
UNIVERSITY OF CONNECTICUT
1881

BROWN AND *ROPER*: THE AMERICAN SOUTH AND THE SUPREME COURT

Takuya Katsuta

Author

Takuya Katsuta is an Associate Professor of Law at Osaka City University. *This Article is partly based on a presentation at the 72nd annual meeting of Japan Society of Comparative Law held at Kanagawa University, Japan, June 6, 2009. The author is grateful to the participants at the meeting for their comments. Many thanks to Michael Klarman and Yutaka Sano for their comments on the draft of this Article. Masaki Abe's suggestions were also inspiring. Errors remain the author's. The author is a Japanese legal academic, which explains sporadic references to Japanese law or its legal system. This Article was originally published for Japanese readers. Takuya Katsuta, Buraun Hanketsu to Ropa Hanketsu wo Tsunagu Mono: Amerika Nanbu no Ho Bunka to Saikosai [Roper and Brown: The American South and the Supreme Court], 56 HŌGAKU ZASSHI [J. L. & POL. OSAKA CITY U.] 618 (2010). Significant changes were made in order to provide information more relevant to English-speaking readers.*

Abstract

This article examines the significance of foreign law and international relations for the Supreme Court of the United States when it resolves constitutional controversies, focusing primarily on the controversial 2005 decision, *Roper v. Simmons*. The conflict between Justices Kenney and Scalia on the issue of referring to foreign law comes under review by reference to the number of states and nations that permitted the challenged practice when the Court applied the cruel and unusual punishment clause of the Eighth Amendment in its decisions on major death penalty issues. This article reveals that since 1958, the Court has consistently referred to foreign law as relevant in decisions, and furthermore that Justice Scalia initiated the criticism against referring to foreign law in the late 1980s. It then considers the question of whether the international climate actually took center stage in *Roper* by considering several factors: the increasingly hostile international environment against the U.S. death penalty practice, the forming global network of the judiciary, and the institutional constraints posed by the Constitution to conform to the international trend through the political branches. It finally contrasts *Roper* with *Brown v. Board of Education*, and concludes that the decisions reveal that the Court arguably favored national interests at the cost of regional preferences of the American South.

CONNECTICUT JOURNAL OF INTERNATIONAL LAW

TABLE OF CONTENTS

INTRODUCTION

This article examines the significance of foreign law and international relations for the Supreme Court of the United States when it resolves difficult constitutional controversies by focusing primarily on the controversial 2005 decision, *Roper v. Simmons.*[1] The Court in *Roper* held that the execution of defendants under the age of eighteen constituted cruel and unusual punishment.[2] *Roper* provides us with an excellent opportunity to observe how the Court serves its extraordinary role in American politics. Let us assume for the sake of argument that the Supreme Court invalidated the state law that allowed executing juveniles in order to follow the international trend at that time, or to avoid damage to the national interests of the United States. Under what circumstances does the Supreme Court of the United States, the least dangerous branch of the most powerful country in the world, which often invites criticisms in the global community on human rights issues,[3] follow international trends on important legal and political issues? This is the problem this article tries to analyze.

The *Roper* decision invited various criticisms and the reference to foreign law was most severely and widely denounced. Although the Court qualified the opinion of the world community as something not controlling its outcome, it did acknowledge that the world community provided "respected and significant confirmation" for its own conclusions.[4] This seemingly constrained reference to foreign law invoked very eager criticism not only from a member of the Court,[5] but also from highly influential lawyers.[6] *Roper* was the high point of the conflict on the appropriateness of citing foreign law when the Court applies the U.S. Constitution to domestic issues—the debate itself was radically stimulated by controversial decisions like *Atkins v. Virginia*[7] and *Lawrence v. Texas*.[8]

This article does not engage in the debate over whether it is appropriate to refer to foreign law, or in the inquiry for a theory of constitutional comparativism.[9] However, this article does consider the significance of *Roper* from the viewpoint of the national interests of the United States. In doing so, it contrasts *Roper* with

---

1. Roper v. Simmons, 543 U.S. 551 (2005).
2. U.S. CONST. amend. VIII.
3. *See, e.g.*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed. 2005).
4. Roper v. Simmons, 543 U.S. 551, 577 (2005).
5. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, criticized the Court for its sophistry when it invoked alien law only when it agreed with one's own thinking. *Roper*, 543 U.S. at 626 (Scalia, J., dissenting).
6. *See, e.g.*, Forward, Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 31, 86 (2005) (criticizing the Court for its citing foreign law as flirting with the idea of universal natural law)*; see also* Comment, *The Debate Over Foreign Law in* Roper v. Simmons, 119 HARV. L. REV. 103 (2008); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2005).
7. Atkins v. Virginia*,* 536 U.S. 304 (2002).
8. Lawrence v. Texas, 539 U.S. 558 (2003).
9. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Roger P. Alford, Roper v. Simmons *and our Constitution in International Equipoise*, 53 UCLA L. REV. 1 (2005); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008).

Brown v. Board of Education.[10] The author believes the significance of *Roper* is better understood when one takes into account the difficult international environment facing the United States, the expectation that the Court ought to lead the nation to resolve difficult political questions in the form of constitutional interpretation, and ensure the larger national interests of the United States at once. *Brown* is the most interesting case to contrast with *Roper,* not only because it was an arguably political decision amid the Cold War, but also because the Court invalidated school segregation, a distinctively Southern practice that was not approved of by the nation at large. This article examines what links *Brown* with *Roper*: the long history of racial subordination in the American South, its unfinished influence on American criminal law, and the Supreme Court as an important political moderator between the South and the international community.

Part I of this Article traces the Supreme Court decisions on major death penalty issues, focusing on the number of states in the United States and foreign countries that permitted the constitutionally objected law. The rigorous criticism against referring to foreign law is a relatively newer phenomenon in the area of major death penalty issues, and the Court has been increasingly influenced by international opinion despite its pretense that it was not controlling the outcome of domestic constitutional issues. Part II briefly outlines the global trend of increasing hostility toward capital punishment. Part III illustrates the national interests of the United States concerning death penalty issues in an increasingly impatient environment in the international community. Part IV brings to light the willingness of the Supreme Court Justices to participate in the global network of the judiciary in the post-Cold War era. Part V considers the constitutional framework in which the Supreme Court, not the President or Congress, leads the United States into the international concurrence and ensures its national interests. Finally, Part VI juxtaposes *Brown* and *Roper*, and concludes that those decisions reveal that the Supreme Court arguably favored national interests at the cost of the regional preference of the American South.

It might be appropriate to caution before continuing that this article is descriptive, not normative. This Article describes the situation in which the Court plays its extraordinary role of resolving difficult political questions in the form of constitutional interpretation. Offering abstract theory to explain the behavior of the Court and constructing normative theory of comparative law are both beyond the reach of this Article.

I. THE NUMBERS IN MAJOR DEATH PENALTY DECISIONS

The U.S. Constitution prohibits cruel and unusual punishment.[11] The opinion of the Court in *Roper*, written by Justice Kennedy, stated that international opinion was only providing "respected and significant confirmation" for its own

10. Brown v. Board of Education, 347 U.S. 483 (1954).
11. U.S. CONST. amend. VIII.

conclusions, not controlling its decisions.[12] However, Justice Scalia eagerly criticized the Court because "the views of other countries and the so-called international community [took] center stage."[13] In short, Justices Kennedy and Scalia disagreed about the actual significance that foreign law had in the controversial decision. One has to go beyond the text of Supreme Court decisions and ask whether the Court had politically acted in determining that there was a national consensus against the execution of juveniles when as many as twenty states allowed it. This part of the article focuses on the major death penalty cases in which the Court counted the number of states and foreign countries that permitted the death penalty in an attempt to resolve constitutional conflicts concerning the death penalty. The Court conducted a proportionality analysis or categorical determination in those major death penalty cases. These are referred to as major death penalty cases or major death penalty issues in this article.

Before we consider those political elements, two premises should be clarified. The first is the method of constitutional interpretation when the Court expounds the meaning of the Eighth Amendment. The second is the general trend of Supreme Court decisions on death penalty issues.

First, in the area of the Eighth Amendment, the evolving standards of decency of a maturing society, not the original intent, has been the controlling norm for constitutional interpretation. More precisely, executing juvenile or mentally retarded offenders is undoubtedly constitutional if one mechanically follows the customs at the time of the ratification of the Eighth Amendment. The Eighth Amendment would be almost meaningless if the fixed original intent controled current constitutional controversies.[14] As we shall see, the Supreme Court has adopted evolving standards since 1958.[15]

Second, the general trend of Supreme Court decisions concerning the death penalty should be summarily stated here.[16] The Court in *Furman v. Georgia*[17] invalidated Georgia's capital punishment procedure because it gave too much discretion to the jury to decide whether the defendant should be sentenced to death. A few years of a continuing moratorium of the execution in the United States followed, perhaps along with the European trend. But the nation witnessed a backlash against the procedural reforms of death sentencing procedures in most retentionist states. In 1976, the Court held it constitutional, in *Gregg v. Georgia*[18], to sentence to death under the revised procedure. In *Gregg*, the jury was given the sentencing guidelines for its decision on whether the defendant should be sentenced to death.[19]

---

12. Roper v. Simmons, 543 U.S. 551, 578 (2005).
13. *Id*. at 622 (Scalia, J., dissenting).
14. *See e.g*., Thompson v. Oklahoma, 487 U.S. 815, 821 n.4 (1988).
15. Trop v. Dulles, 356 U.S. 86 (1958).
16. *See e.g*., STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002).
17. Furman v. Georgia, 408 U.S. 238 (1972).
18. Gregg v. Georgia, 428 U.S. 153 (1976).
19. Many states narrowed the jury's discretion by following the Model Penal Code, which listed several aggravating circumstances. *See e.g.*, BANNER, *supra* note 16, at 267–75.

After the executions resumed, various constitutional issues centered around the death penalty were brought to the Court. This article deals with those major death penalty cases in which the Court discussed the relevance of foreign law or the international climate in expounding the Eighth Amendment. That the discussion on foreign law came to a head in *Roper* puts in perspective the actual significance that foreign law had in *Roper*. The Court resolved issues such as whether defendants under a certain age should be exempted from being executed,[20] or whether defendants who raped adult women but did not kill the victims should be exempted from being executed.[21] When the Court made its judgments on these major issues it counted up the states that prohibited or allowed the execution of offenders who were not categorically exempted by the state legislation at issue. The text of the Eighth Amendment, "cruel and *unusual* punishments"[22], lends itself to a tally because the word "unusual" itself implies heresy. Thus, it is quite natural for the Court to tally prohibiting and permitting states when it applies the evolving standards of decency.[23] In making this decision, reference to foreign law seems natural, though not indispensible. Numbers, not the rationale of foreign law, are most apparently featured in decisions concerning the major death penalty issues. This is the area where numbers matter most strikingly. Taking note of numbers in these decisions by the Court should give us insight to the question of how the Court actually treated numbers inside and outside the United States. We shall examine the numbers in this area in chronological order.[24]

A. The Evolving Standards of Decency in Major Death Penalty Cases

As mentioned above, the Court first adopted evolving standards of decency in *Trop v. Dulles*.[25] The constitutionality of 401(g) of the Nationality Act of 1940 was at issue in *Trop*. The defendant lost his citizenship for his court-martial conviction and dishonorable discharge for wartime desertion.[26] The plurality opinion written by Chief Justice Warren stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing

---

20. Roper v. Simmons, 543 U.S. 551 (2005); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

21. Coker v. Georgia, 433 U.S. 584 (1977).

22. U.S. CONST. amend. VIII (emphasis added).

23. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 n.32 (1958).

24. Factors other than numbers were considered by the Court in these judgments. In particular, the data reflecting the actions of sentencing juries can afford a significant and reliable objective index of social mores. *See, e.g.*, *Roper*, 543 U.S. at 590 (O'Connor, J., dissenting). However, the actions of sentencing juries, the author thinks, are less important than the actions of state legislatures because one could argue that the discretion of a jury of twelve citizens in deciding whether, in a particular case, the defendant should be sentenced to death is needed even though juries infrequently recommend the death sentence. Other factors like scientific studies were also considered, but this Article focuses on numbers because actions of state legislatures were treated as the most important factor when the Court considered whether there existed the national consensus against executing certain peoples or offenders found guilty for capital crimes.

25. *Trop*, 356 U.S. at 86 (plurality opinion).

26. *Id*. at 87–90.

society."[27] When invalidating the Act, the plurality mentioned the virtual unanimity of the civilized nations of the world that statelessness is not to be imposed as punishment for a crime.[28] The Court referred to the United Nation's survey of the nationality laws of eighty four nations of the world, which revealed that only two countries, the Philippines and Turkey, imposed denationalization as a penalty for desertion.[29] It should be noted that no objection was raised by minority opinions against reference to the foreign law itself. In fact, Justice Frankfurter referred to foreign law in his dissenting opinion to buttress his proposition that denationalization, when attached to the offense of wartime desertion, cannot justifiably be deemed so at variance with enlightened concepts of "humane justice".[30]

In 1977, the Court denied the acceptability of the death penalty for offenders who raped adult women in *Coker v. Georgia*.[31] Justice White wrote the plurality opinion in which he sought "guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman."[32] In holding the state law unconstitutional, he turned his attention to numbers. According to him, Georgia was the sole jurisdiction in the United States that authorized a sentence of death when the rape victim was an adult woman.[33] He also referred to the climate of international opinion concerning the acceptability of a particular punishment, and confirmed that it was "not irrelevant" that out of sixty major nations in the world surveyed in 1965, only three retained the death penalty for rape where death did not ensue.[34] In *Coker*, the trend against the acceptability of death penalty for a rape of adult women was patently evident, inside and outside the United States. Here again, as in *Trop,* no member of the Court showed opposition to the reference of foreign law itself.

Next, in *Enmund v. Florida*,[35] the Court held that imposition of the death penalty on offenders who aided and abetted a felony in the course of which murder was committed by others, but who themselves did not kill, attempt to kill, or intend to kill, violated the Eighth and Fourteenth Amendments. Justice White's majority opinion stated that only eight jurisdictions permitted the death penalty to be imposed solely because the defendant somehow participated in a robbery during the course of which a murder was committed.[36] He then confirmed that the climate

27. *Id.* at 100 (citing Weems v. United States, 217 U.S. 349 (1910)).
28. *Id*. at 102.
29. *Id*. at 102–03.
30. *Id*. at 126–27 (Frankfurter, J., dissenting).
31. Coker v. Georgia, 433 U.S. 584 (1977).
32. *Id*. at 593.
33. *Id*. at 595–96.
34. *Id*. at 596 n.10 (citing Trop v. Dulles, 356 U.S. 86, 102 (1958) (citing U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, CAPITAL PUNISHMENT 48, 86 (1986))).
35. Enmund v. Florida, 458 U.S. 782 (1982).
36. *Id*. at 792. He continued by saying that even if the nine states are included where such a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances—which often include the defendant's minimal participation in the murder—only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die. *Id*.

of international opinion was an additional consideration that was "not irrelevant."[37] Here again, the reference to international opinion did not invoke criticism from any member of the Court.

In 1988, the Court in *Thompson v. Oklahoma* held that application of the Oklahoma death penalty statute to a homicide defendant who was fifteen years old at time of the offense constituted cruel and unusual punishment prohibited by the Eighth Amendment.[38] The plurality opinion of the Court, written by Justice Stevens, attended to the actions of state legislatures and found that most state legislatures have not expressly confronted the question of establishing a minimum

crime, respectively in *Penry v. Lynaugh*[45] and in *Stanford v. Kentucky*.[46] *Penry* should have been easier for the Court to deny the establishment of a national consensus for the categorical exclusion because only one state banned the execution of mentally retarded persons who had been found guilty of a capital offense at the time of the decision.[47]

In *Stanford*, the Court was faced with a more difficult problem: the constitutionality of executions of juveniles under eighteen at the time of the crime.[48] Justice Scalia's opinion of the Court first emphasized that it was the American conception of decency that was dispositive, and confirmed that the practices of other nations could not serve to establish the first Eighth Amendment prerequisite that the practice was accepted among the American people.[49] He then looked into the actions of state legislatures. According to his calculation, of the thirty seven states whose law permitted capital punishment, fifteen declined to impose it upon sixteen-year-old offenders, and twelve declined to impose it on seventeen-year-old offenders.[50] This means that twenty states permitted executing sixteen-year-old offenders and twenty five states allowed for the execution of seventeen-year-old offenders. To Justice Scalia, this did not establish the degree of national consensus the Court had previously thought sufficient to label a particular punishment cruel and unusual.[51]

Justice Brennan wrote a dissenting opinion in which he criticized the Court for its discussion of state laws, arguing that these legislative determinations provided a distorted view of the evidence of contemporary standards. According to him, twelve of the states whose statutes specifically permitted capital punishment mandated that offenders under 18 not be sentenced to death; when one added to these twelve states the fifteen (including the District of Columbia) in which capital punishment is not authorized at all, it appeared that the governments in twenty seven of the states have concluded that no one under eighteen should face the death penalty. An additional three states explicitly refused to authorize sentences of death for those who committed their offense when under seventeen, making a total of thirty states that would not tolerate the execution of one petitioner.[52]

Justice Brennan then looked into further indicators of contemporary standards of decency that should inform the Court's consideration of the Eighth Amendment question. For him, these were the opinions of respected organizations like the

---

45. Penry v. Lynaugh, 492 U.S. 302 (1989).
46. Stanford v. Kentucky, 492 U.S. 361 (1989).
47. *Penry*, 492 U.S. at 334–35.
48. *Stanford*, 492 U.S. at 364–65. In *Stanford,* two cases were consolidated to decide whether the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age constitutes cruel and unusual punishment under the Eighth Amendment. *Id.*
49. *Id.* at 370 n.1 (citing Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).
50. *Id.* at 370.
51. *Id.*
52. *Id.* at 384 (Brennan, J., dissenting). Justice Brennan excluded Vermont from death penalty states because its sentencing scheme did not guide jury discretion so it should be unconstitutional under Furman v. Georgia, 408 U.S. 238 (1972). *Id.* at 385 n.1 (citing Thompson v. Oklahoma, 487 U.S. 815, 826, 826 n.25 (1988)).

American Bar Association, the National Council of Juvenile and Family Court Judges, and the American Law Institute's Model Penal Code.[53] Next, he turned his attention to the Court's recognition of legislations in other countries as objective indicators of contemporary standards of decency. Relying on the brief presented by Amnesty International, he said that in over fifty countries, including nearly all of Western Europe, the death penalty either had been formally abolished or had limited its use to exceptional crimes. Twenty seven other countries did not, in practice, impose the penalty; of the nations that retained capital punishment, a majority, sixty five nations, prohibited the execution of juveniles. Since 1979, only eight executions of offenders under eighteen were recorded throughout the world, three of these in the United States, and in addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties.[54] Based on these facts, Justice Brennan concluded that the imposition of the death penalty for juvenile crimes appeared to be overwhelmingly disapproved of within the world community.[55]

The Supreme Court reconsidered these two issues in 2002 and 2005, and reached different conclusions. In *Atkins v. Virginia*,[56] the Court held that executions of the mentally retarded constitute a cruel and unusual punishment. After *Penry v. Lynaugh*,[57] there developed a national consensus against executing the mentally retarded. Justice Stevens' majority opinion noted that many states prohibited the execution of the mentally retarded after *Penry*.[58] Justice Stevens mentioned a much broader social and professional consensus, expressed in the briefs presented by the American Psychological Association, diverse religious communities, and the like. Citing the brief presented by the European Union, he particularly emphasized that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved".[59]

Justice Scalia wrote a dissenting opinion that strongly criticized what he called the Court's "faulty count". He said that even if he accepted the faulty count, that bare number of states alone, eighteen, should be enough to convince any reasonable person that no "national consensus" exists. For him, it was simply impossible that agreement among forty seven percent of the death penalty jurisdictions amounted to consensus.[60] He continued by showing his agreement with Chief Justice Rehnquist that the views of professional and religious organizations and the results of opinion polls were irrelevant. Equally irrelevant for him was "the practices of the world community, whose notions of justice are (thankfully) not always those of our people."[61]

---

53. *Stanford*, 492 U.S. at 388–89 (Brennan, J, dissenting).
54. *Id.* at 389–90.
55. *Id.*
56. Atkins v. Virginia, 536 U.S. 304 (2002).
57. *Stanford*, 492 U.S. 361.
58. *Atkins*, 536 U.S. at 314–15 (he also emphasized that it was not so much the number of these states that was significant, but the consistency of the direction of change).
59. *Id*. at 316 n.21.
60. *Id*. at 343 (Scalia, J., dissenting).
61. *Id*. at 347–48.

Finally in *Roper v. Simmons*,[62] the Court ruled against the execution of offenders who were under eighteen at the time of the crime. *Roper* was the high point of the heated discussion concerning the significance of foreign law to American courts that expound the Eighth Amendment of the United States Constitution. Justice Kennedy wrote the majority opinion where he extensively dealt with foreign law and international opinions on the issue of juvenile executions, and clarified the significance of foreign law in the interpretation of the Eighth Amendment. In his majority opinion, he considered three elements: the national consensus as reflected by the actions of state legislatures, the Court's own judgment, and laws of foreign countries and international authorities.

First, Justice Kennedy found that the evidence of a national consensus against juvenile executions was similar to the evidence that the Court had held was sufficient in *Atkins v. Virginia*[63] to demonstrate a national consensus against the death penalty for the mentally retarded. According to him, thirty states prohibited the juvenile death penalty, comprising twelve that have altogether rejected the death penalty and eighteen that maintained it but, by express provision or judicial interpretation, excluded juveniles from its reach. For him, the rejection of the juvenile death penalty in a majority of the states, the infrequency of its use even where it remained on the books, and the consistency in the trend toward abolition of the practice provided sufficient evidence that American society viewed juveniles categorically less culpable than the average criminal.[64] He next made the Court's own judgment that the death penalty could not be imposed upon juvenile offenders, based on several reasons including scientific and sociological studies.[65]

Finally, the Court dealt with foreign law. It was in this part of the controversial decision that the Court defined the significance of foreign law in expounding the American Constitution, and emphasized that the United States now stood alone in a world that had turned its face against the juvenile death penalty.[66] The Court first confirmed that from the time of *Trop,* it had referred to the laws of other nations and international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments.[67] At the same time, the Court emphasized the limited significance of foreign law in interpreting the U.S. Constitution. According to the Court, even though the United States stood alone, the opinion of the world community did not control its outcome and only provided respected and significant confirmation for its own conclusions.[68]

Although the Court gave limited significance to foreign law, it paid close attention to how completely alone the United States stood in the world community

62. Roper v. Simmons, 543 U.S. 551, 551 (2005).
63. *Atkins*, 536 U.S. at 304.
64. *Roper*, 543 U.S. at 564, 567.
65. *Id*. at 569–75.
66. *Id.* at 575–79.
67. *Id.* at 575–76 (citing Trop v. Dulles, 356 U.S. 86, 102–03 (plurality opinion)); *Atkins*, 536 U.S. at 317 n.21; Thompson v. Oklahoma, 487 U.S. 815, 830–31 and 831 n.31 (plurality opinion); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982); Coker v. Georgia, 433 U.S.584, 596, 596 n.10 (1997).
68. *Roper*, 543 U.S. at 578.

on the issue of the juvenile death penalty. The Court first mentioned the international treaties that prohibited the execution of juveniles, such as Article 37 of the United Nations Convention on the Rights of the Child. Every country in the world had ratified this treaty except for the United States and Somalia. It contained an express prohibition on capital punishment for crimes committed by juveniles under eighteen; parallel prohibitions were contained in other significant international covenants (the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child).[69]

The Court next confirmed that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since that time, each of these countries has either abolished capital punishment for juveniles or has publically disavowed the practice.[70] Finally, the Court said that it was instructive to note that the United Kingdom had abolished the juvenile death penalty before these covenants came into being, because its experience bore particular relevance in light of the historic ties between the United States and the United Kingdom, and in light of the Eighth Amendment's own origins.[71]

In his dissent, Justice Scalia again harshly criticized the Court for its treatment of each of the three elements it used to determine in favor of the categorical prohibition of juvenile executions. First, Justice Kennedy's claim that a national consensus against the juvenile death penalty had emerged was *animadverted* ("[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus").[72] Next, he criticized the Court for its picking and choosing scientific studies, for they needed not look far to find studies contradicting the Court's conclusions.[73]

Finally, Justice Scalia most acidly condemned the Court for the argument that American law should conform to the laws of the rest of the world.[74] Justice Scalia said that the views of other countries and the so-called international community took center stage, and the views of American citizens were essentially irrelevant to the Court's decision.[75] As to the international conventions cited by the Court that prohibited the juvenile death penalty, he contradicted the Court's position by sarcastically stating that "[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position."[76] As rightly pointed out by him, the Senate and the President had declined to join and ratify treaties prohibiting

---

69. *Id.* at 576.
70. *Id.* at 577.
71. *Id.*
72. *Id.* at 608–10 (Scalia, J., dissenting). Justice Scalia excluded the 12 abolitionist states from his calculation and concluded that 18 states that prohibited the juvenile death penalty was a minority among the 38 retentionist states.
73. *Id*. at 616–18.
74. *Roper*, 543 U.S. at 624.
75. *Id*. at 622 (2005).
76. *Id*.

execution of offenders under eighteen. This can only suggest that the United States had either not reached a national consensus on the question, or had reached a consensus contrary to what the Court announces.[77] He continued his criticism against the Court's reference to foreign law by stating that foreign sources were cited to set aside the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of twelve citizens decide whether age should be the basis for withholding the death penalty. Then he concluded his harsh condemnation by stating that what these foreign sources affirmed, rather than repudiated, was the Justices' own notion of how the world ought to be, and their *diktat* that it shall be so henceforth in the United States.[78]

B. Implications

We have seen the major death penalty cases in which the Court applied the evolving standards of decency to determine whether particular punishments were in violation of the Eighth Amendment to the U.S. Constitution, focusing on the numbers of states and foreign countries that prohibited or permitted the contested institutions.[79] It is clear from the opinions of cases since *Trop v. Dulles*[80] in 1958 that the Court has consistently referred to foreign law or international trends as something relevant to their job of interpreting the Eighth Amendment of the U.S. Constitution.[81] It should also be noted that the repeated reference to foreign law did not invite criticism from any member of the Court until the late 1980s. The opposition to the reference to foreign law itself is a newer phenomenon.[82] Also

77. *Id*. at 622–23.

78. *Id*. at 628. In 2010, the Court held that the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime, and in that case it noted the number of U.S. states and foreign nations that permitted or prohibited the challenged practice. According to the majority opinion written by Justice Kennedy, 37 states and the District of Columbia permitted sentences of life without parole for a juvenile non-homicide offender in some circumstances, whereas only 11 nations authorized life in prison without parole for juvenile offenders under any circumstances. Graham v. Florida, 130 S. Ct. 2011, 2023 (2010). The Court repeatedly stated that the judgments of other nations and the international community are not dispositive, but the climate of international opinion is not irrelevant, citing Enmund v. Florida, 458 U.S. 782, 796 (1982). *Id.* These numbers might suggest that the Court was possibly influenced by the international climate, although the Court heavily relied on actual sentencing practices and its independent judgment on the culpability of the juvenile. *Id.* at 2022–39.

79. As to the reference to foreign sources by the Supreme Court in general, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Year of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2009).

80. *Trop*, 356 U.S. 86 (1958) (plurality opinion).

81. *See* Coker v. Georgia, 433 U.S.584, 596, 596 n.10 (1997); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); *Roper*, at 575–78. *See also* Stanford v. Kentucky, 492 U.S. 361, 389–90 (1989) (Brennan, J., dissenting); *Roper*, 543 U.S. at 604–05 (O'Connor, J., dissenting).

82. *See, e.g.*, *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting); *Stanford*, 492 U.S. at 369 n.1; *Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting); *Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting).

newer, is the careful reservation that foreign laws or the international climate are not dispositive but confirm the outcome that the Court has reached.[83]

What explains the Court's reservation about the influence of foreign law when it invalidated the death penalty laws? This Article presumes that the Court in *Roper* made its careful reservation and it was not completely honest about it. The reasons behind this could be that they tried to avoid the rigorous criticism that they expected to invite when they candidly acknowledged that America should stop executing juveniles for the very reason they thought as important—the complete loneliness of the United States in the world climate against juvenile executions. In addition, at least some Justices might have considered possible damage to American national interests that may accompany adherence to the execution of juvenile offenders.[84]

Professor Tushnet stated that he saw no reason to doubt the Court's word when he commented on the ire the Court attracted by *Roper*.[85] Professors Eric A. Posner and Cass R. Sunstein assumed that the Court had been candid about its reasons for using foreign sources.[86] There should be some truth in what they said if we listen to only what the Court said in *Roper*: "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[87] Nevertheless, political or historical analysis of the Supreme Court's decision-making process provides us a more nuanced and realistic image of what the Court actually has done and will do. Whoever analyzes *Roper* from a wider perspective, which takes not only legal but also political aspects into consideration, rather than from the comparative law normative perspective, which aims to construct a theory of comparative law, could not help become aware that always taking the Court at its word is simply naïve. Table 1 shows that the Court has become relatively looser in acknowledging the national consensus when the world climate is almost completely against the challenged institution.

---

83. *See Atkins*, 536 U.S. at 316 n.21 (describing factors, including the foreign law, that are by no means dispositive, but are consistent with the legislative evidence that lends further support to their conclusion that there is a consensus among those who have addressed the issue); *Roper*, 543 U.S. at 578 (describing the opinion of the world community, not controlling the outcome, but providing respected and significant confirmation for their own conclusions).

84. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2010 (2011), *available at* http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf.; *see infra* notes 114, 120–21 and accompanying text.

85. Mark Tushnet, Essay, *When Is Knowing Less Better Than More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1285 (2006); *id*. at n.35.

86. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV.. 131, 137 (2006) (citing Richard A. Posner, *supra* note 6); *see also id*. at 176 (rejecting the rationalization theory, which holds that courts cite foreign law in order to rationalize decisions based on personal preferences, because it does not have any testable implications); *id*. (no one has explained why judges who decide according to personal preferences would cite foreign materials in some opinions and not others, and why some judges who decide according to personal preferences cite foreign materials and other judges who decide according to personal preferences do not).This Article cannot answer the latter question, but tries to shed some light on the former. *See infra* notes 225–228 and accompanying text.

87. *Roper*, 543 U.S. at 578.

TABLE 1 The number of U.S. states and the remarks on foreign laws permitting the contested institutions in the major death penalty cases

Case	Number of states permitting the contested institution	Remarks on foreign nations permitting the contested institution
Trop v. Dulles[88]	n/a	2 out of 84 surveyed[89]
Coker v. Georgia[90]	1	3out of the 60 surveyed[91]
Enmund v. Florida[92]	8 (17)[93]	abolished or severely restricted in Commonwealth countries, and unknown in continental Europe[94]
Thompson v. Oklahoma[95]	fewer than19[96]	consistent with the views that have been expressed by other nations that share our Anglo-American heritage, and by the leading members of the Western European community[97]
Penry v. Lynaugh[98]*	49	no reference
Stanford v. Kentucky[99]*	22・25	overwhelmingly disapproved[100]
Atkins v. Virginia[101]	20	overwhelmingly disapproved[102]
Roper v. Simmons[103]	20	U.S. standing alone[104]

*Constitutionality affirmed.

The author does not claim that table 1 proves that foreign law or the international climate directly forced the Court to invalidate the state laws. To prove this is impossible, given the Court's own explanation on the role of foreign laws in their decision-making process, which the three prominent legal academics do not doubt. There are other jurisprudential factors like the Court's own judgment on the cruelty of the punishment at issue, and possibly political variables affecting the actions of the Court, like the political preferences of the Justices. Nevertheless, the numbers seen in table 1 are impressive because the issues in those cases are relatively simple, and the Court just counted the U.S. states and foreign countries. Moreover, it referred to foreign authority not because it provided better rationales

88. Trop v. Dulles, 356 U.S. 86 (1958).
89. *Id*. at 102–03.
90. Coker v. Georgia, 433 U.S. 584 (1977).
91. *Id*. at 596 n.10.
92. *Enmund*, 458 U.S. 782 (1982).
93. *See supra* text accompanying note 34.
94. *Enmund*, 458 U.S. at 796 n.22.
95. Thompson v. Oklahoma, 487 U.S. 815 (1988).
96. *See supra* text accompanying note 37.
97. *Thompson*, 487 U.S. at 830.
98. Penry v. Lynaugh, 492 U.S. 302 (1989).
99. Stanford v. Kentucky, 492 U.S. 361 (1989).
100. *Id*. at 389–90 (Brennan, J., dissenting).
101. Atkins v. Virginia, 536 U.S. 304 (2002).
102. *Id*. at 316 n.21.
103. Roper v. Simmons, 543 U.S. 551 (2005).
104. *Id*. at 577.

for the Court to learn; the numbers in table 1 arguably show the developing tendency of the Court toward global harmonization on major death penalty issues.[105]

This Article does not claim that the international climate is always dispositive when the Court expounds the U.S. Constitution. If so, it would be a puzzle why the Court has not simply invalidated the death penalty itself, or why the Court has not ruled torture of enemy combatants is illegal. This Article only claims that the international climate could be influential only in limited circumstances, such as when other factors do not demand a univocal result, and when following the international trend could serve larger national interests. Only in very close cases like *Roper* could the international climate be influential. The Court has not struck down capital punishment itself possibly because the first condition was not met, or simply because a majority of justices do not have any problem with capital punishment itself, or perhaps because the United States has never been completely alone in keeping the death penalty itself in the international community. There are many other nations that maintain the death penalty including Japan, the only developed democracy other than the United States that has not abolished the death penalty.[106] This Article cannot fully explain when, in deciding various legal issues, the Court is influenced by the international climate and when it is not. To do so would require a large volume containing highly sophisticated statistical analysis, or it may be altogether impossible to determine. This Article only describes the situations in which the Court was arguably influenced by the international climate, as it was in *Brown* and *Roper*.

Being influenced by the international climate and referring to foreign law when it happens to be in accordance with one's political preference are two different things. Justice Scalia criticized the Court when he said that the Court's argument—that American law should conform to the rest of the world—ought to be rejected out of hand.[107] He seemed to imply that the Court was, in fact, influenced by the international climate, but he continued by stating that the Court itself did not believe it. He demonstrated that American law in many significant respects differs from the laws of most other countries.[108] He accused the Court of sophistry for invoking alien law when it agrees with its own thinking and ignoring it otherwise.[109] It is impossible to prove if the Court in *Roper* or in *Brown* was, in fact, influenced by the international climate, or if the Court invoked foreign law because it agreed with its own thinking, as Justice Scalia insisted. Direct evidence is simply unavailable. Also, each justice who joined the majority opinion may well have had different ideas or attitudes on the relevance of foreign law despite that only a single

105. *See id.* at 611 (Scalia, J. dissenting) (asserting that the Court's national-consensus argument was weak compared with its earlier cases).

106. *See generally* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2010 (2011), *available at* http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf.

107. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

108. *Id.* at 624–27 (discussing the uniqueness of the American jurisprudence taking examples of categorical exclusionary rule, establishment of religion, abortion).

109. *Id.* at 627.

majority opinion written by Justice Kennedy discussed the relevance of foreign law in expounding the U.S. Constitution in *Roper*. This Article only presumes that it is not impossible for the international climate to have had influence on the Court's decision-making process.

This presumption should invite criticism that the presumption itself is impertinent. But the Court has consistently acknowledged the relevance of foreign law in major death penalty cases without being opposed, until the appointment of Justice Scalia, as stated above. This is a factor that arguably suggests that the international climate could have been actually influential when the Court was confronted with a difficult decision, especially in close cases like *Roper,* although being relevant does not necessarily mean being dispositive. Another factor in favor of this presumption is an anecdote, which will be discussed in Part VI. This article also presents other factors that could arguably have prompted the Court to act in accord with the international climate in *Roper*. The author believes that this presumption makes a point of departure to contrast *Roper* with *Brown*.

The rest of this article considers external factors outside the Court's opinions. Before it does so, two factors in the background of the rigorous criticism in the late 1980s against the reference to foreign laws should be noted. First is the appointment of Justice Scalia. Before his entrance to the Court in 1986, the Court routinely referred to foreign law or the international climate without inviting any opposition from its members. Justice Scalia has consistently been the strongest opponent to the reference to foreign laws when the Court expounds the Constitution, even though he has a wide range of knowledge of foreign laws.[110]

Second, as we have seen above, is the recent Court's loose recognition of the national consensus against institutions that were allowed by a substantial number of states. However infrequently juvenile or mentally retarded offenders were executed, it definitely should not have been easy to find a national consensus when as many as twenty states did not categorically prohibit the execution of those offenders.[111] It is quite possible, and perhaps natural to think, that several Justices in *Atkins* and *Roper* took seriously the trends of the foreign law or the international climate on each issue. These two changes, the appointment of Justice Scalia and the Court's gradual inclination to the global trend, generated the heated conflict on the reference to foreign law among Justices, and it ignited more emotional, political debate in the nation.[112]

Then, we shall see what was important for the Court when they declared it unconstitutional to execute juveniles, when as many as twenty out of fifty states permitted it.

110. *See supra* text accompanying notes 29–78.
111. Atkins v. Virginia, 536 U.S. 304, 320 (2002); *Roper*, 543 U.S. at 563 (2005).
112. *See, e.g.*, *The Debate Over Foreign Law in Roper v. Simmons*, *supra* note 6.

II. THE DECLINE OF DEATH PENALTY IN THE WORLD

One of the most important global trends concerning the death penalty has been the consistent decline of capital punishment itself. Meanwhile, the U.S. Supreme Court was confronted with a variety of constitutional issues involving the death penalty after *Gregg v. Georgia*[113] in which it ended the moratorium era of executions. This part outlines the general trends of the death penalty, both inside and outside the United States.

The retentionist countries have recently decreased in the global community. The United States is now the sole retentionist among the developed democracies except for Japan, which has a rather distinctive cultural tradition among these democracies. However, it should be noted that the United States began walking a different path from those of other western democracies only after the 1970s.[114] Indeed, some of the American states in the nineteenth century had abolished the death penalty[115] much earlier than when European countries showed their consistent opposition to the death penalty. The 1960s and the 1970s saw much fewer executions in the United States than in its history.[116] However, executions became more common in America after 1976,[117] and the United States is now one of the most frequently executing countries in the world.[118] Europe, on the other hand, completed its abolition after a lengthy struggle that began as early as the late 1940s.

The abolition of capital punishment in Europe began nation by nation in its first stage. West Germany abolished capital punishment as early as 1949. England followed in 1969, and France joined the abolition alliance in 1981. After the 1980s, it became a common goal for European countries to abolish the death penalty. In 1983, Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibited the death penalty except in very limited circumstances like wartime.[119] In all the forty seven countries that comprise the Council of Europe, the death penalty is now formally abolished or executions are suspended.[120] The death penalty is increasingly disfavored around the world. According to Amnesty International, fifty eight retentionist countries are overwhelmed by 139 abolitionist countries, ninety six of which abolished the death penalty for all crimes.[121]

---

113. Gregg v. Georgia, 428 U.S. 153 (1976).

114. FRANKLIN E. ZIMRING, THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT 5–6 (2003).

115. Banner, *supra* note 16, at 220–23.

116. ZIMRING, *supra* note 114, at 95–96.

117. *Gregg*, 428 U.S. at 153.

118. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2010 (2011), *available at* http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927dba51e88df2e9/act500012011en.pdf.; *see infra* text accompanying note 123.

119. ZIMRING, *supra* note 114, at 19–29. *See also* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2010 46 (2011), *available at* http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf.

120. *The Council of Europe is a Death Penalty Free Area*, COUNCIL OF EUROPE, http://www.coe.int/1portal/web/coe-portal/what-we-do/human-rights/death-penalty (last visited July 7, 2011).

121. ABOLITIONIST AND RETENTIONIST COUNTRIES, AMNESTY INTERNATIONAL, http://www.amnesty.org/death-penalty/abolitionist-and-retentionist-countries (last visited July 7, 2011).

The United States stands alone among the developed democracies, not only in its retention of death penalty on the books, but also in its frequent executions. Frequently executing countries are quite exceptional while, in the year 2010, as many as fifty eight countries retained the death penalty. Amnesty International reports that in 2010, more than 500 people were executed in twenty three out of fifty eight retentionist countries.[122] There is a highly unbalanced distribution in the frequency of executions among the retentionist countries; Iran (252+), North Korea (60+), Yemen (53+), the United States (46), Saudi Arabia (27+), Libya (18+), and Syria (17+) carried out most of the known 527 executions (90%) in the world, whereas China, believed to have carried out thousands of executions, is excluded.[123] The United States shows its exceptional attitude toward executions in that it is the only developed democracy in the execution-frequency ranking.

It also is important to note the increasingly visible activities by individuals and international organizations opposing the death penalty like Amnesty International. They, as discussed in the next Part, submitted their briefs to the Supreme Court of the United States when it was confronted with the issues of whether executing juveniles or the mentally retarded is in violation of the Eighth Amendment.[124]

Let us confirm the different environments in which the Court was situated in *Stanford v. Kentucky*[125] and in *Roper v. Simmons*[126] concerning the executions of people under the age of eighteen at the time of the crime. At the time of *Stanford*, twelve out of thirty seven retentionist states prohibited juvenile executions,[127] whereas at the time of *Roper* eighteen out of thirty eight retentionist states prohibited juvenile executions.[128] Whether one should figure the abolitionist states into the numerator or not, thirty (or eighteen) in *Roper* is not a very persuasive number given that little progress has developed since *Stanford*.

To look around the world, only sixty five countries—about half of the retentionist countries—expressly prohibited the juvenile death penalty at the time of *Stanford*, and four countries other than the United States had executed juveniles since 1979.[129] At the time of *Roper*, the United States stood completely alone in terms of juvenile executions because international consensus against juvenile executions developed since *Stanford* by international conventions like the Convention on the Rights of the Child, which was ratified by all nations in the world except for the United States and the almost stateless Somalia.[130]

---

122. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2010 5, 41 (2011), *available at* http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf.

123. *Id*. The size of the population and the number of convicted capital offenders should be taken into consideration when one compares the frequency of executions, although the author ignores it because it is not a very important point in this Article. The only retentionist among the developed democracies other than the United States, Japan executed two offenders in 2010. *Id*. at 5.

124. *See infra* pp. 138–40 and note 132.

125. Stanford v. Kentucky, 492 U.S. 361 (1989).

126. Roper v. Simmons, 543 U.S. 551 (2005).

127. *Stanford*, 492 U.S. at 370.

128. *Roper*, 543 U.S. at 564.

129. *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting).

130. *Roper*, 543 U.S. at 576–77.

The international movement away from juvenile execution is much more impressive than that in the Unites States. However, it would be rash to conclude that the Court adopted the international standard simply because of the loneliness of the United States in terms of juvenile executions. The Court should need more specific reasons to overrule its precedents then because doing so is in line with the international climate. Two factors should be taken into consideration: the first is national interests in foreign affairs, and the second is the growing network of the global judiciary.

III. AMERICAN NATIONAL INTERESTS AT STAKE

In the United States the death penalty is basically a political question, in that several states are left free to decide if they retain or abolish the death penalty. The Constitution only indirectly, as interpreted by the Supreme Court of the United States, forms the boundary within which the states constitutionally set up their substantive and procedural death penalty laws. The issues around the death penalty in America, at first glance, seem to be purely domestic. Nevertheless, American death penalty practice potentially involves international conflicts and arguably endangers American national interests. The international aspects of American death penalty law are to be considered below in general and in specific contexts.

A. American National Interests and the Amici Curiae

Significant developments of the international aspects concerning the American death penalty were seen in the amicus briefs presented to the Court by international and domestic actors during this century. It was and still is conventional for abolitionists to challenge the U.S. death penalty practice on the basis of the recognition that the right to life is too important to be deprived by states even as a method of criminal punishment. The new argument by the recent abolitionists is that execution impairs America's important national interests. This new strategy is to be seen not only in the arguments of the briefs presented by the amici to the Supreme Court but also in the changed identity of the amici curiae.

The author has researched the briefs presented by the amici curiae in the major death penalty cases during and after the 1980s.[131] In the cases during and after the 1980s, a number of amici and parties have referred to the general international trends against executing juveniles or the mentally retarded, based on foreign law and international conventions. It should be noted that those briefs were presented mostly by human right organizations, and that their most advanced argument that

131. The author's research includes the briefs presented in the following cases. *See* Enmund v. Florida, 458 U.S. 782 (1982); Thompson v. Oklahoma, 487 U.S. 815 (1988); Penry v. Lynaugh, 492 U.S. 302 (1989); Stanford v. Kentucky, 492 U.S. 361 (1989); Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

the international climate constituted the customary international law was never approved by the Court.[132]

The new tendency is found in briefs presented to the Court in the twenty-first century that arguably helped the Court to annul state laws permitting the execution of juvenile and retarded offenders. Not only has the number of amici significantly increased, but the identity of the amici and the rationales that they use to oppose the execution of the juveniles and mentally retarded have also gone through significant changes. First, international and influential actors like the EU and, perhaps more importantly, former U.S. diplomats, have showed up and submitted their briefs to the Court.[133] Second, their argument against executing those offenders was unprecedented in that they premised their argument on the potential damage to the American national interests by continuing the execution of those offenders.[134]

---

132. *See, e.g.*, Brief for Petitioner at 48, Enmund v. Florida, 458 U.S. 782 (1982) (No. 81-5321) (the defendant augured that the climate of international opinion is strongly opposed to death as a sanction for unintentional homicide); In Thompson v. Oklahoma, 487 U.S. 815 (1988), several amici curiae for the defendant referred to the international trend against the juvenile death penalty, arguing that customary international law which forms part of the law of the United States prohibits the execution of juvenile offenders. *See* Brief of The American Bar Association, Amicus Curiae at 18–24, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief for Amicus Curiae Amnesty International, as Amici Curiae in Support of Petitioner at 8–30, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief of the Child Welfare League et al., as Amici Curiae Supporting Petitioner at 44–47, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief of Children International-USA, as Amicus Curiae for defense at 25–27, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief for Curiae International Human Rights Law Group, as Amici Curiae Supporting Petitioner 8-14, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief of the National Legal Aid and Defender Association et al.as Amici Curiae in Support of Petitioner at 26–60, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169).

In Penry v. Lynaugh, 492 U.S. 302 (1989), no party or no amicus curiae referred to the international climate. In Stanford v. Kentucky, 492 U.S. 361 (1989), a number of amici curiae for the defendant referred to the international trend against the juvenile executions, while one amici curiae denied the relevance of the foreign law. *See, e.g.,* Brief for The American Bar Association, as Amici curiae at 15–16, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-6026); Brief for Amnesty International, as Amici Curiae in Support of Petitioner at 9–36, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-6026); Brief for Defense for Children International-USA, as Amici Curiae at 7-51, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-6026); Brief for International Human Rights Law Group, as Amici Curiae in Support of Petitioners at 8–29, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-6026); Brief for Amici Curiae for Respondents Alabama et al., As Amici curiae at 38–40, Stanford v. Kentucky, 492 U.S. 361 (1989) (No. 87-6026) (denying the relevance of the foreign law).

133. Brief for the Eur. Union as Amicus Curiae in Support of the Petitioner, McCarver v. N.C., 533 U.S. 975 (2001), (No. 00-8727), 2001 WL 648609, *available at* http://www.internationaljusticepr oject.org/pdfs/emccarver.pdf; Brief for Diplomats, Morton Abramawitz, et al., as Amici Curiae in Support of Petitioner, McCarver v. N.C., 533 U.S. 975 (2001), (No. 00-8727) 2001 WL 648607, *available at* http://www.internationaljusticeproject.org/pdfs/FormerUSDiplomatBrief.pdf; Brief for the Eur. Union and Members of the Int'l Cmty. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1619203; Brief for Former U.S. Diplomats, Morton Abramaqitz, et al. as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1619203. It is interesting to note that the briefs presented by the EU in both the cases were written by Professor Wilson, who teaches law at American University. Richard Wilson, http://www.wcl.american.edu/faculty/Wilson (last visited July 7, 2011).

134. *Id*.; PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION 5, 104–06 (2008); *see infra* note 135 and accompanying text; Brief for Former U.S. Diplomats, Morton Abramawitz et al. as Amici Curiae in Support of Respondent, Roper v. Simmons 543 U.S. 551 (2005), *supra* note 133, *see* Hongju Kon & Thomas R. Pickering, *infra* note 168, at 19;

It is wrong to suppose that the Supreme Court unconditionally accepted the arguments made by those international actors. However, empirical studies confirm the consistent influence of the Solicitors General of the United States to the outcome of the Supreme Court decisions while the influence of amici in general is not confirmed.[135] No department of the U.S. government submitted briefs either in *Atkins* or in *Roper*, but it should be noted that in *Roper* the former U.S. diplomats, including leading lawyers, some of whom are considered quite distinguished, recommended that the Court to invalidate state death penalty laws on the basis that executing juveniles "will diplomatically isolate the United States and hinder its foreign policy goals by alienating countries that have been American allies of long standing."[136]

It is only natural to doubt the importance of foreign relations for the Court in the interpretation of domestic Constitutional provisions. One could easily dismiss this as irrelevant in resolving domestic civil rights issues. However, it is worth recalling one of the most important decisions of the Supreme Court, *Brown v. Board of Education*.[137] In 1952, the Department of Justice of President Truman submitted a brief for the plaintiffs, in which it stated that "[t]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries."[138] The Justice Department, a highly important actor in civil rights matters, expressed its opposition to segregation in, at least partly, the light of national interests of the United States in foreign relations during the Cold War.[139] One, by definition, cannot directly prove that national interests in foreign relation were the driving force of the decision invalidating state laws. After all, neither in *Brown* nor in *Roper* did the Court expressly ground its resolution on national interests in foreign relations. Nevertheless, this does not necessarily mean that the Court was not influenced by the brief presented by the Attorney General or the former diplomats. It is possible that the factor of national interest in foreign relations was not excluded in the Justices' decision-making process.[140]

B. Death Penalty Issues beyond the American Border

Crimes committed in the United States are usually domestic and do not arouse any international conflicts. However, some cases generate international legal conflicts. American death penalty laws and procedures have recently caused

---

Brief for Nat'l Legal Aid and Defender Ass'n as Amici Curiae supporting Respondent, Roper v. Simmons, *infra* note 170, at 19.

135. COLLINS, *supra* note 134, at 20.

136. Brief for Former U.S. Diplomats as Amici Curiae Supporting Respondent at 20, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), *available at* http://www.abanet.org/crimjust/juvjus/simmons/diplomats.pdf.

137. Brown v. Board of Education, 347 U.S. 483 (1954).

138. Brief for the United States as Amicus Curiae, Brown v. Bd. of Educ., 347 U.S. 483 (1954); 1952WL82045, at *20 (1952); 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 113, 121 (Philip B. Kurland & Gerhard Casper eds., 1975).

139. Brief for the United States as Amicus Curiae, 347 U.S. 483 (1954).

140. *See infra* text accompanying notes 237–39.

possible danger to American national interests due, in particular, to the increasing recognition among the world community that the death penalty is a cruel and unusual punishment in violation of the right to life. More specifically, the issues of extradition of criminals to the United States and the right of foreign nationals to have their consulates notified of their arrests have invited international discord and criticism against the United States.

i.) Extradition of Foreign Nationals to the United States

The United States requests foreign nations to extradite foreign nationals who committed capital crimes in the United States and fled the country. Requested nations extradited the criminals without considering if they could be executed under the law of requesting nations until the 1980s.[141] Nations requested by the United States to extradite the criminals have begun to show their hesitation to do so because of the increased recognition that the right to life should not be infringed upon under any circumstances. The issues discussed below do not directly involve the problem of the juvenile death penalty, but they suggest that American death penalty laws are increasingly isolated from the ever-more abolitionist global climate, and that they could cause serious international conflicts and thereby damage American national interests, although most of these conflicts are minor when considered individually.[142]

Soaring v. United Kingdom is a notorious example in which extradition to the United States was rejected.[143] In this case, a German national who committed capital murder in Virginia fled to England and got arrested.[144] He was likely to be sentenced to death and executed if his trial was heard in Virginia, one of the most frequently executing states in the United States.[145] He would also have to wait for a long time because various procedural issues were expected to be invoked before the execution order became final.[146] The European Court of Human Rights held that extraditing Soering to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 of the European Convention of Human Rights, which prohibits the inhuman or degrading treatment of punishment, partly because of the death row phenomenon experienced in Virginia.[147]

Then, Europe virtually completed the abolition of the death penalty in its entire territory. The policy of denying extradition of criminals to the United States without assurance of non-executions gained legal basis.[148] The Charter of

141. *See, e.g.*, ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 32–34 (2007).
142. *See infra* text accompanying notes 143–66.
143. Soering v. U.K., 161 Eur. Ct. H.R. (ser. A) (1989).
144. *Id*. at ¶¶ 106–11.
145. *Id*. at ¶ 95.
146. *Id*. at ¶ 106.
147. *Id*. at ¶¶ 106–11.
148. ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 28–29 (4th ed. 2008).

Fundamental Rights of the European Union provides that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[149] Now extraditions of capital offenders from Europe to the United States are not permitted without the assurance that offenders are not to be executed under the agreement between the United States and Europe.[150]

The recognition that the death penalty itself is in violation of the fundamental human right to life and refusal to extradite a criminal to the United States where there is a possibility of the execution, expanded beyond Europe. The Supreme Court of Canada in 2001 held that extradition without assurances would be in violation of section 7 of the Canadian Charter of Rights and Freedom, after a comprehensive analysis of the recent movement away from the death penalty among nations around the world.[151] It should be noted that the Supreme Court of Canada had earlier approved extradition to a retentionist state, Pennsylvania, although Canada itself was an abolitionist country.[152] This overruling of its precedent by the Supreme Court of Canada is considered to reflect the developed criticism against American death penalty laws.[153] Similar developments reached other countries and international tribunals including the Republic of South Africa.[154]

ii.) Vienna Convention of Consular Relations

International conflicts might arise concerning the enforcement of the obligation imposed on the United States under the Vienna Convention on Consular Relations, Article 36, to inform the consular post of the sending state when a national of that state is arrested in the United States.[155] The Vienna Convention, one of the most important conventions in the world, is ratified by over 170 nations. The authority shall inform the consular post of the sending state without delay. The obligation to inform the consular post has not been faithfully enforced in the United States for several reasons, one of the most important of which is the divided powers between the national government concluding the international treaties and the state governments enforcing their respective criminal laws.[156]

The enforcement of Article 36's obligation in the United States is so exceptional that American law enforcement officers rarely tell the arrested foreign nationals their right to access their consular post.[157] An international conflict arose when a national of Paraguay was executed in Virginia in 1988. The defendant was found guilty and sentenced to death for rape and murder. It became apparent that

149. Charter of Fundamental Rights of the European Union, 2000 O.J. (C. 364) 1, art. 19(2).
150. Agreement on Extradition, EU-US, art. 13, July 7, 2003 O.J. (L181) 27.
151. U.S. v. Burns, [2001] 1 S.C.R. 283, ¶¶ 79–93 (Can.).
152. Kindler v. Can., [1991] 2 S.C.R. 779 (Can.).
153. HOOD & HOYLE, *supra* note 149, at 29–30.
154. *Mohamed v. President of the Republic of S. Afr.* 2001 (7) BCLR 685 (CC) (S. Afr.).
155. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 596 U.N.T.S. 261.
156. *See infra* text accompanying notes 205–207.
157. CLARKE & WHITT, *supra* note 141, at 54 (citing death penalty information center homepage).

the defendant was not given notice of his rights under the Vienna Convention, and his lawyer was not aware of it. No argument was made concerning the Convention, and the state Supreme Court did not refer to it.[158] The district court of the United States did not give redress because of the procedural default rule.[159] The Supreme Court of the United States affirmed its ruling.[160] With seemingly great reluctance, Secretary of State Albright requested that the Governor of Virginia suspend the execution. She was particularly concerned about "the possible negative consequences for the many U.S. citizens who live and travel abroad."[161] The Governor of Virginia refused to issue a stay and the defendant was executed. The government of Paraguay withdrew its petition before the International Court of Justice after the United States government issued a formal apology.[162] The international law community has heavily criticized the United States' handling of *Breard*.[163]

Mexico, having many nationals that were on death row in the United States, initiated proceedings in the International Court of Justice in 2003, arguing that its nationals had been denied their right to obtain legal help in violation of the Vienna Convention.[164] The ICJ found that the United States had breached its duty under the Vienna Convention by not informing the fifty one Mexican nationals of their rights under Article 36 of the Convention, and that the United State shall provide, by means of its choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention.[165]

The failure to inform the arrested foreign nationals of their rights under the Vienna Convention invited rigorous criticism from the international community. Enforcement of the Vienna Convention in the United States might arouse conflicts around the probable disparity of legal service provided to foreign and U.S. offenders. It is possible that foreign governments provide their nationals arrested

158. *Id*.

159. Breard v. Neth., 949 F. Supp. 1255 (E.D. Va. 1996).

160. Breard v. Greene, 523 U.S. 371 (1998).

161. Johnathan I. Charney & W. Michael Reisman, *Agora: Bread*, 92 AM. J. INT'L L. 666, 671–72 (1998) (citing a letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia, Apr. 13, 1998).

162. CLARKE & WHITT, *supra* note 141, at 55. The Supreme Court of the United States, in Medellin v. Texas, 552 U.S. 491 (2008), declined the argument that the Avena judgment has automatic domestic legal effect and permitted Texas to execute Medellin, a Mexican national, one of the fifty one defendants whose right under Article 36 of the Vienna Convention was determined to be violated by the ICJ in Avena. One could argue against the presumption of this Article that the Supreme Court could be influenced by international opinion. But remember that this Article does not claim that the international climate always overwhelms other jurisprudential and political factors, rather it only asserts that it is possible for the justices to be influenced by the international climate in particular cases, and attempts to describe the situation in which the international climate, in connection with the probable argument for the national interests of the United States, presumably prompted the Court to invalidate domestic practices in favor of following the international trend.

163. Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations,* 92 AM. J. INT'L L. 675, 675 (1998).

164. CLARKE & WHITT, *supra* note 141, at 59.

165. Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12, at ¶ 153 (Mar. 31).

for capital offense in the United States with relatively affluent legal help, whereas poor U.S. offenders are routinely executed without comparative legal advice. The United States Secretary of State finally withdrew from the Optional Protocol to the Vienna Convention on Consular Relations, which allows compulsory jurisdiction over disputes arising under the Convention.[166] This means that the foreign nationals arrested in the United States cannot use the treaty violation claim before the International Court of Justice, and also that Americans arrested in foreign countries are helpless when they are denied their rights under the Convention.

The problems concerning extradition and consular notice not only reveal that the death penalty laws in the United States have increasingly invited criticism in the international community, but also suggest that national interests of the United States could be endangered if the United States persistently adheres to its own policy of execution. It should be noted that in *Atkins* and *Roper*, as stated above, arguably influential actors, namely former American diplomats, including Harold Hongju Koh, who served from 2004 as the Dean of Yale Law School, and currently serves as legal advisor of the Department of State for the Obama administration, have pointed out the increasing isolation of the United States in terms of the death penalty.[167] In particular, their brief presented to the Court in *Roper* reported that U.S. diplomats were increasingly called into meetings to answer foreign criticisms of the death penalty, and that U.S. embassies throughout the world had been flooded with letters and petitions signed by millions of individuals.[168] They warned the Supreme Court about the risk of undermining critical foreign policy interests of the entire nation caused by continuing failure to embrace the globally condemned practice of executing juvenile offenders.[169] They concluded their brief by stating that "[t]o restore the United States to its leading position on human rights, amici urge this Court to bring this country's practice with regard to execution of juvenile offenders into line with those of the rest of the world."[170]

Even larger problems had also arisen around American national interests, which were generated by its death penalty laws. In 2001, the Parliamentary Assembly of the Council of Europe adopted its resolution condemning all executions and expressing its decision to call into question the continuing observer status of Japan and the United States.[171] The United States lost its seat on the United Nations Human Rights Commission in 2001 for the first time since the

166. CLARKE & WHITT, *supra* note 141, at 52 (citing a letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary General of the United Nations, Mar. 7, 2005).

167. *See supra* text accompanying notes 133–136.

168. Brief of Amici Curiae Former U.S. Diplomats in Support of Respondent, *supra* note 120, at 23. *See also* Harold Hongju Koh & Thomas R. Pickering, *American Diplomacy and the Death Penalty,* FOREIGN SERV. J., Oct. 2003, at 19.

169. Brief of Amici Curiae Former U.S. Diplomats Morton Abramaqitz, et al. in Support of Respondent, 543 U.S. 551 at 20.

170. *Id*. at 28–29. *See also* Brief of the Nat'l Legal Aid and Defender Ass'n in Support of Respondent, Roper v. Simmons at 19, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633550, (describing the need to conform to the international climate to lead the war on terrorism).

171. EUR. PARL. ASS., *Abolition of the Death Penalty in Council of Europe Observer States*, Res. 1253, (June 25, 2001), http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta01/eres1253.htm.

Commission's formation in 1947.[172] The embarrassment was precipitated presumably because of continuing U.S. commitment to its own death penalty laws and resistance to accept the prohibition of juvenile executions.[173]

There is no doubt that Justices of the Supreme Court of the United States knew the isolating impact of America's death penalty laws and practices in the world community. And it is unlikely that they did not know that the continuing executions of juvenile offenders in the United States could have negative implications to American national interests, for arguably influential amici curiae had urged the Court to consider the endangered foreign interests of the United States. The considerations of these elements presumably helped in deciding the difficult and delicate constitutional issue of juvenile executions.

IV. GLOBAL NETWORK OF THE JUDICIARY

The globalization of the judicial community might have influenced the Supreme Court's reference to foreign laws if it really were a new phenomenon and if the international climate had actually had impacts on the Court's decision-making process. The United States has much more experience in invalidating legislation than most other democracies. Studying American constitutional jurisprudence has been quite important for constitutional law scholars in many countries.[174] One the other hand, an increasing number of judges around the world have begun to cite foreign laws, including judicial decisions, in their application of constitutional provisions. There should be various factors behind the recent animation of citation practice beyond the national border: the increasing globalization or internationalization of basic human rights issues (especially issues concerning the death penalty), the formation of the international human rights law, judges meeting face to face in seminars or lectures, and the development of technology like the internet.

One only has to see the citation practice among the Commonwealth countries to understand that citing foreign laws is not unprecedented. However, the practice should have a new meaning given the rapid increase in the number of countries with democratic constitutions, especially after the 1990s. Now, judges around the world are notably exchanging opinions beyond national borders and writing what they have studied from foreign laws, including judicial opinions in their own opinions even when foreign law is not essential for the resolutions of issues

172. Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL RTS. J. 309, 320 (2004).

173. *Id*. at 320–23; Jacqulyn Giunta, Note, *Roper v. Simmons: The Executions of Juvenile Criminal Offenders in America and the International Community's Response,* 22 ST. JOHN'S J. LEGAL COMMENTARY 717, 739 (2008).

174. For example, Japanese legal academics have made great efforts to study American law especially after it adopted its current Constitution in 1946. *See, e.g.*, Takuya Katsuta, *Japan's Rejection of the American Criminal Jury,* 58 AM. J. COMP. L. 497, 506–11 (2010) (describing the efforts by Japanese scholars to study the American jury).

presented. Professor Slaughter states that the wide ranging examples demonstrated by her represent "the gradual construction of a global legal system."[175]

Even in the United States, as Professor Slaughter demonstrates, the Federal Judicial Conference established a Committee on International Judicial Relations in 1993 to conduct a wide variety of exchanges and training programs with foreign courts. The U.S. Supreme Court has regular summits with its counterpart in the European Union, the European Court of Justice, and has visited courts in several foreign countries around the world. Judges of other nations also institutionalized judicial exchanges.[176]

Interestingly enough, observers see the relative decline of the influence of older and more established constitutional courts, including the U.S. Supreme Court. The South African Constitutional Court and the Canadian Constitutional Court are said to have gained in influence recently.[177] Also important, is that judges are consciously engaging in dialogue with their international colleagues, not in the reception of the mother law.[178] As Professor Slaughter demonstrates, the Taiwanese Constitutional Court translates large portions of its decisions into English and makes them available on its website to ensure that it is part of the global dialogue.[179]

In the area of human rights, the decisions of the European Court of Justice are frequently cited by courts around the world even when it is only persuasive authority. As Professor Slaughter shows,[180] the Constitutional Court of the Republic of South Africa cited decisions of the ECHR and laws in other countries in its decision that held the death penalty itself as unconstitutional under the South

Constitutional Court of Jamaica, relied on the ECHR decisions in *Soering v. United Kingdom*[183] to commute a Jamaican death sentence to life in prison.[184]

The United States Supreme Court had been quite influential since 1945. The Courts established on the American model borrowed heavily from U.S. Constitutional jurisprudence.[185] The Court's jurisprudence on the Bill of Rights had been the model for other courts around the world. However, in this cross-fertilization age of judges around the world, many courts are increasingly interpreting those of their own constitutional provisions which are similar to the U.S. Bill of Rights in ways that give stronger protection for basic human rights, in particular rights to life.[186] American judges are considered to be less actively participating in the dialogue of the global judiciary. It is reported that Justice Kirby of the High Court of Australia once warned that the United States was in danger of becoming something of a "legal backwater" in a world of such radical global changes.[187] It is in this very context that one can better understand the significance of the heated debate concerning reference to foreign laws between Justices Kennedy and Scalia in *Roper v. Simmons*.[188]

In the current globalization of the judiciary, Justices of the Supreme Court showed their distinctiveness in major death penalty cases in the new millennium, placing foreign law as a confirming factor—the opinion of the world community does not control the outcome but only confirms the conclusions[189]—and the rigorous criticism to the reference itself from some members—acknowledgement of foreign approval has no place in the legal opinion of this Court[190]—even though they join in exchanging opinions face to face with foreign judges. As stated above, the U.S. Supreme Court is said to be losing its champion status of human rights in the world, which the Court had enjoyed for a long time because of its extraordinary history of judicial review. Justices of the U.S. Supreme Court might be least afraid of being isolated from courts around the world, possibly because the Court does not need to reach out to foreign countries for helping their jurisprudence, while they in turn reach out to the U.S. Supreme Court for guidance.

The author takes the position that the Court in *Roper* took the international climate on the juvenile death penalty more seriously than the Court's own characterization of it only as a confirming factor.[191] Justice Scalia's claim that the views of other countries and the so-called international community took "center stage"[192] seems more accurate than the majority's explanation, as the evidence of

183. 161 Eur. Ct. H.R. (ser. A) (1989).
184. Pratt v. Atty Gen. for Jam., [1994] 2 A.C. 1 (P.C.) (appeal taken from Jam.).
185. SLAUGHTER, *supra* note 175, at 71. The Supreme Court of Japan in 1948—just after its Constitution went into force in 1947—referred to Marbury v. Madison, 5 U.S. 137 (1803) in its opinion when the constitutionality of section 2 of the Saibansho Ho [Court Act] was challenged. Setto Hikoku Jiken, 2 KEISHŪ 801, 806 (July 8, 1948) (Theft case).
186. *See supra* text accompanying notes 180–84.
187. Michael Kirby, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001).
188. Roper v. Simmons, 543 U.S. 551.
189. *Id*. at 578.
190. *Id*. at 628 (Scalia, J., dissenting).
191. *Id*. at 578.
192. *Id*. at 622 (Scalia, J., dissenting).

national consensus against juvenile execution in *Roper* was weakest of the major death penalty cases considered in *Roper* and in this Article.[193] Nevertheless, Justice Scalia's position against citing foreign laws sounds curious given his learning on foreign laws and his active participation in the international seminars, lectures, and so on that should provide him many opportunities to exchange opinions with distinguished foreign lawyers, either practicing or academic. His position also sounds quite hidebound because he refuses to be a part of this larger vision of a global network of the judiciary, although one might acknowledge his fidelity to democracy.

The views of Justices Breyer and O'Connor on citing foreign laws form a striking contrast to that of Justice Scalia. Justice O'Connor is a leading member of the Court in terms of participating in the global network. In *Roper* she expressed her disagreement with Justice Scalia's rejection of any place for foreign law in Eighth Amendment jurisprudence because the evolving standard of the United States was neither isolated nor inherently at odds with the values prevailing in other countries.[194] She had expressed her view in favor of global communication more candidly on more informal occasions. In a speech in 2003, she stated that relying increasingly on international and fon l3w-5(t)-127(s)6soglsn gat-2(l)-10(C)7(8)-14(w-ap17(gp17(gearst)3)7(d)b17(

international climate.[198] Nevertheless, it arguably prompts judges to conform to the international climate.

Once again, the Court in *Roper* treated foreign and international laws as a confirmation, not a controlling element.[199] It is not persuasive given the fact that as many as 20 states permitted juvenile executions, as Justice Scalia rigorously criticized in his dissent.[200] Some Justices, as shown above, not in their opinions but in other opportunities, candidly admit the usefulness of referring to foreign opinions. It is presumed they shared the awareness that it was important to participate in the forming global network of the judiciary at the time of *Roper*. For these reasons, it is arguable that when the Court in *Roper* referred to the loneliness of the United States on the issue of the juvenile death penalty in invalidating the juvenile death penalty law, the Court did so after a serious consideration of the impact that the opposite decision might have caused, with the appearance that foreign laws were not controlling but only confirming the result of the case.[201]

V. DISTINCTIVENESS OF THE AMERICAN POWER STRUCTURE

In this age of globalization the United States seems to be quite independent on its domestic political issues. The attitude of the United States on this matter is in sharp contrast with those of other democracies, e.g., Japan, which show the tendency to follow what the leading western democracies do.[202] The United States is not particularly afraid of isolation from international trends, especially when it comes to human rights.[203] One could easily point out various reasons to explain why the United States does not follow the worldwide abolitionist trend but persistently adheres to its own death penalty policy. Historical and cultural backgrounds, and the reality of the international relations in which the United States dominates, are undoubtedly important, but it is not intended here to dig into those matters.[204]

198. Justice O'Connor approved the relevance of foreign law, but did not accept the argument that executing juveniles violates the Eighth Amendment. Roper v. Simmons, 543 U.S. 551, 587–608 (O'Connor, J., dissenting).

199. *Id*. at 575–79.

200. *Id*. at 622–28 (Scalia, J., dissenting).

201. *See infra* text accompanying notes 248–50.

202. This general proposition might be difficult to academically test for its truthfulness. But it is more true than untrue given Japan's modern legal history, which started in the late nineteenth century with the reception of German law. It still is usual in Japan to do comprehensive research on foreign law and its practices before making legal reforms, and the rhetoric of "the international climate" seems to work quite well when reforming. Pressure from the international community also works in Japan to cause a legal reform. For example, Japan's first rather comprehensive but not satisfactory equal employment opportunity law (Kinto-ho [Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment], Act No. 45 of July 1, 1985—Kinto Ho was a major revision of the Kinro Fujin Fukushi-ho [Act on Welfare of Working Women, Act No. 113 of July 1, 1972]—) was arguably a response to its ratification of the Convention on the Elimination of All Forms of Discrimination Against Women in 1985. *But see Katsuta*, *supra* note 174 (describing how Japanese law reformers rejected the American style jury when they considered the appropriate model of lay-participation for Japanese judicial system).

203. *See, e,g.*, Ignatieff, *supra* note 3.

204. *See, e.g.*, Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006).

Instead, this part describes those two institutional constraints that make it difficult for the United States to follow the international trend in general. Those reasons are embedded in the Constitution and cannot be changed easily. The first reason is American federalism and the second reason is a couple of constitutional barriers for the national government to domesticate international norms. It is presumed that these institutional conditions, together with other cultural and institutional factors, work against the introduction of international standards and invite the Supreme Court of the United States to adjust its Constitutional interpretations in accordance with the international climate, and thereby ensure the national interests of the United States.

A. Structural Constraints Imposed by American Federalism

The most obvious distinctive character of the American constitutional design of government is that it follows federalism. Under the federal system established by the Constitution, each state holds its sovereign power and enforces its own criminal law. Most of the criminal trials are heard in state courts under state laws. Capital punishment sentences in federal courts are exceptional in number.[205] At any particular time in the history of the United States, states have been free to be retentionist or abolitionist. This basic framework holds true even though the jurisprudence of the Supreme Court has developed around various aspects of capital punishment law. The national government of the United States enjoys its most powerful status in the international community as the only superpower, while the Constitution does not give the national government the power to prohibit its states from executing offenders. In other words, the Constitution does not permit the U.S. government to force its sovereign states into doing certain things. It seems that the U.S. government can be more influential to foreign countries than its sovereign states, although the Congress effectively—but gradually—prompted the states to finally desegregate their schools by the Civil Rights Act of 1964.[206]

One the other hand, the Constitution prohibits states from doing several matters. In particular, states are not allowed to form a relationship with foreign countries.[207] The federal government is expected to give due consideration to national interests in foreign relationships but states are not. This structure seems to be a major cause for law enforcement officers―most of who work for states―to less seriously fulfill the obligation under the conventions into which the national government entered.[208] In addition to federalism, the voice for state rights gives a great deal of power against infringement by the national government. One has to

---

205. At the end of 2005, 3,245 prisoners were waiting for their execution, only thirty-seven of whom were sentenced to death under federal law. Tracy L. Snell, *Capital Punishment*, 2005, BULLETIN BUREAU OF J. STATISTICS, U.S. Dept. of J., at 5 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp05.pdf.

206. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURT BRING ABOUT SOCIAL CHANGE 47–54 (2d ed. 2008).

207. U.S. CONST. art. I, §, 10.

208. *See supra* text accompanying 157.

only recall the antebellum and civil rights eras when white southerners, intimidated by federal interference, appealed to the watchword of state rights.

States cannot enter into a horizontal relationship with foreign countries on equal footing as stated above. However, there might be various ways in which the international climate reaches into the United States other than through the national government, as Professor Resnik demonstrates.[209] Nevertheless, what is important for this Article is that it is relatively more difficult in the American federal system for international influence to be domesticated than in other unitary democracies like Japan, where the national government is constitutionally expected to lead the domestication of the international standards more effectively than that of the United States.

Also important, is that the American federal system itself has a structure that resembles that of the international community. It is natural for state law reformers to look for as many as forty nine comparable states in the United States for guidance before conducting their research on foreign countries, many of which might lack cultural or political similarity.[210] The fact that a majority of states in the United States are retentionist could be more important for Americans in a particular state than the fact that a majority of nations in the international community has abolished the death penalty. The Supreme Court of the United States has occasionally invalidated the outlier state laws in the United States.[211] Now the Court in *Roper v. Simmons*[212] arguably invalidated the outlier U.S. laws in the global community.

B. Barriers to Ratify the Convention

There are at least two structural barriers that make it difficult for the national government of the United States to act in accordance with the international climate. First, concurrence of two-thirds of the Senators is required for an international convention to be ratified.[213] This threshold is significantly higher than those in most other developed democracies, where simple majority suffices for ratification.[214] In addition, it is easier for a minority to effectively block ratification in certain circumstances because each state has two seats in the Senate regardless of its population. The most obvious example is the refusal to accede to the League of

---

209. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

210. That the United States is made up of fifty states with such diverse local laws is extraordinary. The diversity in the United States is higher than those in most countries but lower than that in the international community whereas the similarity in the United States is lower than those in most countries but higher than that in the international community. As to the role of the Court as a national policy maker, *see* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957).

211. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURTS AND THE STRUGGLE FOR RACIAL EQUALITY 453 (2004).

212. Roper v. Simmons, 543 U.S 551, 574.

213. U.S. CONST. art. II, § 2, cl. 2.

214. Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 187 (Michael Ignatieff ed., 2005).

Nations. Wilson's proposal to join in the League was blocked even though Wilson had a simple majority support in the Senate.[215] Other important international conventions to which a majority of Americans gave their support died in the Senate, including the Genocide Convention and the Convention to Eliminate Discrimination against Women.[216] The International Covenant on Civil and Political Rights was ratified by the Senate in 1992—with significant reservations, one of which reserves the right to impose capital punishment for crimes committed by persons under eighteen[217]— more than a decade after President Carter signed it in 1977.[218]

Justice Scalia most acidly criticized the Court's reference to the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights when he said in *Roper* that "[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position."[219] He was right when he said so, and he chose to ignore, knowingly or not, the structural barriers that the U.S. Constitution imposes on the federal government when it attempts to act in accordance with the worldwide trend. The fact that the barriers imposed by the U.S. Constitution are substantially higher than those in most democracies would be out of sight of Justice Scalia's discipline for American judges.

These structural constraints that are supposed to work against the introduction of the international standard are buttressed by the actuality of American politics in the Senate. The Bricker Amendment, whose main purpose was to restrict the influence of the international norms on the domestic law, almost gained two-thirds votes of the Senators required to make a proposal for a constitutional amendment.[220] The Senate was the very place where the higher constitutional barriers and the actuality of American politics have worked together against the domestication of the international norms. The Senate has been a graveyard of international conventions before and after the World War II. Filibuster likewise, had effectively blocked civil rights bills before the first major success—the Civil Rights Act of 1964.[221]

---

215. F.P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 68–72 (1952).

216. Moravcsik, *supra* note 214, at 187–88.

217. SEN. COMM. ON FOREIGN REL. REP. ON THE INT'L COVENANT ON CIV. & POL. RTS, 31 I.L.M. 645, 645-46 (1992) (reproduced from U.S. Senate Executive Report 102–23 (102d Cong., 2d Sess.)). *See also Roper*, 543 U.S.at 622 (Scalia, J., dissenting).

218. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations,* 42 DEPAUL L. REV., 1183, 1183 n.1 (1993).

219. *Roper*, 543 U.S. at 622 (Scalia, J., dissenting).

220. As to the Bricker Amendment, see for example, N

Second, strict separation of powers in the Constitutional design makes it difficult for the national government to respond to international trends in an accorded way. In the U.S. presidential system, the President and Congress are not expected to agree on any political issues. The President and legislators are independently elected by voters for a fixed term. It is quite possible in theory, and not rare in fact, that the President is a Democrat when the Republican Party rules the Congress, and vice versa. The super-majority requirement for ratification adds more difficulty for the administration to domesticate the international norms when it wants to do so. These constrains are absent from other Parliamentary democracies where the prime minister can expect a majority of the legislators to support the ratification of the convention which his or her administration has signed. The United States has sometimes reflected its confused attitudes for international conventions. President Wilson promoted the idea of the League of Nations, but the United States refused to take part in the League. U.S. Ambassador to the United Nations Albright signed the Convention of the Rights of the Child but ratification has not been given by the Senate.[222] The strict separation of powers embedded in the Constitution is at least a part of the causes that generates the isolated attitudes of the U.S. government regarding international conventions. It is not unnatural for foreign observers to see these American activities and consider them inconsistent, and not acceptable to the common sense of diplomacy.[223]

As stated above, American federalism and the separation of powers among the national political branches are embedded and have a distinctive institutional structure that makes it difficult for the national and local governments to conform to the international climate. This structure could also invite inconsistent activities by several branches of the national and state governments. Whether these institutional barriers against the conformity for international agreement are defects of the founding document or not is beyond the reach of this Article. What is important in this Article is the possibility that the Supreme Court of the United

---

222. On January 26, 1990, the CRC was opened for signature, ratification, and accession, and it entered into force on September 2, 1990. Since that time, several attempts have been made in the U.S. Congress to ratify the CRC. For example, on January 23, 1990, Bill Bradley (D-N.J.) introduced a resolution in the Senate that urged the President to submit the CRC to the Senate for its advice and consent to ratification. The resolution ultimately had sixty co-sponsors . . . . However, President George H. W. Bush failed to sign or pursue ratification of the CRC. After some back and forth, Madeleine Albright, acting as the U.S. Delegate to the U.N. for the Clinton administration signed the CRC on behalf of the United States on February 16, 1995 . . . . Senator Helms submitted a resolution, with twenty-six co-sponsors, urging the President not to pursue ratification of the CRC . . . . No further action was taken on the CRC that year.

Lainie Rutkow & Josua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child,* 19 HARV. HUM. RTS. J. 161, 170–73 (2006). The Senate did not ratify the CRC during the George W. Bush administration although two protocols to the CRC concerning respectively children's involvement in armed forces and the sale of children were ratified on Dec. 23, 2002, under his leadership. *Id.*

223. It should be noted that President Eisenhower perhaps would not have lead the nation to desegregate even if he had had the power to do so, given his tendency to respect the southern whites' self-rule. *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 130 (2000); KLARMAN, *supra* note 211, at 324–25; Moravcsik, *supra* note 214, at 149 (describing criticism against the international human rights policy of the United States).

States arguably tried to ensure the national interests of the United States by harmonizing its domestic death penalty laws with the international trend. The structural barrier against the international standard constitutes one of the background conditions that prompted the Court in *Roper v. Simmons*[224] to adopt the international norm that the political branches have not accepted.

By definition, it is the executive branch, the Presidency, which is supposed to deal with issues of national interests pertaining to foreign relations. On the other hand, the legislative branch, Congress, is supposed to deal with issues of desegregation in the South, the large distinctive region of the United States. Furthermore, the judiciary is not expected to lead in any of these tasks; however, it surely did so in 1954, and arguably did so in 2005. In the author's opinion, it had to do this at least partly because of the structural distinctiveness embedded in the U.S. Constitution.

VI. NEW ROLE FOR THE SUPREME COURT?

If the Supreme Court of the United States took U.S. national interest in foreign relations into consideration in *Roper v. Simmons*,[225] then we should ask if this is a new role the Court assumed in the twenty-first century. The answer is negative. Recent studies reveal that efforts by the federal government in the 1950s and the 1960s to desegregate was at least partly motivated by the international environment during the Cold War that required the national government to avoid the criticism that racial subordination prevailed in the leading nation of the western democracies.[226] Racial segregation and capital punishment are not identical. Nevertheless, it should be noted that they might have a common root, historically and culturally. This Part juxtaposes the similarities and dissimilarities between *Brown*[227] and *Roper* to gain a better understanding of those two cases in both a global and a domestic perspective.

A. Similarities

Three similarities between *Brown* and *Roper* are considered below. First, in both cases the Supreme Court invalidated state laws by defining the issues in constitutional terms that had been considered political questions. The annulled institutions were allowed in as many as twenty states in both cases. At the time of *Brown*, seventeen states forced school segregation, and four others permitted it, constituting as many as twenty one school segregation states.[228] At the time of

224. Roper v. Simmons, 543 U.S. 551 (2005).
225. *Id*.
226. *See, e.g.*, DUDZIAK, *supra* note 223.
227. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
228. School segregation was forced in the following states: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Washington D.C. also forced school segregation. School segregation was allowed in the following states: Arizona, Kansas, New Mexico, and

Roper, twenty states had juvenile executions on the books.[229] Not only are the numbers of retentionist states close enough, but also most of the retentionist states in both cases are identical. Among the seventeen segregation-forcing states and the twenty juvenile-execution-allowing states, fourteen states are common, while among the twenty one segregation-allowing states and the twenty juvenile-execution-allowing states, fifteen states are common.

What explains this remarkable overlap? It surely is not just a coincidence. One can see the historical and cultural linkage behind it. The clue is that most of the overlapping states share the traditions of the American South. Needless to say, even after emancipation, racial discrimination has been dominant in the South for a long time. In addition, the American South constitutes a culturally distinctive area in the United States, in general for respecting honor, and in particular for the rigorousness of its criminal laws and the vigilante tradition.[230]

Professor Zimring persuasively describes the interaction between the history of racial discrimination and lynching, and the reality of the death penalty in modern America.[231] According to his detailed analysis, as much as eighty eight percent of all lynching from 1889 through 1918 took place in the South, while seven percent occurred in the Midwest and five percent in the West.[232] The fact that the fourteen high-lynching states account for eighty five percent of all modern executions[233] cannot help but draw one's attention. Whether a state retains capital punishment on its books and how frequently it executes capital offenders are, however, different problems. Still, the fact remains that most of the executions after 1976 were carried out in the South.[234]

The next question is how the vigilante tradition and modern executions are related. Professor Zimring is most compelling when he states that "[r]acism, vigilantism, and high levels of punishment were concurrent conditions in the South when high levels of punishment came to characterize the region."[235] It is pointed out that the institution of slavery required harsh punishment to manage large populations of slaves in the South.[236] This necessity, combined with Southern vigilante values, presumably provided grounds to keep executing frequently,

---

Wyoming. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 327 (1975).

229. Juvenile execution was allowed in the following states: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia. Roper v. Simmons, 543 U.S. 551, 577–81 (2005).

230. *See, e.g.*, James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and the Legal History of the South*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 4-24 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984); Paul Finkelman, *Exploring Southern Legal History*, 64 N.C.L. REV. 77, 88–116 (1985).

231. ZIMRING, *supra* note 114, at 89–118.

232. *Id*. at 90.

233. *Id*. at 96.

234. *See* Death Penalty Information Center, Number of Executions by State and Region Since 1976, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited July 9, 2011).

235. ZIMRING, *supra* note 114, at 116.

236. BANNER, *supra* note 16, at 142.

though blacks were actually better protected against executions during slavery because of their property value. Between *Brown* and *Roper* there is a cultural, though not necessarily logical, linkage.

Second, *Brown* and *Roper* share international pressure to invalidate the domestic institutions that were permitted in a substantial number of states. The United States in the age of the Cold War was urged to improve the derogated condition of African-Americans. The federal government was faced with a dilemma: it was the champion of the free world being accused of subordinating its colored citizens when increasingly many countries in Asia and Africa escaped from their colonized status. As mentioned earlier, in 1952 the Department of Justice submitted the brief for the plaintiffs, in which it stated that "[t]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries."[237] In 2004, former diplomats of the United States presented a brief in which they warned the Supreme Court against the risk of undermining critical foreign policy interests of the entire nation caused by executing juvenile offenders.[238] The Supreme Court in 1954 was aware of the possible damage to national interests in the foreign relationship caused by permitting the continuance of the segregation, while the Court in 2005 was told that continuing to execute juvenile offenders could damage national interests. The warnings came from the Justice Department in *Brown* and from former diplomats in *Roper*. Both actors should not be easily dismissed as insignificant.[239] The Supreme Court of the United States has wide discretion to choose the cases it deals with, and it presumably took the chance to improve the national interests of the United States in the international community in both the cases.

A word on *Brown,* in terms of the international pressure, seems appropriate here. The author does not claim that international pressure was the driving force for the Court's watershed decision. In addition, it may be difficult to even argue that the Court would have validated school segregation in the absence of the Cold War. The international factor for the Justices in *Brown* should not have been so important. Nonetheless, the Cold War could have been an encouraging factor for

---

237. Brief for the United States as Amicus Curiae, Brown v. Bd. Of Educ., 347 U.S. 483 (1954). *See supra* text accompanying note 138.

238. *See supra* text accompanying notes 133–36.

239. As stated above, empirical studies confirm the consistent influence of the Solicitors General of the United States to the result of the Supreme Court decisions although the influence of amici in general is not confirmed. *See supra* text accompanying note 135.

The author notes that emphasizing the international pressure does not disvalue the efforts by the mainstream Civil Rights Movement. Professor Dudziak tells that the NAACP referred to the Cold War argument, although briefly, when Brown was reargued in 1953. DUDZIAK, *supra* note 223, at 102. Actually, civil rights organizations rather consistently relied on the argument that race discrimination harmed the U.S. interests in the Cold War and they effectively brought international pressure to bear on the Truman administration. For example, in June 1946, the National Negro Congress filed petition to the newly established United Nations Commission on Human Rights seeking relief from oppression for American blacks; in October 1947, the NAACP filed an Appeal to the World, in which it denounced the U.S. race discrimination; Professor Dudziak says that Attorney General Tom Clark remarked that he was humiliated. *Id*. at 43–45.

the Justices to invalidate school segregation in 1954, because they were not sure if other political actors would support the Court when it handed down *Brown*.

The Justices could not expect President Eisenhower to be supportive of invalidating school segregation because he was much less supportive than President Truman on civil rights issues. Eisenhower's administration was involved in the Little Rock Crisis, but this was an exception. Needless to say, the Congress was not very supportive of segregating schools. Thus, the Court stood alone without any support in enforcing *Brown*.[240]

Furthermore, the Court stood alone in its battle against the South, and the Justices should have predicted that other political actors would not support its decision anytime soon. It seems that they were too bold to knowingly invalidate the most sensitive institution for white southerners. However, they could have expected other actors to support their position on school segregation sooner or later as it was in the middle of the Cold War. Racial subordination in the U.S. was ridiculed by its communist enemies, and the Department of Justice in 1952 had informed the Court of the damage that racial segregation in the American South would cause to its national interests.[241] If the Justices rightly had predicted that the segregation in the South could not be maintained, the Cold War could have been an encouraging factor for the Court to invalidate school segregation in 1954, much earlier than 1964 when the Congress began a decisive movement for desegregation.

Third, in both cases, not the original intent but the current standard provided the basis for the Supreme Court to apply the text of the Constitution to the issues they were faced with: school segregation and juvenile execution.[242] Also common is the reference to the so-called scientific evidence. In *Brown*, a psychological study was cited to demonstrate that the segregation had "a detrimental effect upon the colored children."[243] In *Roper*, the Court referred to psychological studies that arguably demonstrate that the culpability of the juvenile is lower than that of the adult.[244] The scientific evidence referred to in both the cases was similarly not quite convincing. It is well known that the Court's reference to the psychological study in *Brown* invited criticism for its appropriateness.[245] In *Roper*, the reliance on the scientific studies was criticized by dissenting Justices O'Connor and Scalia.[246] Reliance on the arguably dubious source might well mean that the decisions were

240. *See, e.g*., KLARMAN, *supra* note 211, at 321–26

241. *See supra* text accompanying note 138, 237–39.

242. Justice Frankfurter's law clerk, Alexander Bickel spent a summer reading the legislative history of the Fourteenth Amendment and reported to Justice Frankfurter that it was impossible to conclude that its supporters intended or even foresaw the abolition of school segregation. Michael Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 434 (2005) (citing memorandum from Alexander M. Bickel, Law Clerk, to Felix Frankfurter, Assoc. Justice, U.S. Supreme Court (Aug. 22, 1953), *microformed on* Frankfurter Papers, pt. 2, reel 4, frames 212–14 (Univ. Publ'ns of Am. 1986)).

243. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

244. Roper v. Simmons, 543 U.S. 551, 569–75 (2005).

245. JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 68 (2001).

246. *Roper*, 543 U.S. at 599-604 (O'Connor, J., dissenting); *id*. at 617-23 (Scalia, J., dissenting).

difficult to justify by the conventional sources of law—original intent and evolving standard in these cases—alone.[247]

B. Dissimilarities

There are seemingly important dissimilarities between *Brown* and *Roper*. First, most obviously, *Brown* neither referred to foreign law nor the international climate. This fact appears critically detrimental, for this article analyzes the Supreme Court's major death penalty cases focusing on the reference to the foreign law. Nevertheless, it is possible that the justices still took the international climate into consideration even though they stated that they did not do so.

Then why did they refer to the foreign law in *Roper* and not in *Brown*? The expected backlash against the reference to the international climate provides us with a clue. In the 1950s, school segregation was one of the most important and sensitive issues for white Southerners.[248] For them, *Brown* represented federal interference in Southern race relations that they could not tolerate.[249] If the Court in *Brown* expressly referred to the international climate or the foreign interests of the United States, it would have provided much more of an explicit target for criticism by conservative white Southerners. Chief Justice Warren intended to write a short, unemotional, and non-accusatory opinion when he wrote it.[250]

On the other hand, juvenile execution was not as important a social issue as school segregation. *Roper* invoked some backlash but it was surely much less severe than the backlash that *Brown* had invited in the South. One could even imagine that Justice Kennedy dared to refer to foreign law in order to invoke the argument and make it clear for the American public that the United States stood completely alone in executing juveniles, in expectation of the negative response from not only Justice Scalia but also conservative commentators and political actors.[251] This imagination is partly inspired by Professor Klarman's thesis that the

247. Professor Klarman, in his inspiring article which juxtaposes *Brown* and *Lawrence*, points out that the Court in Lawrence relies partly on unorthodox source for interpreting U.S. Constitution, a decision by the European Court of Justice. Klarman, *supra* note 242, at 439-40. He says that the invocation of a precedent from the European court may reflect the Justices' concern in Lawrence that the conventional sources of U.S. constitutional law did not adequately support the result, while he admits that one can attribute such a reference to the effects of globalization. *Id.* I agree with Professor Klarman on his view about the effects of globalization, but I should also add that Lawrence could be another occasion for the Court to invalidate a distinctively Southern law, although it requires another article to deal with it. That many famous decisions in the area of the criminal procedure have their origins in the South is to be noted. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

248. KLARMAN, *supra* note 211, at 391.

249. *Id.*

250. PATTERSON, *supra* note 245, at 65.

251. The criticism against referring to the foreign law was possibly more rigorous than the majority presumably expected. The Court abstained from referring to the international climate in a 2008 decision on the constitutionality of the capital punishment of the child rapist, even though the defendant and some amici insisted that it is against the international climate to impose capital punishment for the child rapist. Brief for Respondent at 17, 20, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), 2008 WL 369341; Brief for Petitioner at 20, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343),

Supreme Court justices, with much higher education than those of average Americans, tend to have more liberal views than those of average Americans.[252] At the same time, however, it also reminds us of Judge Richard A. Posner's criticism that *Roper* represented a naked political judgment, with which the author partly agrees to the extent that it is possible to view *Roper* as a political decision.[253] In any case, by definition, it is impossible to prove that *Brown* was motivated by the foreign national interests of the United States because of the lack of direct evidence. It also is impossible to prove that considerations for the international climate and the national interests of the United States were completely excluded from the minds of the justices.

In connection with this point, an anecdote is worth mentioning. In 1963, Justice Goldberg circulated his memorandum to his colleagues that raised the issue of the constitutionality of the death penalty. He stated in his memorandum that the evolving standards of decency condemned as barbaric and inhuman the deliberate institutionalized taking of human life by the state.[254] He then turned his attention to the international trend and concluded that the worldwide trend was unmistakably in the direction of abolition.[255] His proposal was not accepted by his colleagues, so this anecdote at most suggests that a member of the Court considered the international climate as an important factor in applying the evolving standards of decency to death penalty issues. However, the reason Chief Justice Warren gave for denying the proposal by Justice Goldberg could be more telling. Professor Alan M. Dershowitz, who had served as a law clerk for Justice Goldberg, recalled that the Chief Justice was furious to see the suggestion by Justice Goldberg at the time when *Brown* was just taking effect.[256] Professor Dershowitz continued to say that "the idea that we would then allow blacks killing whites to be saved from the death penalty was too much for a politically sensitive Justice like Warren to accept."[257] If the Court refused to hear a case concerning the constitutionality of the death penalty in the consideration of possible negative impact on the enforcement of school segregation, it seems ironic given the cultural linkage between segregation and capital punishment in the American South.[258]

2008 WL 466093; Brief Amici Curiae of Leading British Law Associations, Scholars, Queen's Counsel and Former Law Lords in Support of Petitioner Patrick Kennedy, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), 2008 WL 706791. As to the backlash by political actors, see for example, Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 273–74 (2006).

252. KLARMAN, *supra* note 211, at 450.

253. Posner, *supra* note 6, at 90.

254. Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment*, 27 S. TEX. L. REV. 493, 499 (1986).

255. *Id*.

256. IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME: AMERICAN'S SPEAK OUT AGAINST THE DEATH PENALTY 330 (1989).

257. *Id*.; THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 189 (Melvin I. Urofskey ed., 1987).

258. These materials suggest that the Justices had been well aware of the results their decisions would produce in the 1960s, while we shall have to wait until the notes and memoranda are made public before we know how much they were aware of the international climate and national interests of the United States at the time of Roper v. Simmons, 543 U.S. 551 (2005). *See also* KLARMAN, *supra* note

Second, *Brown* was unanimous while *Roper* was sharply divided five to four. However, this difference is not as important as it seems. It is well known that a few Justices at the time of *Brown* were against overruling *Plessy v. Ferguson*,[259] and that Chief Justice Warren worked hard to bring his colleagues together. He was able to deter some of his colleagues from writing separate opinions and successfully ensured a unanimous opinion.[260] They expected and tried to avoid the strong backlash that should have arisen in the South if the Court were divided when it invalidated school segregation. The members of the Court had to be united when they declared unconstitutional such an established social institution. On the other hand, the issue of juvenile execution was at most slightly more important than the execution of the mentally retarded. The Court invalidated the execution of the mentally retarded in 2002[261] and invited arguably harsh, but definitely not fatal, criticism for the Court's prestige in the American political system. Here again, one could even imagine that the Court deliberately referred to the international climate on juvenile execution when it invalidated it as a domestic institution, in order to let the American people know that the United States stood completely alone in the world.[262] The decision was expected to invite criticism from several members of the Court and others outside the Court, but it could not cause fatal damage to the Court. The degree of the expected backlash could have separated *Roper* from *Brown* in terms of unanimity.[263]

Third, international relations in 2005 were quite different from those in 1954.

is far beyond the reach of this Article. It is only an attempt to see what the Court does from the perspective of American domestic and international environments, particularly the American South and the growing condemnation of its traditional social institution by the international community. The Court in *Brown* invalidated school segregation in as many as twenty one states when to do so arguably ensured greater national interests in foreign relations in 1954, while the Court in *Roper* invalidated juvenile execution in as many as twenty states when to do so arguably ensured similar interests.[264] Most of those states share the Southern tradition. That is the simple framework of analysis of this Article, and it requires another to go beyond this.

Finally, *Brown* and *Roper* dealt with different problems; respectively, school segregation in *Brown* and juvenile execution in *Roper*. *Brown* invalidated school segregation on the basis of the Equal Protection Clause, while *Roper* held that the Eighth Amendment disallows juvenile executions. It is fair for one to cast doubt on the appropriateness of the comparative analysis of these cases. However, as stated above, there is a correlative relationship between school segregation and the death penalty. School segregation was mostly required or permitted in the South and border states at the time of Brown, while it is those states that most frequently execute capital offenders.[265] The fifteen out of twenty states that permitted the juvenile death penalty in 2005 were among the twenty one states that had required or permitted school segregation in 1954.[266]

It is impossible to precisely attest to the causation between school segregation and the frequency of execution in general, or the retention of the juvenile execution in this article. There are too many variables that are intricately related. However, it is useful, even tentatively, to approach this problem by constructing American history. Professor Banner states that the South's retention of capital punishment for Blacks was surely a result of slavery because they needed harsh punishment to manage large captive populations.[267] After abolition, lynching, and after lynching, execution arguably followed this tradition. The states with high-lynching history account for most of the modern executions.[268] There is no doubt that segregation was established by the white Southerners' notion of racial subordination that ultimately dates back to slavery. In this way, school segregation and frequent execution have common roots in racial subordination and slavery in the South.

---

264. *See supra* text accompanying notes 228, 237–41.

265. *See infra* note 278 and accompanying text. According to the death information penalty center, most of the juvenile executions between 1976 through 2005 took place in the South: Texas (13), Virginia (3), Oklahoma (2), Florida (1), Georgia (1), Missouri (1), and South Carolina (1). *Juvenile Offenders Executed, by State*, 1976-2005, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/juvenile-offenders-executed-state-1976-2005 (last visited July 9, 2011).

266. *See supra* notes 228–29 and accompanying text.

267. BANNER, *supra* note 16, at 142.

268. ZIMRING, *supra* note 114, at 96.

CONCLUSION

The Supreme Court of the United States has sometimes assumed important political roles in the form of constitutional interpretation since the nineteenth century. One of the most infamous decisions of the Supreme Court, *Scott v. Sanford*[269] could be considered from the viewpoint that the Court, for the purpose of avoiding a house divided, attempted to prevent a national emergency by constitutionalizing an onerous issue of the day, slavery in the U.S. territory, and thus take it away from the conflicted political branches that were not able to provide adequate resolution.[270] *Brown v. Board of Education*[271] undoubtedly accepted the argument presented by the NAACP that school segregation was in violation of the Equal Protection Clause of the Fourteenth Amendment, but it also is possible to view the decision as an effort to avoid damage to the foreign national interests of the United States caused by continuingly segregating Black Americans. In *Roper*, former U.S. diplomats presented a brief in which they urged the Court to invalidate the state death penalty laws on the basis that executing juveniles "will diplomatically isolate the United States and hinder its foreign policy goals by alienating countries that have been American allies of long standing."[272]

Slavery and segregation were deeply rooted in the South, and now frequent executions are distinctively a Southern phenomenon. The Court has dealt with the difficult problem of drawing a line of power distribution between the states and the nation in its long history. It might have needed to consider only domestic politics in the nineteenth century after which international relationships began to gain importance. The Court was asked to offer a resolution for an internationally condemned practice for which the national government was not willing or able to resolve in a satisfactory way. The United States by its nature is less afraid of standing alone in the global community than most other democracies. Nevertheless, the highly educated and most knowledgeable justices of the Court should have been aware of the consequences resulting from the adherence to the distinctively southern tradition. *Dred Scott* and *Brown* suggest how difficult it is to predict the consequences such bold decisions bring about. The Court in *Brown* and *Roper* arguably prioritized the greater national interests by invalidating the law of the Southern states that have been enjoying a unique cultural tradition in the huge nation in which diversity is usually welcomed. The Court played its role of dissolving the conflicts among the states in the nation and the conflicts the nation was faced with in the international community in *Brown* and *Roper*.

We should be careful not to overemphasize the role of the Supreme Court in American politics. The Court does not have the power to enforce its decisions, and

---

269. Scott v. Sanford, 60 U.S. 393 (1856).

270. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978). *But see* AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–57 (2006) (criticizing the Fehrenbacher's overstatementof the influence of sectional politics).

271. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

272. Brief for Former U.S. Diplomats as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005), at 20.

justices are undoubtedly well aware of it. As Professor Klarman states, court decisions cannot fundamentally transform a nation.[273] *Brown* did not fundamentally transform the American society of the day.[274] *Roper* dealt only with a specific issue of juvenile execution, and the Court could easily predict that invalidating state laws concerning the juvenile death penalty would not generate huge backlash against the Court. Neither *Brown* nor *Roper* invalidated the institution that was supported by a majority of Americans. This, however, is not inconsistent with the general proposition that the Court sometimes ensures the national interests by adopting the international standard. This Article does not claim that the Court always ensures the national interests at any cost, but it only assumes that the Court, under certain circumstances, invalidates the institution adopted by a substantial number of states in order to ensure the greater national interest. In other words, "[l]itigation is unlikely to help those most desperately in need."[275]

A word on the death penalty in the United States is appropriate. Capital punishment has been in consistent decline in the international community, but it is unlikely that it will disappear from the United States in the near future. The Supreme Court, the only authority to declare that capital punishment itself is in violation of the Eighth Amendment, is not likely to do so given that more than two-thirds of the states retain capital punishment for normal crimes. Also, the Court might have learned the lesson from *Furman v. Georgia*[276] that abolishing capital punishment could cause a backlash that could endanger the status of the Court as a voice of wisdom in the great nation. Then, the United States will be a retentionist nation in an increasingly hostile environment to retentionist nations.

It would however, be a misapprehension if one believes that capital punishment is so deeply embedded in the minds of the most American people. New Mexico in 2007, then New Jersey in 2009, by legislation, abolished capital punishment. Illinois followed this trend in 2011, making the number of retentionist states thirty four.[277] Moreover, many of the retentionist states execute capital offenders, but the executions are few in number. Most of the executions are carried out in the South; in particular, in Texas and Virginia.[278] This deviation in frequency to execute among the retentionist states in the United States resembles the deviation in frequency to execute among the retentionist countries in the world to a certain degree. As stated above, among 527 known executions in the year 2010, seven countries including the United States out of fifty eight retentionist countries

273. KLARMAN, *supra* note 211, at 468.

274. *Id*. *See also* ROSENBERG, *supra* note 206, at 39–169 (concluding that there is evidence that the changes in civil rights could plausibly have happened without Supreme Court action).

275. KLARMAN, *supra* note 211, at 463.

276. Furman v. Georgia, 408 U.S. 238 (1972).

277. Recent abolition movement is at least partly motivated by the cost concern. *See, e.g.*, Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 25, 2009 http://www.nytimes.com/2009/02/25/us/25death.html?pagewanted=all.

278. According to the Death Penalty Information Center, 1036 executions out of 1260 since 1976 took place in the South. Texas and Virginia alone account for 579 executions. *See* Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited July. 9, 2011).

accounted for ninety percent of all executions.[279] As Professor Zimring states, "[t]here is a larger difference between Minnesota and Oklahoma on issues of capital punishment than between Minnesota and Australia."[280] The Court distinguishably has filled its role in the United States, whose constitutional design characterized by federalism and the division of power among the national branches, prompts it to do so. The Supreme Court, with learned justices usually in a consciously and advisedly disciplined way, sometimes, though perhaps not frequently, boldly leads the great nation, balanced between its sovereign states, the nation itself, and the global community.

279. *See supra* note 106 and accompanying text.
280. ZIMRING, *supra* note 114, at 118.