

COMMENT

THE DEBATE OVER FOREIGN LAW IN *ROPER V. SIMMONS*

[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty.

— Justice Kennedy, for the majority¹

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

— Justice Scalia, in dissent²

Last Term, in *Roper v. Simmons*,³ the Supreme Court held that executing an individual for crimes committed while a juvenile was “cruel and unusual punishment[],”⁴ confirming its judgment by noting an international consensus against the practice.⁵ When the Court in *Atkins v. Virginia*⁶ and *Lawrence v. Texas*⁷ had previously considered foreign and international law,⁸ an outpouring of criticism and praise arose from the academy.⁹ Similarly, the *Roper* decision has prompted a national debate over the propriety of citing foreign and

¹ *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005).

² *Id.* at 1225 (Scalia, J., dissenting).

³ 125 S. Ct. 1183.

⁴ U.S. CONST. amend. VIII.

⁵ *See Roper*, 125 S. Ct. at 1198.

⁶ 536 U.S. 304 (2002).

⁷ 123 S. Ct. 2472 (2003).

⁸ *Id.* at 2483 (“The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”); *Atkins*, 536 U.S. at 317 n.21 (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

⁹ *Compare, e.g.*, 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, 1326–27 (2004) (criticizing *Lawrence* for “us[ing] foreign and international law to infuse the Constitution with substantive meaning”), and Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 77–79 (2004) (faulting *Atkins* for not seriously inquiring into international opinion, but rather taking amici at their word), with Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 281–82 (2003) (praising the Court’s transnational turn), Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 56 (2004) (arguing enthusiastically that “*Lawrence* and *Atkins* may signal that the nationalists’ heyday has finally passed”), and Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 89 (2004) (commending *Lawrence* as “a rather modest use of international law in aid of constitutional interpretation”).

international law in domestic constitutional cases;¹⁰ Congress has even entertained resolutions condemning the practice.¹¹ In the following Comments, Professors Vicki C. Jackson, Jeremy Waldron, and Ernest A. Young take a hard look at the use of foreign and international law in cases like *Roper*.

Roper arose out of the proposed execution of Christopher Simmons, who was seventeen when he murdered Shirley Crook.¹² Days before the murder, he had convinced a friend to join him; they would “get away with it,” he said, “because they were minors.”¹³ On the night of the murder the two entered Crook’s house, took her to a railroad trestle over the Meramec River, hog-tied her hands and feet with electrical cable, and covered her entire face in duct tape.¹⁴ Simmons pushed Crook, alive and conscious, into the river below to drown.¹⁵ When later arrested by the police, Simmons confessed to the homicide.¹⁶

At trial a state jury convicted Simmons of first-degree murder.¹⁷ During the penalty phase, defense counsel argued that Simmons’s youth should mitigate the gravity of his crime,¹⁸ but the jury nevertheless found three aggravating factors and sentenced him to death.¹⁹

¹⁰ See, e.g., Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL’Y REV., June–July 2005, at 33, 47–49 (arguing that *Roper*’s use of foreign authorities undermines the democratic basis of American constitutional jurisprudence); 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. (forthcoming Dec. 2005) (analyzing historical practice to argue that the Court should avoid citing foreign law unless interpreting the Fourth and Eighth Amendments); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. (forthcoming 2005) (pointing out that international norms have traditionally supplied substantive meaning in some constitutional contexts); Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”*: *International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005) (arguing that the Constitution’s framers did not intend to incorporate foreign authorities).

Foreshadowing the current controversy, Justices Scalia and Breyer publicly debated the issue but six weeks before *Roper* was decided. See Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/01F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

¹¹ See, e.g., S. Res. 92, 109th Cong. (2005) (“Resolved, That it is the sense of the Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”).

¹² *Roper*, 125 S. Ct. at 1187.

¹³ *Id.*

¹⁴ See *State v. Simmons*, 944 S.W.2d 165, 169–70 (Mo. 1997).

¹⁵ See *id.* at 170.

¹⁶ *Id.*

¹⁷ *Roper*, 125 S. Ct. at 1188.

¹⁸ See *id.* at 1188–89.

¹⁹ See *Simmons*, 944 S.W.2d at 191 (listing “murder for pecuniary gain,” “murder to avoid a lawful arrest,” and “murder involv[ing] depravity of the mind” as the three aggravating factors).

Simmons moved to overturn the conviction on account of ineffective assistance of counsel, among other claims, but was denied by the motion court and the Missouri Supreme Court.²⁰ After the U.S. Supreme Court's decision that the Eighth Amendment proscribes capital punishment for the mentally retarded in *Atkins*,²¹ Simmons filed for state habeas relief claiming that a national consensus had developed against juvenile execution.²² The Missouri Supreme Court granted his request, setting aside Simmons's sentence and resentencing him to life imprisonment.²³

The U.S. Supreme Court affirmed. Writing for the majority, Justice Kennedy²⁴ acknowledged the similarities between the Court's inquiry in *Atkins* and its task in *Roper*.²⁵ First, the majority considered the "objective indicia of consensus,"²⁶ finding that a majority of states rejected juvenile execution and that the national trend had consistently favored its abolition.²⁷ Second, the majority invoked its "own independent judgment" to hold that capital punishment was unconstitutionally disproportionate for a juvenile convicted of first-degree murder.²⁸ In making this judgment, Justice Kennedy relied heavily on psychological and sociological studies suggesting that juveniles' underdeveloped mental capacity eviscerated retribution and deterrence rationales for capital punishment.²⁹ Third, he confirmed this judgment by examining international opinion, which he claimed "has turned its face against the juvenile death penalty."³⁰ Justice Kennedy observed that only Somalia and the United States had failed to ratify Article 37 of the United Nations Convention on the Rights of the Child,³¹ which prohibits juvenile execution.³² Furthermore, the United Kingdom's abolition of juvenile execution "decades before" its complete abolition

²⁰ See *id.* at 170, 191. The federal courts similarly denied Simmons's request for habeas relief. *Simmons v. Bowersox*, 235 F.3d 1124, 1127 (8th Cir. 2001).

²¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²² See *State ex. rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003). "Juvenile execution" refers to the age of a defendant at the time of a crime, even if the trial or execution does not happen until the defendant reaches adulthood. See *id.* at 399 n.2.

²³ *Id.* at 413.

²⁴ Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's opinion.

²⁵ See *Roper*, 125 S. Ct. at 1192.

²⁶ *Id.*

²⁷ See *id.* at 1194. The majority also noted that the trend in abolition had been slower than the analogous trend analyzed in *Atkins*, but reasoned that the difference could be attributed to the "impropriety of executing juveniles between 16 and 18 years of age gain[ing] wide recognition earlier than the impropriety of executing the mentally retarded." *Id.* at 1193.

²⁸ *Id.* at 1192.

²⁹ See *id.* at 1195–96.

³⁰ *Id.* at 1199.

³¹ *Adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

³² See *Roper*, 125 S. Ct. at 1199.

of capital punishment “bears particular relevance here in light of the historic ties between our countries.”³³

Justice Stevens concurred to stress the importance to the Court’s holding of evolving interpretations of the Constitution, a principle “settled since John Marshall breathed life into its text.”³⁴ All that remained for debate was the “pace of that evolution.”³⁵

Justice O’Connor dissented. She accused the majority of “substitut[ing] [its] judgment . . . for the judgments of the Nation’s legislatures,”³⁶ since the evidence of domestic consensus was “weaker than in most prior cases in which the Court has struck down a particular punishment.”³⁷ Although she agreed with the Court’s general methodology, including its citation of foreign law,³⁸ Justice O’Connor found the moral arguments against juvenile execution unconvincing because the “mitigating characteristics associated with youth [did] not justify an absolute age limit.”³⁹

Justice Scalia also dissented.⁴⁰ He claimed that “[w]ords have no meaning” if the majority could find a domestic consensus against juvenile execution when less than half of capital punishment states forbade the practice.⁴¹ But Justice Scalia primarily bristled at what he thought was “the real force driving today’s decision” — “the Court’s own judgment.”⁴² In contrast to the majority’s analysis that neither deterrence nor retribution justified juvenile execution, he argued that juries were better equipped than the Court to determine the merits of execution in any given case.⁴³ Finally, he accused the majority of invoking foreign and international law selectively,⁴⁴ arguing that “[e]ither America’s principles are its own, or they follow the world; one cannot have it both ways.”⁴⁵ By relying on an international consensus on the juvenile death penalty expressly rejected by the political branches, the

³³ *Id.*

³⁴ *See id.* at 1205 (Stevens, J., concurring). Justice Ginsburg joined Justice Stevens’s concurrence.

³⁵ *Id.*

³⁶ *Id.* at 1206 (O’Connor, J., dissenting).

³⁷ *Id.* at 1211.

³⁸ *See id.* at 1215–16 (“[T]he existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.”).

³⁹ *Id.* at 1216.

⁴⁰ Chief Justice Rehnquist and Justice Thomas joined Justice Scalia’s dissent.

⁴¹ *Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting).

⁴² *Id.* at 1221 (internal quotation marks omitted).

⁴³ *See id.* at 1225.

⁴⁴ *See id.* at 1228 (“To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”).

⁴⁵ *Id.* at 1228 n.9.

majority, Justice Scalia asserted, had effectively claimed the right to “ratify treaties on behalf of the United States.”⁴⁶

Prompted by the *Roper* majority’s use of international consensus and Justice Scalia’s fiery dissent against such reliance, these Comments critique the use of foreign and international law in domestic constitutional adjudication.

In *Constitutional Comparisons: Convergence, Resistance, Engagement*,⁴⁷ Professor Jackson proposes a framework for understanding how courts treat transnational legal norms in interpreting their own constitutions: courts can incorporate them, resist them, or engage with them.⁴⁸ Professor Jackson praises engagement, arguing that it has been traditionally embraced in Eighth Amendment jurisprudence⁴⁹ and more generally offers “modest benefits” to constitutional interpretation,⁵⁰ especially given the inevitability of comparison.⁵¹ She proposes tentative standards of inquiry for the Court in considering foreign or international law and concludes that the Court appropriately considered the international consensus against juvenile execution in its *Roper* decision.⁵²

In *Foreign Law and the Modern Ius Gentium*,⁵³ Professor Waldron revives the ancient idea of the law of nations, or *ius gentium*, to justify turning to foreign law when deciding domestic cases. Tracing the *ius gentium*’s origins to Rome, Professor Waldron argues that it was not originally confined to what we now call international law, but instead constituted a repository of wisdom for governance in all matters international and domestic.⁵⁴ Early jurists relied on the *ius gentium* much as scientists rely on the experiments of their peers worldwide,⁵⁵ and nothing in modern jurisprudence should prevent courts from doing the same today.⁵⁶

In *Foreign Law and the Denominator Problem*,⁵⁷ Professor Young argues that *Roper*’s use of foreign law is more determinative than most commentators let on. Although domestic courts could use foreign law

⁴⁶ *Id.* at 1226 (citing S. EXEC. DOC. NO. 102-23 (1992)).

⁴⁷ Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

⁴⁸ *See id.* at 112–15.

⁴⁹ *See id.* at 109 & nn.3–4.

⁵⁰ *Id.* at 111.

⁵¹ *See id.* at 120.

⁵² *See id.* at 127.

⁵³ Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

⁵⁴ *See id.* at 133–35.

⁵⁵ *See id.* at 138–39.

⁵⁶ *See id.* at 140–43.

⁵⁷ Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

to determine the consequences of a particular policy or to discern arguments as yet unarticulated domestically,⁵⁸ Professor Young argues that the *Roper* Court instead used foreign consensus to expand the “denominator” — the community that defines mainstream opinion — of the Eighth Amendment inquiry into whether a consensus views juvenile execution as cruel and unusual.⁵⁹ Comparing this inquiry to assessing community standards under First Amendment obscenity doctrine,⁶⁰ he cautions that expanding the denominator by relying on foreign law may have profound and troubling consequences for adjudication.⁶¹

⁵⁸ *See id.* at 150.

⁵⁹ *See id.* at 153–54.

⁶⁰ *See id.* at 158–61.

⁶¹ *See id.* at 161–67.