign jurisdictions to proscribe the juvenile death penalty — but employs them in such a way as to foreclose any ability of the political branches to articulate a different view. Incorporation of foreign practice into *constitutional* law thus eliminates the political branches' usual prerogative to dissent from the formation of customary norms or to depart from those norms once they have developed. The *Roper* Court thus decided that it — not the President, and not the Congress — would control the way in which the American legal system would respond to developments in international law.

The interference with political branch authority in *Roper* was much more blatant than in the example just sketched. The national political branches had not, in fact, sat passively by as the rest of the world staked out positions on the juvenile death penalty. The Court, however, gave these political branch decisions the back of the hand. The majority emphasized Article 37 of the United Nations Convention on the Rights of the Child, which prohibits the juvenile death penalty, notwithstanding that the United States has never ratified this treaty.<sup>86</sup> The majority likewise cited a parallel prohibition in the International Covenant on Civil and Political Rights,<sup>87</sup> notwithstanding that the United States's ratification of the treaty included a reservation denying the binding force of that particular point.<sup>88</sup> The national political

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<sup>83</sup> See, e.g., H.R. Res. 568, 108th Cong. (2004) (“[I]nappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens . . . the separation of powers and the President’s and the Senate’s treaty-making authority . . .”).

<sup>84</sup> See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 325–26.

<sup>85</sup> A very dubious proposition. See Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 382–83, 474–77 (2002).

<sup>86</sup> See *Roper*, 125 S. Ct. at 1199.

<sup>87</sup> Adopted Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

<sup>88</sup> *Roper*, 125 S. Ct. at 1194, 1199.

branches had plainly determined that the world's condemnation should not affect our own domestic law. But the Court adopted precisely the opposite course.

A second set of structural imbalances results from the use of foreign law to impose a uniform “consensus” position. Prior to *Roper*, decisions about the juvenile death penalty were left to two sets of decentralized decisionmakers: state legislatures, which determined whether to permit capital punishment as an option for sentencing offenders under the age of eighteen, and juries, which determined whether to impose the death penalty in individual cases. The effect of finding a “consensus” at the national or international level is to displace state-by-state diversity on the question. As voices on both Left and Right are recognizing, however, the best solution to our increasingly divisive “culture wars” may be to let each state define its own course on the “hot-button” issues of the day.<sup>89</sup> Indeed, the very notion of “consensus” as a basis for imposing constitutional restrictions on the States is an odd one. Our system generally requires a series of explicit political acts, rather than simply a confluence of opinion, to impose binding national or international norms on the States.<sup>90</sup>

States retaining the juvenile death penalty relied upon an even more decentralized decisionmaker: the jury in each case. The Court stressed that even states that had kept the penalty as a formal matter actually imposed it only in a very small number of cases.<sup>91</sup> This evidence is perfectly consistent with a “consensus” view that juveniles ought *generally* not receive the death penalty, but also that juries should retain the authority to impose it in extraordinary circumstances. That view would also respect the central importance of the jury in our constitutional tradition<sup>92</sup> — an emphasis not shared by most of the foreign jurisdictions to which the Court referred.<sup>93</sup> It is unsurprising that jurisdictions without a strong tradition of case-by-case application of moral norms by juries would approach questions like the juvenile death penalty in a more categorical way.

### C. Arguments from Institutional Competence

Finally, any approach to constitutional interpretation should be evaluated in terms of its decision costs (the time, effort, and expense

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<sup>89</sup> See, e.g., David J. Barron, *Reclaiming Federalism*, DISSENT, Spring 2005, at 64, 64.

<sup>90</sup> See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

<sup>91</sup> See *Roper*, 125 S. Ct. at 1192.

<sup>92</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS* 83–98 (1998).

<sup>93</sup> See, e.g., Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 453–67 (1997) (describing alternatives to the jury in civil law systems).

involved in deciding cases in a particular way) and its error costs (the likelihood of making mistakes by pursuing a particular method). Both kinds of costs seem likely to be high for American courts dealing with foreign materials, given language and cultural barriers and most American lawyers' lack of training in comparative analysis.<sup>94</sup> As Professor Ramsey's analysis of the briefs and opinions in *Atkins* and *Lawrence* demonstrates, neither advocates nor judges have yet invested the resources necessary to bring comparative analysis up to the standards of rigor that we demand of arguments grounded in domestic law.<sup>95</sup>

Consider, for example, Justice Breyer's argument in *Printz v. United States*<sup>96</sup> that "commandeering" state officials to enforce federal law poses no threat to federalism because German federal laws are implemented by officials of the Länder and European Union directives are implemented by officials of the member states. Daniel Halberstam has demonstrated that Justice Breyer's discussion overlooked critical differences in institutional context such that commandeering might actually enhance decentralized autonomy in Europe while undermining it in the United States.<sup>97</sup> Even in a relatively straightforward case of *factual* influence like *Printz*, then, the error costs (or the decision costs necessary to avoid them) may be unacceptably high.

To be sure, these competence concerns parallel arguments against the use of history in originalist constitutional interpretation. Although reliance on history has increased research burdens on lawyers and courts, and courts surely get the history wrong in some cases,<sup>98</sup> I think it fair to say that the courts have proved reasonably capable of making sense of historical arguments. Moreover, because law engages virtually the full range of human activity, courts must inevitably dabble in a wide range of disciplines in which they may lack training or expertise — for example, economics in antitrust cases, science and engineering in patent cases, psychology in criminal cases. One should not overstate the disadvantages confronting courts in assessing arguments predicated on a particular discipline. At the same time, the

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<sup>94</sup> When House Majority Leader Tom DeLay recently attacked Justice Kennedy for doing his own research into international law on the Internet, *DeLay Criticizes Justice Kennedy*, L.A. TIMES, Apr. 20, 2005, at A28, for example, he may have been voicing plausible concerns about the casual and inexpert ways in which the Court currently practices comparative law. Many of the opinions read as if a law clerk had been deputized for an afternoon to find useful citations.

<sup>95</sup> See Ramsey, *supra* note 75, at 72–80; see also Alford, *supra* note 48, at 64–67 (detailing the Court's "haphazard" use of foreign sources).

<sup>96</sup> 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

<sup>97</sup> See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION 213, 249–51 (Kalypso Nicolaidis & Robert Howse eds., 2001).

<sup>98</sup> Compare *Seminole Tribe v. Florida*, 517 U.S. 44, 100–85 (1996) (Souter, J., dissenting) (incurring eighty-five pages' worth of decision costs to interpret the historical background of state sovereign immunity), *with id.* at 44–76 (majority opinion) (doing considerably less work but, not surprisingly, getting the history wrong).

incremental burdens associated with comparative legal inquiry need to be assessed against the benefits to be gained, and we may reasonably insist that the Court be considerably more careful, articulate, and thorough when it cites foreign law than it has been to date.<sup>99</sup>

A third category of costs — call them “indeterminacy costs” — arises because there are so many foreign jurisdictions to choose from and because the sources of international law (particularly the customary kind) are often so ambiguous that the whole enterprise is profoundly manipulable.<sup>100</sup> We might well compare foreign citation to the classic quip about legislative history: it is like “looking over a crowd and picking out your friends.”<sup>101</sup> This additional layer of indeterminacy is particularly troubling for Eighth Amendment jurisprudence, in which the practice component of the analysis is supposed to act as some constraint upon the other component, which simply *is* the personal moral judgments of the Justices. Such obvious manipulability may, in turn, undermine the legitimacy of the Court’s decisions.

#### CONCLUSION

References to foreign law in cases like *Roper* are not simply innocuous attempts to “learn something” from the practices of foreign nations. Rather, foreign law becomes part of the binding doctrinal analysis that generates the outcome of the case. More specifically, the addition of foreign jurisdictions to the denominator of the *Roper* fraction made the numerator — those American jurisdictions retaining the juvenile death penalty — seem small and aberrant. It is disingenuous to deny that the foreign law component “matters” in these cases. The decades-long clash over the appropriate size of the denominator in obscenity cases ought to remind us of that fact.

Acknowledging this reality is a necessary predicate to a mature debate about foreign law’s place in our legal system. I have suggested several reasons to prefer small denominators over large ones — that is, to confine the normative inquiry in “community standards” cases to the domestic community. Whether or not those reasons ultimately prove persuasive, we cannot have an intelligent discussion about them until we recognize that the subject makes a difference.

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<sup>99</sup> See Ramsey, *supra* note 75, at 72–80 (proposing standards for comparative argument).

<sup>100</sup> See generally J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82 (1992).

<sup>101</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing a remark by Judge Harold Leventhal).