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Holly Arnould

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NOTES

LAWRENCE V. TEXAS AND ROPER V. SIMMONS: ENRICHING CONSTITUTIONAL INTERPRETATION WITH INTERNATIONAL LAW

HOLLY ARNOULD*

It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.¹

INTRODUCTION

There is a jurisprudential battle looming over the Supreme Court between the Justices who support the use of international law in Constitutional interpretation and the other side headed unofficially by Justice Scalia, who considers the practice com-

* J.D. Candidate 2007, St. John's University School of Law; B.A. Political Science, *cum laude*, James Madison University, May 2004.

¹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

pletely inappropriate.² Those who favor international law as an interpretive tool emphasize the "increasing number of domestic legal questions that directly implicate foreign or international law."³ They also stress that the growing number of constitutional issues addressed by foreign courts can serve as helpful comparisons.⁴ Those who oppose it claim that "however enlightened" the Justices of other nations are, their views "cannot be imposed upon Americans through the Constitution."⁵ This note discusses two fairly recent Supreme Court cases *Lawrence v. Texas*⁶ and *Roper v. Simmons*⁷ and the Court's increased willingness to use international law as persuasive authority in determining 'contemporary standards of decency' with regards to the crucial constitutional areas of cruel and unusual punishment and due process.⁸ It will argue that the Court's use of international law in those instances were not only appropriate but vital. The cases involved fundamental rights and evolving standards of decency, which implicate the entire world community.

Part I will provide a background on the two principal methods of constitutional interpretation. It will discuss how international law was used to interpret the Constitution from the very found-

² See *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (finding that the majority's reliance on Amnesty International's account of what constitutes civilized standards of decency in other countries is "inappropriate as a means of establishing the fundamental beliefs of this Nation"); see also Sarah H. Cleveland, *Is There Room for the World in Our Courts?*, WASH. POST, Mar. 20, 2005, at B04 (explaining that Justice Breyer and Justice Scalia are on opposing sides regarding use of international law in constitutional interpretation and that *Roper* was the most recent battleground).

³ Stephen Breyer, Keynote Address, *American Society of International Law Proceedings*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003).

⁴ See *id.* at 266 (finding an increasing number of issues in which decisions of foreign courts help by offering useful comparisons); see also Sujit Choudry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819, 825, 836 (1999) (stating that courts "identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions . . . in order to better understand their own constitutional systems and jurisprudence").

⁵ *Thompson*, 487 U.S. at 869 (Scalia, J., dissenting).

⁶ 539 U.S. 558 (2003).

⁷ 543 U.S. 551 (2005).

⁸ See Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 922 (2005) ("[c]omparative constitutionalism appears to be emerging as a means by which the U.S. Supreme Court determines contemporary standards of decency regarding cruel and unusual punishment and due process"); see also *Thompson*, 487 U.S. at 831 n.31 (positing that the Court has considered in the past the relevance of international laws in determining whether a punishment is cruel and unusual).

ing of this nation. Part II will then explain how international law has been used for constitutional interpretation in a more modern context. Part III will go through *Lawrence* and *Roper*, focusing on the way the Court used international law to interpret the Constitution. It will then discuss the implications of these two decisions, and the contexts in which it is more appropriate for the Court to look to international law as persuasive authority. It will also rebut the most common arguments against using international law in the constitutional framework. Part IV will then discuss the broader implications for the country and the country's credibility as a whole if we choose to isolate ourselves, and do not recognize international law as a pertinent and important source of constitutional authority. Finally Part V will give a forecast for the future given the new membership on the Supreme Court with Chief Justice John Roberts replacing the late Chief Justice William Rehnquist and Justice Samuel Alito replacing Justice Sandra Day O'Connor.

I. BACKGROUND

A. Methods of Constitutional Interpretation and Origins of International Law as an Interpretive Guide

At the most basic level there are two schools of thought with regard to constitutional interpretation: originalists and non-originalists.⁹ Originalists are those who look to the original intent of the Constitution's framers.¹⁰ However, among originalists there are different beliefs with regard to the effect of history and how to define intent.¹¹ A strong originalist would ignore prece-

⁹ See DANIEL A. FARBER, SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 373-74 (West Pub. Co. 1990). Scholars often consider originalist as a subset of a textualist. For the purposes of this article, originalists are synonymous with textualists.

¹⁰ See Steven G. Gey, *A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation*, 19 ARIZ. ST. L.J. 587 (1988) (defining originalists as those who "define the parameters of constitutional discourse as the 'original intent' of the Constitution's framers").

¹¹ See FARBER & SHERRY, *supra* note 9, at 374 (outlining the different "shades of belief" among originalists); see also Daniel A. Farber, *The Originalism Debate, a Guide for the Perplexed*, 49 OHIO ST. L. J. 1085, 1086-87 (1989) (positing that originalists differ in their definitions of original intent, with some focusing on the framers' general principles and others focusing on the framers' views of particular governmental practices).

dent and practicality and would only look at historical evidence.¹² A moderate originalist might view other factors as important, especially when evidence of intent is not clear.¹³ The minimum originalist would look to historical evidence on open questions of constitutional law that have not been resolved by the Supreme Court.¹⁴ Non-originalists would not believe that the original intent of the framers constitutes binding authority, and would disagree with other types of originalists on the amount of weight that intent should be given.¹⁵

At first glance it might seem that a non-originalist would be a stronger supporter of the use of international law in constitutional interpretation than an originalist. However, the use of international law is in fact quite consistent with the originalist view. An originalist looks to the original intent of the framers, and the framers and early American Justices recognized the importance and legitimacy of referring to international law.¹⁶ In fact, support existed that predated the founding of the nation, in such revolutionary leaders as Alexander Hamilton, John Jay, and James Wilson.¹⁷ Therefore, history should lead an originalist toward international opinion.¹⁸

¹² See FARBER & SHERRY, *supra* note 9, at 374 (explaining that the sole relevant factor for a strong originalist is historical evidence).

¹³ See *id.* (noting that a moderate originalist would look to other factors beyond historical evidence when evidence of intent is unclear).

¹⁴ See *id.* (discussing the minimum originalist's view that clear evidence of original intent is controlling with respect to all open constitutional law questions that have not yet been decided by the Supreme Court).

¹⁵ Farber, *supra* note 11, at 1087 ("Non-originalists share a rejection of the binding authority of original intent, but this leaves room for considerable disagreement about how much weight to give intent in comparison with other factors").

¹⁶ See *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (declaring the U.S.'s duty to provide that the laws of nations were respected and obeyed); see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) (explaining that the framers' and early Justices' recognition of the importance of compatibility of U.S. law with international law).

¹⁷ See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1076-77 (1985) ("[s]trong support existed among the revolutionary leadership, including Alexander Hamilton, John Jay, and James Wilson, for the view that the government's power was limited by treaties and by fundamental principles of international law").

¹⁸ See Koh, *supra* note 16, at 47 (arguing that the originalist should look towards international law like the framers themselves did); Mark C. Rahdert, 56 AM. U.L. REV. 553, 645 (2007) (recognizing the consideration of foreign law by the drafters of the United States Constitution).

The U.S. Supreme Court considered foreign and international laws from the very beginning when construing American law.¹⁹ In 1793, in *Chisholm v. Georgia*,²⁰ the nation's first Chief Justice John Jay stated that by taking its place among the nations of the earth, the United States had "become amenable to the laws of the nations."²¹ In *Ware v. Hylton*,²² another decision from the eighteenth century, Justice Wilson stated "[w]hen the United States declared their independence, they were bound to receive the law of nations."²³ Additionally, in the 1878 case of *Wilkerson v. State of Utah*,²⁴ the Court relied on "corresponding rules that prevail in other countries" in holding that a sentence of death by shooting was constitutional.²⁵ There is also the quite famous remark by Justice Gray in 1900 that "international law is part of our law."²⁶

Harold Koh has suggested that throughout history, the Supreme Court has looked to international law to aid in constitutional interpretation in three situations: parallel rules, empirical light and community standard.²⁷ Parallel rules as it sounds, is "when American legal rules seem to parallel those of other nations, particularly those with similar legal and social traditions."²⁸ International law can serve as an empirical light when foreign courts apply standards "roughly comparable to our own constitutional standards in roughly comparable circumstances."²⁹ Finally, the Court will look at international law when interpret-

¹⁹ See Cleveland, *supra* note 2 (finding that since nation's founding courts have looked to international law in broad range of contexts); Koh, *supra* note 16, at 45 (stating that "American courts regularly took judicial notice of both international and foreign law").

²⁰ 2 U.S. 419 (1793).

²¹ *Id.* at 474.

²² 3 U.S. 199 (1796).

²³ *Id.* at 199.

²⁴ 99 U.S. 130 (1878).

²⁵ *Id.* at 134.

²⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁷ See Koh, *supra* note 16, at 45 (identifying three situations in which Court has regularly looked to international law in constitutional interpretation); see also Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1298 (2004) (explaining "three uses to which the Justices of the Rehnquist Court have put international and comparative law in deciding constitutional cases: an expository use, an empirical use, and a substantive use").

²⁸ Koh, *supra* note 16, at 45.

²⁹ *Id.* at 46 (citing *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting)).

ing terms that implicitly refer to community standards, such as "cruel and unusual," or "due process of law."³⁰

B. Use of International Law in Twentieth Century Case Law

Reference to international law when interpreting the Eighth Amendment occurred periodically throughout the twentieth century.³¹ In 1958, in the case of *Trop v. Dulles*³² the Court determined that a statute authorizing expatriation as a punishment was beyond the war powers of Congress because denationalization was prohibited by the Eighth Amendment.³³ The Court noted that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."³⁴ In 1977, in *Coker v. Georgia*³⁵ the Court held that a sentence of death for the crime of rape of an adult woman was grossly disproportionate, and constituted 'excessive punishment' under the Eighth Amendment.³⁶ In a footnote to the holding the Court noted that due to the legislative decisions in almost all the states and countries around the world, it would be hard to claim that "the death penalty for rape is an indispensable part of the criminal justice system."³⁷ Then in another footnote later in the opinion, the Court referenced the *Trop* decision and how the plurality "took pains to notice the climate of international opinion concerning the acceptability of a particular punishment."³⁸

In addition to Eighth Amendment jurisprudence, reference to international law continued to occur episodically in constitutional

³⁰ *Id.*

³¹ See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 n.4 (2005) (finding that after *Wilkerson v. Utah*, 99 U.S. 130 (1879), courts considered foreign law in many cases resolving "cruel and unusual" punishment challenges); see also Stephen Arvin, *Roper v. Simmons and International Law*, 83 DENV. U. L. REV. 209, 224 (2005) (stating that there is "growing acceptance of international law as source of persuasive authority in [the Court's] general approach to Constitutional interpretations").

³² 356 U.S. 86 (1958).

³³ *Id.* at 101 (finding denationalization, as a punishment, to violate Eighth Amendment).

³⁴ *Id.* at 102.

³⁵ 433 U.S. 584 (1977).

³⁶ *Id.* at 592 (concluding that sentence of death is grossly disproportionate and excessive punishment for crime of rape and is therefore forbidden by Eighth Amendment as cruel and unusual punishment).

³⁷ *Id.* at 592 n.4.

³⁸ *Id.* at 596 n.10 (finding that in 1965 a survey of sixty major nations in the world revealed that only three implemented the death penalty for rape).

history, and between 1949 and 1970, several opinions referred to the Universal Declaration of Human Rights.³⁹ Foreign law also played a role in the debate over the relationship between the Bill of Rights and the Fourteenth Amendment as in *Palko v. Connecticut*.⁴⁰

More recently, in the 1999 case of *Knight v. Florida*,⁴¹ Justice Breyer wrote a dissent over the Court's refusal to hear the appeal of a prisoner arguing that twenty years on death row amounted to cruel and unusual punishment.⁴² In his dissent, Justice Breyer quoted legal opinions from Jamaica, India, Zimbabwe, and the European Court of Human Rights and noted the increasing number of courts *outside* the United States holding that a lengthy delay in administering a lawful death penalty "renders ultimate execution inhuman, degrading or unusually cruel."⁴³

II. EXPANSION OF THE USE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

A. *Lawrence and Roper*

In the 2003 case of *Lawrence v. Texas*⁴⁴ the Court held that a Texas statute that made it a crime for two persons of the same sex to engage in intimate sexual conduct was unconstitutional as applied to adult males engaging in consensual sexual acts.⁴⁵ This decision not only explicitly overruled a prior decision, *Bowers v.*

³⁹ See Jackson, *supra* note 31, at 111 (noting that while the Court does not address foreign or international law as much as other national courts, international references can be found in a number of cases); see also *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 776-77 (1961) (Douglas, J., concurring) (discussing a debate on the Universal Declaration of Human Rights).

⁴⁰ 302 U.S. 319, 325-26 n.3 (1937) (citing foreign law to demonstrate that compulsory self-incrimination is part of the established procedure in the law of Continental Europe); see also George L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 83 (2004) (stating that "foreign law played a well-known role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment").

⁴¹ 528 U.S. 990 (1999).

⁴² *Id.* at 993 (Breyer, J., dissenting) (noting that both cases involved long delays as a result of constitutionally suspect death penalty procedures).

⁴³ *Id.* at 995-96 (Breyer, J., dissenting) (commenting that in India an appellate court must take into account delay when deciding whether to impose the death penalty).

⁴⁴ 539 U.S. 558 (2003).

⁴⁵ *Id.* at 578-79 (finding that the Due Process Clause protects intimate choices by both married and unmarried people).

*Hardwick*⁴⁶ that had been decided just seventeen years before, but also found that *Bowers* had been wrong when decided.⁴⁷ At the outset the Court noted that there was "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."⁴⁸ In fact, the majority noted that American laws targeting same sex couples were far from possessing "ancient roots" and in fact did not develop until the last third of the 20th century.⁴⁹ Further, the Court found that the laws and traditions of the last half century showed an increasing awareness that liberty provides protection to adults in deciding how to conduct their lives regarding sex.⁵⁰

The Court found it particularly noteworthy that the majority's opinion in *Bowers* did not even address the authority in the other direction, including a case, *Dudgeon v. United Kingdom*,⁵¹ decided by the European Court of Human Rights five years prior to the *Bowers* ruling.⁵² *Dudgeon* was based on similar facts as *Bowers*; yet the European Court reached the opposite conclusion of the Supreme Court in *Bowers*.⁵³

In *Dudgeon*, the European Court had struggled with whether two Northern Irish statutes that imposed criminal penalties for certain homosexual acts, could be justified under the Article 8 paragraph 2 of the European Convention on Human Rights as "necessary in a democratic society. . .for the protection of health or morals, or for the protection of the rights and freedoms of others."⁵⁴ The Court had developed three guidelines to determining

⁴⁶ 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁷ *Lawrence*, 539 U.S. at 578 (stating *Bowers* was not correct when decided, is not correct today and thus is overruled).

⁴⁸ *Id.* at 568.

⁴⁹ *Id.* at 570.

⁵⁰ See *id.* at 571-72 (noting substantive due process inquiry begins by examining history and tradition of the liberty in dispute).

⁵¹ 45 Eur. Ct. H.R. (ser. A) (1981).

⁵² See *Lawrence*, 539 U.S. at 573 (discussing the *Dudgeon* case).

⁵³ *Id.* (positing that *Dudgeon* is the rule in all countries that are Council of Europe members).

⁵⁴ See *Dudgeon*, 45 Eur. Ct. H.R. at 37. The actual text reads:

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8.

whether a particular law relating to health and morals was justified under paragraph 2.⁵⁵ First, “necessary” was understood as to imply the existence of a pressing social need.⁵⁶ The Court looked to how a large majority of the member states of the Council of Europe had abolished criminal penalties for homosexual acts between consenting adults, as well as the fact that Northern Ireland’s had long been unenforced, to conclude the Government had not presented enough evidence to demonstrate a pressing social need.⁵⁷ However, in accordance with the second guideline, the Court accepted the Government’s bare assertion that the legislation was necessary to protect the “moral ethos.”⁵⁸ Nevertheless, the Court still found the law failed under the third guideline of proportionality.⁵⁹ Even assuming a change in the laws in question would be harmful to the moral fabric of society, the Court found that interest could not outweigh the detrimental effect of these laws on the private lives of adults with a homosexual orientation.⁶⁰

Though the *Lawrence* Court did mention the *Dudgeon* opinion, the Court clearly looked at the reaction in this nation to *Bowers*, noting that the deficiencies of *Bowers* became apparent in our nation following the decision.⁶¹ The Court pointed to the reduction

⁵⁵ See MARY ANN GLENDON, RIGHTS TALK 149 (The Free Press 1991) (stating that the Court had developed three broad guidelines for determining whether a law was justified under paragraph 2 of the European Convention on Human Rights); see also *Dudgeon*, 45 Eur. Ct. H. R. at 5 (Zekia, J., dissenting), available at <http://www.worldlii.org/eu/cases/ECHR/1981/5.html> (discussing guidelines such as the fact that morals are subject to change over time) (last visited Oct. 21, 2007).

⁵⁶ *Dudgeon*, 45 Eur. Ct. H. R. at 51 (asserting that “necessary” in this context is not flexible, but may only mean pressing social need); see J. Andrew Atkinson, *King Arthur in a Yankee Court: The United States Supreme Court’s Use of European Law in Lawrence v. Texas*, 10 ILSA J. INT’L & COMP. L. 143, 146 (2003) (noting that the European court had the power to determine necessary societal interests).

⁵⁷ See *Dudgeon*, 45 Eur. Ct. H.R. at 60 (finding that the government failed its burden of proof when it could not show public demand or pressing social need for the law).

⁵⁸ *Id.* at 12 (Walsh, J., partially dissenting) (conceding that legislation may be needed to protect the morals of society).

⁵⁹ *Id.* at 60 (stating that proportionality could not be satisfied where detrimental effects of legislation far outweigh benefits).

⁶⁰ *Id.* at 60-61 (reasoning that the interest was not sufficient to criminalize consensual relations between adults).

⁶¹ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (explaining “[i]n our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement”); see Jay Michaelson, *On Listening to the Kulturkampf, Or, How America Overruled Bowers v. Hardwick, even though Romer v. Evans Didn’t*, 49 DUKE L.J. 1559, 1568 (2000) (positing that *Bowers* had “dramatic ripple effects”).

in states that prohibited homosexual conduct, the fact that those states that did prohibit homosexual conduct did not enforce it, and two significant American cases decided after *Bowers*, *Planned Parenthood of Southeastern PA v. Casey*⁶² and *Romer v. Evans*⁶³ as evidence of the inadequacy of *Bowers*.⁶⁴ In *Casey*, the Court found that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁶⁵ In *Romer*, the Court invalidated a law that deprived homosexuals, lesbians or bisexuals protection under state anti-discrimination laws.⁶⁶

The Court did acknowledge the principle of stare decisis, but noted it is not an "inexorable command."⁶⁷ The majority found it important that the *Bowers* holding had not induced detrimental reliance which would counsel against overruling, especially when sound reasons existed to do so.⁶⁸ Although there were several reasons noted by the Court for overruling *Bowers*, significantly the majority opinion, written by Justice Kennedy stated that "to the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."⁶⁹ The majority then went on to note that the European Court of Human Rights had not followed *Bowers*, but its own decision in *Dudgeon*, and that other nations had taken action affirming the right of homosexual adults to engage in intimate consensual conduct.⁷⁰ The majority concluded that the right petitioners sought to be recognized in this case was "accepted as an integral part of human freedom in many other countries."⁷¹

The dissent, written by Justice Scalia took the majority to task for overruling *Bowers*, a decision rendered just seventeen years

⁶² 505 U.S. 833 (1992).

⁶³ 517 U.S. 620 (1996).

⁶⁴ *Lawrence*, 539 U.S. at 573 (providing evidence that the deficiencies of *Bowers* became apparent to the states referenced in *Bowers*).

⁶⁵ *Casey*, 505 U.S. at 851.

⁶⁶ *Romer*, 517 U.S. at 635 (concluding that the Colorado statute was beyond the state's legislative authority).

⁶⁷ *Lawrence*, 539 U.S. at 577.

⁶⁸ *Id.* at 577 (noting that the *Bowers* decision had not induced detrimental reliance comparable to other instances where recognized individual rights are involved).

⁶⁹ *Id.* at 576.

⁷⁰ *Id.* (explaining that the United States shares values common to other nations).

⁷¹ *Id.* at 577.

ago. In regards to the majority's reference to international law, though Justice Scalia stated it was dicta, he noted it was dangerous because "this Court should not impose foreign moods, fads, or fashions on Americans."⁷²

Two years later, in the 2005 case of *Roper v. Simmons*,⁷³ the Court held that the execution of a person who was under the age of eighteen at the time the crime was committed was unconstitutional under the eighth and fourteenth amendments.⁷⁴ Similar to the *Lawrence* decision, it explicitly overruled a fairly recent case, *Stanford v. Kentucky*,⁷⁵ decided only sixteen years prior. Justice Kennedy again wrote the majority opinion and began by noting the finding of the Missouri Supreme Court that since the *Stanford* case,

a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.⁷⁶

Justice Kennedy went on to compare the present case to *Atkins v. Virginia*,⁷⁷ in which the Court had found the execution of the mentally retarded to be unconstitutional based on the evolving standards of decency.⁷⁸ Justice Kennedy acknowledged that the nation's rate of change in reducing the frequency of the juvenile death penalty has been slower than that demonstrated in *Atkins*

⁷² *Id.* at 598 (Scalia, J., dissenting) (citing *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring)).

⁷³ 543 U.S. 551 (2005).

⁷⁴ *Id.* at 578 ("the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

⁷⁵ 492 U.S. 361 (1989). The *Stanford* court affirmed a decision of the Supreme Court of Missouri holding that imposing capital punishment on a 16 or 17 year old did not constitute cruel and unusual punishment under the eight amendment.

⁷⁶ *Roper*, 543 U.S. at 559-60.

⁷⁷ 536 U.S. 304 (2002).

⁷⁸ *Roper*, 543 U.S. at 563-64 (explaining that in *Atkins*, the Court noted the evolving standards of decency and comparing the evidence of a national consensus in *Atkins* to the evidence here).

of abolishing the death penalty for the mentally retarded.⁷⁹ However, Justice Kennedy concluded that "any difference between this case and *Atkins* with respect to the pace of abolition [was] counterbalanced by the consistent direction of the change."⁸⁰ Justice Kennedy then went on to discuss the difference between adults and juveniles under age eighteen which demonstrated juveniles could not be considered the worst offenders.⁸¹

Finally, Justice Kennedy ended his opinion by addressing the fact that "[t]he United States is the only country in the world that continues to give official sanction to the juvenile death penalty."⁸² He was quick to note that though this fact was not controlling and the task of interpreting the Eighth Amendment remains the responsibility of the Court, since the decision in *Trop v. Dulles*⁸³, the Court had looked to other country's laws in interpreting the Eighth Amendment.⁸⁴ He then cited to briefs from foreign and international organizations for the proposition that Article 37 of the United Nations Convention on the Rights of Children, which every country in the world besides the United States and Somalia had ratified, expressly prohibited capital punishment for crimes committed by juveniles under the age of eighteen.⁸⁵ Justice Kennedy drove home the point by again stating "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."⁸⁶

Justice Scalia dissented, strongly disagreeing with the majority that a national consensus against the juvenile death penalty had developed.⁸⁷ In fact, he found that the views of U.S. citizens

⁷⁹ *Id.* at 565 (stating the rate of change in abolishing the juvenile death penalty has been slower than that of abolishing the death penalty for the mentally retarded).

⁸⁰ *Id.* at 566.

⁸¹ *Id.* at 569-76 (discussing the many differences between juveniles under age eighteen and adults).

⁸² *Id.* at 575.

⁸³ 356 U.S. 86 (1958).

⁸⁴ *Roper*, 543 U.S. at 575 (stating that foreign law is not controlling but has been referred to in Eighth Amendment jurisprudence since *Trop v. Dulles*).

⁸⁵ *Id.* at 576 (noting both Article 37's express prohibition on capital punishment for crimes committed by juveniles under 18 and parallel prohibitions in other significant international covenants).

⁸⁶ *Id.* at 577.

⁸⁷ *Id.* at 609 (Scalia, J., dissenting) (arguing "[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus . . . Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time").

had been pushed to the side, while the views of the international community and had taken center stage.⁸⁸ He went so far as to accuse the court of sophistry, in enacting foreign law when it agrees with one's own thinking and ignoring it otherwise.⁸⁹

Although Justice O'Connor dissented in the Court's ruling because she did not believe that there was a true national consensus against the juvenile death penalty, she disagreed with Justice Scalia's assertion in his dissent that international law had no place in Eighth Amendment jurisprudence.⁹⁰ She defended the use of international law noting that in the last half century, the Court has frequently referred to international law when assessing the evolving standards of decency.⁹¹ Even while recognizing American law is distinctive in many respects, she still stated,

This Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement-expressed in international law or in the domestic laws of individual countries-that a particular form of punishment is inconsistent with fundamental human rights.⁹²

B. Implications of Lawrence and Roper

The *Lawrence* and *Roper* decision are highly significant decisions in terms of constitutional jurisprudence for several reasons. First, both decisions demonstrate the proper use of international law as persuasive authority in interpreting phrases such as "evolving standards of decency," "cruel and unusual punishment," and "due process" that involve the entire world commu-

⁸⁸ *Id.* at 622 (Scalia, J., dissenting) ("[t]hrough the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage").

⁸⁹ *Id.* at 627 (Scalia, J., dissenting) (positing that to invoke alien law only when it agrees with one's own thinking is sophistry).

⁹⁰ *Id.* at 604 (O'Connor, J., dissenting) (disagreeing with Scalia's dissent and arguing that the Court has referred to international law in assessing evolving standards of decency).

⁹¹ *Id.* (O'Connor, J., dissenting) (finding that "[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant").

⁹² *Id.* at 605 (O'Connor, J., dissenting).

nity.⁹³ The text of the Constitution does not define these terms and some external interpretive tool is necessary at times to resolve constitutional questions.⁹⁴ By using international law to bring meaning to these terms, the Court implicitly recognized the legitimacy of the practice.

Second, the decisions show that the use of international law in constitutional interpretation is not "the Draconian usurpation of US sovereignty envisaged by the critics."⁹⁵ In fact, when used properly constitutional law can be seen as "a site of engagement between domestic law and international or foreign legal sources and practices."⁹⁶ In other words international law is not treated as binding, but the constitution's interpreters are not forced to "put on blinders that exclude foreign legal sources."⁹⁷ In *Lawrence*, the use of international law was a modest aid in constitutional interpretation,⁹⁸ while in *Roper* the Court first looked to the text of the Constitution along with American history, tradition and precedent and then undertook an extensive analysis of U.S. concepts of "cruel and unusual punishment" before turning to foreign laws.⁹⁹

Finally, *Lawrence* and especially *Roper* are significant because they represent a growing awareness by the Court of the validity

⁹³ See Cleveland, *supra* note 2 (noting that general concepts incorporated into Constitution such as "liberty" and "cruel and unusual punishment" invoke fundamental values of international community); Yitzchok Segal, *The Death Penalty and the Debate over the U.S. Supreme Court's Citation of Foreign and International Law*, 33 FORDHAM URB. L.J. 1421, 1451 (2006) (discussing Court's use of citing international law as "objective indicator[] of society decency standards").

⁹⁴ See Charles Hobson, *Culpability and the Death Penalty: The Intersection of Law and Psychology*, 11 WIDENER L. REV. 23, 26-27 (2003) ("phrase 'cruel and unusual punishment' . . . did not have a static meaning"); Tamela R. Hughlett, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 180 (1992) (finding fact that Bill of Rights does not define certain rights is first reason for courts to use international law as interpretive guide).

⁹⁵ Sean D. Murphy, *The Law of the Lands: Why Courts Look Overseas*, BOSTON GLOBE, Jun. 5, 2005, at D12, available at 2005 WLNR 8985892.

⁹⁶ Jackson, *supra* note 31, at 114.

⁹⁷ *Id.*

⁹⁸ See Neuman, *supra* note 40, at 89 (positing that Supreme Court's invocation of international law in aid of constitutional interpretation is modest); Mark Tushnet, "A Decent Respect to the Opinions of Mankind": Referring to Foreign Law to Express American Nationhood, 69 ALB. L. REV. 809, 809 (2006) (noting Court's referral to foreign law in *Lawrence* did not give foreign law "any degree of authority").

⁹⁹ See Murphy, *supra* note 95 (explaining that Court fully accepted that Constitution's prohibition on cruel and unusual punishment should be interpreted according to text); Segal, *supra* note 93, at 1438 (highlighting Court first finding national consensus before turning to foreign and international law).

of international law.¹⁰⁰ In fact, “*Lawrence* represents the first time the Supreme Court has cited foreign case law in the process of overruling an American constitutional precedent.”¹⁰¹ Together both cases signal recognition by the Court that it does not make sense to reach decisions in a vacuum, especially considering it has a “common legal heritage, tradition, and history with many foreign constitutional systems.”¹⁰² As Justice Kennedy noted in the *Lawrence* opinion, when the Supreme Court issued the opinion of *Bowers v. Hardwick*, there was no mention of the *Dudgeon v. United Kingdom* case that had just been decided by the European Court of Human Rights, even by the side it would have helped.¹⁰³ By not mentioning the *Dudgeon* case, the Justices and especially *Bowers*’ lawyer ignored a valuable resource.¹⁰⁴ The *Dudgeon* case yielded six opinions from some of the world’s leading jurists. Even if it would not have changed the result in *Bowers*, it could have clarified the issues and broadened perspectives, as well as improved the quality of reasoning, which would have helped to place the opinion on more solid ground.¹⁰⁵ For example, the European Court explained how its holding grew out of guidelines developed in prior decisions, while the “cryptic” *Bowers* de-

¹⁰⁰ See Stephen Arvin, *supra* note 31, at 210 (positing that *Roper* stands for growing appreciation of validity of international law); see also Elizabeth Burleson, *supra* note 8, at 921 (noting that *Roper* reaffirmed relevance of international law and practice in U.S. constitutional jurisprudence).

¹⁰¹ William N. Eskridge, Jr., *Development -- United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT’L J. CONST. L. 555 (2004).

¹⁰² Koh, *supra* note 16, at 47 (finding it makes little constitutional sense for Supreme Court to decide cases in vacuum since U.S. has never been hermitically sealed legal system).

¹⁰³ See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s passion for foreign law could change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, available at http://www.newyorker.com/fact/content/articles/050912fa_fact (quoting Justice Kennedy as stating that, though *Dudgeon v. United Kingdom* had just been decided exactly way defendants in *Bowers* wanted the Court to go, “the lawyers didn’t even cite it in their briefs”); see also GLENDON, *supra* note 55, at 148 (explaining that *Dudgeon* case was ignored by lawyers on both sides of *Bowers* case, as well as majority and dissenting judges).

¹⁰⁴ See GLENDON, *supra* note 55, at 152 (finding that in *Bowers*’ case Supreme Court Justices and plaintiff’s attorney ignored valuable and readily available resource); Sir Sydney Kentridge, *Comparative Law in Constitutional Adjudication: The South African Experience*, 80 TUL. L. REV. 245, 254 (2005) (stating “*Dudgeon* case was not mentioned” in *Bowers* case).

¹⁰⁵ See Shirley S. Abrahamson & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 289 (1997) (highlighting that opinions in *Dudgeon* case had many comparative law references); GLENDON, *supra* note 55, at 152 (explaining how six *Dudgeon* opinions, issued by world’s leading jurists, could have improved *Bowers* decision).

cision, looked more like the mere product of majority vote.¹⁰⁶ The principal writers of *Bowers* resorted more to “bald assertion than principled justifications.”¹⁰⁷ In fact, if the American Justices in the *Bowers* case had read the *Dudgeon* case, they might have been shocked to discover the similarity in the European Court’s decision making techniques with the great American judge’s tradition of judicial candor and craftsmanship, as practiced by great judges such as Robert Jackson, John Marshall Harlan, Henry Friendly and Learned Hand.¹⁰⁸ According to Justice Kennedy, this ignorance of foreign decisions “would never happen today,” because even though we know foreign decisions are not binding on us, “we know we have to be aware of what’s going on in the world.”¹⁰⁹

In addition, Justice Kennedy himself has pointed to the greater amount of available information from different legal systems.¹¹⁰ The two main legal databases in the United States carry opinions from dozens of countries.¹¹¹ It would constitute “willful ignorance” on the part of the Justices to not be aware of the jurisprudence in other countries.¹¹² As Ann Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton put it: “The opinions are out there, easy to get, and the briefs are being filed. If the Justices didn’t cite them, it would be like pretending the rest of the world didn’t exist.”¹¹³

¹⁰⁶ See Abrahamson & Fischer, *supra* note 105, at 289 (recognizing *Dudgeon* court’s care in its decision that was lacking in *Bowers*); see also GLENDON, *supra* note 55, at 156.

¹⁰⁷ GLENDON, *supra* note 55, at 157.

¹⁰⁸ See Abrahamson & Fischer, *supra* note 105, at 289-90 (explaining how courts in *Dudgeon* and *Bowers* made their respective decisions); see also GLENDON, *supra* note 55, at 156-57.

¹⁰⁹ Toobin, *supra* note 103.

¹¹⁰ See *id.* (“judges’ use of foreign law today is a response to the availability of global sources of information”); see also Tony Mauro, *U.S. Supreme Court vs. The World: ‘Are We So Arrogant That We Think We Have Nothing to Learn from Judges and Lawmakers Around the World Who Have Faced the Same Issues We Face?’*, USA TODAY, Jun. 20, 2005, at A15 (highlighting Justice Kennedy’s progression from rejecting international law as “too remote and unknown to American judges” to acceptance of the potential to learn from such law).

¹¹¹ See Toobin, *supra* note 103 (“two most frequently consulted legal databases in the [U.S.], Lexis and Westlaw, carry foreign opinions from dozens of countries”); see, e.g., www.lexis.com (having “Global Legal” database carrying a wide-variety of international legal sources).

¹¹² Toobin, *supra* note 103 (arguing “it would require almost willful ignorance on the part of Supreme Court Justice’s not to be aware of judicial activity in other countries”).

¹¹³ *Id.*

C. When International Law is Most Applicable

The legitimacy regarding the use of international law will depend on several factors, the most obvious being the issue being decided.¹¹⁴ Certain rights are written into the Constitution and do not need to be interpreted, such as the requirement that the president be thirty-five years old or there be a grand jury for federal prosecutions.¹¹⁵ However the Constitution contains many vague terms and reasonable people can disagree on the interpretation.¹¹⁶ In construing issues that are open to interpretation, such as whether executing a person for a crime committed when the person was under the age of 18 constitutes cruel and unusual punishment, it makes sense to look to how other jurisdictions which dealt with the same issue, resolved it.¹¹⁷ If other jurisdictions have already examined these issues, “then our commitment to the pursuit of justice should lead us to examine the end product of their labors for guidance.”¹¹⁸ Further, critics of due process jurisprudence who find it rests on subjective whims of the justices should welcome justices looking to other authority, so as to be sure they are not reading their own views into the open-ended provisions of the Constitution.¹¹⁹

¹¹⁴ See Jackson, *supra* note 31, at 125 (discussing various factors going to the legitimacy of applying international law including the “specificity and history of our constitutional text, the degree to which the issue is genuinely unsettled, and the strength of other interpretive sources”); see also Robert C. Bird, *Procedural Challenges to Environmental Regulation of Space Debris*, 40 AM. BUS. L.J. 635, 664 (2003) (stating “[a] rule has legitimacy in international law to the extent it possesses four distinct properties - determinacy, symbolic validation, coherence, and adherence”).

¹¹⁵ See U.S. CONST. art. II, § 1 (“No person . . . shall be eligible to the office of the President . . . who shall not have attained the age of thirty five years”); Jackson, *supra* note 31, at 125 (noting that “[w]hatever the foreign practice, the U.S. Constitution requires a grand jury for federal prosecutions”).

¹¹⁶ See Hughlett, *supra* note 94, at 180 (“[t]he provisions of the Constitution are often vague and, even reasonable people could disagree on how the Supreme Court should interpret the Constitution”); see also Robert J. Pushaw, Jr., *Article: Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 380 n.127 (2001) (describing “the Constitution is often extremely vague” and asserting “that reasonable people disagree about what it means” (citation omitted)).

¹¹⁷ See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 140 (2005) (concluding that when determining the constitutionality of open questions, we can use “all the help we can get”).

¹¹⁸ *Id.*

¹¹⁹ See Eskridge, *supra* note 101, at 557 (stating that “[o]ne way for a judge to be more certain that she is not just reading her own views into the Constitution’s open-textured provisions is to see if differently situated judges elsewhere in the world are reaching the same normative judgment”); Sarah Ramsey and Daan Braveman, *Articles: “Let Them*

Looking to international law as an interpretive source is especially appropriate regarding issues of human rights.¹²⁰ In the words of Justice Kennedy,

Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means?¹²¹

In essence, there are some rights deemed so fundamental that they transcend national borders. Though not every issue will have a clear international consensus as was the case in *Roper*,¹²² it still makes sense to look to those jurisdictions that have dealt with a particular issue and examine the end product of their labor.¹²³ Justice Breyer stated that foreign judges are "dealing with texts that more and more protect basic human rights. If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says, if it's similar enough? Maybe I'll learn something."¹²⁴

Starve: *Government's Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1645 (1995) (explaining that international law may be used as a "guiding principle" in interpreting the U.S. Constitution and such use is relevant when determining issue related to the enforcement of treaties and "customary law").

¹²⁰ See Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) ("comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights"); Kathleen M. Kedian, *Note, Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquette Habana*, 40 WM. & MARY L. REV. 1395, 1398 (1999) (noting that "[a]n increase in the number of international human rights cases reaching federal courts, and the recent trend toward loosening the requirements of and decreasing the time necessary for establishing customary norms, have intensified the customary international law debate and imposed urgency on the need to resolve it").

¹²¹ Toobin, *supra* note 103.

¹²² See Jackson, *supra* note 31, at 127 ("[c]ases like *Roper*, with so strong a consensus in international and foreign law and practice prohibiting the juvenile death penalty, are likely to be rare").

¹²³ See Waldron, *supra* note 117, at 140 (positing that the "accumulated legal wisdom of mankind can still offer something," even when dealing with a case that is "peculiarly American"); see also Toobin, *supra* note 103 (quoting Justice Kennedy who stated: "[i]f we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us").

¹²⁴ Toobin, *supra* note 103.

The second factor that will help to determine whether the use is appropriate is the persuasive value of the source. It is important to look at whether the source shares common values, such as democracy and freedom.¹²⁵ As Koh explains, those who advocate the use of international law in constitutional interpretation are not advocating that the courts defer to a “global nose count.”¹²⁶ Instead, the point is to look to the practices of other mature democracies for relevant evidence of how to construe these open ended terms.¹²⁷

Finally, support from international sources should only be used when it has reached a certain level of legitimacy.¹²⁸ This can be shown through codification or an international agreement such as the United Nations Convention on the Rights of Children used by the Court in *Roper*. It was not necessary for the United States to have ratified the agreement because it still provided evidence of concrete human rights norms accepted by many other nations.”¹²⁹ Legitimacy of an international source can also be shown by a general practice or prohibition. Justice Harlan explained

¹²⁵ See Jackson, *supra* note 31, at 125 (finding that countries which share our commitment to human rights, democracy and the rule of law roughly comparable to ours are likely to have more positive persuasive value); see also Thomas M. Franck, *Human Rights International Law Symposium: Article: The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 8-9 (1994) (“[a]s in our national jurisprudence, the soil from which international law springs is the loam of widely-shared social values. Participatory democracy is becoming such a common value of humanity and it is to this value that international law is already starting to respond”).

¹²⁶ Koh, *supra* note 16, at 56.

¹²⁷ See *id.* (suggesting that the most relevant evidence is that of mature democracies). But see, e.g., Gary Bauer, *Disorder in our High Court*, USA TODAY, Mar. 21, 2005, at A23 (arguing that “[u]nder no circumstances should laws passed by the British Parliament, the French National Assembly, the German Bundestag or the High Court of Zimbabwe be a factor in deciding what is a permissible decision by the American people in our own self-governance”).

¹²⁸ See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 9-10 (2006) (positing that before applying international law to a constitutional issue, one of the factors the court should consider is “how uniformly accepted and well defined the international norm is and whether states have complied with it in practice”); Hughlett, *supra* note 94, at 183-84 (asserting that international law should not be used unless it can be shown that it has reached the level of international custom, either through a showing of general or consistent prohibition or practice by countries, or as evidenced by international agreements).

¹²⁹ See Hughlett, *supra* note 94, at 183 (“[i]nternational agreements evidence concrete human rights norms accepted by most nations, whether or not the nations ratify or even sign the agreements”); see also David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. J. INT’L L. & POL’Y 339, 348 (1988) (commenting “[t]he greater the number of parties to a treaty, the greater the inference that it rises to the level of customary international law”).

that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it".¹³⁰

D. Why it is not "totally inappropriate" to use International Law

Critics of the use of international law often claim one of two things: either (1) the whole idea of using international law is wrong or (2) the use of international law is not necessarily wrong but it is being used selectively, haphazardly or opportunistically, and therefore is an opportunity for a Judge to infuse his or her own views into the Constitution.

Justice Scalia stated in his dissent in *Roper* that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."¹³¹ However, in neither *Roper* nor *Lawrence* did the majority argue or imply that the American law must conform to the laws of the rest of the world. In both cases, the use of foreign law was used merely as persuasive authority as opposed to binding precedent. Further, Justice Scalia's comment that "[w]e don't have the same moral and legal framework as the rest of the world and never have,"¹³² is simply not true when it comes to certain fundamental rights in which there has been a growing world-wide consensus.¹³³ It also ignores the fact that the U.S. has ties with international and foreign law because our courts have relied upon both from the very beginning of our nation.¹³⁴

In *Lawrence*, Justice Scalia found that it was wrong for the Court to impose "foreign moods, fads, or fashions on Americans," however, established international norms regarding human

¹³⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

¹³¹ 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

¹³² Charles Lane, *The Court Is Open for Discussion; AU Students Get Rare Look At Justices' Legal Sparring*, WASH. POST, Jan. 14, 2005, at A01 (quoting Justice Scalia).

¹³³ See Breyer, *supra* note 3, at 266 (stating that increasing number of globalized issues, such as the ever stronger consensus on the importance of protecting basic human rights, allows for foreign law and decisions in foreign courts to help with domestic issues, including constitutional issues, by providing points of comparison).

¹³⁴ See Murphy, *supra* note 95 (responding to critics regarding the use of international law by explaining the US does have an inherent relationship to international and foreign law).

rights can hardly be demeaned to the level of a fad or fashion.¹³⁵ Jeremy Waldron analogized the use of international law in U.S. decision-making to that of science and of scientific problem solving.¹³⁶ According to Waldron, just as it would be ridiculous for public health authorities to only look to American science when a new disease arises, so is it to ignore international law when dealing with difficult legal problems in America, such as the juvenile death penalty.¹³⁷ It also ignores the plain fact that Judges are forced to make judgment calls regarding Constitutional terms that are vague and undefined.

Another common critique of international law is one Justice Scalia mentioned in *Roper*, the invoking of international law opportunistically.¹³⁸ This critique has merit because as Justice Scalia rightly pointed out, foreign law was invoked in a homosexual sodomy case, but there was “not a whisper about foreign law in the series of abortion cases.”¹³⁹ International law should be invoked in an even handed manner because as is the case with most theories, it is capable of misuse. Justice Breyer acknowledged this but he also he stated he hoped that all judges “would refer to materials that support positions that the judge disfavors as well as those that he favors.”¹⁴⁰ He then discussed his dissent in *Knight v. Florida*,¹⁴¹ in which he had cited international law that supported his position, as well as opposed it.¹⁴²

¹³⁵ See Hughlett, *supra* note 94, at 192 (noting that international law provides an objective standard); Waldron, *supra* note 117, at 144 (positing that referring to foreign law does not simply look to foreign fads).

¹³⁶ See Waldron, *supra* note 117, at 144 (comparing the use of foreign law to that of the establishment of scientific theories in that solutions to problems in the law may change over the years as there is progress).

¹³⁷ *Id.* at 143 (showing the similarities between scientific and legal comparisons on an international scope).

¹³⁸ See *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (“[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry”); Waldron, *supra* note 117, at 130 (noting the argument that the use of foreign law is opportunistic).

¹³⁹ *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005) [hereinafter *Scalia-Breyer Debate*] (arguing that justices use foreign law selectively, Scalia stated, “[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it”).

¹⁴⁰ *Id.* at 523.

¹⁴¹ 528 U.S. 990, 993-99 (1999) (Breyer, J., dissenting).

¹⁴² See *Scalia-Breyer Debate*, *supra* note 139, at 527-28 (explaining his dissent in *Knight v. Florida*, where he referred to decisions by the Supreme Court of India, the Supreme Court of Canada, certain United Nations determinations, and a case from Zimbabwe).

Even assuming Justice Scalia is right, a theory should not be rejected because it is being used opportunistically in certain instances, when the theory is capable of being used in a constructive and appropriate manner.¹⁴³ Jeremy Waldron made the point that the same critique could be made of the doctrine of stare decisis, as Justices can choose to follow precedent for the wrong reasons and invoke it in an opportunistic manner.¹⁴⁴ However, simply because stare decisis can be used in an opportunistic fashion at times, does not justify rejecting it completely.¹⁴⁵ Similarly, the use of international law should not be rejected because of the possibility of abuse.

Furthermore, it is important to acknowledge that the use of international law necessarily has to be somewhat selective, because it would only make sense to make comparisons with other mature democracies and not those that lag behind developmentally.¹⁴⁶ Koh exclaimed that the critics "bizarrely . . . assume that United States judges should construe a national bill of rights that the framers thought was the model for the world in light of the world's worst practices."¹⁴⁷

The best answer to critics however, is that when utilized properly, the use of international law can actually decrease a Judge's

¹⁴³ See Cleveland, *supra* note 128, at 96-97 (recognizing argument that use of international law can be "sloppy, misguided, and even opportunistic" and noting this problem with any interpretive mechanism); Waldron, *supra* note 117, at 130-31 (positing that following and departing from precedent can be unprincipled and opportunistic, but it does not follow that theory of stare decisis should be rejected, just as a theory of citing to foreign law should not be rejected solely because it has been cited opportunistically); *see also id.* (stating international law should not be rejected so long as international standards used involve a "determined effort to accurately construe and apply international law and to meaningfully validate claims of widespread state practice").

¹⁴⁴ See Waldron, *supra* note 117, at 130-31 (asserting that stare decisis can also be invoked opportunistically); *see also* Cleveland, *supra* note 128, at 102-03 (noting that "common law, historical sources, social science and scientific data, law and economics theory, pragmatic policy concerns, and judge-made rules of construction, including principles of stare decisis" are all interpretive sources not produced by democratic lawmaking and are subject to abuse).

¹⁴⁵ See Waldron, *supra* note 117, at 130-31 (stating that we should not reject the theory of stare decisis just because following or departing from precedent can be opportunistic).

¹⁴⁶ See Koh, *supra* note 16, at 56 (noting that "mature democracies... constitute the most relevant evidence of what Eighth Amendment jurisprudence calls the 'evolving standards of decency that mark the progress of a maturing society'" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

¹⁴⁷ *Id.*

subjectivity.¹⁴⁸ Those who claim that the use of international law is an opportunity for Judges to infuse their own beliefs into the Constitution fail to recognize that vague Constitutional terms often require a judge to exercise discretion and make judgment calls. Citing an international norm or law for their interpretation of a vague clause such as due process can actually prevent judges from infusing their own beliefs and preferences.¹⁴⁹ Justice Breyer noted that when a judge looks to international law it is “not to impose his own moral views, but for a more objective standard.”¹⁵⁰ As much as it might vex the critics, comparison to international law and the law of foreign nations to at least some degree is inevitable in today’s jurisprudence.¹⁵¹ Judges should not have to pretend that they close their eyes to the world, nor should we want them to.

III. BROADER IMPLICATIONS

Thankfully, it is no longer true that “the United States. . .remains sadly isolated from the rapidly developing corpus of international human rights law,”¹⁵² as demonstrated by both the *Lawrence* and *Roper* cases. However, the United States courts are far ways off from other courts which cite international sources of law with great frequency.¹⁵³ In 1988, Anthony Lester noted that the courts in Europe and elsewhere have recognized the “persuasive authority of legal principles developed by the United States federal judiciary”¹⁵⁴ and advocated that it would be beneficial for the United States to reciprocate. Lester found it regrettable that for the United States, human rights have been “for export only” and submitted that it could have many undesir-

¹⁴⁸ See Justice Michael Kirby, *International Law-The Impact on National Constitutions*, 21 AM. U. INT’L L. REV. 327, 349 (2006) (finding proper use of international law can actually decrease subjectivity).

¹⁴⁹ See Hughlett, *supra* note 94, at 201 (explaining that using international law decreases a Judge’s subjectivity).

¹⁵⁰ *Scalia-Breyer Debate*, *supra* note 139, at 527.

¹⁵¹ See Jackson, *supra* note 31, at 119 (stating that comparison is inevitable).

¹⁵² Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 539 (1988).

¹⁵³ See Neuman, *supra* note 40, at 86 (noting that other countries’ constitutional courts voluntarily consider international human rights norms in interpreting constitutional rights and providing the example of the German Constitutional Court and the Supreme Court of Canada).

¹⁵⁴ Lester, *supra* note 152, at 543.

able consequences, such as diminishing American influence abroad.¹⁵⁵ Mary Ann Glendon echoed similar thoughts in 1991, when she discussed the implications of America being only an exporter of ideas.¹⁵⁶ She emphasized that our rights traditions and struggle to bring rights to all Americans have inspired others.

In closing our own eyes and ears to the development of rights ideas elsewhere, our most grievous loss is not the influence of our legal ideas, but rather the kind of assistance in the never-ending project of revitalizing and renewing our own rights traditions that can be gained from observing the successes and failures of others.¹⁵⁷

Since Lester and Glendon's observations, there have been signs of change and hopefully the *Lawrence* and *Roper* decisions are signs of greater movement toward recognition of international law as a valid tool for constitutional interpretation. Just as Supreme Court decisions have been plentiful sources for human rights doctrines in other countries, now the favor can be reciprocated.¹⁵⁸ As Chief Justice Rehnquist stated extrajudicially, "now that constitutional law is solidly grounded in so many countries . . . it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process."¹⁵⁹ His words have been echoed by several other Justices, including Sandra Day O'Connor who has stated that "conclusions reached by other countries and by the international community should at times constitute persuasive authority."¹⁶⁰

¹⁵⁵ *Id.* at 561 (commenting on inconsistency between America's willingness to contribute to human rights globally while simultaneously refusing to consider outside sources in its own judicial interpretations).

¹⁵⁶ GLENDON, *supra* note 55, at 170 (discussing the implications of this practice).

¹⁵⁷ *Id.*

¹⁵⁸ See Lester, *supra* note 152, at 543 (stating English courts and others have "acknowledged the persuasive authority of legal principles developed by the United States federal judiciary"); Neuman, *supra* note 40, at 87 (finding that the Supreme Court has been a prestigious source of individual rights doctrines and argumentation in the global community).

¹⁵⁹ Jackson, *supra* note 31, at 112 (quoting William H. Rehnquist, *Foreword to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, at vii-viii (Vicki C. Jackson & Mark Tushnet eds., 2002)).

¹⁶⁰ Sandra Day O'Connor, Keynote Address, Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); see Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges*

However, if the United States instead follows a path of isolationism based on a notion of the exceptional character of the American constitution, the ramifications could be severe. We live in an interdependent world and “for any nation consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but also would diminish that nation’s ability to invoke those international rules that served its own national purposes.”¹⁶¹ It also incites attacks of parochialism and could undermine the U.S. influence abroad over the development of global human rights.¹⁶²

Beyond the fact that declaring other law irrelevant to our Constitution makes “our Constitution appear irrelevant to the world,”¹⁶³ to disregard international law is to ignore a legitimate and helpful tool for constitutional interpretation. The Constitution is rightly praised for its concern with individual human rights,¹⁶⁴ however due to the lack of definitions in certain parts, some external guides are necessary.¹⁶⁵ Richard Posner, a well respected federal court of appeals judge candidly admitted, that when deciding a novel constitutional case, there is nothing else to draw on other than “discretionary judgment” because “the constitutional text and history, and the pronouncements in past opinions, do not speak clearly.”¹⁶⁶ International law can in appropriate situations serve as one persuasive authority for interpreting vague or unclear points in the Constitution. It also provides Justices with “a road map of consequences that are likely to follow their recognition of rights for a previously excluded minority.”¹⁶⁷

and Lawyers Must Learn About Foreign Law, INT’L JUD. OBSERVER 2 (1997) (advocating the consideration of the conclusions reached by other countries and by the international community in U.S. courts).

¹⁶¹ Koh, *supra* note 16, at 44.

¹⁶² See *id.* at 56 (discussing potential damage if U.S. courts ignore foreign precedent).

¹⁶³ Neuman, *supra* note 40, at 87 (citing Claire L’Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 33-34, 37-39 (1998)).

¹⁶⁴ See Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT’L L. 851, 851 (1989) (stating that “contemporary observers . . . rightly praise the constitution’s concern with human rights”).

¹⁶⁵ See Hughlett, *supra* note 94, at 180 (explaining that “[s]ome external interpretive tool is necessary at times to resolve constitutional questions”).

¹⁶⁶ Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 40 (2005).

¹⁶⁷ Eskridge, *supra* note 101, at 560.

Former Supreme Court Justice Benjamin Cardozo noted in his writings that "the judge in shaping the rules of the law must heed the social mores of the day."¹⁶⁸ Significantly the social norms of the country are now directly influenced by those of other countries and the world in general. To require Judges to ignore this important fact is both illogical and damaging to our nation's jurisprudence.

IV. FORECAST FOR THE FUTURE

The membership on the Supreme Court recently changed with the passing of Chief Justice Rehnquist in 2005 and the retirement of the influential, and often swing voter, Justice Sandra Day O'Connor in 2006. Both Justices supported the use of international law in certain contexts.¹⁶⁹ Beyond her extrajudicial statements on the topic,¹⁷⁰ Justice O'Connor made it clear in her *Roper* dissent, where she disagreed with Justice Scalia's assertion that the use of international law is always inappropriate when interpreting the U.S. Constitution, that it can be proper in certain circumstances.¹⁷¹

Although the views of the replacements, Chief Justice John Roberts and Justice Samuel Alito are yet to be determined, one can speculate from their confirmation hearings, as both were asked what they thought was the proper role of foreign law in

¹⁶⁸ BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 104 (Yale University Press ed., 1991) (1921).

¹⁶⁹ See Sandra Day O'Connor, Keynote Address, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002) ("[a]lthough international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts"); William Rehnquist, *Constitutional Courts - Comparative Remarks* (1989), reprinted in *GERMAN AND ITS BASIC LAW: PAST, PRESENT AND FUTURE-A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) ("it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process").

¹⁷⁰ See O'Connor, *supra* note 169 at 350 (endorsing reliance on decision of international courts as persuasive authority).

¹⁷¹ 543 U.S. 551, 604 (O'Connor, J., dissenting) ("[I] disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency").

U.S. Supreme Court decisions.¹⁷² When asked by Senator Kyl about foreign law in constitutional interpretation, Justice Roberts's response was to first express concern about accountability because judges in this country are not accountable to the people.¹⁷³ He then expressed concern about the discretion of judges and stated: "[i]n foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever . . . [l]ooking at foreign law for support is like looking out over a crowd and picking out your friends."¹⁷⁴ He maintained that foreign law allowed judges to incorporate their personal preferences, though cloaked in precedent of a foreign law, to interpret the Constitution.¹⁷⁵

Justice Alito's response to the same question by Senator Kyl was more definite as he replied "I don't think foreign law is helpful in interpreting the Constitution."¹⁷⁶ He further elaborated that the Constitution does two basic things: "it sets out the structure of our government and it protects fundamental rights."¹⁷⁷ He first explained that he did not think international law was helpful for interpreting the structure of our constitution because it is unique to our country.¹⁷⁸ He then went on to state that he did not find foreign law helpful in interpreting individual rights and we should look to our own Constitution and precedents.¹⁷⁹ He noted that our country has been a leader in protecting fundamental rights, and that at the time of our adoption of the Bill of Rights, there were not many countries, possibly none, that protected

¹⁷² See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005), available at http://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm (last visited Oct. 17, 2007) [hereinafter *Roberts Hearings*]; *Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 277 (2006), available at http://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm (last visited Oct. 17, 2007) [hereinafter *Alito Hearings*].

¹⁷³ *Roberts Hearings*, *supra* note 172, at 200 (commenting on the proper role of international law when considered in regards to democratic theory).

¹⁷⁴ *Id.* at 201.

¹⁷⁵ *Id.* (finding this to be "a misuse of precedent").

¹⁷⁶ *Alito Hearings*, *supra* note 172, at 370.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (commenting that the structure of our government is unique to our country).

¹⁷⁹ *Id.* (stating that "[a]s for the protection of individual rights, I think that we should look to our own Constitution and our own precedents").

human rights the way our Bill of Rights did.¹⁸⁰ He then stated "We have our own law. We have our own traditions. We have our own precedents. And we should look to that in interpreting our Constitution."¹⁸¹ When Senator Coburn further questioned him on a later date, Justice Alito first restated that he did not think foreign law was useful or appropriate in interpreting the Constitution.¹⁸² He then frankly stated "I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world."¹⁸³

If their Senate confirmation hearing statements are any indication, it seems likely that both Chief Justice Roberts and Justice Alito lean more toward the Scalia camp of Justices who unequivocally oppose the use of international law in constitutional interpretation. However, unlike Justice Alito, Justice Roberts never expressly stated that he was opposed to the practice. Justice Roberts expressed concerns about the practice and seemed worried about the way in which it was being used.¹⁸⁴ He never stated that it was not a legitimate source of persuasive authority under certain circumstances. Therefore, it is not completely implausible that he might come to support the use of international law in certain circumstances.

As significant as the views of the new membership are, there are also seven sitting Justices who have already expressed their views on the topic. Firmly on one side, Justices Scalia and Thomas have made it clear that they always oppose the use of international law for constitutional interpretation.¹⁸⁵ Justice Scalia adamantly dissented to both the *Lawrence* and *Roper* decisions and explicitly criticized the use of international law in constitutional interpretation in both decisions.¹⁸⁶ Justice Thomas has

¹⁸⁰ *Id.* (explaining how our country has been a leader in the protection of individual rights).

¹⁸¹ *Id.*

¹⁸² *Id.* ("I don't think that we should look to foreign law to interpret our own Constitution").

¹⁸³ *Id.*

¹⁸⁴ See *Roberts Hearings*, *supra* note 172 ("as a general matter[,] that there are a couple of things that cause concern on my part about the use of foreign law as precedent").

¹⁸⁵ See Koh, *supra* note 16, at 52 (explaining that Justices Scalia and Thomas exemplify the "nationalist jurisprudence" which is "characterized by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives").

¹⁸⁶ See *Roper v. Simmons*, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting) (stating that "[t]hrough the views of our own citizens are essentially irrelevant to the Court's decision

similar views, finding it improper to “impose foreign moods, fads, or fashions on Americans.”¹⁸⁷

However, at one time or another, the remaining five Justices have all supported the use of international law in constitutional interpretation.¹⁸⁸ Besides the fact that Justices Kennedy, Breyer, Ginsburg, Souter, and Stevens were all in the majority of both the *Lawrence* and the *Roper* decisions, Justices Kennedy, Breyer and Ginsburg have made extrajudicial statements favoring the practice. Justice Ginsburg spoke about the importance of comparative analysis in constitutional interpretation, especially within the field of human rights.¹⁸⁹ On the subject of human rights, she found that “[w]e are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.”¹⁹⁰ She further expressed this view in her concurrence in *Grutter v. Bollinger*¹⁹¹ where she cited the text of the International Convention on the Elimination of All Forms of Racial Discrimination for support of the position that race conscious programs must have a logical end.¹⁹²

Justice Breyer has been perhaps the most vocal supporter, and has written on the practice as well as engaged in a public debate with Justice Scalia on the subject.¹⁹³ But to many, the biggest

today, the views of other countries and the so-called international community take center stage”); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (positing that “this Court...should not impose foreign moods, fads, or fashions on Americans” (citing *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari))).

¹⁸⁷ *Foster*, 537 U.S. at 990 (Thomas, J., concurring in denial of certiorari).

¹⁸⁸ See Breyer, *supra* note 3, at 265 (explaining that Justices Ginsburg, Souter and Stevens have all embraced international law in constitutional interpretation); see also Toobin, *supra* note 103 (noting that Justice Kennedy has invoked international law in two important court decisions).

¹⁸⁹ See Ginsburg and Merritt, *supra* note 120, at 282 (“comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights”).

¹⁹⁰ *Id.*

¹⁹¹ 539 U.S. 309 (2003).

¹⁹² *Id.* at 344 (Ginsburg, J., concurring) (finding that the need for race-conscious admissions policies to be limited in time was in accord with the international understanding of affirmative action).

¹⁹³ See Breyer, *supra* note 3, at 266 (discussing the use of international law in constitutional jurisprudence); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 519 (2005) (referring to the appropriateness of relying on international

surprise has been the support of Justice Kennedy to the practice of using international law for constitutional interpretation. Along with Justice Breyer, he is one of the Justices most prominently associated with the controversy.¹⁹⁴ Justice Kennedy arrived at the court without a formal judicial philosophy and his willingness to consider international law seems to reflect an open mind and a willingness to learn from diverse sources.¹⁹⁵ His support for the practice also makes it clear that it is much more than a liberal-conservative issue.¹⁹⁶ In fact, the support of Justices Rehnquist and O'Connor, neither known as liberal Justices, further emphasizes that to categorize this as a liberal issue misses the point. The real point is that in an interdependent world where many countries face the same issues, our justice system can only benefit from looking to other nations to see how they grappled with the issue, regardless of whether we resolve the question in the same respect.

Despite the potential reluctance of the two new members to the Court to look to international law as persuasive authority in constitutional interpretation, the majority of the Court looks approvingly at the practice. However, the loss of Justices Rehnquist and O'Connor makes it a slim majority. Therefore, although it seems likely that the practice of utilizing international law as persuasive authority in appropriate circumstances will continue, it is hard to predict what could happen when there is another change in Court membership.

decisions in deciding American constitutional issues as "[a]mong the most hotly disputed questions at the United States Supreme Court in recent years").

¹⁹⁴ See Toobin, *supra* note 103 (stating that Kennedy and Breyer are the two Justices most associated with the controversy over foreign law); see also Roger P. Alford, *Symposium: "Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence: Four Mistakes in the Debate on "Outsourcing Authority"*, 69 ALB. L. REV. 653, 669 (2006) (referencing "Justice Kennedy's frequent participation" in "global exchanges with other constitutional judges" and Justice Breyer as "the intellectual leader in the movement toward constitutional comparativism").

¹⁹⁵ See Toobin, *supra* note 103 (commenting that this has allowed Justice Kennedy to "absorb[] the diverse lessons of a changing world.>").

¹⁹⁶ See *id.* (noting that it would be a mistake to regard the dispute over foreign law as another iteration of America's conservative-liberal split); Alford, *supra* note 194, at 663 (describing the foreign law debate as "far more complex" than criticism from the right against the left wings of politics).

CONCLUSION

The use of international law is appropriate in constitutional interpretation from both an originalist and non-originalist viewpoint. An originalist looks to historical evidence of the Framers; however, it is clear that the both Framers and early Justices as well assumed that international law was part of our law.¹⁹⁷ A non-originalist does not view the Framer's intent as binding, and will look to external sources, and therefore should recognize international law as a useful tool in constitutional interpretation.¹⁹⁸

Lawrence and *Roper* represented the Court's moving toward a greater recognition of the usefulness of international law in determining vague terms that necessarily develop with the times, such as "evolving standards of decency" and "cruel and unusual punishment."¹⁹⁹ In fact, *Lawrence* represents the first time the Supreme Court cited foreign law in overruling a constitutional precedent.²⁰⁰ *Roper* represents the most extensive discussion of international law in a majority opinion regarding capital punishment.²⁰¹ Both cases also demonstrate that the use of international law for constitutional interpretation is not imposing the views of foreigners on Americans, nor is it binding. It is simply a modest aid that seeks to illuminate constitutional issues that our country shares with a global community.

¹⁹⁷ See Koh, *supra* note 16, at 44 (purporting that both the Framers and the early Justices "understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance"); Lobel, *supra* note 17, at 1076-77 (supposing there to be "substantial evidence" indicating that the Framers of the Constitution believed the government's power to be "limited by treaties and by fundamental principles of international law").

¹⁹⁸ See Gey, *supra* note 10, at 609 (stating non-originalists locate sources "in everything from common community traditions to external moral schemes").

¹⁹⁹ See Arvin, *supra* note 31, at 226 (noting that *Roper*, "taken in conjunction with *Atkins*, *Grutter*, and *Lawrence* signals that . . . the Court's appreciation for transnationalist jurisprudence is ripening"). But see Mark Wendell DeLaquil, Symposium: "Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence: Foreign Law and Opinion in State Courts, 69 ALB. L. REV. 697, 702 (2006) (describing *Roper* as the "exception that proves the rule" of international authority receiving a "chilly reception" in state courts).

²⁰⁰ See Eskridge, *supra* note 101, at 555 (explaining that "*Lawrence* represents the first time the Supreme Court has cited foreign law in . . . overruling an American constitutional precedent").

²⁰¹ See Arvin, *supra* note 31, at 210 (noting that significance of *Roper* with regards to the use of international law in U.S. cases).

The Court's dynamic will necessarily change with two new Justices on the Court, replacing Justices that supported the practice, in certain circumstances. However, even if theoretically they both did oppose the practice in every instance, it would still leave the five Justices who comprised the majorities in both *Lawrence* and *Roper*. Therefore, it is the opinion of this author that the Court is going to continue to move in the direction of recognizing the laws of the international community in our constitutional jurisprudence as persuasive authority. This practice, simply put, will enrich constitutional interpretation.