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GLOBAL SOCIETY VS. NATIONAL SOVEREIGNTY:  
DEFENDING THE USE OF LEGAL AND CONSTITUTIONAL  
COMPARATIVISM IN DEATH PENALTY JURISPRUDENCE

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INTRODUCTION

The death penalty is a divisive and complex area of American jurisprudence, often raising spirited debates between the factions supporting its use and those supporting its abolishment. In 1972, the death penalty was essentially abolished after being declared unconstitutional as a form of punishment by the Supreme Court in *Furman v. Georgia*.<sup>1</sup> However, through its 1976 decision in *Gregg v. Georgia*, the Court again permitted the death penalty as a form of punishment in certain situations.<sup>2</sup> In the years since this decision, the Court has further limited the use of the death penalty to particular circumstances where certain guidelines must be followed in its imposition. This narrowing is in large part due to the constantly shifting public perceptions concerning its use,<sup>3</sup> coupled with the lack of quantitative evidence verifying the purported benefits of using the death penalty as a form of punishment.

Two recent cases, *Atkins v. Virginia* and *Roper v. Simmons*, reflect the Court's continuing restriction of what type of crime and what type of criminal are subject to the death penalty.<sup>4</sup> In *Atkins*, the Court ruled that the execution of the mentally retarded is a "cruel and unusual punishment" that is prohibited by the Eighth Amendment.<sup>5</sup> In *Roper*,

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<sup>1</sup> *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (5-4 decision) (Douglas, J., concurring).

<sup>2</sup> *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

<sup>3</sup> See Russell G. Murphy & Eric J. Carlson, "Like Snow [Falling] on a Branch. . .": *International Law Influences on Death Penalty Decisions and Debates in the United States*, 38 *DENV. J. INT'L L. & POL'Y* 115, 119 (2009).

<sup>4</sup> *Id.* at 115.

<sup>5</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

the Court held unconstitutional the imposition of capital punishment on individuals under the age of eighteen.<sup>6</sup> While both decisions provide numerous areas of contention for legal scholars and practitioners alike, one area is most notable for the amount of controversy and contention it has spawned—the citation and use of foreign sources and authorities in developing the Court’s decisions, otherwise known as legal or constitutional comparativism.<sup>7</sup>

In *Atkins*, Justice Stevens, writing for the majority, supported the Court’s decision that executing mentally retarded criminals was cruel and unusual punishment by stating in a footnote that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>8</sup> In *Roper*, Justice Kennedy, also writing for the majority, supported the Court’s decision that imposition of capital punishment for individuals under the age of eighteen was unconstitutional by referencing international sources and authorities.<sup>9</sup> Justice Kennedy stated, “[t]he overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18.”<sup>10</sup> This use of legal comparativism has garnered support in the Court from other Justices as well, most notably Justices Ginsburg and Breyer.<sup>11</sup> However, there are numerous detractors of comparativism—both on the Court and off—and they have vocalized their disdain for its use in Supreme Court decisions.

One of the more outspoken and notable opponents of comparativism is Justice Antonin Scalia.<sup>12</sup> In his *Atkins* dissent, Justice Scalia states “[e]qually irrelevant are the practices of the ‘world community,’

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<sup>6</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>7</sup> See Shawn E. Fields, *Constitutional Comparativism and the Eighth Amendment: How a Flawed Proportionality Requirement Can Benefit From Foreign Law*, 86 B.U. L. REV. 963, 964 (2006) (discussing the comeback of constitutional comparativism in the Supreme Court); Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://slate.msn.com/id/2098559/> (discussing the comeback of legal comparativism in the Supreme Court).

<sup>8</sup> *Atkins*, 536 U.S. at 317 n.21.

<sup>9</sup> *Roper*, 543 U.S. at 554.

<sup>10</sup> *Id.*

<sup>11</sup> See Harold Hongju Koh, *Agora: The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 48 (2004) (discussing the Justices’ views on using foreign policy or precedent in the opinions of the Court).

<sup>12</sup> *Id.* at 47.

whose notions of justice are (thankfully) not always those of our people.”<sup>13</sup> Furthermore, in *Roper*, Scalia opined, “I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court and like-minded foreigners.”<sup>14</sup> Moreover, Justice Scalia participated in a public discussion with Justice Breyer where he criticized Breyer’s willingness to utilize international law in writing his opinions.<sup>15</sup> Justice Scalia is not alone in his views, often finding support from Justice Thomas and Chief Justice Rehnquist.<sup>16</sup>

The opposition to the use of comparativism has not been limited to the confines of the Supreme Court. The issue of using comparativism in American courts has been raised during the Senate Confirmation Hearings of both Chief Justice John Roberts and Justice Sonia Sotomayor.<sup>17</sup> In 2004, Tom Feeney, a Representative from Florida, sponsored a resolution calling for the impeachment of judges who engage in comparativism.<sup>18</sup> Moreover, Conservative Alerts, a lobbying organization based in Washington, called for the impeachment of Supreme Court Justices that use comparativism.<sup>19</sup> The use of comparativism in the Court’s decisions is clearly a hot-button issue that raises the ire of many.

Notable and legitimate reasons are given by opponents of comparativism as to why they are vehemently against using international sources in Supreme Court rulings. The first and most notable reason involves national sovereignty. Opponents suggest that using international sources infringes upon areas traditionally left to the determina-

<sup>13</sup> *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting).

<sup>14</sup> *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).

<sup>15</sup> Murphy & Carlson, *supra* note 3, at 133.

<sup>16</sup> See Traci Donovan, *Foreign Jurisprudence – To Cite or Not to Cite: Is That the Question or is it Much Ado About Nothing?*, 35 CAP. U. L. REV. 761, 776 (2007) (discussing Justice Scalia’s dissenting opinion in *Atkins*, which was joined by Chief Justice Rehnquist and Justice Thomas); see also Yitzchok Segal, Comment, *The Death Penalty and the Debate Over the U.S. Supreme Court’s Citation of Foreign and International Law*, 33 FORDHAM URB. L.J. 1421, 1427 (2006) (discussing Justice Scalia’s dissenting opinion in *Lawrence v. Texas*, which was joined by Chief Justice Rehnquist and Justice Thomas).

<sup>17</sup> Jesse J. Holland, *Justice Breyer Says Debate Over Foreign Law is Irrelevant*, ASSOCIATED PRESS, Apr. 2, 2010, [http://www.law.com/jsp/article.jsp?id=1202447341873&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW\\_20100402&kw=Justice%20Breyer%20Says%20Debate%20Over%20Foreign%20Law%20Is%20Irrelevant](http://www.law.com/jsp/article.jsp?id=1202447341873&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20100402&kw=Justice%20Breyer%20Says%20Debate%20Over%20Foreign%20Law%20Is%20Irrelevant).

<sup>18</sup> Fields, *supra* note 7, at 966.

<sup>19</sup> *Id.*

tions of the states of our sovereign nation, and that the “global opinions of humankind” will be used to “thwart the domestic opinions of Americans.”<sup>20</sup> Others are concerned with the relevancy and transferability of international sources.<sup>21</sup> Opponents espouse that legal systems and rulings evolved from a “distinct historical and cultural context” that generally involve very fact-specific situations that are likely not applicable or reconcilable with our democratic process and the development of American jurisprudence.<sup>22</sup> While these concerns may be legitimate, there are several reasons to support the use of comparativism in death penalty jurisprudence that are just as compelling, if not more so.

This paper will discuss why the limited use of comparativism as a factor in death penalty jurisprudence is appropriate and a highly valuable resource. Part I of the paper will discuss the historical use of comparativism in the development of American jurisprudence and governance, as evidenced through the use of foreign sources and authorities in not only Supreme Court cases, but also in the development of the Constitution. This history will reflect that comparativism generally has never been the lone, dispositive consideration of the Court or the Framers, but has been used only as a limited factor in developing its rulings and principles of governance. Part II will discuss the role comparativism played in establishing and interpreting the Eighth Amendment’s ban on “cruel and unusual punishment,” which is generally implicated when discussing the constitutionality of the death penalty. Moreover, there will be a discussion of how comparativism can be used to assist in developing a more complete definition of the “evolving standards of decency” that is more appropriate to helping achieve one of the purposes of the Constitution. Part III will discuss the rise of a “global society” as evidenced by the amount of foreign-born citizens in the American population, and how comparativism can be used as a resource in helping to answer questions about political representation and deterrence stemming from the use of capital punishment in such a diverse society. Lastly, Part IV will recommend guidelines to follow in using comparativism that will alleviate some of the concerns of its detractors.

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<sup>20</sup> Roger P. Alford, *Agora: The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58 (2004).

<sup>21</sup> Fields, *supra* note 7, at 992.

<sup>22</sup> *Id.*

## I. HISTORICAL USE

The use of comparativism is not a recent trend that is wholly unfamiliar to legal scholars, practitioners, and politicians. To the contrary, foreign sources and authorities have played a role in the development of our systems of government and jurisprudence. An early example, and possibly the strongest response to the contention of Justice Scalia and other originalists that the use of comparativism is “possibly unconstitutional,”<sup>23</sup> is its use in the development of the United States Constitution.<sup>24</sup> The Federalist Papers, often used as a reference when interpreting the Constitution because they reflect the thought process and motivations of the Framers in developing the Constitution, reference and discuss the ancient federations of Greece, Rome, Switzerland, and the Netherlands.<sup>25</sup> While the Framers “viewed them as undesirable models” to follow,<sup>26</sup> these writings suggest that the Framers understood the value in referencing foreign sources and authorities in deciding what to incorporate in developing our system of government.

The Framers of the Constitution did not limit their use of foreign sources and authorities to studies of ancient federations of Europe. The political theories and philosophies of Montesquieu, a French political thinker from the 18th century, were studied and referenced by the Framers in developing our system of government.<sup>27</sup> One of Montesquieu’s most notable works, *The Spirit of the Laws*, was influential in shaping the Framers’ views on federalism and the separation of powers.<sup>28</sup> James Madison, considered by some to be the “Father of the Constitution” because of his contribution to its creation,<sup>29</sup> and the other Framers were particularly influenced by Montesquieu and his views on the separation of powers.<sup>30</sup> This provides further support to the notion that the Framers understood the benefits of referencing

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<sup>23</sup> *Id.* at 965.

<sup>24</sup> John S. Baker, Jr., *Citing Foreign and International Law to Interpret the Constitution: What’s the Point?*, 69 ALB. L. REV. 683, 684 (2006).

<sup>25</sup> *Id.* (citing THE FEDERALIST NO. 6, at 22-23 (Alexander Hamilton) (Terence Ball ed., 2003); NO. 4 at 15 (John Jay) (Terence Ball, ed., 2003)).

<sup>26</sup> *Id.* (citing THE FEDERALIST NO. 9, at 35 (Alexander Hamilton) (Terence Ball ed., 2003)).

<sup>27</sup> *Id.* at 685.

<sup>28</sup> *Id.*

<sup>29</sup> About the White House Presidents: James Madison, <http://www.whitehouse.gov/about/presidents/jamesmadison> (last visited Feb. 17, 2011).

<sup>30</sup> Patrick M. Garry, *The Unannounced Revolution: How the Court has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 697 (2006).

and studying foreign sources and authorities in developing a system of government free from the errors that plagued others.

While the Framers clearly expressed a willingness to reference foreign sources and authorities, the Supreme Court has also utilized comparativism in interpreting the Constitution and developing its rulings.<sup>31</sup> An early example of the Court's use of comparativism can be found in the opinions of Chief Justice John Marshall. In *Murray v. The Schooner Charming Betsy*, Chief Justice Marshall stated that, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>32</sup> The "law of nations" is a term used when referring to international law, or, more specifically, when referring to legal principles that have developed a "consensus among judges, jurists, and lawmakers around the world."<sup>33</sup> The Court would have had to resort to some sort of comparativism in developing its ruling for it could not have known whether Congress had violated the "law of nations" unless it had an understanding of what those laws were. Moreover, in *McCulloch v. Maryland*, Chief Justice Marshall discussed the "universal assent of mankind" in stating that the federal government maintained supremacy in the United States despite its limited powers, further evidencing an understanding that the views and practices of other nations can be a factor or reference point in the interpretation of our Constitution and development of our laws.<sup>34</sup> These are merely two of the many instances in which the Court has used comparativism as a factor in developing its opinions.

Comparativism was utilized by the Court in the seminal case of *Pennoyer v. Neff*, a case that established the power of a court to maintain personal jurisdiction over a party if that party is physically present in a state when served with process.<sup>35</sup> Relying on the precepts of *stare decisis* was impossible for the Court because determining the limits of a state's personal jurisdiction over a party was a case of first impression for the Court, so the Court was forced to rely on other sources in developing its opinion.<sup>36</sup> Discussing "the international law" and how the federal courts "are not foreign tribunals in their relations to State courts," the

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<sup>31</sup> G. Brinton Lucas, *Structural Exceptionalism and Comparative Constitutional Law*, 96 VA. L. REV. 1965, 1965 (2010).

<sup>32</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>33</sup> Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132 (2005).

<sup>34</sup> *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

<sup>35</sup> Fields, *supra* note 7, at 968 (citing *Pennoyer v. Neff*, 95 U.S. 714, 730 (1877)).

<sup>36</sup> *Id.*

Court studied and referenced a concept used in Western Europe known as “public international law.”<sup>37</sup> The use of foreign authority and sources was not dispositive to the decision of the Court, but instead represented an approach taken by the Court designed to formulate an enlightened decision based on the strategy taken by those faced with a similar problem.

A similar approach was taken by the Court in another seminal case, *Palko v. Connecticut*.<sup>38</sup> In writing for the Court, Justice Cardozo established that a claimed right is only guaranteed against the States through the Due Process Clause of the Fourteenth Amendment if that right is “implicit in the concept of ordered liberty.”<sup>39</sup> Justice Cardozo impliedly and expressly acknowledges his use of foreign sources and authorities in shaping his opinion, referencing the “conscience of mankind” and stating within a footnote that “[c]ompulsory self-incrimination is part of the established procedure in the law of Continental Europe.”<sup>40</sup> In both *Pennoyer* and *Palko*, landmark rulings that helped shape American civil and criminal procedures as we know them today, the Court used foreign authorities and sources as a frame of reference to help in establishing rules tailored to remedy perceived problems while staying within the constraints of the Constitution.

Modern cases also reflect the Court’s use of comparativism as a resource in helping to formulate its decisions. Justice Burger, in writing a concurring opinion in *Bowers v. Hardwick*, discussed Roman and English law in supporting the ruling of the Court that Georgia’s sodomy statute did not violate the fundamental rights of homosexuals.<sup>41</sup> The decision of the Court in *Bowers* was later overturned through the Court’s opinion in *Lawrence v. Texas*.<sup>42</sup> In *Lawrence*, Justice Kennedy’s majority opinion discussed the European Court of Human Rights, and cited *Dudgeon v. United Kingdom*, a case decided by the English courts, in supporting the Court’s ruling that a Texas statute making it a crime for two persons of the same sex to engage in sexual conduct was unconstitutional.<sup>43</sup> This ruling has drawn the ire of many for its use of comparativism, proving that death penalty cases are not the only cases

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<sup>37</sup> *Id.* at 968, 968 n.31.

<sup>38</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>39</sup> *Id.* at 325.

<sup>40</sup> *Id.* at 323, 326 n.3.

<sup>41</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, J., concurring).

<sup>42</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>43</sup> *Id.* at 576-77.

prone to controversy.<sup>44</sup> Moreover, comparativism has been used by one of the Court's more staunch opponents of its use. Chief Justice William Rehnquist, whose dissenting opinion in *Lawrence* was critical of the Court's use of comparativism, discussed the experience of the Dutch with their legislation regarding physician-assisted suicides in his opinion in *Washington v. Glucksberg*.<sup>45</sup> In discussing the respondents' contention that similar legislation could be used in the United States, Chief Justice Rehnquist used the Dutch experience as an example of how the effectiveness of such legislation against the involuntary euthanasia of individuals has not been proven.<sup>46</sup> While seemingly used as mere dicta, the Court's reference to Dutch legislation served to further establish a basis and support for the Court's solution to a problem that other nations have faced.

While comparativism has clearly been used throughout many areas of American jurisprudence, its use can also be found in the Court's prior rulings in death penalty cases. In *Coker v. Georgia*, the Court was faced with the question of whether the imposition of the sentence of death for rape was unconstitutional under the Eighth Amendment.<sup>47</sup> In deciding that the death sentence for the crime of rape was indeed unconstitutional after taking into consideration the legislative enactments of the states and the national jury sentencing decisions,<sup>48</sup> the Court also discussed the relevance of foreign practices in a footnote supporting its decision.<sup>49</sup> The use of comparativism was clearly minimal, as it was merely a small factor among many considered in developing its opinion.<sup>50</sup>

The Court again used comparativism in the case of *Enmund v. Florida*.<sup>51</sup> In declaring unconstitutional the use of capital punishment on a defendant who does not actually kill, but only aids and abets a felony where someone else kills, the Court, again focusing its analysis mainly on the legislative enactments of the states and the national jury sen-

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<sup>44</sup> Wu, *supra* note 7.

<sup>45</sup> *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

<sup>46</sup> *Id.*

<sup>47</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>48</sup> *Id.* at 594-97.

<sup>49</sup> *Id.* at 596 n.10 ("In *Trop v. Dulles*, the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.") (citations omitted).

<sup>50</sup> *See id.*

<sup>51</sup> *Enmund v. Florida*, 458 U.S. 782 (1982).



tencing decisions, stated in a footnote that international opinion is “not irrelevant” to its analysis and supported its ruling by referencing the abolition of the death penalty for felony murder in England and India.<sup>52</sup> Again, comparativism was a small factor used to support the Court’s ruling, with the practices of the states and juries monopolizing the Court’s opinion.<sup>53</sup>

History has shown that foreign sources and authorities have been studied and referenced repeatedly in developing our systems of government and jurisprudence. Never used as the dispositive fact controlling the decisions made, comparativism is more appropriately viewed as a factor to be considered in an effort to support and sometimes to make a more informed and enlightened decision regarding important aspects of American governance and jurisprudence. The Framers used comparativism as a reference in developing the “supreme Law of the Land”<sup>54</sup> while the Supreme Court utilized it in developing our systems of civil and criminal procedure. If the Framers and jurists felt that comparativism was appropriate to use in such important circumstances, then it stands to reason that its use is just as appropriate in determining the constitutionality of a punishment that involves extinguishing a human life.

## II. INTERPRETING THE EIGHTH AMENDMENT

The debate concerning the constitutionality of the death penalty generally involves differing interpretations of the Eighth Amendment of the United States Constitution. The Eighth Amendment provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>55</sup> The main point of contention between supporters of the death penalty and abolitionists concerns whether or not the death penalty can be deemed a “cruel and unusual punishment.”<sup>56</sup> The Court has been unable to give an exact definition of what constitutes a “cruel and unusual punishment,” stating that, “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.”<sup>57</sup> However, the

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<sup>52</sup> *Id.* at 796 n.22.

<sup>53</sup> *See id.*

<sup>54</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land”).

<sup>55</sup> U.S. CONST. amend. VIII.

<sup>56</sup> *Id.*

<sup>57</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878).

Court has utilized many different resources in interpreting the Eighth Amendment, which has resulted in the development of principles throughout the years that act as guides in determining whether a punishment is prohibited as “cruel and unusual.”<sup>58</sup> One such resource is comparativism, which has helped shape Eighth Amendment jurisprudence and can continue to help in clarifying remaining ambiguities. The role comparativism has played becomes evident when looking at the background of the Eighth Amendment, from its establishment and through the numerous decisions of the Court interpreting it.

In establishing the Eighth Amendment, in particular the prong concerning “cruel and unusual punishments,” the Framers referenced section 9 of the 1776 Virginia Declaration of Rights.<sup>59</sup> In doing this, the Framers engaged in comparativism due to the fact that section 9 of the Virginia Declaration of Rights was essentially lifted from the 1689 English Bill of Rights.<sup>60</sup> While there is much unknown surrounding the history of the Amendment, an understanding of the English Bill of Rights is “universally recognized as relevant” in interpreting the meaning and purpose of the Eighth Amendment.<sup>61</sup> This begs the question as to why it would be inappropriate to reference foreign sources in interpreting a constitutional provision that is rooted in foreign authorities. However, in examining the Court’s decisions interpreting the Eighth Amendment ban on “cruel and unusual punishments,” it becomes clear that the Court shows the same willingness to use comparativism in developing their opinions as they showed in developing laws in other areas of American jurisprudence.<sup>62</sup> In particular, the history behind the Court’s establishment of the rule, that the death penalty

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<sup>58</sup> See Murphy & Carlson, *supra* note 3, at 116-17 (stating that a death penalty scheme is constitutional as long as (1) “[i]t is not imposed in an arbitrary and capricious manner,” (2) “[i]t ‘advances’ a legitimate ‘penalogical justification,’” and (3) that “[i]t is consistent with the ‘evolving standards of decency’ recognized by a ‘maturing society’ and respects the ‘human dignity’ that is at the core of the Eighth Amendment”).

<sup>59</sup> See Michael J. Zydney Mannheimer, *When the Federal Death Penalty is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819, 832 (2006).

<sup>60</sup> See *id.*

<sup>61</sup> *Id.*

<sup>62</sup> Compare *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (citing cases from the European Court of Human Rights that protect homosexual, consensual sexual conduct as “an integral part of human freedom” in support of the Court’s ruling that a statute criminalizing homosexual relations was unconstitutional), and *Pennoy v. Neff*, 95 U.S. 714, 732-33 (1877) (using international concepts of territorial sovereignty in a personal jurisdiction case), with *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (discussing the origin of the phrase “cruel and unusual” in the English Bill of Rights of 1688 and tracing the origin of the principle to the Magna Carta), and *Weems v. United States*, 217 U.S. 349,

scheme be “consistent with the ‘evolving standards of decency’ recognized by a ‘maturing society’”<sup>63</sup> in order to survive a constitutional challenge, suggests comparativism played a role in the thinking behind its establishment and leads to reason that comparativism can help explain some of the ambiguities that remain surrounding the rule’s meaning and purpose.

The establishment of the rule can be traced to the Court’s decisions in the early cases of *Weems v. United States*<sup>64</sup> and *Trop v. Dulles*.<sup>65</sup> In *Weems*, the Court reviewed the judgment of the Supreme Court of the Philippines in sentencing the plaintiff to fifteen years imprisonment for “falsifying a ‘public and official document.’”<sup>66</sup> In delivering the opinion of the Court, Justice McKenna found the punishment to be “cruel and unusual,” stating that the Cruel and Unusual Clause of the Constitution “may be therefore progressive and . . . not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>67</sup> Moreover, the Court seemed to have created a proportionality requirement between the crime and the punishment when it stated that it is “a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”<sup>68</sup> While the Court does not expressly cite to foreign sources or authorities, Justice McKenna’s use of the phrase “humane justice” suggests the possibility that international considerations played a role in the Court’s decision.<sup>69</sup> The word “humane” is not a word that is uniquely American, but is a word with global implications as it refers to all of mankind and how we treat each other.

In *Trop*, the Court reviewed the decision of the United States Court of Appeals affirming the plaintiff’s punishment of expatriation for his desertion from the United States Army during wartime.<sup>70</sup> In finding the punishment of expatriation unconstitutional, the Court seemingly expanded upon the Eighth Amendment and its ruling in *Weems* by stating that a punishment must be judged as “cruel and un-

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376 (1910) (reviewing a House of Lords case construing the English Bill of Rights of 1688 while analyzing the cruel and unusual punishment clause).

<sup>63</sup> Murphy & Carlson, *supra* note 3, at 117.

<sup>64</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>65</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>66</sup> *Weems*, 217 U.S. at 357.

<sup>67</sup> *Id.* at 378.

<sup>68</sup> *Id.* at 367.

<sup>69</sup> *See id.* at 378.

<sup>70</sup> *Trop*, 356 U.S. at 87.

sual” based upon the “evolving standards of decency that mark the progress of a maturing society.”<sup>71</sup> The Court was more explicit in its use of comparativism in coming to this decision, discussing the origin of the phrase “cruel and unusual” from the English Declaration of Rights of 1688 and stating that the “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>72</sup> The Court expanded the definition of the Eighth Amendment through its decisions in *Weems* and *Trop*, holding that a punishment is constitutional under the Eighth Amendment if it is proportional to the crime committed, and that proportionality must be determined in regards to the “evolving standards of decency that mark the progress of a maturing society.”<sup>73</sup> While the Court seemingly set explicit guidelines to follow when determining the constitutionality of a punishment under the Eighth Amendment,<sup>74</sup> the Court did not elaborate as to what qualified as an evolving standard of decency or what composes a “maturing society.”

The Court attempted to clarify how to identify evolving standards in its decision in *Penry v. Lynaugh*, where the Court explained that evolving standards come from “objective evidence of how our society views a particular punishment today.”<sup>75</sup> The Court determined this objective evidence by looking at state legislative enactments and “data concerning the actions of sentencing juries.”<sup>76</sup> Moreover, in *Stanford v. Kentucky*, the Court stated in a footnote that “it is *American* conceptions of decency that are dispositive” and that foreign practices are irrelevant in the analysis of what constitutes an evolving standard of decency.<sup>77</sup> However, the Court’s stance changed sixteen years later in its ruling in *Roper* when it discussed the “overwhelming weight of international opinion against the juvenile death penalty.”<sup>78</sup> While this change could be due to the Court’s increased reliance on the personal judg-

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<sup>71</sup> *Id.* at 101.

<sup>72</sup> *Id.* at 99-103.

<sup>73</sup> Fields, *supra* note 7, at 974 (“Currently, any punishment must be ‘graduated and proportioned to [the] offense,’ as determined by the ‘evolving standards of decency that mark the progress of a maturing society’ . . . .”) (footnotes omitted).

<sup>74</sup> See, e.g., *Trop*, 356 U.S. at 103 (holding that “the Eighth Amendment forbids Congress to punish by taking away citizenship”).

<sup>75</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

<sup>76</sup> *Id.*

<sup>77</sup> *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989).

<sup>78</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

ments of the individual Justices,<sup>79</sup> it becomes clear that foreign practices and authorities play some role in the evolving standards analysis. While its use may draw the ire of many and create ambiguities about what exactly constitutes an evolving standard of decency, there are reasons that support the use of comparativism in the evolving standards analysis.

The first reason involves the discussion in *Trop*, the case that essentially established the “evolving standards” analysis.<sup>80</sup> In establishing that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” Chief Justice Warren relies on comparativism in discussing how expatriation is “a condition deplored in the international community of democracies” and that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>81</sup> Moreover, Chief Justice Warren discusses a survey of the United Nations regarding the nationality laws of eighty-four nations.<sup>82</sup> While an argument can be made as to the weight given to these foreign authorities and practices in developing the Court’s ruling, it would be difficult to suggest that foreign practices played no role at all in Chief Justice Warren’s analysis of the “evolving standards” of a “maturing society.” It stands to reason that if the innovator of the analysis felt that foreign practices should be referenced to in determining the “evolving standards” of a “maturing society,” then modern Courts should not be restricted to only considerations of American practices in formulating their analyses. Comparativism would assist in producing a more applicable definition to use in an increasingly global, interconnected society where the lines of sovereignty are becoming more blurred as each day passes.

A second reason for supporting the use of comparativism in an “evolving standards” analysis is that it helps in furthering one of the purposes behind the creation of the Constitution. The Constitution was established to develop a system of government composed of checks

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<sup>79</sup> *Id.* at 563 (“The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court’s independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions pre-dating *Stanford*, that ‘the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’” (citation omitted)).

<sup>80</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>81</sup> *Id.* at 101-02.

<sup>82</sup> *Id.* at 103.

and balances meant to prevent the rise of “tyrannical rule.”<sup>83</sup> Furthermore, included within the Constitution is a Bill of Rights, which was established to protect individual liberties from government infringement.<sup>84</sup> Essentially, the purpose of the Constitution is to constrain the power of the government and protect the “rights of the minority from oppression by social majorities.”<sup>85</sup> In letting the majority of the state legislatures define the “evolving standards of decency” through their legislative enactments, the Court is essentially allowing the majority of the states to define what constitutes a “cruel and unusual punishment” under the Eighth Amendment. This means that the Court is allowing a majority of the states, motivated by their own distinct ideologies and discriminations, to define a constitutional provision that will apply to all of American society. Conceding this power to the majority of the state legislatures runs counter to the Constitution’s purpose of protecting the “rights of the minority from oppression by social majorities” and gives rise to concerns that the definition of “evolving standards of decency” will be the product of a politically powerful majority pushing their own agenda, as opposed to the true feelings and desires of the American society as a whole.<sup>86</sup>

The use of comparativism furthers the purpose of the Constitution in protecting the rights of the minority by acting as an additional check on the majority and providing a source in the Eighth Amendment analysis that is independent of state governments and the personal judgments of the individual Justices.<sup>87</sup> This is beneficial in establishing a definition of what constitutes a “cruel and unusual punishment” that is reflective of the true attitudes and values of American society as a whole. It stands to reason that if a punishment is abolished and deemed “cruel and unusual” by essentially all of the international community, but its use is supported by a majority of state governments, that this would likely trigger a more thorough inquiry by the Court into whether these views are a true reflection of the majority of Ameri-

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<sup>83</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (3d ed. 2006).

<sup>84</sup> *Id.* at 12.

<sup>85</sup> *Id.* at 7.

<sup>86</sup> See Fields, *supra* note 7, at 981-82 (“A change in the majority of legislatures on a given punishment reflects a change in society’s standards of decency. This reasoning misses the point of the Bill of Rights. Fearful of the ‘tyranny of the majority,’ the Framers of the Constitution included a Bill of Rights specifically to protect the minority, whether that minority is an unpopular speechmaker on the Boston Common or a despised criminal defendant at sentencing.”).

<sup>87</sup> *Id.* at 982-83.

can society or the views of a politically powerful majority pushing their own ideologies. While comparativism would not be the dispositive consideration in the analysis, it would act as another reference point for Justices to consider when “interpreting society’s values and determining the proper scope of Eighth Amendment protection” in regards to the use of the death penalty in the United States.<sup>88</sup>

### III. THE RISE OF A GLOBAL SOCIETY

An argument most often put forth by opponents of comparativism is that the Court’s use of foreign authorities and sources in establishing their rulings in death penalty cases will infringe upon national sovereignty and that the “global opinions of mankind” will be used to “thwart the domestic opinions of Americans.”<sup>89</sup> However, the makeup of American society has become increasingly global throughout the years with the influx of foreign-born citizens. Foreign-born citizens consist of people of foreign-birth who are now naturalized citizens, and also those people of foreign-birth who reside permanently or temporarily in the United States and are not naturalized citizens. From 1970 through 1997, the population of foreign-born citizens in the United States rose from 9.6 million to 25.8 million.<sup>90</sup> In terms of the percentage of the entire United States population consisting of foreign-born citizens, this was an increase from 4.7 percent of the population in 1970 to 9.7 percent in 1997.<sup>91</sup> As of 2003, the number of foreign-born citizens living in the United States had increased to 33.5 million and the percentage had increased to 11.7 percent of the population.<sup>92</sup> Moreover, this trend does not appear to be slowing down or coming to an end anytime in the near future. Researchers have suggested that the percentage of foreign-born citizens in the United States will increase to nineteen percent by 2050, meaning nearly one in five Americans will be foreign-born.<sup>93</sup> While there are uncertainties involved and a number of assumptions made in formulating this projection, the

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<sup>88</sup> *Id.*

<sup>89</sup> Alford, *supra* note 20, at 58.

<sup>90</sup> CAMPBELL J. GIBSON & EMILY LENNON, HISTORICAL CENSUS STATISTICS ON THE FOREIGN-BORN POPULATION OF THE UNITED STATES: 1850-1990 1 (Feb. 1999) (U.S. Bureau of the Census, Population Division Working Paper No. 29), *available at* <http://www.census.gov/population/www/documentation/twps0029/twps0029.html>.

<sup>91</sup> *Id.*

<sup>92</sup> LUKE J. LARSEN, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003 (2004), <http://www.census.gov/prod/2004pubs/p20-551.pdf>.

<sup>93</sup> JEFFREY S. PASSEL & D’VERA COHN, PEW RESEARCH CTR., U.S. POPULATION PROJECTIONS: 2005-2050 at i (2008), <http://pewhispanic.org/files/reports/85.pdf>.

trends of the past forty years suggest that the foreign-born population will continue to increase.<sup>94</sup>

What this data shows is that the makeup of American society is continually changing and becoming more global in nature, meaning the “domestic opinions of Americans” are not the only opinions that should be taken into consideration by policymakers or jurists. The shift to a more “global society” means that the capital punishment schemes promulgated throughout the nation not only have an effect on American citizens, but also on the many foreign-born citizens who now comprise a sizable portion of the American population. This reality raises two questions in regards to the use of capital punishment in such a diverse society. First, are the interests of foreign-born citizens adequately represented in the development of capital punishment legislation? Second, is capital punishment achieving its penalogical justification of deterrence in regards to the diverse population of the United States? Comparativism can be a useful resource to utilize in addressing both questions.

The continued use of capital punishment in this country mainly stems from the Court’s analysis of state legislature enactments in determining whether they still employ the use of the death penalty as a form of punishment.<sup>95</sup> The rationale behind this is that “[a] change in the majority of legislatures on a given punishment reflects a change in society’s standards of decency.”<sup>96</sup> In turn, the decision of the state legislature as to whether or not to employ the use of capital punishment is mainly influenced by the desires of their voting constituents. The problem that arises is that a good portion of the foreign-born citizens residing in the United States are not naturalized citizens, but are aliens who possess no voting rights. The fact that these portions of foreign-born citizens do not possess the right to vote means that they cannot “protect themselves through the political process” and advance their interests in regards to the state’s use and imposition of capital punishment.<sup>97</sup>

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<sup>94</sup> *Id.* at i-ii.

<sup>95</sup> Fields, *supra* note 7, at 981 (“Eighth Amendment cases indicate that Justices rely heavily (some exclusively) on the legislative enactments of the states to determine whether a given punishment is constitutionally sound.”) (footnotes omitted).

<sup>96</sup> *Id.* at 982.

<sup>97</sup> CHEMERINSKY, *supra* note 83, at 771 (“Aliens cannot vote and thus cannot protect themselves through the political process.”) (footnote omitted).



A justification for judicial review that has achieved prominence is that the “courts are needed to protect interests that will be systematically disadvantaged in the political process.”<sup>98</sup> An example of a situation where the Court has been needed to protect interests not represented in the political process has been where states enacted regulations which burdened out-of-state citizens, and the Court intervened in order to represent the interests of the out-of-state citizens who were unrepresented in that state’s political process.<sup>99</sup> While the lack of representation in the political process for aliens and the lack of representation for American citizens residing in different states are clearly different situations because aliens are not American citizens and thus essentially possess no rights, an underlying rationale behind the theory persists: it is inherently unfair to impose the burdens or negative effects of legislation on individuals who possess no influence or voice in its creation. When situations such as these arise, the Court is needed to step in and advance the interests of those not protected by the political process.

Aliens clearly are not protected by the political process with respect to capital punishment legislation because they do not have the right to vote. The Court has recognized this fact in other areas of the law concerning aliens, applying strict scrutiny as the appropriate test for discrimination against aliens because they constitute a group that is “highly vulnerable” because they are “disenfranchised” and possess “no political clout.”<sup>100</sup> Moreover, aliens are clearly affected by capital punishment legislation, as evidenced by the number of foreign nationals currently on death row. As of 2010, there are a reported 131 foreign nationals currently on death row, representing a total of thirty-four dif-

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<sup>98</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 190 (16th ed. 2007) (“One prominent theory of the justification for judicial review is that courts are needed to protect interests that will be systematically disadvantaged in the political process.”).

<sup>99</sup> *See id.* (“[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”) (citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 n.2 (1945)).

<sup>100</sup> CHEMERINSKY, *supra* note 83, at 771 (“The usual rule of judicial deference to the legislative process is least appropriate when a group is disenfranchised and thus does not have any opportunity to influence that process. The group has no political clout and thus is highly vulnerable.”).

ferent nationalities.<sup>101</sup> This data does not even take into account the countless other aliens who commit a crime and are subject to the sentence of capital punishment, but receive a lesser sentence instead. The unfairness of the situation is further magnified because the enactment of death penalty legislation allows the government to make use of its most extreme power—the power to take a person’s life.

This represents a situation where the Court can step in and advance the interests of a group that is clearly burdened or affected by the enactment of death penalty legislation and is not protected by the political process. The use of foreign sources and authorities as a limited factor in the Court’s analysis in death penalty cases can be utilized in an effort to eliminate some of this perceived unfairness. While comparativism does not give aliens voting rights and a voice in their state legislatures, it does allow the views and practices of other nations to act as a proxy in representing their interests at one stage of the death penalty debate. This is not a complete solution to the problem, but it does add a sense of fairness to the situation.

This rise of a “global society” has also resulted in an impact that is more directly related to the death penalty analysis. The Court has identified certain rules that must be followed in developing a death penalty scheme that will be considered constitutional under the Eighth Amendment.<sup>102</sup> One such rule is that the scheme must advance a “legitimate penological function,” which means that the scheme must be used to achieve retribution, deterrence, incapacitation, or rehabilitation.<sup>103</sup> A “legitimate penological function” often put forth by supporters of the death penalty is that of deterrence.<sup>104</sup> There is a belief that would-be murderers will be deterred from committing such offenses if they understand the prospects of receiving the death penalty should they commit the offense.<sup>105</sup>

Most studies conducted on the deterrent effect of capital punishment have shown quite the opposite or been inconclusive at best.<sup>106</sup>

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<sup>101</sup> Mark Warren, *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CTR. (2010), <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us>.

<sup>102</sup> See Murphy & Carlson, *supra* note 3, at 116-19.

<sup>103</sup> *Id.* at 117.

<sup>104</sup> *Facts About Deterrence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty> (last visited Feb. 18, 2011).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

There has been a reluctance to look at the murder rates in other nations that still use or have abolished the death penalty to assist in determining if capital punishment does actually deter murder, mainly because of the same concerns cited by opponents of the use of comparativism—the transferability and relevancy of studies that are unique to that particular nation.<sup>107</sup> However, as the data above indicated, a large portion of American society is composed of foreign-born citizens that were part of those unique situations and subject to the various punishment schemes. It stands to reason that their response to punishment schemes did not change drastically from that of their countrymen because of their move from one nation to another. If deterrence of murder is an actual purpose of the use of capital punishment, then referencing the murder rates of other countries using various punishment schemes can provide a more thorough analysis and help elaborate upon the inconclusive results studies in the United States have produced. The Court’s use of comparativism may not completely answer the deterrence question in regards to American citizens, but it will provide a clearer understanding of whether the use of capital punishment advances a “legitimate penological function” and actually deters the 33.5 million foreign-born citizens of our population from committing murders.

#### IV. A FRAMEWORK FOR USING COMPARATIVISM

Comparativism has never been used by the Court as the dispositive fact controlling its decisions, but as more of a factor in helping to “corroborate” or sometimes make a more enlightened decision.<sup>108</sup> In death penalty cases, the “national legislative enactments and national jury sentencing determinations” have been the “crucial indicators” used in the Court’s “evolving standards” analysis under the Eighth Amendment.<sup>109</sup> The Court’s limited use of comparativism in its decisions is reflected in recent statements from Justice Breyer.<sup>110</sup> In discussing his use of foreign sources and authorities in his decisions, Justice Breyer stated “I do read it, and if I read it, why don’t I just refer

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<sup>107</sup> See, e.g., John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 843 n.116 (2005).

<sup>108</sup> Segal, *supra* note 16, at 1435 (“The primacy of the national indicia consigns comparative legal sources to the periphery. The Court does not accord independent judicial value to comparative legal materials; rather, it values supranational materials only as corroboratory of the national consensus.”).

<sup>109</sup> *Id.*

<sup>110</sup> Holland, *supra* note 17.

to that fact? I know it isn't binding, so what's the problem?"<sup>111</sup> The reference to the fact that comparativism is not binding is important, for it acknowledges the fact that foreign sources and authorities are mostly supportive materials that are not essential or dispositive to the Court's decisions. This limited use of comparativism, coupled with the prominence of national legislative enactments and national jury sentencing determinations, should alleviate the concerns of those worried comparativism will infringe upon national sovereignty and "thwart the domestic opinions of Americans."<sup>112</sup>

However, there still remains concern with the transferability and relevancy of foreign sources and authorities.<sup>113</sup> There are certain guidelines that can be followed when using comparativism that can help in alleviating the concerns of these detractors. First, the use of comparativism should be limited to referencing nations that are similar to the United States politically and legally.<sup>114</sup> This tends to assure transferability of the views or practices if the nation is grounded in a form of democratic constitutional law, has a government in place that "respects the existence of reasonable disagreement among citizens about questions of constitutional or political morality," and has a history of judicial interpretation of constitutional issues.<sup>115</sup> Second, comparativism should be used only in situations where there is not an overwhelming national consensus regarding "American society's views on a certain punishment."<sup>116</sup> This would ensure that foreign sources and authorities do not trump the "domestic opinions of Americans," while maintaining relevancy as a factor in the determination of what view of American society is more likely indicative of the "evolving standards of decency" when there is no consensus. Lastly, the Court should only use comparativism in regards to views or practices that have achieved an "international consensus" between the nations that are, as discussed above, similar to the United States politically and le-

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<sup>111</sup> *Id.*

<sup>112</sup> Alford, *supra* note 20, at 58.

<sup>113</sup> *See id.*

<sup>114</sup> *See* Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 979 (2008) ("Comparison must, first, be restricted to countries which are highly similar to the United States at a general constitutional level. Second, it must be restricted to countries which share relevant topic-specific constitutional commitments.").

<sup>115</sup> *Id.* at 980.

<sup>116</sup> Fields, *supra* note 7, at 993-94 ("Thus, when ample evidence exists of a 'national consensus' regarding American society's views on a certain punishment, there is no need to reference or rely on foreign law.").

gally.<sup>117</sup> If foreign views and practices are isolated and not shared by a majority of the similar nations, then they would be irrelevant to the “evolving standards” analysis because it would be irrational to suggest that they are indicative of the likely views of American society.<sup>118</sup>

While the current use of comparativism maintains the preeminence of American society’s opinions through referencing national legislative enactments and national jury sentencing determinations in the “evolving standards” analysis, restricting its use to situations where there is a lack of national consensus, and only referencing foreign views and practices that have reached an “international consensus” in similar nations, should help in also silencing detractors concerned with the relevancy and transferability of foreign sources and authorities.

#### CONCLUSION

The use of the death penalty in this nation is representative of the government employing its most extreme power in extinguishing the life of a human being. The “evolving standards of decency that mark the progress of a maturing society” must be continually analyzed in determining the continued use and constitutionality of capital punishment under the Eighth Amendment’s Cruel and Unusual Clause.<sup>119</sup> Comparativism, as it has been throughout history, can be a beneficial resource and assist in establishing what the “evolving standards” of our society are and whether we are still supportive of the use of capital punishment. The propriety of the use of comparativism has even been recognized by one of the more notable opponents of its use, Chief Justice William Rehnquist. In discussing the rise of the Court’s use of constitutional comparativism, Chief Justice Rehnquist stated:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that

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<sup>117</sup> *See id.* at 998 (“Justices should look for and give credence to only those comparative analyses that yield an overwhelming international consensus for or against a punishment.”).

<sup>118</sup> *See id.*

<sup>119</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>120</sup>

While remaining detractors will continue to question the constitutionality of its use and bemoan it as a tool utilized to “thwart the domestic opinions of Americans,”<sup>121</sup> history has shown that comparativism has mainly been used for support and as a limited factor in helping the Court formulate more enlightened decisions. With the rise of a more “global society” in America, comparativism will become an even more valuable and proper asset for the Court to use in establishing whether our society still condones the government’s use of such an extreme and irremediable punishment.

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<sup>120</sup> Saby Ghoshray, “Outsourcing Authority?” *Citation to Foreign Court Precedent in Domestic Jurisprudence: To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 714 (2006) (quoting Chief Justice William Rehnquist).

<sup>121</sup> Alford, *supra* note 20, at 58.