

**FOREIGN JURISPRUDENCE—TO CITE OR NOT TO CITE:
IS THAT THE QUESTION OR IS IT
MUCH ADO ABOUT NOTHING?**

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As a result of the Supreme Court's decision in *Lawrence v. Texas*,¹ and its jurisprudence in death penalty cases such as *Stanford v. Kentucky*,² *Thompson v. Oklahoma*,³ *Atkins v. Virginia*,⁴ and most recently, *Roper v. Simmons*,⁵ the Court has been accused of using foreign jurisprudence and opinion to interpret U.S. constitutional provisions. In *Lawrence*, the Court made reference to the European Court of Human Rights case, *Dudgeon v. United Kingdom*,⁶ in cases interpreting the Eighth Amendment's prohibition against cruel and unusual punishment, the Court made reference to the laws and opinions of other countries with respect to the application of the death penalty to juveniles and the mentally retarded.⁷ In fact, the *Roper* decision has been criticized for relying too heavily on foreign decisions and for not being grounded in conventional legal materials.⁸ It is argued that the Court uses foreign decisions as authority to support its decisions rather than for merely informational purposes.⁹

In *Roper*, the Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders.¹⁰ The Court noted that standards of decency have evolved to a point that the prohibition of cruel and unusual punishment includes the application of the

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¹ 539 U.S. 558 (2003).

² 492 U.S. 361 (1989).

³ 487 U.S. 815 (1988).

⁴ 536 U.S. 304 (2002).

⁵ 543 U.S. 551 (2005).

⁶ *Lawrence*, 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) ¶ 52 (1981)).

⁷ See discussion *infra* Parts III.A–B.

⁸ See Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–85 (2005). Judge Posner argues that the Supreme Court has used foreign opinions as precedent in interpreting constitutional provisions as a means to overcome adverse precedent. *Id.*

⁹ *Id.* at 85.

¹⁰ 543 U.S. at 578.

death penalty to minors.¹¹ This judgment is likely to further fuel the debate on whether and to what extent foreign jurisprudence or experience should be factored into the interpretation of constitutional provisions.¹² This Article argues that the Court's references to international opinion and jurisprudence were simply parenthetical departures in the overall discussion and were not used by the Court to reach its conclusions. If all references to foreign opinion and jurisprudence were removed from the opinions, the outcome would remain the same. This Article maintains that the Court's use of the "evolving standards of decency" test, a conventional method of constitutional analysis, has ensured that the decisions rely only on inward-looking factors as expressed by national consensus.¹³ It further argues that any references to outward-looking factors are incidental and are done only *after* a national consensus has been established. The Court has followed its decision in *Thompson*, where it first determined the point that must be exceeded before a national consensus is established.¹⁴

Part I of this Article introduces the current debate on the Court's use of foreign jurisprudence and experience in its decisions. Part II explains the gradual development of the evolving standards of decency test and illustrates the factors used to analyze whether standards of decency have evolved. Part III of this Article demonstrates how, through the development of this test, the Court has *avoided* using foreign jurisprudence and experience to arrive at its decisions by relying on factors that are specific to the United States.

¹¹ See *id.* at 576–77.

¹² See, e.g., Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?*, 12 TULSA J. COMP. & INT'L L. 149, 149 (2004) ("[I]n *Roper v. Simmons*, the Court will again have an opportunity to debate the appropriateness of foreign precedent in constitutional analysis, when it revisits the issue whether the juvenile death penalty amounts to cruel and unusual punishment." (citation omitted)); see also Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 422 (2004) (predicting that foreign opinion would likely play a role in *Roper*).

¹³ *Contra* Posner, *supra* note 8, at 85. Judge Posner argued that the use of evolving standards of decency and "[t]he search for such a consensus is an effort to ground controversial Supreme Court judgments in something more objective than the Justices' political preferences and thus to make the Court's political decisions seem less political." *Id.*

¹⁴ See *Thompson v. Oklahoma*, 487 U.S. 815, 821–23 (1988).

I. THE DEBATE

While academics have long debated the appropriateness of the Supreme Court's use of foreign law and experience,¹⁵ two Justices formally joined the discussion—a discussion that they, in large part, commenced.¹⁶ On January 13, 2005, American University hosted a discussion between Justices Breyer and Scalia on the relevance of foreign court decisions to the interpretation of American constitutional law.¹⁷ As an originalist, Justice Scalia adhered to his position that constitutional provisions should be interpreted in light of what specific terminology meant at the time it was created and adopted.¹⁸ Therefore, Scalia believes that looking abroad is not only irrelevant, but it is erroneous.¹⁹

According to his originalist understanding, the Bill of Rights was created for the purpose of preventing change.²⁰ However, does an originalist approach prevent change altogether? According to Scalia, if and when change must occur, the point of reference is the American experience only.²¹ His view is illuminated well in *Printz v. United States*,²² where the Supreme Court held that provisions of the Brady Gun Control Act that commandeered local law enforcement officials into enforcing the federal statute were unconstitutional.²³ Writing for the plurality, Justice Scalia categorically dismissed the use of comparative analysis with foreign federal systems:

¹⁵ See, e.g., Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 748–54 (2005).

¹⁶ *A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases—A Conversation between Justice Antonin Scalia and Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005) [hereinafter *Scalia & Breyer Debate*].

¹⁷ *Id.* at 519–20.

¹⁸ See *id.* at 525 (“[M]y theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don’t think it has changed since then.”).

¹⁹ See, e.g., *id.* at 521; Justice Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1988).

²⁰ *Scalia & Breyer Debate*, *supra* note 16, at 525 (“It seems to me that the purpose of the Bill of Rights was to prevent change, not to foster change and have it written into a Constitution.”).

²¹ *Id.* at 526.

²² 521 U.S. 898 (1997).

²³ *Id.* at 933.

Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.²⁴

Justice Breyer, on the other hand, believes that the "experience [of other countries' federal systems] may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."²⁵

Similarly, the Court has tackled its task of interpreting the prohibition against cruel and unusual punishment by referring to evolving standards of decency.²⁶ In part, the squabble between academics and the Justices is over whose standards of decency should be used. For Scalia, only the "standards of decency of *American* society" count or should be used, "not the standards of decency of other countries that don't have our background . . . [or] our moral views."²⁷ On the other hand, Justice Breyer's view is that foreign jurisprudence should be examined by judges and lawyers and is "food for thought."²⁸ While the discussion between the two Justices sheds light on the debate in general, it presents only a few facets of the dispute.

The current debate addresses a wide range of issues, including whether the Supreme Court should look to foreign jurisprudence when interpreting constitutional provisions,²⁹ and if so, to what extent;³⁰ how the Court

²⁴ *Id.* at 921 n.11.

²⁵ *Id.* at 977 (Breyer, J., dissenting).

²⁶ *See, e.g.,* *Thompson v. Oklahoma*, 487 U.S. 815, 821–23 (1988).

²⁷ *Scalia & Breyer Debate*, *supra* note 16, at 526.

²⁸ *Id.* at 524.

²⁹ *See, e.g.,* Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 *TEX. INT'L L.J.* 353, 360 (2004) (arguing that world community practices are irrelevant to interpreting the U.S. Constitution). *But see* Bodansky, *supra* note 12, at 424 (arguing that foreign practices are relevant because the courts are engaged in a "common legal enterprise"); 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, 965–66 & n.78 (2004) (discussing how the Court used international law in *Atkins v. Virginia*, 536 U.S. 304 (2002), and arguing why it should be used in cases applying the death penalty to juveniles).

³⁰ *See, e.g.,* Diarmuid F. O'Scannlain, U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, *What Role Should Foreign Practice and Precedent Play in the Interpretation* (continued)

decides which foreign materials should³¹ or should not be used;³² why such materials are used at all;³³ whether the use of foreign jurisprudence is “countermajoritarian”³⁴ or threatens U.S. sovereignty;³⁵ why foreign

of Domestic Law? (Oct. 11, 2004), in 80 NOTRE DAME L. REV. 1893, 1900–01 (2005) (arguing that although the U.S. and Great Britain share a common legal heritage, they remain very distinct in many important ways, and the use of comparativism in legal opinions should be approached with caution); see also Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 69–70 (2004) (discussing how the Court can approach the use of foreign materials to define constitutional rights); John K. Setear, *A Forest With No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 583–87 (2005) (arguing that the Court actually avoided using international law when it should have in its 2003 term).

³¹ See Louis J. Blum, Comment, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157 (2002) (discussing how courts can use and have properly used comparative materials); see also Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 411–33 (2005) (arguing that two criteria for determining which foreign opinions are permissible to cite are whether the opinions are from institutions that are created by liberal democracies or from institutions that share societal affinities with the United States).

³² See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 67 (2005) (arguing that comparativism invites the selective use of international materials).

³³ See, e.g., Waters, *supra* note 12, at 150 (arguing that the Court’s use of foreign jurisprudence is a reaction to and a result of a “transnational judicial dialogue”).

³⁴ See, e.g., Alford, *supra* note 32, at 58–59 (“Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing . . . constitutional supremacy . . . [to] trump the democratic will reflected in state and federal legislative and executive pronouncements. . . . [I]nternational standards cannot serve as community standards unless they reflect our own national experience. To conclude otherwise would grant countermajoritarian international norms constitutional relevance as a community standard.”); cf. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1407 (1999) (arguing that Scalia’s methodology also poses a countermajoritarian difficulty because the “obscure intent” of the deceased Framers is chosen over the judgment of living judges, and it also displaces the will of the current majority); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 739–42 (2005) (arguing that the use of foreign materials as persuasive authority can lead to a lack of judicial accountability).

³⁵ See Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT’L L. 547, 547–48, 561 (2004) (arguing that the use of international and foreign law threatens U.S. sovereignty with respect to the criminal justice system).

jurisprudence should be used;³⁶ whether such use is a “new” practice or the Court’s practice throughout its history;³⁷ and the differences about the meaning of the debate.³⁸ In fact, there is even a debate *about* what the debate between Breyer and Scalia actually is!³⁹

The breadth of this debate is immense, as it touches upon nearly every aspect of the appropriateness of the use of foreign law and experience and how it should be done at all. However, the debate is not comprehensive, for it fails to include a proper inquiry into the extent the Court’s holdings would have changed, if at all, if international experience or jurisprudence were not mentioned.

II. THE EVOLUTION OF EVOLVING STANDARDS OF DECENCY

Modern interpretation of the Eighth Amendment’s prohibition of cruel and unusual punishment springs primarily from *Trop v. Dulles*,⁴⁰ where the Supreme Court was asked to decide whether it was cruel and unusual punishment to revoke the citizenship of a war-time deserter.⁴¹ In analyzing

³⁶ *E.g.*, Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Mass., “Wise Parents Do Not Hesitate to Learn From Their Children”: Interpreting State Constitutions in an Age of Global Jurisprudence, *in* 79 N.Y.U. L. REV. 1633 (2004). Chief Justice Marshall discusses how she uses foreign jurisprudence in her opinions because she believes that

the work of other courts with a differently inflected jurisprudence might allow us to unearth our deep-seated but often unstated assumptions, to expose our legal and normative constructs to the penetrating light of fresh scrutiny, and to examine our analyses and conclusions against a broader background of possibilities. Such acute reevaluation, wherever it leads, can only make our jurisprudence stronger.

Id. at 1650; *see also* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 215 (2003) (arguing that courts should look to other nations and act as a “global community of courts”).

³⁷ *See, e.g.*, Bodansky, *supra* note 12, at 423–24 (arguing that the use of international sources in constitutional opinions reflects the Framers’ intent and therefore should be used).

³⁸ *See* Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003) (“[T]he current debate about comparative constitutional law is not a debate about comparativism as such. Rather the debate . . . is about the role of the judiciary within American democracy.”).

³⁹ *See* Levinson, *supra* note 29, at 364. The author construes the debate between Justices Breyer and Scalia in *Printz* to be about the use of empirical data that may be useful in determining the best means to “achieve common norms.” *Id.*

⁴⁰ 356 U.S. 86 (1958).

⁴¹ *Id.* at 87, 99.

the issue, the Court stated that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,”⁴² because “[t]he provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation.”⁴³

The *Trop* Court did not set forth rules or a blueprint to determine what constitutes evolving standards,⁴⁴ but more recent Eighth Amendment jurisprudence has. These cases have shaped the evolving standards of decency test into a more precise method of establishing these standards. Thus, standards have evolved when it is shown that there is a “national consensus” as to what does or does not constitute cruel and unusual punishment.⁴⁵

In 1988, the Supreme Court held in *Thompson v. Oklahoma*⁴⁶ that the Eighth Amendment proscribes the application of the death penalty to offenders under the age of sixteen.⁴⁷ The Court found a national consensus by analyzing the trend of states legislatures⁴⁸ and the proclivity of juries to apply that punishment.⁴⁹ One year later in *Penry v. Lynaugh*, the Court held that the Eighth Amendment permitted the imposition of the death penalty to mentally retarded offenders.⁵⁰ The Court stated that evolving standards of decency must be reflected by a national consensus, which is found by looking at the “objective evidence of how our society views a particular punishment today.”⁵¹ Again, the objective evidence used by the Court was legislation enacted by states and data on how juries sentenced the convicted.⁵²

Stanford v. Kentucky,⁵³ decided at the same time as *Penry*, clarified that the Court’s independent judgment should be accorded less weight than

⁴² *Id.* at 101.

⁴³ *Id.* at 103.

⁴⁴ *See id.* at 101 (referring to “evolving standards of decency” without further definition).

⁴⁵ *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 330–34 (1989).

⁴⁶ 487 U.S. 815 (1988).

⁴⁷ *Id.* at 838.

⁴⁸ *Id.* at 823–31.

⁴⁹ *Id.* at 831–33.

⁵⁰ *Penry*, 492 U.S. at 340.

⁵¹ *Id.* at 331.

⁵² *Id.* at 330–35.

⁵³ 492 U.S. 361 (1989).

evolving standards of decency.⁵⁴ The Court stated, “Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”⁵⁵ However, in *Atkins v. Virginia*,⁵⁶ the Court stated that although objective evidence is of great import,⁵⁷ where cases involve a consensus, the Justices’ “own judgment ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”⁵⁸ Most importantly, the Court added that the number of states that permit or prohibit the death penalty as applied to certain offenders is not necessarily significant; instead, it is the “consistency of the direction of change” that is significant.⁵⁹

Today, the Court’s evolving standards of decency test is applied in Eighth Amendment cases by deciding whether there is a national consensus for or against a particular punishment and to whom it is applied.⁶⁰ The national consensus is determined by looking at the legislation of states as well as the existence of a movement toward change and the actual application of the law as applied to the group of offenders in question.⁶¹

III. FINDING NATIONAL CONSENSUS

Has the Court crafted the evolving standards of decency test as a means to evaluate American standards? Or is it an artful means by which the Court uses foreign standards to achieve a desired outcome?⁶²

A. *Juvenile Offenders—The Road to Roper*

The *Thompson* Court held that it was cruel and unusual punishment to apply the death penalty to a person convicted of a capital crime that was

⁵⁴ See *id.* at 369.

⁵⁵ *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

⁵⁶ 536 U.S. 304 (2002).

⁵⁷ *Id.* at 312 (citing *Coker*, 433 U.S. at 597).

⁵⁸ *Id.* at 313 (quoting *Coker*, 433 U.S. at 597).

⁵⁹ *Id.* at 315.

⁶⁰ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–64 (2005).

⁶¹ See, e.g., *id.*; *Atkins*, 536 U.S. at 315–16.

⁶² See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring) (“The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.”).

committed while under the age of sixteen.⁶³ The Court's conclusion was based upon the fact that there was a national consensus that such a punishment is cruel and unusual according to today's standards of decency.⁶⁴

The Court used two objective indicia to find national consensus. First, only eighteen states permitted the death penalty to be applied to capital offenders of a minimum age.⁶⁵ Additionally, the Court noted:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.⁶⁶

Second, the Court observed that juries are reluctant to execute persons for crimes committed under the age of sixteen, as evidenced by the fact that no executions of persons who committed a capital crime while under the age of sixteen occurred after 1948.⁶⁷ That fact, according to the Court, "leads to the unambiguous conclusion that the imposition of the death penalty on a fifteen-year-old offender is now generally abhorrent to the conscience of the community."⁶⁸

Justice Scalia attacked the plurality and argued that it mistook its own views of evolving standards for those of the Nation and failed to make an objective assessment of "how today's society views a particular punishment."⁶⁹ He denounced "[t]he plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries"⁷⁰ as a "totally inappropriate . . . means of establishing the fundamental beliefs of this Nation."⁷¹

In spite of the *Thompson* plurality's references to the Western European community, it did not rely upon the world community's views in

⁶³ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

⁶⁴ *Id.* at 830.

⁶⁵ *Id.* at 829.

⁶⁶ *Id.* at 830.

⁶⁷ *Id.* at 832.

⁶⁸ *Id.*

⁶⁹ *Id.* at 864–65 (Scalia, J., dissenting).

⁷⁰ *Id.* at 868 n.4.

⁷¹ *Id.*

order to find an American consensus.⁷² However, the *Trop* Court's standard was inclusive of foreign law, as it did not confine evolving standards to American standards, but stated that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a *maturing society*."⁷³

In *Trop*, the Court held that it is cruel and unusual punishment and contrary to modern-day standards of decency to revoke the citizenship of a war-time deserter.⁷⁴ In reaching this conclusion, the Court examined worldwide practices and based its conclusion on the following: the notion that banishment is "a fate universally decried by civilized people";⁷⁵ the fact that "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime";⁷⁶ and a United Nations survey of eighty-four nations that found that only two countries permitted denationalization as a punishment.⁷⁷ The *Trop* Court founded its decision almost entirely upon the comparative practices of other nations.⁷⁸

Since *Trop*, however, the Court's national consensus requirement has curtailed foreign comparativism. In *Thompson*, the Court established that evolving standards requires a finding of a *national consensus*, which is determined by state laws and jury practices.⁷⁹ Although the Court in *Thompson* referred to civilized standards and did not completely confine its inquiry to American standards,⁸⁰ the opinion *first* found a national consensus by examining the objective indicia based entirely upon the *American* experience.⁸¹ The objective indicia applied specifically to patterns of American standards as evidenced by state legislatures and jury sentencing practices.⁸² Scalia may disagree with whether eighteen states prohibiting the imposition of the death penalty on capital offenders under the age of sixteen actually constitutes a national consensus, but the plurality's decision was based *only* on American standards.⁸³ The Court's

⁷² See *id.* at 824–32 (plurality opinion).

⁷³ Cf. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (emphasis added).

⁷⁴ See *id.* at 101–02.

⁷⁵ *Id.* at 102.

⁷⁶ *Id.*

⁷⁷ *Id.* at 103.

⁷⁸ See *id.* at 101–03.

⁷⁹ *Thompson v. Oklahoma*, 487 U.S. 815, 822–33 (1988).

⁸⁰ *Id.* at 830–31.

⁸¹ *Id.* at 823–29.

⁸² *Id.* at 823–29, 831–33.

⁸³ *Id.* at 859, 867–69 (Scalia, J., dissenting).

reference to civilized standards was mentioned as *additional explanatory material*—as if to say, “While on the subject . . .”—for what had already been established by national consensus.

One year later, the Court held in *Stanford* that the Eighth Amendment permits the application of the death penalty to capital offenders who committed their crimes at the ages of sixteen and seventeen because a national consensus against it had not been established.⁸⁴ At the time *Stanford* was decided, only twelve states prohibited the application of the death penalty to offenders under the age of eighteen, and fifteen states prohibited the implementation of the death penalty on sixteen-year-old capital offenders.⁸⁵ If *Thompson* set a threshold that at least eighteen states must prohibit a punishment before there is a national consensus, then clearly there was no consensus in *Stanford*, and the Court rightly followed its evolving standards of decency test in spite of the fact that, at that time, the United States was one of only seven nations to have a juvenile death penalty.⁸⁶

Most recently, however, in *Roper v. Simmons*, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the application of the death penalty to persons who committed a capital crime while under the age of eighteen.⁸⁷ In holding that the death penalty is prohibited as applied to a person who was a juvenile at the time the capital crime was committed, the Court again used the evolving standards of decency analysis to find a national consensus.⁸⁸

The *Roper* Court concluded that there is a national consensus against the execution of persons under the age of eighteen.⁸⁹ The Court revisited its decision in *Atkins v. Virginia*, where it found that there was a national consensus against the execution of the mentally retarded.⁹⁰ The *Roper* Court recognized that in *Atkins*, the indicia used to determine that there was a national consensus were: (1) the rejection of this practice by a

⁸⁴ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

⁸⁵ *Id.* at 370.

⁸⁶ See Death Penalty Information Center, Execution of Juveniles in the U.S. and Other Countries, <http://www.deathpenaltyinfo.org/article.php?scid=27&did=203#execsworld> (last visited June 29, 2007); see also *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

⁸⁷ *Roper*, 543 U.S. at 578–79.

⁸⁸ *Id.* at 564–67.

⁸⁹ *Id.*

⁹⁰ *Id.* at 563–64 (citing *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002)).

majority of states, (2) the infrequency of the practice in states that permit the death penalty, and (3) a consistent trend toward legislative change.⁹¹

In holding that juveniles under the age of eighteen may not be executed, the *Roper* Court also recalled its decision in *Stanford*, where it found that there was no national consensus against applying the death penalty to juveniles under the age of eighteen but over the age of fifteen.⁹² Essentially, the numbers in *Stanford* did not constitute a national consensus as required by *Thompson*.⁹³

After *Stanford*, the Court held in *Atkins v. Virginia*⁹⁴ that there was a national consensus against the execution of the mentally retarded.⁹⁵ The Court stated that whether a punishment is excessive must be determined by standards “that currently prevail.”⁹⁶ While several states adopted prohibitions against the execution of the mentally retarded, the Court said that the number *per se* was not of paramount importance.⁹⁷ Instead, a national consensus had been established by the “consistency of the direction of change,”⁹⁸ and because even in states that do permit execution of the mentally retarded, it is rarely practiced.⁹⁹ On the other hand, at the time *Roper* was decided, eighteen states had proscribed the application of the death penalty to offenders under the age of eighteen¹⁰⁰—the same number of states that constituted a national consensus in *Thompson*.¹⁰¹

The *Roper* opinion dedicated a considerable amount of its discussion to international opinion.¹⁰² The Court noted that the United States is the

⁹¹ See *id.* at 567 (citing *Atkins*, 536 U.S. at 316).

⁹² *Id.* at 562 (citing *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989)).

⁹³ See *id.*

⁹⁴ 536 U.S. 304 (2002).

⁹⁵ *Id.* at 321.

⁹⁶ *Id.* at 311.

⁹⁷ *Id.* at 313–17.

⁹⁸ *Id.* at 315.

⁹⁹ *Id.* at 316.

¹⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

¹⁰¹ See *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988).

¹⁰² See Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”*: *International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261, 261 (2005). The author noted that the foreign materials “got star billing—an entire roman numeral of the Court’s opinion (roughly 20% of the total pages) is devoted to considering international instruments and practices,” but the Court did “not suggest that international law is *binding* on U.S. courts in constitutional cases”; rather, it provides ““*confirmation* for our own conclusions.”” *Id.* (citing *Roper*, 543 U.S. at 578).

only country with a juvenile death penalty, but stated that “[t]his reality does not become controlling.”¹⁰³ The Court found it “instructive to note”¹⁰⁴ that the United Kingdom had abolished the death penalty because “[t]he United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the *Eighth Amendment’s* own origins”¹⁰⁵—the origins to which Justice Scalia often refers.¹⁰⁶ The Court was careful to note that “[t]he opinion of the world community, *while not controlling our outcome*, does provide respected and significant confirmation for *our own conclusions*.”¹⁰⁷ Finally, it emphasized that “to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹⁰⁸

The Court’s agreement with the world community only demonstrates that the Court and the United States are like-minded, *not* that the world community’s opinion is a foundation of the United States’ own opinion. In these cases the Court did not engage in outward-looking analysis to arrive at its decision; rather, the Court first established a national consensus before introducing or discussing non-U.S. practices and opinions.¹⁰⁹ The references to international opinion and jurisprudence “is more properly described as a ‘polite reference,’ rather than persuasive authority.”¹¹⁰ The omission of all references to the world community would leave the decision intact.

¹⁰³ *Roper*, 543 U.S. at 575.

¹⁰⁴ *Id.* at 577.

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *See, e.g., id.* at 608 (Scalia, J., dissenting); *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part).

¹⁰⁷ *Roper*, 543 U.S. at 578 (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ *Cf.* Sharon Ongerth, Note, *Deference to the Majority: Why Isn’t the Supreme Court Applying the Reasoning of Atkins v. Virginia to Juveniles?*, 37 LOY. L.A. L. REV. 483 (2003). The author argued that the Court first established that there was a national consensus before it considered the approach of other nations and the opinions of professional groups as persuasive. *See id.* at 513.

¹¹⁰ Matthew S. Raalf, Note, *A Sheep in Wolf’s Clothing: Why the Debate Surrounding Comparative Constitutional Law Is Spectacularly Ordinary*, 73 FORDHAM L. REV. 1239, 1260 (2004) (quoting Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 420 (2003)).

B. Mentally Retarded Offenders

In 1989, the Supreme Court held in *Penry* that it was not cruel and unusual punishment to apply the death penalty to mentally retarded offenders.¹¹¹ Fourteen years later in *Atkins*, the Court rejected *Penry* insofar as there was now a national consensus that standards of decency had evolved to a point that American society viewed the execution of the mentally retarded as cruel and unusual.¹¹² As one commentator notes, the change indicates that

the American ostrich is finally starting to take its head out of the sand. In *Atkins v. Virginia*, the Court signaled its willingness to cite foreign and international law practice, holding that execution of persons with mental retardation would offend civilized standards of decency, in part because “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹¹³

Again, the Court’s reference to foreign opinion and practice was not applied to reach its conclusion, but was merely an aside.¹¹⁴ Without these references, the decision, grounded firmly in an evolving standards of decency analysis as developed by *Thompson* and *Stanford*, would remain unchanged.

In *Penry*, the Court concluded that a national consensus had not developed against the execution of the mentally retarded so there was no Eighth Amendment justification to proscribe it.¹¹⁵ Based on the first of the “objective indicia,” only one state banned the practice at that time, and one state had recently adopted the same restriction.¹¹⁶ According to the Court,

¹¹¹ See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1988); see also Hadar Harris, “*We Are the World*”—Or Are We? *The United States’ Conflicting Views on the Use of International Law and Foreign Legal Decisions*, 12 HUM. RTS. BRIEF 5, 8 (2005) (“[T]he controversy over the use of foreign and international law is based on a fundamentally flawed understanding of the Court’s current decisions and the role which international law and foreign court decisions have played.”).

¹¹² See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹¹³ Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 48–49 (2004) (quoting *Atkins*, 536 U.S. at 316 n.21).

¹¹⁴ *Contra* Rothenberg, *supra* note 35, at 563–64 (arguing against the Court’s use of international law and opinion as a source for evidence of consensus).

¹¹⁵ See *Penry v. Lynaugh*, 492 U.S. 302, 333–34 (1989).

¹¹⁶ See *id.* at 334.

“the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”¹¹⁷ Furthermore, aside from public opinion polls on the execution of the mentally retarded, *Penry* did not “offer any evidence of the general behavior of juries with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors.”¹¹⁸

Because only two states categorically prohibited the application of the death penalty to the mentally retarded,¹¹⁹ and no evidence was introduced that juries were disinclined to impose such punishment on them,¹²⁰ a national consensus against the practice was not established. Although the Court did not state exactly what *would* constitute a national consensus, it illustrated that a national consensus was established in *Thompson*, where eighteen states had established that the death penalty may not be applied to a capital offender under the age of sixteen.¹²¹

By the time *Atkins* reached the Court, a national consensus had emerged that the Eighth Amendment definitively prohibited the application of the death penalty to mentally retarded capital offenders.¹²² The *Atkins* opinion noted that in order to determine whether a punishment is excessive, it must be judged by today’s standards and “not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted.”¹²³ In finding a national consensus in 2002, which was eighteen years after the *Penry* decision, approximately forty-two percent of states had enacted or were in the process of or attempting to enact statutes prohibiting the application of the death penalty to the mentally retarded.¹²⁴ Furthermore, evidence was

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 334–35.

¹¹⁹ *Id.* at 334.

¹²⁰ *Id.*

¹²¹ *Id.* (citing *Thompson v. Oklahoma*, 487 U.S. 815, 829 & n.30 (1988)).

¹²² *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

¹²³ *Id.* at 311.

¹²⁴ *See id.* at 314–15. The Court lists the following twenty-one states that had enacted or were attempting to enact statutes prohibiting the application of the death penalty to the mentally retarded: Kentucky, Tennessee, Georgia, Maryland, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina, Texas, Virginia, and Nevada. *Id.*

introduced which demonstrated that, in the states that permitted execution of the mentally retarded, it was rarely practiced.¹²⁵

The Court also noted that “[a]dditional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus” against imposing the death penalty on the mentally retarded.¹²⁶ The “additional evidence” to which the Court referred was the rejection of the practice by many religious communities, the disapproval within the world community, and American opinion polls.¹²⁷ Justice Scalia, in his dissenting opinion in *Atkins*, joined by Chief Justice Rehnquist and Justice Thomas, caustically suggested that the “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.”¹²⁸ In addition to an appeal to the world community, Scalia stated that the Court bolstered “its embarrassingly feeble evidence of ‘consensus’” by giving great weight to “the *consistency* of the direction of change.”¹²⁹ Moreover, Chief Justice Rehnquist, joined by Scalia, in a separate dissenting opinion, wrote:

I fail to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination. . . . [W]e have . . . explicitly rejected the idea that the sentencing practices of other countries could “serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.”¹³⁰

According to the Chief Justice, the only objective indicia of contemporary values that are firmly supported by precedent are state legislatures and sentencing jury determinations.¹³¹ Evidently, to Rehnquist and Scalia, the majority’s acknowledgment of the world community was an additional objective criterion.

¹²⁵ *Id.* at 316.

¹²⁶ *Id.* at 316 n.21.

¹²⁷ *Id.*

¹²⁸ *Id.* at 347 (Scalia, J., dissenting).

¹²⁹ *Id.* at 344.

¹³⁰ *Id.* at 324–25 (Rehnquist, C.J., dissenting) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1) (second alteration in original).

¹³¹ *Id.* at 324.

However, if eighteen states in *Thompson* established a national consensus, then surely twenty-one states prohibiting the application of the death penalty to the mentally retarded would also constitute a national consensus. Interestingly, both Rehnquist and Scalia joined in the part of the *Penry* decision that used *Thompson* as illustrative of a national consensus.¹³² Although the *Atkins* majority mentioned the world community, it did not rely on this additional “evidence” in order to find consensus.¹³³ As the *Penry* plurality noted, a national consensus was uncontrovertibly established in *Thompson*.¹³⁴ The same Justices who criticized the *Atkins* majority used the evidence in *Penry* to find that there was not a consensus; yet they disagreed with the use of that same evidence when used to reach a different result in *Atkins*.¹³⁵

Although both Scalia and Rehnquist dissented in *Thompson*,¹³⁶ they nevertheless stated in *Penry* that the objective indicia were supported by the *Thompson* precedent—where a national consensus was found.¹³⁷ In *Thompson*, eighteen states (thirty-six percent) that prohibited the execution of capital offenders who were under the age of sixteen at the time the crime was committed established a national consensus.¹³⁸ The objective indicia—even without a “direction of change” or foreign opinion—was even stronger in *Atkins*, as forty-two percent of states prohibited, or were attempting to prohibit, the imposition of the death penalty on mentally retarded capital offenders.¹³⁹

¹³² See *Penry v. Lynaugh*, 492 U.S. 302, 306, 334.

[I]n examining the objective evidence of contemporary standards of decency in *Thompson v. Oklahoma*, the plurality noted that 18 States expressly established a minimum age in their death penalty statutes, and all of them required that the defendant have attained at least the age of 16 at the time of the offense.

Id. at 334 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 829 & n.30 (1988)).

¹³³ See *Atkins*, 536 U.S. at 316 n.21 (majority opinion).

¹³⁴ See *Penry*, 492 U.S. at 334.

¹³⁵ Compare *Penry*, 492 U.S. at 306, 334, with *Atkins*, 536 U.S. at 321–22 (Rehnquist, C.J., dissenting).

¹³⁶ *Thompson*, 487 U.S. at 859.

¹³⁷ See *Penry*, 492 U.S. at 335.

¹³⁸ See *Thompson*, 487 U.S. at 829.

¹³⁹ See *Atkins*, 536 U.S. at 314–315.

C. Constructive Consensus: From Bowers to Lawrence

In *Bowers v. Hardwick*,¹⁴⁰ the Supreme Court upheld the constitutionality of a Georgia statute which outlawed consensual homosexual sodomy.¹⁴¹ The Court stated that there was no connection between homosexual sodomy and family, marriage, or procreation; therefore, there was no privacy interest to be protected.¹⁴² Seventeen years later, in *Lawrence v. Texas*,¹⁴³ the Court held that laws prohibiting consensual homosexual sodomy in one's home is a constitutionally protected right of privacy.¹⁴⁴ Laws prohibiting such conduct do not further a legitimate state interest that outweighs an individual's privacy interest.¹⁴⁵ The *Lawrence* opinion made reference to Western European bans on laws prohibiting homosexual sodomy,¹⁴⁶ however, it did not use this as evidence to reach its conclusion.¹⁴⁷ In fact, all references to foreign jurisprudence and opinion countered the historical assumptions used by the *Bowers* plurality.¹⁴⁸

In *Bowers*, the Court held that the Constitution does not confer a fundamental right to engage in homosexual sodomy in large part because "[p]roscriptions against that conduct have ancient roots."¹⁴⁹ Additionally,

¹⁴⁰ 478 U.S. 186 (1986).

¹⁴¹ *Id.* at 187–89.

¹⁴² *Id.* at 191.

¹⁴³ 539 U.S. 558 (2003).

¹⁴⁴ *Id.* at 578.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 573.

¹⁴⁷ *See id.* at 573–78.

¹⁴⁸ *See id.* at 573, 576–77.

¹⁴⁹ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); *see also id.* at 196–97 (Burger, C. J., concurring) (“Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King’s Courts, the first English statute criminalizing sodomy was passed. Blackstone described ‘the infamous *crime against nature*’ as an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named.’ The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right

(continued)

at the time the Court heard *Bowers*, twenty-four states and the District of Columbia provided criminal penalties for consensual sodomy performed in private, which provided support for the conclusion that American society continued to take issue with that conduct.¹⁵⁰

In *Lawrence*, the Court made reference to Britain's repeal of laws punishing homosexual conduct and the European Court of Human Rights' (ECHR) opinion in *Dudgeon v. United Kingdom*, which held that such laws are proscribed by the European Convention on Human Rights.¹⁵¹ The *Lawrence* Court stated that the ECHR decisions are "[a]uthoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now)."¹⁵²

According to Professor Larsen, the Court cannot justify the "actual use of foreign and international law in cases like *Lawrence*."¹⁵³ Larsen states that the Court looked abroad for "moral fact-finding,"¹⁵⁴ which, according to her, is the most problematic way to use foreign reasoning or foreign court decisions.¹⁵⁵ Under the moral fact-finding approach, the Court failed to use a foreign court's rationale; instead, it relied only on the result.¹⁵⁶ In *Lawrence*, so Larsen's argument goes, the Court used this approach by stating only that these values are "values we share with a wider civilization"¹⁵⁷ and by using the *Dudgeon* case as evidence.¹⁵⁸ The reference to or use of foreign sources in *Lawrence* was to "infuse the Constitution with substantive meaning."¹⁵⁹

would be to cast aside millennia of moral teaching." (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215 (Univ. of Chicago Press 1979) (citations omitted))).

¹⁵⁰ *Id.* at 193–94. The Court also noted that prior to 1961, all fifty states outlawed sodomy. *Id.* at 193.

¹⁵¹ *Lawrence*, 539 U.S. at 572–73 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 27 (1981)).

¹⁵² *Id.* at 573.

¹⁵³ Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1286 (2004).

¹⁵⁴ *Id.* at 1291.

¹⁵⁵ *Id.* at 1293.

¹⁵⁶ *See id.* at 1295.

¹⁵⁷ *Id.* at 1296 (quoting *Lawrence*, 539 U.S. at 576).

¹⁵⁸ *Id.*; *see also Lawrence*, 539 U.S. at 573, 576.

¹⁵⁹ Larsen, *supra* note 153, at 1326.

Similarly, in his dissent, Justice Scalia criticized the plurality's opinion because "[t]he widespread opposition to *Bowers* . . . is offered as a reason in favor of *overruling* it."¹⁶⁰ Scalia accused the plurality of selectively using foreign experience by ignoring countries that maintain antisodomy laws.¹⁶¹ According to Scalia, fundamental rights do not "spring into existence . . . because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on 'values we share with a wider civilization,' but rather rejected the claimed right to sodomy on the ground that such a right was not 'deeply rooted in *this Nation's* history and tradition."¹⁶²

On its face, the *Lawrence*, opinion appears to rely heavily on foreign practice and jurisprudence; however, when read closely against its predecessor, any and all references to foreign practice, experience, or international law are specific responses to the *Bowers* majority and concurring opinions. For example, the *Bowers* majority wrote that "[p]roscriptions against . . . [sodomy] have ancient roots."¹⁶³ And, Chief Justice Burger's concurrence opened Pandora's Box when he rationalized that homosexual sodomy has been

subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is . . . a crime not fit to be named." The common law of

¹⁶⁰ *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

¹⁶¹ *See id.* at 598 ("The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'" (quoting *Foster v. Florida*, 537 U.S. 990, 990 (2002)) (second omission in original)).

¹⁶² *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986)).

¹⁶³ *Bowers*, 478 U.S. at 192.

England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies.¹⁶⁴

The *Lawrence* majority countered that Chief Justice Burger's "sweeping references . . . to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take into account other authorities pointing in an opposite direction."¹⁶⁵ The majority explicitly stated: "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."¹⁶⁶ Accordingly, the *Lawrence* Court did not rely on foreign experience to reach its conclusion.

The *Lawrence* Court did not use international law to achieve a different result than *Bowers*. Its findings were based on two major factors¹⁶⁷—neither of which had to do with the European Court of Human Rights' decision or the world community's experience. Had the Court in *Lawrence* not even taken on head-to-head the historical roots arguments put forth by the *Bowers* majority and Chief Justice Burger (and therefore not had mentioned at all jurisprudence or experience beyond our borders), the *Lawrence* outcome would have been the same.

First, the *Bowers* Court framed the issue as whether the Due Process Clauses of the Fifth and Fourteenth Amendments confer a fundamental right to engage in homosexual sodomy.¹⁶⁸ Based on tradition, text, and history, the Court concluded there was no such right.¹⁶⁹ When *Lawrence* came before the Court, the majority interpreted the issue differently because the *Bowers* opinion failed "to appreciate the extent of the liberty at stake."¹⁷⁰ In determining whether there is a fundamental right to engage in consensual sodomy, the *Bowers* majority stated that the prohibition against the acts "have ancient roots."¹⁷¹ The *Lawrence* Court noted that most of the early American laws were aimed at sodomy between men and women

¹⁶⁴ *Id.* at 196–97 (Burger, C.J., concurring) (quoting BLACKSTONE, *supra* note 150, at 215).

¹⁶⁵ *Lawrence*, 539 U.S. at 572 (majority opinion).

¹⁶⁶ *Id.* at 576 (emphasis added).

¹⁶⁷ *See id.* at 564.

¹⁶⁸ *See Bowers*, 478 U.S. at 191, 194–95.

¹⁶⁹ *Id.* at 191–96.

¹⁷⁰ *Lawrence*, 539 U.S. at 567.

¹⁷¹ *Id.* (quoting *Bowers*, 478 U.S. at 192).

and “were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”¹⁷²

Second, the Court reasoned that two post-*Bowers* decisions—*Planned Parenthood v. Casey*¹⁷³ and *Romer v. Evans*¹⁷⁴—seriously eroded the foundations of *Bowers*.¹⁷⁵ The *Casey* decision “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education[,]”¹⁷⁶ and the same protection should be afforded to the autonomy in homosexual relationships.¹⁷⁷ *Romer*, although based upon the Equal Protection Clause, also brought into question the central holding of *Bowers* because “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”¹⁷⁸ In addition to *Casey* and *Romer* weakening *Bowers*, the Court acknowledged that “criticism from other sources is of greater significance.”¹⁷⁹ The decision had been substantially and continuously criticized in the United States and the courts of five states refused to follow it in the interpretation of their own constitutions.¹⁸⁰

Contrary to Scalia’s suggestion that the Court attempted to “impose foreign moods, fads, or fashions on Americans,”¹⁸¹ the Court simply countered historical arguments and comparativism with those who share our common law background. However, it is argued that even if foreign materials are not relied upon, these

references are integrated within the broader analyses being executed. Moreover, these references contain wider implications pertaining to how the jurisprudence of particular doctrines being interpreted via the use of foreign precedent is to be viewed by courts and practitioners in the

¹⁷² *Id.* at 568.

¹⁷³ 505 U.S. 833 (1992).

¹⁷⁴ 517 U.S. 620 (1996).

¹⁷⁵ *Lawrence*, 539 U.S. at 576.

¹⁷⁶ *Id.* at 573–74.

¹⁷⁷ *See id.* at 574.

¹⁷⁸ *Id.* at 574–75.

¹⁷⁹ *Id.* at 576.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 598 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari)).

future. Thus, given the increasing use of comparative analysis, one should not minimize the doctrinal impact of foreign materials on Eighth Amendment and Due Process jurisprudence¹⁸²

The *Lawrence* opinion was grounded solidly in the fact that *Bowers* was weakened by two subsequent cases. Furthermore, though the Court did not overtly use its evolving standards of decency test, the analysis was similar to that used in its Eighth Amendment jurisprudence.¹⁸³ Evidence of the “weakening” of *Bowers* included the facts that

[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.¹⁸⁴

Although the Court does not use evolving standards of decency to determine fundamental rights, the Court reframed the issue in *Lawrence* and there was overwhelming evidence that the foundation of *Bowers* was weakened.

The *Bowers* majority opinion and Chief Justice Burger’s concurring opinion relied in large part upon the historical roots against sodomy.¹⁸⁵ However accurate those historical roots may be, they are no longer applicable to today. For example, in 1989 only two states prohibited the execution of the mentally retarded even though historically it may have been an acceptable punishment.¹⁸⁶ But, when viewed in light of today’s standards, it no longer is acceptable. Similarly, at the time *Bowers* was decided almost half the states prohibited sodomy between consenting adults.¹⁸⁷ The *Bowers* Court drew upon the historical prohibition as a justification to permit the states—fifty percent of them at that time—to maintain such a ban.¹⁸⁸ Over time, however, the historical rationale has

¹⁸² Glensy, *supra* note 31, at 372–73.

¹⁸³ See *Lawrence*, 539 U.S. at 573.

¹⁸⁴ *Id.*

¹⁸⁵ See *Bowers v. Hardwick*, 478 U.S. 186, 192–94, 196–97 (1986).

¹⁸⁶ *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002).

¹⁸⁷ *Bowers*, 478 U.S. at 193–94.

¹⁸⁸ See *id.* at 192–96.

become inapplicable to the reality of today. By the time *Lawrence* came before the Court, only twenty-six percent of states retained the ban.¹⁸⁹

Under an evolving standards of decency examination, there is no national consensus that such conduct should be banned or is viewed in the same historical light cited by Chief Justice Burger in *Bowers*. Furthermore, not only have states repealed those laws,¹⁹⁰ but under the second prong of the evolving standards of decency analysis, those states that continue to forbid such conduct, rarely, if ever, enforce the law.¹⁹¹ There has undoubtedly been a consistency in the direction of change since *Bowers*.

The evolving standards of decency means of interpreting the cruel and unusual punishment clause of the Eighth Amendment is well settled.¹⁹² In *Weems v. United States*,¹⁹³ the Court wrote:

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth. . . . The [cruel and unusual punishment] clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.¹⁹⁴

Even though it has not been overtly applied beyond Eighth Amendment cases, approaching cases like *Lawrence* with the same analysis is just as reasonable. Although *Lawrence* appertains to privacy interests, the right to privacy, when based on “ancient historical roots,” should also be interpreted in light of modern views on how privacy is defined.¹⁹⁵

¹⁸⁹ See *Lawrence*, 539 U.S. at 573.

¹⁹⁰ Melanie C. Falco, Comment, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 751 (2004).

¹⁹¹ See *id.*

¹⁹² See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 821 n.4 (1988) (citing *Weems v. United States*, 217 U.S. 349 (1910)).

¹⁹³ 217 U.S. 349 (1910).

¹⁹⁴ *Id.* at 373, 378 (quoted in *Thompson*, 487 U.S. at 821 n.4).

¹⁹⁵ This argument is not meant to apply to cases where privacy interests are also balanced with other constitutional rights, such as the right to life versus a woman’s right to obtain an abortion. Although scientific evidence and society’s views on when it should be
(continued)

The right to privacy, like the cruel and unusual punishment clause, is not conclusively defined in the Constitution. The “constitutional text itself is often open-ended and invites the use of community standards as a means of interpretation.”¹⁹⁶ For the right of privacy to “be vital [it] must [also] be capable of wider application than the mischief which gave it birth.”¹⁹⁷ Similar to evaluating what is “cruel and unusual punishment,” a way of determining what constitutes fundamental values—like privacy—is “to figure out what constitutes a particular society’s way of expressing values in the world.”¹⁹⁸ The objective indicia used in Eighth Amendment jurisprudence—state legislatures and jury determinations—are firmly established by precedent.¹⁹⁹ The indicia are inward rather than outward looking.

The *Lawrence* Court’s references to jurisprudence or laws outside our borders alone were simply responses to the *Bowers* references to the historical roots of prohibiting sodomy.²⁰⁰ Just as the *Atkins* and *Thompson* decisions were firmly rooted in accepted modes of constitutional analyses, so too was *Lawrence*.

permissible to obtain an abortion do change, the right to obtain an abortion and the limitations on that right are not drawn from antiquated historical beliefs and opinions.

¹⁹⁶ Bodansky, *supra* note 12, at 425.

¹⁹⁷ *Weems*, 217 U.S. at 373.

¹⁹⁸ Levinson, *supra* note 29, at 363.

¹⁹⁹ *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting).

²⁰⁰ *See Koh, supra* note 113, at 51. The author argued that the

Supreme Court simply used foreign legal evidence to challenge assumptions that the lower court had accepted without analysis. For example, to justify its ruling upholding the Texas sodomy statute, the Texas Court of Appeals had cited ancient Roman law, Blackstone, and Montesquieu to support the claim that ‘Western civilization has a long history of repressing homosexual behavior by state action.’ Yet incredibly, in making that assertion, the court took no notice of any judicial decision from any *modern* Western civilization, when all of Europe, for example, had for more than two decades taken the opposite view.

Id. (quoting *Lawrence v. State*, 41 S.W.3d 349, 361 (Tex. App. 2001)).

Case	States Prohibiting Punishment	Percentage	National Consensus
Thompson (1988)	18	36%	Yes
Penry (1989)	2	4%	No
Stanford (1989)	15 (16 year olds) 12 (17 year olds)	30% 24%	No No
Atkins (2002)	21	42%	Yes
Roper (2005)	18	36%	Yes
Case	States Prohibiting Conduct	Percentage	National Consensus
Bowers (1986)	24	48%	Yes
Lawrence (2003)	13	26%	No

IV. CONCLUSION

The Supreme Court's reliance on national consensus has been developed and solidified through its case law and is a well-settled, conventional mode of constitutional analysis. When the Court finds a national consensus, it ensures that only American standards are used in determining prevailing standards of decency. Any references to foreign opinion or jurisprudence have been used only after American notions of decency have been established and only for the purpose of either confirming the conclusion at which it already arrived or simply as parenthetical departures from the overall decision.