

# Finding Consensus While Footnoting the “Opinions of Mankind”: *Roper v. Simmons* and the Proper Role of International Consensus in United States Eighth Amendment Jurisprudence

## [*Roper v. Simmons*, 125 S. Ct. 1183 (2005)]

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*If the substance of the Eighth Amendment is to turn on the “evolving standards of decency” of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.*<sup>1</sup>

### I. INTRODUCTION

As architect Cass Gilbert was preparing to design the building that would permanently house the highest court in America, he knew that his commission entailed much more than providing a functional environment for a judicial body.<sup>2</sup> The building had to be an enduring symbol of the legal values of the American Republic.<sup>3</sup> This requirement was no small obligation. If the building was truly to exemplify the power and majesty of the law, Gilbert knew that he should not restrict himself to resources from the United States.<sup>4</sup> With that framework in mind, Gilbert included sculptures of lawgivers from every culture, underscoring the universality of justice.<sup>5</sup> Gilbert similarly incorporated both foreign and domestic materials into the essential design and construction of the Supreme Court building.<sup>6</sup> For the central

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1. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *YALE L.J.* 39, 48 (1994).

2. See HARRY A. BUTOWSKY, *THE U.S. CONSTITUTION: A NATIONAL HISTORIC LANDMARK THEME STUDY* (1986), available at [http://www.cr.nps.gov/history/online\\_books/butowsky2/constitution9.htm](http://www.cr.nps.gov/history/online_books/butowsky2/constitution9.htm); The Supreme Court Historical Society, *Homes of the Court*, [http://www.supremecourthistory.org/02\\_history/subs\\_sites/02\\_d.html](http://www.supremecourthistory.org/02_history/subs_sites/02_d.html) (last visited Oct. 16, 2005) (describing Gilbert’s plan for “a building of dignity and importance”).

3. See BUTOWSKY, *supra* note 2 (explaining that Gilbert considered those ideals to be liberty and equal justice).

4. See, e.g., *id.* (stating that perfection was Gilbert’s goal); Supreme Court Historical Society, *supra* note 2 (emphasizing Gilbert’s demand for particularly delicate tinted marble).

5. See, e.g., BUTOWSKY, *supra* note 2 (listing some of the lawgivers, including: Confucius, Augustus, Moses, Hammurabi, Napoleon, Mohammed and Justinian); Jackie Craven, *Great Buildings: The U.S. Supreme Court Building*, <http://architecture.about.com/library/blgilbert-supremecourt.htm> (last visited Oct. 16, 2005) (noting sculptor’s emphasis that law was inherited in this country from a variety of ancient and foreign cultures).

6. See BUTOWSKY, *supra* note 2 (stating that marble, the principal material, was drawn from both domestic and foreign quarries); Craven, *supra* note 5 (highlighting the inspiration that Gilbert drew from ancient Rome).

court chamber itself, Gilbert knew the finest building materials came from outside the United States; thus, the chamber was constructed solely with foreign marble and wood.<sup>7</sup> In the end, Gilbert's vision was fulfilled, as he completed a magnificent home for the nation's highest judicial institution that reflected the worldwide value of justice and the rule of law.<sup>8</sup>

Like Cass Gilbert, the Supreme Court "architects" of American human rights jurisprudence, which is partially embodied in the Eighth Amendment, recently faced a commission that provided them the opportunity to construct a framework that would reflect the same universal values aspired to in the design of their building.<sup>9</sup> Unfortunately, the Supreme Court architects failed at their task. Instead of incorporating the international consensus against the juvenile death penalty as a central feature of its Eighth Amendment framework, the Supreme Court chose to keep it at the margins, relegating it to a minor role supporting, but not helping to define, American conceptions of human dignity. Consequently, rather than being a lasting monument to the universality of human dignity, the Court's decision in *Roper v. Simmons*<sup>10</sup> affords primacy to American views while paying only token respect to the views of the world.

The opinion caused tremendous backlash. One might think the ruling represents a fundamental shift in the way the Supreme Court considers international consensus.<sup>11</sup> The majority's reference to this consensus provoked strong dissent from the Court's more conservative members.<sup>12</sup> It also galvanized those in politics who suggest imposing a gag order on the federal courts to discourage judges from considering international views.<sup>13</sup> Moreover, Justice John Paul Ste-

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7. See, e.g., BUTOWSKY, *supra* note 2 (explaining that the marble columns came from Italy, the marble walls and friezes came from Spain, and the floor borders came from Italy and Africa); Supreme Court Historical Society, *supra* note 2 (stating that the mahogany fittings in the chamber came from Honduras). Ironically, despite the building's testament to democracy, Gilbert acquired the Italian marble through his close friendship with fascist dictator Benito Mussolini. See Craven, *supra* note 5.

8. It is significant to note that Gilbert did not merely use the foreign materials for "detail" work. In fact, during tours of the building, a representative from the Curator's office explains that the use of foreign material in the actual court chamber was intended to transcend bias or favoritism among the states.

9. See, e.g., Douglass W. Cassel, Jr., *Top Court Embraces a World View*, CHICAGO DAILY LAW BULLETIN, Mar. 4, 2005, at 5, available at LEXIS, News (arguing that the case was partially about the proper role of foreign law in United States' jurisprudence); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 569 (2005) (explaining that *Simmons* was a unique opportunity for the Court to construct a framework to consider international consensus).

10. 125 S. Ct. 1183 (2005).

11. As it is used in this comment, "international consensus" is exemplified by various foreign laws, foreign judicial decisions, treaties, and decisions of international tribunals that tend to demonstrate a global trend away from the juvenile death penalty.

12. *Simmons*, 125 S. Ct. at 1217 (Scalia, J., dissenting) (criticizing the use of international consensus, joined by Chief Justice William Rehnquist and Justice Clarence Thomas).

13. Martha F. Davis, *Don't 'Gag' U.S. Courts*, BROWARD DAILY BUS. REV., Aug. 30, 2004, at 6, available at LEXIS, News.

vens received a mass mailing suggesting that he should be impeached for joining the majority opinion.<sup>14</sup> Criticism of *Simmons* is widespread, but the actual position taken by the Court is rather limited because it failed to substantially incorporate international consensus. The Court correctly held that imposing the death penalty on a juvenile offender, who was under eighteen at the time of his crime, violates the Eighth Amendment prohibition of cruel and unusual punishment.<sup>15</sup> The Court, however, missed an opportunity to give international consensus a more centralized role in future court decisions by incorporating it into the “evolving standards of decency” that guide Eighth Amendment jurisprudence.<sup>16</sup>

The Court’s decision subtly, yet significantly, continues a pattern of disregard for the opinions of other countries, weakening the moral authority of law on an international stage.<sup>17</sup> The United States’ interests are increasingly intertwined with other countries’ interests,<sup>18</sup> and judicial philosophies suspicious of outside opinion ignore the need to engage the world.<sup>19</sup> The Court’s acknowledgement of international consensus is not enough.<sup>20</sup> By failing to incorporate that consensus into its rationale, the Court undermines the United States’ ability to influence other nations’ discussions and acceptance of human rights principles. Rather than attempting to ensure that international consensus plays a secondary role in constitutional deliberation, the Court should have directly incorporated it into the interpretation of the Eighth Amendment by constructing a framework of “humane consensus” that truly reflects the underlying purposes and principles embodied in the constitutional prohibition against cruel and unusual punishments.<sup>21</sup>

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14. Pamela A. MacLean, *Justice Stevens Speaks Out on Attacks*, NAT’L L.J., June 6, 2005, at 6, available at LEXIS, News.

15. *Simmons*, 125 S. Ct. at 1198.

16. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This comment is neither an exhaustive criticism nor defense of the Court’s opinion in *Simmons*, nor a discussion of the merits of the death penalty and its relationship to juvenile culpability. Rather, this comment focuses solely on the Court’s consideration of international consensus in its interpretation of the Eighth Amendment.

17. Thomas M. Franck & Gregory H. Fox, *Introduction: Transnational Judicial Synergy*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 1, 4-5 (Thomas M. Franck & Gregory H. Fox eds., 1996); cf. Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 53-54 (2004) [hereinafter Koh, *International Law*] (arguing that strong consideration and coordination of rules with foreign sources by United States courts would promote international judicial stability).

18. Blackmun, *supra* note 1, at 49.

19. WILLIAM O. DOUGLAS, TOWARDS A GLOBAL FEDERALISM xi (1968) (arguing that the United States’ mistrust of the international world resulted in the wasteful and deadly Vietnam War).

20. See *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (contending that it is proper to “acknowledge” international consensus).

21. See *infra* note 203 (discussing the term “humane consensus”).

## II. CASE DESCRIPTION

At seventeen, Christopher Simmons violently murdered Shirley Crook.<sup>22</sup> There was little doubt that Simmons was guilty because he confessed to the crime and performed a videotaped reenactment for police.<sup>23</sup> After he turned eighteen, he was tried and sentenced to death in a Missouri state court.<sup>24</sup> Because he was outside the jurisdiction of Missouri's juvenile court system, Simmons was tried as an adult.<sup>25</sup> At trial, his attorneys did not call any witnesses, and Simmons was quickly convicted.<sup>26</sup>

During sentencing, the State presented evidence of various aggravating factors to justify the death penalty.<sup>27</sup> The State argued that the crime involved depravity of mind rising to the level of "vile, horrible, and inhuman" and that Simmons committed the murder to avoid arrest and receive money.<sup>28</sup> The victim's husband, daughter, and two sisters testified for the State regarding the devastating impact Crook's death had on their lives.<sup>29</sup> To mitigate the impact of this evidence, Simmons' attorney called a Missouri juvenile justice officer to testify that Simmons did not have a criminal record.<sup>30</sup> Simmons's neighbor, friend, parents, and siblings also testified about the bonds they had developed with Simmons and about his ability to love.<sup>31</sup> During their closing arguments, both attorneys addressed Simmons's age.<sup>32</sup>

Determining that the State sufficiently proved its case, the jury recommended the death penalty.<sup>33</sup> The trial judge accepted the jury's recommendation and sentenced Simmons to death.<sup>34</sup> Simmons subsequently obtained new representation and moved to set aside the conviction due to ineffective assistance of counsel.<sup>35</sup> Simmons's new lawyer called witnesses who testified that Simmons had a difficult childhood, mental problems, and used drugs.<sup>36</sup> He argued that Sim-

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22. *Simmons*, 125 S. Ct. at 1187. Simmons and two accomplices took Crook from her home, tied her up, covered her head with duct tape, and threw her from a railroad trestle to drown in a river below. *Id.* at 1188.

23. *Id.* at 1188.

24. *Id.* at 1187.

25. *Id.* at 1188.

26. *Id.*

27. *Id.*

28. *Id.* Simmons boasted about the crime to friends both before and after its commission. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Each witness made a plea for mercy on Simmons' behalf. *Id.*

32. *Id.* at 1188-89. Simmons's defense attorney suggested that states do not allow juveniles to serve on juries, drink alcohol, or see movies with particular ratings because they lack responsibility. *Id.* Conversely, the prosecutor characterized Simmons's crime, in light of his age, as especially "scary." *Id.*

33. *Id.* at 1189.

34. *Id.*

35. *Id.*

36. *Id.*

mons's trial attorney failed to present these facts in the penalty phase of the original trial.<sup>37</sup> The trial court denied Simmons's motion, however, and the Missouri Supreme Court affirmed.<sup>38</sup> Simmons filed for federal habeas corpus relief, which was also denied.<sup>39</sup>

After Simmons's unsuccessful appeals, the United States Supreme Court decided *Atkins v. Virginia*,<sup>40</sup> holding that the Eighth and Fourteenth Amendments prohibited the execution of mentally retarded offenders.<sup>41</sup> Simmons filed a new petition for postconviction relief in the Missouri Supreme Court, relying on the reasoning in *Atkins* to argue that the Constitution also prohibited the execution of juveniles.<sup>42</sup> The Missouri Supreme Court agreed and resentenced him to life without parole.<sup>43</sup> The court's opinion briefly noted the international opposition to the juvenile death penalty but underlined the non-dispositive nature of such opposition.<sup>44</sup>

The United States Supreme Court granted certiorari to consider whether the Eighth and Fourteenth Amendments to the Constitution allowed a state to execute an offender who was younger than eighteen when he committed a capital crime.<sup>45</sup> The Court held that such executions were unconstitutional.<sup>46</sup> In its opinion, the Court acknowledged the near-universal consensus against the juvenile death penalty but took pains to ensure that it was not controlling.<sup>47</sup>

### III. BACKGROUND

The Court's decision to downplay the international consensus against the juvenile death penalty is a reflection of recent trends, emerging in both domestic Eighth Amendment and general constitutional jurisprudence. To understand these trends, it is necessary to examine modern judicial interpretation of the Eighth Amendment, to analyze the historical relationship between the United States' domestic law and international viewpoints, and to explore the effects that these viewpoints have on Eighth Amendment interpretation.

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37. *Id.*

38. *Id.*

39. *Id.*

40. 536 U.S. 304 (2002).

41. *Simmons*, 125 S. Ct. at 1189 (discussing *Atkins*, 536 U.S. at 321).

42. *Id.*

43. State *ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400 (Mo. 2003) (en banc). This aspect of the decision provoked a harsh response from Justice Scalia, who criticized the Missouri Supreme Court's action as essentially overturning United States Supreme Court precedent. *Simmons*, 125 S. Ct. at 1229 (Scalia, J., dissenting).

44. *Simmons*, 112 S.W.3d at 411.

45. *Simmons*, 125 S. Ct. at 1187.

46. *Id.* at 1190.

47. See *infra* Part IV.B.1.

### A. *The Modern Eighth Amendment and the Search for Consensus*

The Eighth Amendment to the United States Constitution prohibits the government from imposing excessive fines and inflicting cruel and unusual punishments.<sup>48</sup> While it acknowledges the power of the state to punish, the Eighth Amendment is designed as a civilized limitation on that power to protect “nothing less than the dignity of man.”<sup>49</sup> Although some claim that the Eighth Amendment only limits those punishments that were considered cruel at the time of its creation,<sup>50</sup> modern jurisprudence is guided by the enlightened viewpoint that the Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>51</sup>

The evolving standards embraced by the Court when addressing the death penalty have established that the Eighth Amendment not only bars punishments that are “barbaric,” but also those that are “excessive in relation to the crime committed.”<sup>52</sup> The evaluation of these categories rests primarily on objective factors.<sup>53</sup> The Court, in analyzing the application of the death penalty to various classes of crimes, often looks to legislative judgments of the states<sup>54</sup> and to sentencing decisions of juries,<sup>55</sup> before bringing its own judgment to bear on the issue.<sup>56</sup> To reach their conclusion, the Justices also consider a defendant’s relative culpability and whether the specific application of the death penalty supports recognized social purposes.<sup>57</sup>

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48. U.S. CONST. amend. VIII.

49. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (Warren, C.J.).

50. *See, e.g., Simmons*, 125 S. Ct. at 1228 (Scalia, J., dissenting) (arguing that the Court has wrongly rejected a purely originalist interpretation of the Eighth Amendment).

51. *Trop*, 356 U.S. at 101. Although *Trop* is frequently cited for the proposition underlying modern jurisprudence, the concept of a progressive Eighth Amendment originated in *Weems*. *Compare Weems v. United States*, 217 U.S. 349, 378 (1910), *with, e.g., Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). For instance, the Court claimed in *Weems* that the Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems*, 217 U.S. at 378.

52. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (White, J.).

53. *Id.*

54. *See, e.g., Atkins*, 536 U.S. at 314 (explaining that state legislatures were beginning to address the issue of capital punishment for the mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (recognizing that of thirty-seven states that allow capital punishment, only twelve decline to execute seventeen-year-olds); *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (noting that of eighteen states to have established a minimum death penalty age, all of them require the defendant to be at least sixteen); *Enmund v. Florida*, 458 U.S. 782, 792-93 (1982) (reasoning that current legislative evidence weighs against the punishment of death for felony murder); *Coker*, 433 U.S. at 596 (explaining that current judgment related to death as a penalty for rape weighs heavily on the side of rejection).

55. *See, e.g., Thompson*, 487 U.S. at 831; *Enmund*, 458 U.S. at 794; *Coker*, 433 U.S. at 596.

56. *Coker*, 433 U.S. at 597.

57. *See, e.g., Thompson*, 487 U.S. at 833. The Court recognized two such social factors: retribution and deterrence. *Id.* at 836 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). Retribution is an expression of societal outrage at particularly egregious actions. *Id.* Deterrence suggests that someone will not commit the crime based on the severity of the punishment. *See id.* at 837.

This current Eighth Amendment analytical process originated largely in the Supreme Court's decision in *Coker v. Georgia*,<sup>58</sup> which further refined the method introduced in *Gregg v. Georgia*<sup>59</sup> the previous year.<sup>60</sup> The principal cases establishing the evolving standards framework did not mention a search for objective evidence from legislatures or juries.<sup>61</sup> Still, this analytical structure is consistently used in modern Eighth Amendment jurisprudence.<sup>62</sup> In *Thompson v. Oklahoma*,<sup>63</sup> the framework was re-characterized by Justice Sandra Day O'Connor as entailing a search for a "national consensus,"<sup>64</sup> although she did not put forth a reason for her new articulation.<sup>65</sup> Despite this lack of stated justification, every significant Eighth Amendment opinion since *Thompson* has used the same terminology.<sup>66</sup> This characterization may seem innocuous and insubstantial, but the implications are nevertheless significant for the Court's use of international consensus in Eighth Amendment jurisprudence.<sup>67</sup>

## B. *International Consensus in United States' Jurisprudence*

### 1. General Influence of International Consensus in United States' Jurisprudence

The Founding Fathers' awareness of international consensus is well-noted among constitutional commentators.<sup>68</sup> Many of the Founders, such as Thomas Jefferson and John Adams, had strong personal

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58. 433 U.S. 584 (1977).

59. 428 U.S. 153 (1976).

60. *See Coker*, 433 U.S. at 592 (plurality opinion) (outlining the process *Gregg* used to sustain the death penalty).

61. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (plurality opinion) (failing to consider legislative decisions or jury sentences). While one could argue that this omission occurred because the Court in *Trop* was required to analyze the constitutionality of a congressional enactment, as opposed to a state punishment, there is still no mention of anything representing the current Eighth Amendment framework.

62. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 312-13 (2002) (outlining the procedure for reviewing a punishment under the evolving standards framework).

63. 487 U.S. 815 (1988).

64. *Id.* at 848-49 (O'Connor, J., concurring). Justice O'Connor's reference to "national consensus" was not used in Eighth Amendment jurisprudence prior to *Thompson*. *See, e.g., Edmund v. Florida*, 458 U.S. 782, 788-89 (1982) (describing the process created in *Coker* for evaluating objective evidence).

65. *Thompson*, 487 U.S. at 848-49 (providing no rationale for Justice O'Connor's use of the term).

66. *See, e.g., Atkins*, 536 U.S. at 316 ("The practice, therefore, has become truly unusual, and it is fair to say that a *national consensus* has developed against it." (emphasis added)); *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) ("This does not establish the degree of *national consensus* this Court has previously thought sufficient to label a particular punishment cruel and unusual." (emphasis added)).

67. *See infra* Part III.B.2.

68. *See, e.g., Blackmun, supra* note 1, at 39 ("[T]he early architects of our nation understood that the customs of nations—the global opinions of mankind—would be binding upon the newly forged union."); Koh, *International Law, supra* note 17, at 44 (explaining that early officials understood that the legitimacy of the new nation depended on the "compatibility of its domestic law[s]" with global norms); Jonathan Zimmerman, *The White House and World Opinion*, BOSTON GLOBE, Mar. 3, 2005, at A15, available at 2005 WLNR 3223684 (listing the Founders' proclivities to know and use international information).

respect for the opinions and customs of other countries.<sup>69</sup> Additionally, both the Constitution and the Declaration of Independence contain references to international law and reputation.<sup>70</sup> In fact, the words of the Eighth Amendment were not American inventions but were taken directly from the English Declaration of Rights of 1688.<sup>71</sup> The drafters of the Eighth Amendment believed that standards embedded in it should be partially measured against international norms.<sup>72</sup>

Contrary to the view that courts should avoid all things foreign,<sup>73</sup> a preference for international consensus was not restricted solely to the political branches of early American government.<sup>74</sup> As Professor Harold Koh has noted, “[t]he original design and early practice of our courts envisioned that they would not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind.”<sup>75</sup> Consequently, many of Chief Justice John Marshall’s opinions internalized international law into United States domestic law.<sup>76</sup> This practice continued through the nineteenth century as the Supreme Court consistently adopted an international focus by holding, for instance, that acts of Congress must not be “construed to violate the law of nations” and that treaties share an “equal footing with federal statutes.”<sup>77</sup> Moreover, the Court occasionally evaluated the general practices of foreign nations in defining and punishing certain statutorily undefined crimes, such as piracy.<sup>78</sup>

The trend continued into the early twentieth century. In 1900, the Court wrestled with the issue of protecting a coastal fishing boat

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69. See, e.g., Brief for Amici Curiae The Human Rights Committee of the Bar of England and Wales et al. at 4-5, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (No. 03-633) [hereinafter Brief for Human Rights Committee] (explaining that Thomas Jefferson appreciated international thought); *id.* at 5-6 (highlighting that John Adams referenced ancient international scholars in his defense of the Constitution).

70. See U.S. CONST. art. I, § 8, cl. 10 (establishing authority of Congress to punish offenses “against the Law of Nations”); THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (noting the requirements of a “decent Respect to the Opinions of Mankind”).

71. Brief for Human Rights Committee, *supra* note 69, at 4.

72. Blackmun, *supra* note 1, at 45-46.

73. See, e.g., JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 213-14 (1999) (arguing that ruling on foreign law issues is a foreign affairs question and should be reserved for the political branches).

74. Koh, *International Law*, *supra* note 17, at 44 (“[T]he early Supreme Court saw the judicial branch as a central channel for making international law part of U.S. law.”); see also CHARLES PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES 8 (1928) (demonstrating the Court’s quick affirmation of international law before the end of the eighteenth century).

75. Koh, *International Law*, *supra* note 17, at 44.

76. *Id.*

77. Blackmun, *supra* note 1, at 39-40; see also PERGLER, *supra* note 74, at 9 (“The position proclaimed so early in the history of the Supreme Court this tribunal has consistently maintained.”).

78. *United States v. Smith*, 18 U.S. (1 Wheat.) 153, 162 (1820).

captured during wartime in *The Paquete Habana*.<sup>79</sup> After analyzing the historical development of the law surrounding such vessels, the Court stated that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>80</sup> This decision came to stand for the proposition that, absent any superseding United States law, customary international law controls.<sup>81</sup> Still today, this passage is often used to persuade the Court to consider international consensus and to defend positions, in academic writings, advocating the use of international consensus in United States courts.<sup>82</sup>

After World War II, the United States was the critical force in establishing international institutions and legal regimes.<sup>83</sup> Many of the rights listed in the earliest international human rights documents were specifically drawn from the United States Constitution.<sup>84</sup> Americans were among the “primary architects” and “strongest champions” of human rights conventions and monitoring institutions.<sup>85</sup> Despite this legacy, American views regarding international consensus, as it was embodied in human rights institutions, became quite hypocritical.<sup>86</sup> American standards of law were seen as superior to others, deserving exportation around the globe, while international standards were not binding on the United States.<sup>87</sup> These attitudes affected the judiciary as well. Although *The Paquete Habana* appears to offer a ringing endorsement of judicial consideration of international consensus, given the American hostility to international standards that arose after World War II, courts have struggled with “some of that decision’s more sweeping promises.”<sup>88</sup>

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79. 175 U.S. 677, 678 (1900).

80. *Id.* at 700.

81. Blackmun, *supra* note 1, at 40.

82. *See, e.g.*, Brief for Human Rights Committee, *supra* note 69, at 22; Blackmun, *supra* note 1, at 40; Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 37, 69 (Thomas M. Franck & Gregory H. Fox eds., 1996) (hoping that the Court’s decision in *The Paquete Habana* will set an example for this millennium).

83. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1981-82 (2004).

84. ROGERS, *supra* note 73, at 208 (noting the similarity of language between the Universal Declaration of Human Rights and the United States Constitution).

85. Rubenfeld, *supra* note 83, at 1981-82; *see also* Brief of Amici Curiae Nobel Peace Prize Laureates at 26-27, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (No. 03-633) [hereinafter Brief of Nobel Peace Prize Laureates] (describing the United States’ enthusiasm for international human rights law after World War II).

86. *See* Rubenfeld, *supra* note 83, at 1974 (explaining that Americans often supported the application of international law to other countries but often resisted its application to the United States).

87. *Id.* at 1973, 1974 (“America has spoken out of both sides of its mouth on international law, championing internationalism in one breath, rejecting it in the next.”).

88. Blackmun, *supra* note 1, at 40.

The Supreme Court continues to struggle with international consensus.<sup>89</sup> While nearly every member of the Rehnquist Court<sup>90</sup> mentioned international or foreign practice in an opinion,<sup>91</sup> such references were rare.<sup>92</sup> Even Justice O'Connor, who supported the use of international consensus in *Simmons*, recognized that the Court only occasionally followed its "obligation" to consider that consensus.<sup>93</sup> Some commentators even suggest that certain judges "decry the introduction of international precedents as if they were in the presence of the first spores of a new virus."<sup>94</sup> For example, one Supreme Court concurrence labeled the creation of private rights based upon international law "nonsense upon stilts."<sup>95</sup> Additionally, references to international consensus in a substantive due process claim have been called meaningless and relegated to the status of "dangerous dicta."<sup>96</sup> In short, although several early decisions suggested a significant role for international consensus in judicial decision-making, more recent opinions have instead reflected a judicial struggle over its proper role.<sup>97</sup>

## 2. Influence of International Consensus on Eighth Amendment Jurisprudence

The judicial debate over the role of international consensus in Eighth Amendment jurisprudence exemplifies the larger judicial struggle over the role of international consensus in other constitutional cases. While a number of Eighth Amendment decisions briefly mention international consensus when considering the constitutionality of punishments,<sup>98</sup> even judges who in principle support the incor-

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89. See, e.g., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761-62 (2004) (discussing the application of "present-day law of nations"); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (explaining that some values are shared with a "wider civilization").

90. *Roper v. Simmons* was one of the last cases in which Chief Justice Rehnquist participated, as he passed away before the beginning of the next Term.

91. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1514 (2003) [hereinafter Koh, *American Exceptionalism*]. The one member who has not explicitly referenced such material is Justice Ruth Bader Ginsburg, but she supports its use. See *infra* note 226 and accompanying text.

92. Slaughter, *supra* note 82, at 69.

93. Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 16 (Thomas M. Franck & Gregory H. Fox eds., 1996); see also *id.* at 18 (comparing the high flow of ideas from the United States to other countries with the low flow of ideas into the United States from other countries).

94. Rubinfeld, *supra* note 83, at 1997.

95. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2772 (2004) (Scalia, J., concurring) (disagreeing with the Court's ability to create private rights of action based on the law of nations).

96. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (rejecting the notion that private homosexual conduct is a fundamental right protected by the Constitution).

97. Compare *The Paquete Habana*, 175 U.S. 677, 700 (1900) (envisioning a large role for international law in domestic court decisions), with *Sosa*, 124 S. Ct. at 2762, 2772 (containing strong debate between Justices Scalia and Stevens regarding the Supreme Court's ability to define violations of the law of nations).

98. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (explaining that it is "not irrelevant" that many nations ban the death penalty for rape).

poration of such views rarely allow those views to affect their final judgment in practice.<sup>99</sup> This double standard limits the number of “watershed” cases applying international consensus and restricts such references to piecemeal appearances in different opinions.<sup>100</sup> It follows that analysis of Eighth Amendment cases provides a limited, yet useful, picture of the Court’s consideration of international consensus.

In *Trop v. Dulles*,<sup>101</sup> the United States Supreme Court addressed the punishment of statelessness, or the loss of citizenship rights, for the crime of wartime desertion.<sup>102</sup> After establishing the evolving standards framework now used to evaluate the constitutionality of punishments, the plurality emphasized the international condemnation of statelessness as a punishment.<sup>103</sup> The opinion explained that “[t]he civilized nations of the world are in *virtual unanimity* that statelessness is not to be imposed as punishment for crime.”<sup>104</sup> The Court ultimately concluded that the Eighth Amendment prohibited such punishment in America.<sup>105</sup>

Although *Trop* seemed to link the evolving standards of decency with the views of the international community, it is unclear whether that link was intended to inspire references to international consensus in future Eighth Amendment decisions.<sup>106</sup> Three things are clear, however. First, the Eighth Amendment, as described in *Trop*, was flexible, progressive, and designed to broadly protect human dignity by ensuring that the power of punishment be exercised in accordance with civilized standards.<sup>107</sup> Second, international consensus occupied a significant role in the Court’s analysis of the progressive evolving standards of decency.<sup>108</sup> Finally, international consensus, in modern

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99. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1215 (2005) (O’Connor, J., dissenting) (“[T]he evidence of international consensus does not alter my determination . . .”).

100. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion) (listing countries that banned the juvenile death penalty and devoting one footnoted sentence to the relevance of international views); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (footnoting views of other nations concerning imposition of the death penalty to the felony murder rule).

101. 356 U.S. 86 (1958) (plurality opinion).

102. *Id.* at 88.

103. *Id.* at 102 (observing that statelessness is “deplored in the international community”). This reference to international consensus was not limited to the plurality. See *id.* at 126 (Frankfurter, J., dissenting) (reasoning that many nations of the world remove citizenship as a punishment).

104. *Id.* at 102 (plurality opinion) (emphasis added).

105. *Id.* at 103.

106. See *id.* at 101.

107. See *id.* at 100-01 (noting that the scope of the Amendment is undefined but that the words are neither static nor precise). This concept did not originate in *Trop*. See *Weems v. United States*, 217 U.S. 349, 373 (1910) (explaining that, to be effective, a principle such as the Eighth Amendment “must be capable of wider application than the mischief which gave it birth”). The Court in *Trop* relied on the decision in *Weems* in its analysis of the Eighth Amendment. *Trop*, 356 U.S. at 100.

108. See *Trop*, 356 U.S. at 102 (positing that statelessness is universally opposed by other democracies). The significance of international consensus in *Trop* was still evident to the Court almost twenty years later. See *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (observing that the plurality in *Trop* made a special effort to note the “climate of international opinion”).

Eighth Amendment jurisprudence, has assumed a more limited role since *Trop* and plays a particularly insignificant role in death penalty cases.<sup>109</sup>

There is no clear rule governing the consideration of international consensus in Eighth Amendment jurisprudence. When international consensus is set forth, even briefly, it is often confronted by a strong dissent.<sup>110</sup> The various positions regarding such consensus include the openly hostile<sup>111</sup> and the moderately respectful,<sup>112</sup> but no case incorporates international consensus with the same fervor exhibited in *Trop*.<sup>113</sup> Many decisions relegate their analysis of international behavior to footnotes.<sup>114</sup> Even those opinions in which such evidence is presented in the text often position the evidence as a conceptual footnote to the Court's own conclusion.<sup>115</sup>

Why has this footnoting occurred? The result was not required by *Trop*.<sup>116</sup> In fact, the dissent in that case did not even question the propriety of international consensus.<sup>117</sup> Although international consensus often received only brief treatment in later decisions such as *Enmund* and *Coker*, it was not met by harsh criticism.<sup>118</sup> Thus, the

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109. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (devoting a single footnoted sentence to the overwhelming disapproval of executions of the mentally retarded worldwide).

110. See, e.g., *id.* at 347-48 (Scalia, J., dissenting).

111. *Id.* ("Equally irrelevant are the practices of the 'world community' . . .").

112. See *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.31 (1988) (plurality opinion).

113. Compare *Trop*, 356 U.S. at 102-03 (relying heavily on the "virtual unanimity" of the world's nations in its determination that statelessness offends the Eighth Amendment), with *Coker*, 433 U.S. at 596 n.10 (relegating its analysis of international practice to a two-sentence-long footnote and limiting its implication to the status of merely "not irrelevant" while overturning the death penalty for the crime of rape).

114. See, e.g., *Atkins*, 536 U.S. at 316 n.21 (footnoting the fact that the world community overwhelmingly disapproved of the execution of the mentally retarded); *Thompson*, 487 U.S. at 830-31 & n.31 (justifying the relevance of international views in a footnote while citing those views in the opinion and overturning the death penalty for fifteen- and sixteen-year-olds); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (relegating the views of other countries to a relatively short footnote concerning statistics in overturning the death penalty for felony murders); *Coker*, 433 U.S. at 596 n.10 (footnoting international practice regarding the death penalty for rape).

115. See, e.g., *Atkins*, 536 U.S. at 316 n.21 ("Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." (emphasis added)); *Thompson*, 487 U.S. at 830 (reasoning that the conclusion is consistent with the views of the world). While these grammatical and descriptive limitations may appear inconsequential, such strategies have empirically been used to dismiss international consensus. See, e.g., Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 68 (2005) (noting that a phrase arguing for respect of international views, in *Breard v. Greene*, was "tellingly buried" in a subordinate sentence clause and highlighting the Court's subsequent "casual dismissal" of those views). The Court in *Breard* gave "respectful consideration" to an international court's interpretation of the Vienna Convention before promptly rejecting that interpretation for its own preference. *Breard v. Greene*, 523 U.S. 371, 375 (1998).

116. See *Trop*, 356 U.S. at 102-03 (discussing international views and not restricting such views to confirmation of the Court's conclusions or some other secondary purpose).

117. See *id.* at 126 (Frankfurter, J., dissenting) (commenting that other nations imposed statelessness for certain crimes rather than questioning the Court's consideration of those nations' views at all).

118. See *Enmund*, 458 U.S. at 796 n.22 (referring to the views of other countries); *Coker*, 433 U.S. at 596 n.10 (same); see also *Enmund*, 458 U.S. at 801-02 (O'Connor, J., dissenting) (failing

division and hostility regarding such consensus must have originated subsequent to the Court's creation of both the evolving standards framework and the modern method for analyzing those standards.<sup>119</sup>

The current ambivalence toward international consensus originated with the formulation in *Thompson* of the search for "national consensus," and was solidified in *Stanford v. Kentucky*,<sup>120</sup> the Court's second juvenile death penalty case.<sup>121</sup> *Thompson* contributed three new attributes to the debate over the role of international consensus in Eighth Amendment decisions. First, it contained the most in-depth analysis of international views in an Eighth Amendment opinion.<sup>122</sup> Second, it contained the original characterization of the evolving standards analysis as a search for "national consensus."<sup>123</sup> Finally, it contained the most significant criticism of the use of international consensus in an Eighth Amendment decision.<sup>124</sup> In his dissent, Justice Antonin Scalia advanced that criticism by strategically using the concept of *national* consensus to demonstrate the irrelevance of *international* consensus in Eighth Amendment jurisprudence.<sup>125</sup> Justice Scalia's criticism became the law in *Stanford*, which completely abandoned the Court's consideration of international opinion.<sup>126</sup>

Since the emergence of the national consensus framework and Justice Scalia's subsequent use of it to exclude international views, the framework has played a limiting role in other Eighth Amendment opinions. For example, Chief Justice William Rehnquist argued that international consensus is irrelevant to determine evolving standards

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to mention the brief reference to international practice in the majority opinion); *Coker*, 433 U.S. at 604 (Burger, C.J., dissenting) (same).

119. See *supra* Part III.A.

120. 492 U.S. 361 (1989).

121. See Carly Baetz-Stangel, Note, *The Role of International Law in the Abolition of the Juvenile Death Penalty in the United States*, 16 FLA. J. INT'L L. 955, 961 (2004) (arguing that *Stanford* rejected the relevance of international views to the juvenile death penalty).

122. See *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion) (devoting a paragraph in the decision to the views and practices of other countries relative to the general death penalty and the death penalty for fifteen- and sixteen-year-olds).

123. See *supra* note 64 and accompanying text.

124. See *Thompson*, 487 U.S. at 869 n.4 (Scalia, J., dissenting) (concluding that international consensus is irrelevant to Eighth Amendment jurisprudence).

125. See, e.g., *id.* at 868 (positing that *all* that is relevant are the views of American society); *id.* at 869 n.4 (describing reliance on international sources as inappropriate for establishing the fundamental American beliefs); *id.* ("But where there is not first a settled consensus among our own people, the views of other nations . . . cannot be imposed upon Americans through the Constitution.").

126. See *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant."); Baetz-Stangel, *supra* note 121, at 965 (noting that *Stanford* rejected the use of international views); Elizabeth A. Reimels, Comment, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, but Only If It Makes the Rules*, 15 EMORY INT'L L. REV. 303, 308 (2001) (highlighting abandonment of international standards in juvenile death penalty cases).

of decency because evolving standards must be American.<sup>127</sup> Others, such as Justice Stevens, defended the relevance of international views to determine evolving standards but limited their application to a role confirming the American position.<sup>128</sup> The similarity is ironic. Opponents of international consensus reject its relevance by centralizing the American view of the standards of decency while proponents restrict its relevance to mere confirmation by also centralizing the American view.<sup>129</sup>

#### IV. COURT'S DECISION

In *Roper v. Simmons*, the United States Supreme Court considered whether executing a juvenile violated the Eighth and Fourteenth Amendments to the Constitution.<sup>130</sup> Further, the Court indirectly addressed the proper role that international consensus should serve in Eighth Amendment jurisprudence.<sup>131</sup> Unfortunately, the Court failed to clarify that role by merely referencing international views as “confirmation” of the Court’s own conclusions.<sup>132</sup> The decision functionally continues the pattern of piecemeal and insignificant treatment of international opinion in the United States. The decision is thus inconsistent with the humane purpose of the evolving standards of decency doctrine inherent in the Eighth Amendment and ultimately weakens the United States’ judicial leadership in the field of human rights.

##### A. Arguments

###### 1. Parties

Understanding the parties’ arguments in *Simmons* provides further insight into the trend toward marginalizing the role of international consensus in Eighth Amendment jurisprudence. The State of Missouri primarily questioned the existence of a *national* consensus. It cited a lack of state legislative action banning the juvenile death penalty, and pointed out a consistent use of the punishment by juries

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127. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (“For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”). This view is not limited to the United States Supreme Court. See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001) (claiming that the defendant’s arguments relying on customary and treaty-based international law are meritless).

128. See, e.g., *Atkins*, 536 U.S. at 316 n.21 (“Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to *our* conclusion that there is a consensus among those who have addressed the issue.” (emphasis added)). The opinion does not explain how the outcome would change had the Court’s conclusion not been consistent with the international consensus, but it is likely that the American consensus would remain predominant.

129. See *supra* Part III.B.2.

130. *Roper v. Simmons*, 125 S. Ct. 1183, 1187 (2005).

131. *Id.* at 1198.

132. *Id.*

in states across the country.<sup>133</sup> Moreover, the State criticized other data, such as polls and expert opinions, that suggested banning the practice.<sup>134</sup>

Regarding *international* consensus, the State of Missouri briefly and dismissively argued that it was irrelevant because the question only concerned an “American consensus.”<sup>135</sup> The State argued that the Court should look solely to the political attitudes of American society rather than to the views of “first, second, or third world countries.”<sup>136</sup> The State conceded the overwhelming international consensus against the juvenile death penalty but contended that such overwhelming opposition did nothing to illuminate an American consensus for or against the punishment.<sup>137</sup>

Although more accepting of international opinion than the State, Simmons also focused on the domestic issues. Simmons argued that the penalty was disproportionate to the culpability of juvenile offenders.<sup>138</sup> Citing a number of psychological sources, Simmons contended that juveniles differ dramatically from adults in their psychological development and that those differences limit their culpability.<sup>139</sup> Simmons also pointed to the development of a national consensus against the juvenile death penalty by referring to data illustrating a general rejection of the punishment and its extremely limited application in places where it was still legal.<sup>140</sup>

Regarding the international consensus against the juvenile death penalty, Simmons provided an array of evidence.<sup>141</sup> He pointed to the near-universal support for the United Nations Convention on the Rights of the Child, which “bars capital punishment for those under 18.”<sup>142</sup> Simmons discussed other international agreements that ban the juvenile death penalty, including the International Covenant on

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133. Brief for Petitioner at 22-26, *Simmons*, 125 S. Ct. 1183 (No. 03-633) (emphasizing legislative adoption of juvenile death penalty in Arizona, Florida, Missouri, and Virginia and discrediting Simmons’s examples of Kansas, New York, and Washington as states that have rejected the juvenile death penalty); *id.* at 31 (positing that juries in thirteen states placed juvenile offenders on death row).

134. *Id.* at 37-40.

135. *Id.* at 10. Further evidence of the State’s lack of concern regarding international consensus can be found in the fact that out of a forty-two page brief, just over three paragraphs even mentioned the evidence. *Id.* at 41.

136. *Id.* at 41.

137. *Id.* The State Solicitor was even more forthright in oral argument. When asked if the respect of other countries was to be totally ignored, the Solicitor replied that it is “not a consideration under the Eighth Amendment.” Transcript of Oral Argument at 49, *Simmons*, 125 S. Ct. 1183, (No. 03-633).

138. Brief for Respondent at 10, *Simmons*, 125 S. Ct. 1183 (No. 03-633).

139. *Id.* at 10-11.

140. *Id.* at 11-12 (analyzing data such as legislative and jury rejection of the penalty).

141. *See id.* at 47 (“In the 15 years since *Stanford*, it has become clear that an overwhelming worldwide consensus rejects the execution of juvenile offenders.”).

142. *Id.* at 48. Aside from the United States, the only country in the world that has not yet ratified the Convention is Somalia, largely because it has no organized government. Transcript of Oral Argument, *supra* note 137, at 24-25.

Civil and Political Rights,<sup>143</sup> the American Convention on Human Rights,<sup>144</sup> and the African Charter on the Rights and Welfare of the Child.<sup>145</sup> Simmons also showed that world-wide executions of juveniles had, in fact, “virtually ceased.”<sup>146</sup> Since 1990, other than the United States, only Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China had executed a juvenile, and each of those countries had subsequently renounced the practice.<sup>147</sup> Finally, Simmons cited a decision by the Inter-American Commission on Human Rights, which declared that the ban on juvenile executions was a “binding norm of international law.”<sup>148</sup> Despite the wide-ranging discussion of international opinion in his brief, Simmons reaffirmed that it was not binding and that it merely confirmed his position.<sup>149</sup>

## 2. Amicus Briefs

Although the issue of international consensus occupied a relatively limited space in both of the parties’ briefs, the amicus briefs in

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143. International Covenant on Civil and Political Rights, art. 6(5), Dec. 19, 1966, 999 U.N.T.S. 171 (“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . .”).

144. Organization of American States, American Convention on Human Rights, art. 4(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (“Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . .”).

145. African Charter on the Rights and Welfare of the Child, art. 5(3), July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999), available at <http://www1.umn.edu/humanrts/africa/afchild.htm> (last visited Oct. 21, 2005) (“Death sentence shall not be pronounced for crimes committed by children.”); Brief for Respondent, *supra* note 138, at 48 n.104.

146. Brief for Respondent, *supra* note 138, at 49.

147. *Id.* Besides the United States, only Iran and Pakistan executed more than one child since 1990. *Id.* Between 2000 and 2002, the number of countries executing juveniles dropped from eight to four. Brief of Amici Curiae Former United States Diplomats Morton Abramowitz et al in Support of Respondent at 16-17, *Simmons*, 125 S. Ct. 1183 (No. 03-633) [hereinafter Brief of Diplomats]. After 2002, only China and the United States executed a juvenile. *Id.* at 17. Between 1990 and 2003, the United States executed more juveniles than the rest of the world combined. *Id.* at 5. In fact, some of the purported offending governments denied that juvenile executions actually took place within their countries. See Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at 9-10, Roper v. Simmons, 125 S. Ct. 1183 (2005) (No. 03-633) [hereinafter Brief of European Union] (explaining that both the governments of Nigeria and Saudi Arabia denied that executions actually involved juvenile offenders). The public disavowal of the practice has taken various forms. Brief for Respondent, *supra* note 138, at 49. Iran, Saudi Arabia, and Nigeria each ratified the Convention on the Rights of the Child. *Id.* The Democratic Republic of Congo, China, and Pakistan each unilaterally banned the juvenile death penalty. *Id.* Nigeria and Iran both ratified the Covenant on Civil and Political Rights, as well. *Id.* Yemen enacted a new penal code that raised the minimum age for execution to eighteen. Brief of European Union *supra*, at 9.

148. Brief for Respondent, *supra* note 138, at 49 (citing *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/USA.12285.htm> (last visited Oct. 21, 2005)).

149. *Id.* at 47-48 (arguing that the rejection of the juvenile death penalty around the world confirms that it is contrary to American Eighth Amendment standards). Interestingly, Simmons made his conclusion before referring to any international sources but after referring to American behavior. See *id.* at 47 (arguing that the objective evidence regarding American society was sufficient in and of itself to clearly indicate a moral direction).

support of Simmons relied heavily on such material.<sup>150</sup> Multiple briefs presented evidence similar to that used by Simmons concerning the widespread abolition of the juvenile death penalty throughout the world.<sup>151</sup> The Brief of the European Union and Members of the International Community (European Union), for instance, devoted almost all of its content to establishing the solidity of the international consensus.<sup>152</sup> The Human Rights Committee of the Bar of England and Wales (Human Rights Committee) similarly argued that treaties, international judicial decisions, and foreign laws provided evidence of the widespread abolition of the juvenile death penalty.<sup>153</sup>

Each of the briefs argued that international opinion should have some influence on the Court's decision.<sup>154</sup> The group Murder Victims' Families for Reconciliation argued that abolishing juvenile executions was required, with or without recognizing the international consensus.<sup>155</sup> The Human Rights Committee, however, claimed that the international ban on the juvenile death penalty was binding on the United States because it had attained the level of a *jus cogens* norm in international law.<sup>156</sup>

The implications of international consensus, as discussed in the amicus briefs, varied as well. A group of former United States diplomats focused on the repercussions of the juvenile death penalty.<sup>157</sup>

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150. Two amicus briefs were filed on behalf of the State of Missouri, but neither addressed the issue of international practice. See Brief of Amici Curiae Justice for All Alliance in Support of Petitioner, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (No. 03-633) (failing to mention the international evidence against the juvenile death penalty); Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia in Support of Petitioner, *Simmons*, 125 S. Ct. 1183 (No. 03-633) (same).

151. Compare, e.g., Brief of Diplomats, *supra* note 147, at 5 (noting "nearly universal condemnation" of the juvenile death penalty); Brief of European Union, *supra* note 147, at 26 (arguing that an international consensus against the juvenile death penalty existed), with *supra* text accompanying notes 141-49.

152. Brief of European Union, *supra* note 147, at 6.

153. Brief for Human Rights Committee, *supra* note 69, at 13. Other organizations referenced statistical data similar to that in Simmons's brief. See, e.g., Brief of European Union, *supra* note 147, at 8 ("Since 1990, only eight countries reportedly executed children . . .").

154. See Brief of Diplomats, *supra* note 147, at 6 (noting that United States practice is "inconsistent with global standards of decency"); Brief of European Union, *supra* note 147, at 27 (outlining the case for international consensus against the juvenile death penalty while considering international norms); Brief for Human Rights Committee, *supra* note 69, at 6-7 (highlighting the Court's past recognition of the relevance of international norms); Brief of Amici Curiae Murder Victims' Families for Reconciliation in Support of Respondent at 12, *Simmons*, 125 S. Ct. 1183 (No. 03-633) [hereinafter Brief of Murder Victims' Families] (arguing that violating human rights does not vindicate the rights of victims); Brief of Nobel Peace Prize Laureates, *supra* note 85, at 30 (contending that the juvenile death penalty should be rejected because it violates both international standards and the Eighth Amendment).

155. Brief of Murder Victims' Families, *supra* note 154, at 12. The other suggested uses of international evidence encompassed a span of options as well. See, e.g., Brief of European Union, *supra* note 147, at 27 (suggesting the Court merely overturn the penalty in light of international consensus); Brief of Nobel Peace Prize Laureates, *supra* note 85, at 28-29 (arguing for using the opinions from foreign constitutional courts and considering international human rights standards).

156. Brief for Human Rights Committee, *supra* note 69, at 12. For further discussion of *jus cogens*, see *infra* Part V.D.

157. Brief of Diplomats, *supra* note 147, at 6.

They argued that Simmons's execution would diplomatically isolate the United States and that the continued execution of juveniles caused outrage throughout the world.<sup>158</sup> Specifically, the diplomats noted that both regional and international organizations regularly condemned the practice in the United States.<sup>159</sup> Criticism from these organizations undermined United States leadership and deflected attention away from serious human rights violations occurring in other countries.<sup>160</sup>

A group of Nobel Peace Prize laureates reinforced the argument of the diplomats by agreeing that the juvenile death penalty was "condemned and vigorously protested" in many places around the world and that the United States' practice provided an excuse for oppressive regimes to resist efforts to improve their own human rights records.<sup>161</sup> Moreover, the Nobel laureates articulated the historical importance of progressive human rights actions by the United States and highlighted the continuing resolve of United States leaders to protect human rights.<sup>162</sup>

Finally, the Murder Victims' Families for Reconciliation made passing reference to international consensus by arguing that the execution of juveniles only served to lower United States society to the same level of brutality that brought about their suffering, and that "justice for victims—whose human rights have been so completely violated—does not come from violating the human rights of others."<sup>163</sup>

## B. *Court's Opinion*

### 1. Majority

In a 5-4 decision, the United States Supreme Court held that executing an offender, who was under the age of eighteen at the time of his crime, violated the Eighth Amendment prohibition on cruel and unusual punishment.<sup>164</sup> In an opinion by Justice Anthony Kennedy, the Court reaffirmed the long-held principle that the Eighth Amend-

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158. *Id.* at 20, 22.

159. *Id.* at 8-13 (highlighting organizations that criticized the United States, including the United Nations (U.N.) Economic and Social Council; the U.N. Commission on Human Rights; the U.N. High Commissioner for Human Rights; the U.N. Sub-Commission on the Promotion and Protection of Human Rights; the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the U.N. Human Rights Committee; the Council of Europe; the European Union; and the Inter-American Commission on Human Rights).

160. *Id.* at 25-26.

161. Brief of Nobel Peace Prize Laureates, *supra* note 85, at 24.

162. *Id.* at 27-28 (highlighting the United States' involvement in human rights institutions after World War II and quoting Secretary of State Colin Powell's reiteration of the United States' current commitment to advance international human rights).

163. Brief of Murder Victims' Families, *supra* note 154, at 12-13.

164. *Roper v. Simmons*, 125 S. Ct. 1183, 1187, 1200 (2005). Justice Kennedy wrote for the majority, and he was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor wrote a separate dissent, and Justice Scalia wrote a dissenting opinion joined by Chief Justice Renquist and Justice Thomas.

ment turned on “evolving standards of decency.”<sup>165</sup> Emphasizing how quickly such standards can evolve, Justice Kennedy explained that the death penalty for the mentally retarded was rejected in *Atkins v. Virginia* only thirteen years after it was held constitutional by the Supreme Court.<sup>166</sup> He reasoned that the combination of objective indicia of a national consensus against the death penalty for the mentally retarded and the Court’s own judgment warranted overturning the recent precedent.<sup>167</sup>

In light of that history, Justice Kennedy began the Court’s reconsideration of the juvenile death penalty.<sup>168</sup> In a pattern reflecting the priority of domestic evidence in the parties’ briefs, Justice Kennedy analyzed the objective evidence for a national consensus against the juvenile death penalty.<sup>169</sup> Justice Kennedy also applied the Court’s “independent judgment” to the decision.<sup>170</sup> He explained that a juvenile’s diminished culpability undermines the recognized social purposes of retribution and deterrence often used to justify the death penalty.<sup>171</sup> Ultimately, Justice Kennedy concluded, based on this domestic evidence, that the government cannot execute juveniles.<sup>172</sup>

After articulating a domestic basis for rejecting the juvenile death penalty, the Court’s opinion also examined the international consensus against the punishment.<sup>173</sup> Justice Kennedy observed that a number of Eighth Amendment cases referred to international sources, and he set out facts that provided “confirmation” of the Court’s determination.<sup>174</sup> Justice Kennedy stated that Article 37 of the United Nations Convention on the Rights of the Child, ratified by every nation on the planet, except for the United States and Somalia, expressly prohibits execution of juveniles.<sup>175</sup> Moreover, he explained that only seven countries besides the United States had executed a juvenile in the last fifteen years and that those countries had since renounced the

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165. *Id.* at 1190 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

166. *Id.* at 1191. The death penalty for the mentally retarded was held constitutional in 1989, the same day that *Stanford v. Kentucky* was decided. See *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

167. *Simmons*, 125 S. Ct. at 1191-92.

168. *Id.* at 1192.

169. *Id.* Justice Kennedy reasoned that thirty states prohibited the execution of juveniles (either by banning the death penalty as a whole or by setting the age limit at eighteen), that the practice was infrequent in the states maintaining the juvenile death penalty, and that, although the pace was slower than the rate noted in *Atkins*, this change consistently moved away from the execution of juveniles. *Id.* at 1192-94 (discussing *Atkins v. Virginia*, 536 U.S. 304 (2002)). These facts combined to provide sufficient evidence that there was a national consensus against the juvenile death penalty.

170. *Id.* at 1198.

171. *Id.* at 1196.

172. *Id.* at 1198.

173. See *id.*

174. *Id.*

175. *Id.* at 1199.

practice.<sup>176</sup> Finally, Justice Kennedy commented that over fifty years ago the United Kingdom banned the execution of juveniles under the age of eighteen and that the English origins of the Eighth Amendment made this fact particularly relevant.<sup>177</sup> These circumstances demonstrate, Justice Kennedy claimed, that “the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>178</sup>

Although the international consensus overwhelmingly opposed the juvenile death penalty, Justice Kennedy stopped short of incorporating it into the rationale for the Court’s decision.<sup>179</sup> He emphasized that such evidence of international opinion was not controlling and that the determination of the limits of the Eighth Amendment was solely the United States Supreme Court’s responsibility.<sup>180</sup> He explained that it was proper to “acknowledge” such opinions but that they were merely “confirmation for *our own conclusions*.”<sup>181</sup> It is unclear exactly what role the international consensus actually played in the majority’s deliberation and decision-making process,<sup>182</sup> but the opinion itself rhetorically limited it to a confirmatory role.<sup>183</sup>

## 2. Justice O’Connor’s Dissent

Justice O’Connor’s rationale focused on the inconclusive objective evidence of national consensus and criticized the proportionality arguments advanced by Justice Kennedy.<sup>184</sup> Despite agreeing with much of Justice Kennedy’s analysis concerning international views and specifically repudiating the position taken by Justice Scalia that “foreign and international law have no place in our Eighth Amendment jurisprudence,” Justice O’Connor reasoned that because there was no clear national consensus, the international consensus did not alter her dissenting position.<sup>185</sup>

Justice O’Connor explained that the Court has referred to foreign sources in a number of cases and contended that the evolving standards used by the Supreme Court are “neither wholly isolated from, nor inherently at odds with, the values prevailing in other coun-

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1200.

180. *Id.* at 1198.

181. *Id.* at 1200 (emphasis added). Justice Kennedy subtly emphasized the unilateral nature of the holding in other sections of the opinion. *See, e.g., id.* at 1198 (“*[o]ur* determination” (emphasis added)); *id.* at 1200 (“*our own* heritage of freedom” (emphasis added)).

182. *See, e.g.,* Cassel, *supra* note 9, at 5 (“But how much weight does the foreign and international ban on the juvenile death penalty really swing with the majority?”).

183. *Simmons*, 125 S. Ct. at 1200.

184. *Id.* at 1216 (O’Connor, J., dissenting).

185. *Id.* at 1215.

tries.”<sup>186</sup> She ultimately concluded, however, that although an international consensus “can serve to *confirm* the reasonableness of a consonant and genuine *American* consensus,” there was no such national consensus in this case, and the international consensus did not change that dispositive fact.<sup>187</sup>

### 3. Justice Scalia’s Dissent

Justice Scalia scathingly dissented from the majority opinion.<sup>188</sup> He primarily criticized the finding of a national consensus by attacking Justice Kennedy’s “usurpation of the role of moral arbiter,” questioning the soundness of the psychological studies used by the majority, challenging the conclusion that the goals of retribution and deterrence are not served by executing juveniles, and chastising the Court for functionally allowing a state supreme court to overrule United States Supreme Court precedent.<sup>189</sup>

Justice Scalia was particularly harsh in his attack on Justice Kennedy’s use of the opinions of the “so-called international community.”<sup>190</sup> Justice Scalia criticized the Court’s apparent attempt to assign itself the power to “join and ratify treaties on behalf of the United States.”<sup>191</sup> He claimed that the failure of the senate and president to enter into the treaties cited by the majority represented evidence that the national consensus supported the juvenile death penalty and that the Constitution empowers only those political branches to bind the United States to international agreements.<sup>192</sup> Additionally, Justice Scalia indicated that foreign political systems have fundamentally different judicial and legal characteristics, which make a decision to ban the juvenile death penalty abroad utterly inapplicable to a decision to ban it in the United States.<sup>193</sup>

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186. *Id.* at 1215-16.

187. *Id.* at 1216 (emphasis added).

188. *Id.* at 1217 (Scalia, J., dissenting). Justice Scalia concluded that “[b]ecause I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.” *Id.*

189. *Id.* at 1218-29.

190. *Id.* at 1225. Justice Scalia is not shy about his disdain for domestic application of international law. *See, e.g.,* *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (Scalia, J., dissenting) (“The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners.” (citation omitted)); *Atkins v. Virginia*, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting) (awarding the consultation of foreign views in the majority opinion “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’”); *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (noting that the lack of an American consensus is controlling, “even if that position contradicts the uniform view of the rest of the world”).

191. *Simmons*, 125 S. Ct. at 1226.

192. *Id.*

193. *Id.*

Justice Scalia also thoroughly criticized the Court's willingness to reference international consensus when it confirms American views but not when it rejects those positions.<sup>194</sup> He maintained that unless the Court was willing to incorporate international consensus in other areas of law, its invocation of such international sources amounted to "sophistry" rather than reasoned decision-making.<sup>195</sup> Ultimately, Justice Scalia concluded that the Court's attempts to downplay the importance of the international discussion rang hollow and that the Court should cease including international views in legal opinions, unless they serve as part of the rationale for judgment.<sup>196</sup>

## V. COMMENTARY

The majority in *Simmons* failed to adequately incorporate international consensus into its reasoning. The Court should have considered the overwhelming international consensus against the juvenile death penalty as an "objective indicia"<sup>197</sup> of the standards of decency, entitled to "great weight"<sup>198</sup> affecting the outcome of the decision, rather than relegating that evidence to "confirmation" of its own views.<sup>199</sup> Instead of continuing to characterize Eighth Amendment standards as a search for "national consensus,"<sup>200</sup> the Court should have reformulated the discussion and reaffirmed the original progressive notions in *Weems v. United States*<sup>201</sup> and *Trop v. Dulles*<sup>202</sup> by integrating the international consensus into its reasoning as part of a "humane consensus"<sup>203</sup> not bound by the geographic limitations of the current framework.

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194. *Id.* at 1228. Justice Scalia pointed to other areas of United States law in which international consensus might require domestic changes, including jury and grand jury requirements; the exclusionary rule; separation of church and state; abortion jurisprudence; and the double jeopardy prohibition. *Id.* at 1226-28.

195. *Id.* at 1228. Additionally, in response to Justice O'Connor's position, Justice Scalia commented that her position of assigning foreign law only a confirmatory role was untenable because "[e]ither America's principles are its own, or they follow the world; one cannot have it both ways." *Id.* at 1228 n.9.

196. *Id.* at 1229.

197. *Id.* at 1192 (majority opinion). This is significant because the Court, when considering the Eighth Amendment, identifies the analysis of objective evidence as the starting point for review of a punishment. *Id.*

198. *Id.* at 1207 (O'Connor, J., dissenting).

199. *Id.* at 1200 (majority opinion).

200. *See id.* at 1192 (evaluating the evidence for national consensus).

201. 217 U.S. 349, 378 (1910) (demonstrating that the Eighth Amendment can change as views become "enlightened by a humane justice").

202. 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is *nothing less* than the dignity of man." (emphasis added)).

203. This term does not appear in any of the previously written discussions of *Simmons*. It is a term new to Eighth Amendment jurisprudence. It rarely appears in any writings and never in the context in which it is used in this comment. *See, e.g.*, Gideon Polya, *Global Mortality, Iraq and the Muslim Holocaust*, July 23, 2004, <http://world.mediamonitors.net/content/view/full/8387> (arguing that mass mortality can be stopped through humane consensus but failing to explain or define the term in the article). "Humane consensus" is intended to reinforce the central message of human dignity underlying both the Eighth Amendment and international human rights re-

### A. *A Changing World, but Not a Changing Court*

Instant global communication and rapid intercontinental travel have connected human interests in ways that were impossible at the time the Framers drafted the Constitution.<sup>204</sup> As those interests are increasingly intertwined, the Court must begin developing a human rights jurisprudence that accounts for international consensus.<sup>205</sup> As former Justice William Douglas once wrote, “much must be fashioned anew to deal with modern electronic and jet-age problems, not merely with those of the age of sailing ships.”<sup>206</sup>

The change being wrought in the international system is not limited to technological connections or high-speed communications.<sup>207</sup> Law is changing as well.<sup>208</sup> As the international arena is continually transformed and “traditional threats to national security” recede,<sup>209</sup> the law has correspondingly expanded to involve all interests of modern international life rather than merely attempting to prevent international conflict.<sup>210</sup> New international institutions are originating at a pace not seen since the era immediately following World War II,<sup>211</sup> and domestic courts all over the world are taking notice.<sup>212</sup> As histori-

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gimes. While it still continues the tradition of the evolving standards framework by emphasizing consensus, the word “humane” communicates that American perceptions of decency alone do not define dignity. The term reinforces the idea that a search for consensus must arise out of a common humanity, rather than any particular nationality. As a strategic rhetorical device, eliminating the word “national” from the phrase prohibits opponents of international consensus from arbitrarily excluding evidence because it is not American or “national.”

204. Jonah C. Well, *The Principle of the Wedge and the Splinters*, TURKISH PROBE, Dec. 27, 1999, available at LEXIS News (“‘Globalization’ would have given the authors of the American Constitution a collective heart attack.”); see also Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 649 (2002) (demonstrating that there may be an “architectural change in the international system”); *id.* at 660 (stressing that improved communication and transportation reduce the costs imposed by geographical distance).

205. Blackmun, *supra* note 1, at 49 (noting that the United States has become more intertwined with the world than ever before and is a member of the global community).

206. DOUGLAS, *supra* note 19, at x (paraphrasing India’s President Hussain). This admonition was not new in 1968. Advocates have emphasized the fundamental changes in the world before the end of World War II. See, e.g., Frederic R. Coudert, *Foreword* to JOHN H. WIGMORE, A GUIDE TO AMERICAN INTERNATIONAL LAW AND PRACTICE vii, vii (1943) (“The last half century has wrought changes more profound than have occurred probably since man first appeared on this planet. . . . national isolation, whether for a great or a small people, is now quite impossible—indeed, unthinkable.”).

207. Spiro, *supra* note 204, at 660 (“Beyond that, globalization is so broad a phenomenon that comprehensive description now seems almost futile.”).

208. MALCOM N. SHAW, INTERNATIONAL LAW 39-40 (4th ed. 1997) (explaining how international law has expanded to include issues, such as human rights, not relating solely to territorial or jurisdictional issues of states).

209. Spiro, *supra* note 204, at 649-50 (comparing the “centuries-old” state-based threats of interstate competition, balance of power, and hostility with the “new” issues of the environment, human rights, trade, health, and development).

210. SHAW, *supra* note 208, at 36-37.

211. O’Connor, *supra* note 93, at 13 (referring to the establishment of new multilateral development banks, environmental bodies, trade organizations, and judicial tribunals designed to prosecute those responsible for atrocities committed in Rwanda and Yugoslavia).

212. Slaughter, *supra* note 82, at 37. For example, both the Supreme Court of Zimbabwe and the Inter-American Court of Human Rights frequently cite decisions from the European Court of Human Rights. *Id.* Additionally, constitutional courts in a number of new democracies

cal and technological trends increasingly internationalize domestic decisions, courts are compelled into a jurisprudential exchange with foreign legal systems.<sup>213</sup> This exchange has resulted in detailed examinations of foreign materials becoming regular features in constitutional deliberation in many courts outside of the United States.<sup>214</sup> Decisions interpreting prohibitions against cruel punishments provide evidence of this judicial exchange and of the trend toward universalizing human rights.<sup>215</sup> This development has prompted the observation that “[c]oncepts like liberty, equality, and privacy are not exclusively American constitutional ideas but, rather, part and parcel of the global human rights movement.”<sup>216</sup>

Unfortunately, American courts have yet to join this global movement.<sup>217</sup> Although there may be signs that the “American ostrich is finally starting to take its head out of the sand,”<sup>218</sup> courts still exhibit a lack of responsiveness to foreign and international tribunals.<sup>219</sup> For instance, between 1990 and 2003, the United States Supreme Court referred to decisions from Britain or Canada twenty-one times.<sup>220</sup> In comparison, during 1990 *alone*, the Canadian Supreme Court cited United States decisions 230 times.<sup>221</sup> Justice William Douglas once posited that a lack of judicial responsiveness to outside influences resulted from a suspicion inherited from the Cold War.<sup>222</sup> Other commentators have faulted a “nationalist”<sup>223</sup> or “unilateralist”<sup>224</sup> jurisprudence. Regardless of the underlying motivation, one thing is clear: the United States has failed to adequately consider and learn from other countries.<sup>225</sup>

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rely heavily on United States Supreme Court precedent, as well as precedent from courts in Europe, Australia, Africa, and Canada. See Waters, *supra* note 9, at 493.

213. Slaughter, *supra* note 82, at 60.

214. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 820 (1999).

215. WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* 4, 5 (1996).

216. Koh, *International Law*, *supra* note 17, at 54.

217. Slaughter, *supra* note 82, at 69 (“Today, however, the Supreme Court rarely looks far beyond its own chambers, even in international cases.”).

218. Koh, *International Law*, *supra* note 17, at 48.

219. Franck & Fox, *supra* note 17, at 9.

220. Diarmuid F. O’Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 *NOTRE DAME L. REV.* 1893, 1895 (2005).

221. *Id.* The courts of appeal are equally reluctant to use foreign precedent. Between 1990 and 2003, out of several thousand opinions, only forty-three “cited modern British precedent.” *Id.*

222. DOUGLAS, *supra* note 19, at xi.

223. Koh, *International Law*, *supra* note 17, at 52.

224. Rubinfeld, *supra* note 83, at 1973.

225. See O’Connor, *supra* note 93, at 18.

### B. *Continuing the Trend*

Regrettably, this failure continued in *Roper v. Simmons*. True, the explanation of international views in *Simmons* is thorough<sup>226</sup> and has encouraged many who support an increased role for such consensus in Supreme Court decisions.<sup>227</sup> Nonetheless, Justice Kennedy's assignment of international consensus to a strictly confirmatory role is problematic.<sup>228</sup> Justice Kennedy repeatedly underscored the non-controlling nature of international views and consistently underlined the decision as "our own."<sup>229</sup> More significantly, however, Justice Kennedy reaffirmed that a "national consensus" is the primary framework through which punishments must be analyzed.<sup>230</sup>

Functionally, it seems that *Simmons* represents nothing more than another mark in the long line of footnotes and brief treatments of international consensus in modern Eighth Amendment jurisprudence.<sup>231</sup> It is possible for a country, such as the United States, to change a practice without truly internalizing and accepting the norm calling for such change.<sup>232</sup> Given the result and the Court's acknowledgement of international consensus, it appears that this is exactly what happened in *Simmons*. Still, the primacy of "national consensus," with the assignment of international consensus to a "confirmatory" role, limits the practical future impact of international consensus in both lower court and Supreme Court decisions.<sup>233</sup>

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226. See Justice Ruth Bader Ginsburg, Address at the American Society of International Law Annual Meeting: "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html> (explaining that *Simmons* was one of the most significant cases outlining the importance of looking to foreign sources).

227. See, e.g., Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 920 (2005) ("*Roper v. Simmons* reaffirmed the relevance of international law and practice in United States constitutional jurisprudence."); Waters, *supra* note 9, at 569 (claiming that Justice Kennedy seized the opportunity to contribute to transnational judicial dialogue).

228. See Waters, *supra* note 9, at 569 (suggesting that the analytical framework adopted in *Simmons* is "fairly conservative").

229. See *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) ("*o*ur determination" (emphasis added)); *id.* at 1200 (noting that opinions of the world merely provide confirmation "for *our* own conclusions" and explaining that the affirmation by others reinforces "*our* own heritage of freedom" (emphasis added)).

230. *Id.* at 1192 (explaining that *Atkins* was based on "national consensus" as well as considerations of proportionality and looking at support for national consensus against the juvenile death penalty).

231. See *supra* notes 114-15 and accompanying text.

232. See ROGERS, *supra* note 73, at 219 ("But it is entirely possible to comply without making the norms directly applicable in court."); Harold Hongju Koh, *Jefferson Memorial Lecture Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004) [hereinafter Koh, *Transnational Legal Process*] (distinguishing between accepting norms into internal value sets and merely complying with them); cf. Jennifer L. Brillante, Note, *Continued Violations of International Law by the United States in Applying the Death Penalty to Minors and Possible Repercussions to the American Criminal Justice System*, 29 BROOKLYN J. INT'L L. 1247, 1305 (2004) (calling for the United States to abolish the practice of the juvenile death penalty even if it does not "recognize and comply with the international standards").

233. See Waters, *supra* note 9, at 572 (predicting that the decision means "the Court will ensure that domestic norms remain predominant"); *supra* note 115 (discussing a case in which

In lower courts, there are signs that the limiting effect is already emerging. For example, the California Supreme Court recently relied on *Simmons* to reject a petitioner's international claims regarding the death penalty.<sup>234</sup> The majority opinion stated that "although international authorities and norms are *relevant* to the consideration whether a punishment is cruel and unusual under the Eighth Amendment, they are *not controlling*. Eighth Amendment analysis instead *hinges upon* whether there is a *national consensus* in this country against a particular punishment."<sup>235</sup> Contrary to one commentator's hopes that *Simmons* would guide lower courts to a proper consideration of international consensus,<sup>236</sup> it appears, instead, that it has provided an excuse for courts to readily dismiss such evidence.<sup>237</sup>

In Supreme Court opinions, there is significant evidence that *Simmons*' endorsement of international consensus is rather limited as well. The best example is Justice O'Connor's dissent.<sup>238</sup> She conceded that an international consensus against the juvenile death penalty exists, but she flatly rejected the implication by reasoning that because a *national* consensus had not yet developed, international consensus could not serve a *confirmatory* role and could not affect the final judgment.<sup>239</sup> This example illustrates the limited change that *Simmons* actually represents. If the opposition of every other nation in the world<sup>240</sup> is not enough to affect the outcome of a search for "consensus," then what function can acknowledging that opposition possibly serve?<sup>241</sup> The logic behind the "confirmatory" role assigned to international consensus is flimsy at best.<sup>242</sup> As Justice Scalia noted, one cannot logically have totally independent views on a punishment

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placing primacy on American views nullified the effect of the Court's "respectful" consideration of foreign viewpoints).

234. *People v. Blair*, 115 P.3d 1145, 1189 (Cal. 2005).

235. *Id.* (emphasis added) (citations omitted) (relying on *Simmons*).

236. *See Waters, supra* note 9, at 569.

237. Empirical evidence illustrates the impact that a conservative approach to international sources may have. *See, e.g., Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (noting that "uncertainty" about the role of international law undermines support for using it in the decision); *Brennan v. State*, 754 So. 2d 1, 14 (Fla. 1999) (Anstead, J., concurring) (explaining that because the United States Supreme Court has only said other courts *may* consider international views, it is preferable to stand by one's *own* decision).

238. Cassel, *supra* note 9, at 5.

239. *Roper v. Simmons*, 125 S. Ct. 1183, 1215 (2005) (O'Connor, J., dissenting).

240. *See supra* Part IV.A.2.

241. Professor Melissa Waters argues that the Court serves as a "mediator between domestic and international norms" and that the framework adopted in *Simmons* is a "signaling device" used to placate its domestic audience while signaling a willingness to participate in what she terms "transnational judicial dialogue." *See Waters, supra* note 9, at 570. However, she ultimately concludes that in this mediatory role, "the Court will ensure that domestic norms remain predominant." *Id.* at 572.

242. *See Simmons*, 125 S. Ct. at 1228 (Scalia, J., dissenting) ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.").

as well as properly incorporate international consensus.<sup>243</sup> One must be willing to consider such consensus when it is contradictory in addition to when it is confirmatory.<sup>244</sup>

### C. *A Missed Opportunity*

*Roper v. Simmons* presented a “golden opportunity” for the United States Supreme Court to begin clearly considering and weighing international consensus.<sup>245</sup> There was no dispute about the nature of the international climate;<sup>246</sup> the case for international opposition to the juvenile death penalty was overwhelming.<sup>247</sup> Even the State of Missouri acknowledged the overwhelming opposition to the penalty on the world stage.<sup>248</sup> Additionally, Eighth Amendment jurisprudence has a well-established precedential basis for considering international opinion.<sup>249</sup> The Court thus had the opportunity to use the evolving standards and objective indicia framework to thoughtfully incorporate international views without creating a new substantive right and triggering many of the problems feared by staunch opponents of international consensus.<sup>250</sup> Rather than take this opportunity, the Court chose to perpetuate the ineffective national consensus framework, marginalizing international viewpoints.<sup>251</sup>

Unfortunately, the marginalization of international consensus, cleverly hidden in *Simmons*, gives rise to a number of consequences. A more forceful inclusion of international consensus in *Simmons* would have complied with the original spirit of the evolving standards framework created in *Trop v. Dulles*.<sup>252</sup> That decision did not mention the national consensus framework and did not limit human dignity to the boundaries prescribed by American standards of decency.<sup>253</sup> *Simmons* does just that, despite acknowledging others’

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243. See *id.* at 1228 n.9 (“Either America’s principles are its own, or they follow the world; one cannot have it both ways.”).

244. See *id.*

245. See Waters, *supra* note 9, at 569.

246. But see *Simmons*, 125 S. Ct. at 1226 (Scalia, J., dissenting) (hinting that it is naïve to believe that foreign nations actually adhere to their stated bans).

247. See *supra* text accompanying notes 141-49.

248. See *supra* note 137 and accompanying text.

249. See *supra* Part III.B.2 (arguing that *Trop*’s notions of evolving standards included a significant portion devoted to international practice).

250. See, e.g., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring) (concluding that international disapproval should not give rise to a private action for money damages in federal courts); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001) (cautioning against inferring jurisdiction over foreign sovereigns through customary international law).

251. See *supra* Part IV.B.1. But see Waters, *supra* note 9, at 569 (arguing that Justice Kennedy seized the opportunity).

252. See Blackmun, *supra* note 1, at 48 (contending that there is no justifiable reason to limit inquiry to United States’ views).

253. In fact, in *Trop* the only significant mention of anything American was its passing notation that the policy of the Eighth Amendment was “firmly established in the Anglo-American tradition of criminal justice.” See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

views.<sup>254</sup> Giving primacy to American standards perpetuates attitudes that are historically at the root of our disdain for international law.<sup>255</sup> Such theoretical attitudes can have practical consequences.<sup>256</sup>

The primary result of restricting Eighth Amendment jurisprudence to a search for national consensus is the failure of the Court to assert its role as a human rights leader.<sup>257</sup> While courts all around the world are engaging in transnational judicial exchange,<sup>258</sup> the United States Supreme Court, in *Simmons*, perpetuated its indifference toward such exchanges, undermining its ability to be involved in transnational dialogues.<sup>259</sup> Yet, participation in such discourse better protects the fundamental rights of all people by strengthening international norms,<sup>260</sup> which will lead to their internalization.<sup>261</sup> The United States' failure to adequately join in this norm-strengthening discussion can weaken and fracture the global legal regime designed to protect the rule of law on an international scale.<sup>262</sup> At its worst, non-participation may be labeled "American exceptionalism" and spur international resentment.<sup>263</sup> Ultimately, United States courts must stop marginalizing international consensus and demonstrate a willingness to "live by the same rules as all."<sup>264</sup>

#### D. *Humane Consensus*

While criticism of *Simmons* is important, it is equally necessary to consider ways in which the Court could have more effectively incorporated international consensus. Any framework for evaluating the

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The Court, however, did not limit its search for "civilized standards" to Anglo-American ideals. *Id.* at 102.

254. *Roper v. Simmons*, 125 S. Ct. 1183, 1198, 1200 (2005) (acknowledging propriety of international views in United States courts' decisions).

255. Rubinfeld, *supra* note 83, at 1988-89.

256. J. Peter Pham, *The Perils of 'Consensus': Hans Kelsen and the Legal Philosophy of the United Nations*, 14 *IND. INT'L & COMP. L. REV.* 553, 584 (2004) (quoting philosopher Richard Weaver).

257. See David Weissbrodt, *International Human Rights Law Perspective on Grutter and Gratz*, 21 *CONST. COMMENT.* 275, 283 (2004) ("Judicial reluctance to use . . . international human rights standards is inconsistent with the status of the United States as a powerful and influential nation . . .").

258. See Waters, *supra* note 9, at 490 (describing the emergence of informal networks of courts that interact and dialogue with each other on a number of issues).

259. See *supra* notes 226-30 and accompanying text.

260. See Koh, *Transnational Legal Process*, *supra* note 232, at 338-39 (explaining the process of norm internalization).

261. See Waters, *supra* note 9, at 490 (explaining that judicial dialogue is a co-constitutive project because participation helps internalize and create international norms).

262. See Franck & Fox, *supra* note 17, at 4-5. Other commentators offer more concrete examples. See, e.g., Connie de la Vega, *Human Rights and Trade: Inconsistent Application of Treaty Law in the United States*, 9 *UCLA J. INT'L L. & FOREIGN AFF.* 1, 36-37 (2004) (examining nations' efforts to file claims against the United States in international tribunals as a result of the United States' failure to reject the juvenile death penalty).

263. Ivan Shearer, *In Fear of International Law*, 12 *IND. J. GLOBAL LEGAL STUD.* 345, 377 (2005).

264. *Id.* at 376.

evolving standards of decency under the Eighth Amendment should reflect the fundamental principle, laid out in *Weems*, that the Amendment can and should acquire new meaning as opinion “becomes enlightened by a humane justice.”<sup>265</sup> The dignity of all persons should be considered paramount.<sup>266</sup> These considerations demand that international views be incorporated into the rationale for Eighth Amendment decisions.<sup>267</sup>

Rather than rely on the national consensus framework, the Court should have reformulated the debate and incorporated international views under the rubric of a “humane consensus.”<sup>268</sup> Humane justice and universal dignity should inform this framework.<sup>269</sup> Instead of focusing on the national/international divide that is becoming increasingly irrelevant in the globalized world of human rights,<sup>270</sup> and that often causes the United States to look inward,<sup>271</sup> the Court should have acknowledged the universality of human dignity and the particular relevance of international consensus for determining standards of decency.<sup>272</sup> The humane consensus approach contributes a unique perspective to the debate. Too often commentators who suggest that international consensus should be a factor in the Court’s reasoning limit their arguments to fit within the national consensus framework.<sup>273</sup>

There are a number of advantages to the “humane consensus” approach. First, it should ensure that the international views regarding the juvenile death penalty become part of the reasoned basis for a court’s decision, exerting some controlling influence on the outcome. By incorporating international consensus into Eighth Amendment cases when there exists near-universal international opposition to a particular punishment, courts would be establishing a rigorous standard for challenges to other laws. Establishing such a standard would discourage future legal challenges, based on a much weaker interna-

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265. See *Weems v. United States*, 217 U.S. 349, 378 (1910).

266. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

267. See Blackmun, *supra* note 1, at 48 (“Refusing to consider international practice in construing the Eighth Amendment . . . is not consistent with this Court’s established construction of the Eighth Amendment.”).

268. See *supra* note 203 (analyzing the phrase).

269. See *supra* Part III.A.

270. See de la Vega, *supra* note 262, at 35-36 (noting that the economic integration of the world has spurred integration in the protection of human rights, blurring the line between foreign and domestic affairs).

271. See Reimels, *supra* note 126, at 303.

272. See Koh, *International Law*, *supra* note 17, at 56.

273. See, e.g., Baetz-Stangel, *supra* note 121, at 965-66 (arguing that international views provide support to the national opposition against the juvenile death penalty); Carrie Martin, Comment, *Spare the Death Penalty, Spoil the Child: How the Execution of Juveniles Violates the Eighth Amendment’s Ban on Cruel and Unusual Punishment in 2005*, 46 S. TEX. L. REV. 695, 724-28 (2005) (calling for international consensus to be a “strongly considered factor,” but focusing on national consensus and proportionality analysis).

tional consensus, against other practices of the United States.<sup>274</sup> Second, incorporating international consensus retains the benefit of objective analysis that is currently part of Eighth Amendment jurisprudence.<sup>275</sup> The Court could still weigh the international consensus factor, but instead of relegating it to mere confirmation of American judgment, would explicitly rely upon it. For example, overwhelming international consensus, when coupled with a less-than-clear consensus among the fifty states, could tip the scales in favor of finding a punishment unconstitutional. This approach would eliminate positions that assign token weight to international consensus but only truly consider national evidence, such as the positions taken by Justice O'Connor and the California Supreme Court.<sup>276</sup> Finally, using humane, rather than *national*, consensus would neutralize the rhetorical advantage of opponents of international consensus by capturing the moral authority of human dignity and collapsing the domestic/foreign dichotomy that is currently used to exclude and marginalize international views.<sup>277</sup> Neutralizing this advantage will be even more critical for proponents of international consensus in the future, as a growing backlash threatens the Court's emerging global awareness.<sup>278</sup>

This position should not be confused with the call for the Supreme Court to recognize the consensus against the juvenile death penalty as a *jus cogens* norm, which is binding on the United States.<sup>279</sup> A *jus cogens* norm is a norm of "general international law . . . accepted by a large majority of states."<sup>280</sup> It is a norm that cannot be ignored and that has not been modified by a subsequent norm.<sup>281</sup> *Jus cogens* norms reflect fundamental values of the international community, and violations of such norms "shock the conscience of humankind."<sup>282</sup> Examples include the international prohibitions against

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274. For example, the opposition of twenty-five nations to a United States punishment would not be enough evidence of international consensus to justify inclusion in a future Court opinion because it would not represent a true consensus among the nations of the world. Justice Scalia raised this concern in his dissent. *Roper v. Simmons*, 125 S. Ct. 1183, 1226-27 (2005) (Scalia, J., dissenting) (cautioning that other American policies will have to be changed if international views are given any weight).

275. *See id.* at 1207 (O'Connor, J., dissenting) (noting the strong influence of objective factors in Eighth Amendment jurisprudence).

276. *See supra* Part V.B.

277. *See supra* Part III.B.2. Even supporters of international viewpoints cannot ignore the inconsistencies in Justice Kennedy's reasoning that result from the national consensus framework. *See Waters, supra* note 9, at 571 (explaining that using treaties to establish a confirmatory international consensus, when they have been rejected by the United States Senate, tends to undercut a conclusion of national consensus).

278. *See Waters, supra* note 9, at 573. Justice Scalia, who is familiar with using imprecise language to exclude international views, is leading this backlash. *See supra* Part III.B.2.

279. *See, e.g.*, Brief of Nobel Peace Prize Laureates, *supra* note 85, at 19 (contending that the consensus against the juvenile death penalty is recognized as a *jus cogens* norm).

280. Brief for Human Rights Committee, *supra* note 69, at 13.

281. *Id.*

282. Brief of Nobel Peace Prize Laureates, *supra* note 85, at 19.

genocide, slavery, and torture.<sup>283</sup> Some commentators have made the case for abolition of the juvenile death penalty as a *jus cogens* norm.<sup>284</sup> Recognition of a *jus cogens* norm by the Supreme Court differs from the use of a humane consensus framework.<sup>285</sup> Rather, the humane consensus framework is intended to find a middle ground between the binding nature of *jus cogens* and the superficial respect given to international consensus in *Simmons*.<sup>286</sup>

By incorporating international consensus as part of a humane consensus in *Simmons*, the Court could have positively influenced Eighth Amendment jurisprudence. Instead, the Court remained trapped in the national consensus framework, continuing to relegate international consensus to second-class status.

#### E. Potential Drawbacks

Although the humane consensus approach is a significant improvement over the flawed logic of *Roper v. Simmons*, it raises two significant concerns. Many may fear the potential loss of sovereignty resulting from a formal incorporation of international consensus.<sup>287</sup> While this argument has merit, it is easily answered. As described above, the traditional notions of sovereignty and the state are already being eroded due to the increasing globalization of the international arena.<sup>288</sup> Rather than fearing this inevitable shift, the United States should acknowledge it and prepare to deal creatively with the changes.<sup>289</sup> The question is not *if*, but *when* and *how*, the United States Supreme Court should address these changes. Incorporating international consensus into the interpretation of the Eighth Amendment is a relatively simple way to begin joining a globalized judiciary and world.<sup>290</sup>

Furthermore, previous Court decisions refute the loss of sovereignty argument. For example, *Trop v. Dulles* specifically discussed

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283. *Id.* at 29.

284. *See, e.g.*, Baetz-Stangel, *supra* note 121, at 977 (contending that because the norm against the juvenile death penalty is *jus cogens*, it must be applied in United States courts); Brillante, *supra* note 232, at 1295-97 (claiming that the prohibition against the juvenile death penalty meets the criteria for establishing *jus cogens* norms).

285. *Cf.* Brief for Human Rights Committee, *supra* note 69, at 12 (implying that there is a distinction between recognizing *jus cogens* and weighing international consensus as part of Eighth Amendment analysis by calling for one instead of the other).

286. Humane consensus is more than just confirmation of an American consensus, but it is less than an independent basis for overturning the juvenile death penalty. *See id.* at 24 (providing a somewhat analogous position by contending that if the consensus against the juvenile death penalty is not recognized as *jus cogens*, it should at least be strong evidence in an evolving standards analysis).

287. *See, e.g.*, O'Scannlain, *supra* note 220, at 1900 (explaining that use of international consensus undermines sovereignty).

288. *See* Spiro, *supra* note 204, at 649 (recognizing state-based threats as centuries old).

289. *See supra* notes 204-06 and accompanying text.

290. *See supra* note 249 and accompanying text (noting the well-established evolving standards mechanism to integrate international opinion).

international views,<sup>291</sup> yet it was decided at the height of the Cold War arms race, when sovereignty was a more significant geopolitical concern.<sup>292</sup> Not surprisingly, the reference in *Trop* to other nations' views did not precipitate a catastrophic loss of sovereignty. The Eighth Amendment also contains limiting features that will prevent sovereignty concerns from coming to fruition. For example, the Amendment specifically acknowledges the state's sovereign power to punish.<sup>293</sup> Moreover, even if the incorporation of international consensus into Eighth Amendment jurisprudence were to undermine sovereignty with respect to the power to punish, it is unlikely to provide precedent for incorporating international consensus into other areas of the law.<sup>294</sup> Even though international consensus may become part of the evolving standards framework, it does not automatically justify its use to interpret the due process or equal protection clauses, which are not as explicitly tied to a progressive standard.<sup>295</sup>

The second argument against an increased use of international consensus is that it circumvents the political process.<sup>296</sup> This argument essentially posits that the judicial nullification of certain punishments, based on international consensus, violates the spirit of democratic election.<sup>297</sup> Again, while this argument has merit, it is certainly not without flaws. First, the criticism applies more strongly to the creation of new rights than to the use of international consensus as evidence concerning evolving standards of decency.<sup>298</sup> More importantly, courts are designed to apply principles of law "without regard to the will of shifting democratic majorities."<sup>299</sup> Opponents may contend that courts overstep their role by using international consensus, but the alternative is more dangerous because of the inherent risk to fun-

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291. *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion).

292. *See* Spiro, *supra* note 204, at 649 (acknowledging that the Cold War era focused on more traditional geopolitical threats to the state-based system than current international law).

293. *See supra* Part III.A.

294. Incorporating international consensus in Eighth Amendment jurisprudence may encourage investigation into international sources in other areas of law, but it would not provide precedent for the wholesale incorporation of international consensus in all domestic legal opinions.

295. The concern regarding a slippery slope may be moot. *See Lawrence v. Texas*, 539 U.S. 558, 573, 576-77 (2003) (citing a decision from the European Court of Human Rights and referring to the view shared with other countries in interpreting the Due Process Clause).

296. *See, e.g., Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005) (Scalia, J., dissenting) (worrying about the Court's substitution of its judgment for the will of the people).

297. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring) (contending that unelected judges usurp democratic lawmaking by converting norms of international law into American law). This argument speaks more to the relationship of the judiciary to the political branches. It goes to the heart of the classic counter-majoritarian difficulty, and a full response is beyond the scope of this comment.

298. *See, e.g., Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001) (arguing that applying jus cogens norms to create a right over foreign sovereigns would challenge the consensual nature of democracy).

299. *See Koh, International Law, supra* note 17, at 55.

damental rights that are not insulated from a majority vote.<sup>300</sup> The limitation on the unrestrained free will of the majority is more than outweighed by the essential function served when courts uphold the Bill of Rights.<sup>301</sup> Finally, in the Eighth Amendment context, the argument for circumvention of the political process is considerably weaker. Formal incorporation of international consensus into the evolving standards analysis has some precedential backing extending at least fifty years,<sup>302</sup> if not to the writing of the Constitution.<sup>303</sup>

Although concerns over loss of sovereignty and democracy are valid, the benefits accrued by incorporating international consensus into Eighth Amendment jurisprudence vastly outweigh the potential disadvantages. Incorporating international consensus would strengthen the ability of the United States to influence the progress of human rights throughout the world.<sup>304</sup> It would also strengthen democratic human rights protections within the United States.<sup>305</sup> Incorporation would further assure the United States' democratic allies, many of whom have serious misgivings about the way the United States operates toward the rest of the world, and it would begin to position the United States Supreme Court to address the inevitable global changes that will dramatically affect American and international legal interests.<sup>306</sup> By reformulating the consensus debate to account for principles of universal human dignity, the Court could have strengthened the democratic protections embodied in the Eighth Amendment while making the adjustments necessary to participate in the globalized world.

## VI. CONCLUSION

The United States Supreme Court appropriately ruled in *Simmons* that the juvenile death penalty violated the Eighth Amendment prohibition on cruel and unusual punishment and should be commended for acknowledging the similar consensus among other nations. The Court did too little in actually incorporating that consensus, however, and consequently relegated it to the same secondary status it has recently held in other Eighth Amendment decisions. The Court should have included the overwhelming international consensus against the juvenile death penalty in its reasoning rather than

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300. *Stanford v. Kentucky*, 492 U.S. 361, 392 (1989) (Brennan, J., dissenting) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

301. *See id.*

302. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion).

303. *See supra* notes 71-72 and accompanying text.

304. *See supra* notes 17-21 and accompanying text.

305. *See supra* notes 260-61 and accompanying text.

306. *See supra* notes 158-60 and accompanying text; *supra* notes 204-06 and accompanying text.

using the consensus as mere confirmation of its own independent judgment. Incorporating international views into a “humane consensus” would reflect the humility necessary to endorse universal human values throughout the world and provide a monument to human dignity, ensuring that foreign “materials” play a constructive role somewhere other than in the materials used to erect the Supreme Court building.