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# CONSTITUTIONAL COMPARATIVISM AND THE EIGHTH AMENDMENT: HOW A FLAWED PROPORTIONALITY REQUIREMENT CAN BENEFIT FROM FOREIGN LAW

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*Within the context of the Eighth Amendment, “clear, predictable, and uniform constitutional standards are especially desirable.”<sup>1</sup> However, the Eighth Amendment’s current proportionality requirement lacks the clarity or predictability needed for a principled jurisprudence. This Note considers the source of these problems, and posits that a limited comparativism can inform proportionality review and bring consistency to the application of the Eighth Amendment. In doing so, this Note answers critics of comparative theory, and creates a framework for the limited use of comparativism in Eighth Amendment cases.*

#### INTRODUCTION

Constitutional comparativism in the United States Supreme Court “is staging a comeback.”<sup>2</sup> Nearly every Justice on today’s Court has made use of foreign law in some respect, whether to describe the global context of a legal issue, to assess the rationality of a legal rule, or even to apply as persuasive precedent.<sup>3</sup> Since the start of the twenty-first century, various members of the Court have employed legal comparativism in deciding controversial cases about the constitutional scope of the death penalty and the right to sexual privacy.<sup>4</sup> Justice Breyer, by far the strongest advocate of constitutional comparativism, sees this type of analysis as healthy for the judiciary because it forces judges to reflect on how their colleagues in other countries handle

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O’Connor, J., dissenting).

<sup>2</sup> Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://www.slate.com/id/2098559>.

<sup>3</sup> See, e.g., *Roper*, 543 U.S. at 575 (majority opinion) (“[T]he United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”); *Lawrence v. Texas*, 539 U.S. 558, 567-73 (2003) (discussing changing attitudes toward homosexuality in England and other Commonwealth countries); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (“[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control.”); *Washington v. Glucksberg*, 521 U.S. 702, 785-87 (1997) (Souter, J., concurring) (relating the Dutch experience with physician-assisted suicide and euthanasia); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (“It is . . . worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”).

<sup>4</sup> See, e.g., *Roper*, 543 U.S. at 575-76; *Lawrence*, 539 U.S. at 567-73; *Atkins*, 536 U.S. at 316 n.21.

similar legal issues.<sup>5</sup> He also points out that comparative constitutional analysis is nothing new, explaining that “this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”<sup>6</sup>

But the recent resurgence of legal comparativism has been met with scornful criticism from other members of the Court.<sup>7</sup> As Professor Tim Wu observes, “[t]o a court already divided along every ideological position imaginable, add judicial foreign policy as the latest fault line.”<sup>8</sup> In particular, Justices Scalia and Thomas criticize most mentions of foreign law in other Justices’ decisions, and at least one of them dissents almost every time a majority opinion cites foreign precedent.<sup>9</sup> Justice Scalia argues that the Court should “nearly never” reference foreign law, because the practice is “wrong” and possibly unconstitutional.<sup>10</sup> He contends that: “[T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>11</sup> Both Justices Scalia and Thomas have downplayed the importance and relevance of foreign law, referring to foreign precedent as the “moods, fads, or fashions”<sup>12</sup> of the “so-called ‘world community.’”<sup>13</sup> Justice Scalia has even personally attacked members of the Court for engaging in comparative analysis, awarding them the “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’” for looking to European legal traditions.<sup>14</sup>

However, Justices Scalia and Thomas are not alone. The increasing practice of constitutional comparativism has also caught the ire of several politicians

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<sup>5</sup> See Wu, *supra* note 2 (referring to critics’ concern that Justice Breyer is “hopelessly intoxicated by foreign ways”).

<sup>6</sup> *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

<sup>7</sup> See, e.g., *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (“Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”); *Knight*, 528 U.S. at 990 (Thomas, J., concurring in denial of certiorari) (criticizing defendant’s reliance on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, and the Privy Council, stating that such reliance “would be unnecessary . . . were there any such support in our own jurisprudence”); *Printz*, 521 U.S. at 921 n.11 (“We think such comparative analysis inappropriate to the task of interpreting a constitution . . .”).

<sup>8</sup> Wu, *supra* note 2.

<sup>9</sup> *Id.*

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

<sup>11</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

<sup>12</sup> *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari).

<sup>13</sup> *Atkins v. Virginia*, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting).

<sup>14</sup> *Id.*

and political groups.<sup>15</sup> Rep. Tom Feeney (R-FL) has sponsored a resolution called the “Reaffirmation of American Independence,”<sup>16</sup> which states that judges who engage in comparativism “‘may subject themselves to the ultimate remedy, which would be impeachment.’”<sup>17</sup> Feeney explains that his resolution attempts to give the courts back to the American people, who “‘have not consented to being ruled by foreign powers or tribunals.’”<sup>18</sup> Similarly, Conservative Alerts, a major Washington-based lobbying organization, posted on its website the following statement in response to the actions of Justice Breyer and others: “‘No More to these internationalist Supreme Court Justices . . . they could be IMPEACHED for favoring OTHER countries’ laws instead of the U.S. Constitution.’”<sup>19</sup>

This heated rhetoric highlights the growing centrality of constitutional comparativism as an issue in today’s political and legal landscape.<sup>20</sup> While some have argued that this “spectacularly ordinary” debate is given far too much attention in an age of wedge issues and political extremism,<sup>21</sup> the current public discourse on “judicial activism” has brought judges’ and politicians’ views on constitutional comparativism under closer scrutiny than ever before.<sup>22</sup> Legal academics have weighed in, some praising the use of comparativism and others criticizing it.<sup>23</sup>

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<sup>15</sup> See Wu, *supra* note 2 (“[Scalia’s] jeremiads on the subject have inspired something of a Republican crusade.”).

<sup>16</sup> H.R. Res. 97, 109th Cong. (2005).

<sup>17</sup> Wu, *supra* note 2 (quoting Rep. Feeney).

<sup>18</sup> Tom Feeney, Should Americans Be Governed by the Laws of Jamaica, India, Zimbabwe, or the European Union?, <http://www.house.gov/feeney/reaffirmation.htm> (last visited Oct. 1, 2006) (promoting the “Reaffirmation of American Independence” resolution).

<sup>19</sup> Wu, *supra* note 2 (quoting Conservative Alerts).

<sup>20</sup> See Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 325 (1998) (discussing an “upsurge of interest in comparative constitutional law”).

<sup>21</sup> See generally Matthew S. Raalf, *A Sheep in Wolf’s Clothing: Why the Debate Surrounding Comparative Constitutional Law is Spectacularly Ordinary*, 73 FORDHAM L. REV. 1239 (2004) (comparing the use of comparative materials to other, more settled methods of constitutional adjudication).

<sup>22</sup> See, e.g., Tony Mauro, *Justice Ginsburg Says Death Threat Fueled by Dispute Over International Law*, LAW.COM, Mar. 16, 2006, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1142429895843> (disclosing that Justices Ginsburg and O’Connor “were the targets of an Internet death threat [in 2005] because of their citation of foreign law in decisions”).

<sup>23</sup> Compare Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999) (supporting comparativism), David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001) (same), and Mark Tushnet, *The Possibilities of Comparative Law*, 108 YALE L.J. 1225 (1999) (same), with Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and

One context in which constitutional comparativism has evoked especially strong opinions is Eighth Amendment jurisprudence.<sup>24</sup> This Note examines the use of constitutional comparativism in Eighth Amendment jurisprudence, and explains why the Court so frequently engages in comparative analysis to resolve cruel and unusual punishment issues. In short, flaws in the Court's current proportionality framework often create unprincipled and inconsistent results, and comparativism addresses these flaws.

This Note explains where the Court's current proportionality framework fails, and advocates the limited use of comparativism in a narrow range of Eighth Amendment cases. Part I describes the history and contours of constitutional comparativism in the United States, and outlines the three major uses of comparative analysis. Part II examines the evolution of the Court's cruel and unusual punishment jurisprudence, identifies the major problems with the Court's proportionality analysis, and posits that constitutional comparativism can alleviate these problems. Part III responds to critics of comparativism and Part IV provides a framework for limited comparativism in Eighth Amendment analysis.

## I. CONSTITUTIONAL COMPARATIVISM IN THE UNITED STATES

This section outlines the history of constitutional comparativism in the United States and describes the principal manners in which Justices have used foreign law in their opinions.

### A. *The Historical Context*

Although the use of comparative analysis is a topic that divides the current Court, Justices have referenced foreign law a number of times since Reconstruction.<sup>25</sup> Following the Civil War, an increasing number of Justices recognized the usefulness of looking to foreign law to resolve novel questions that had gone unanswered in American jurisprudence.<sup>26</sup> These cases of first

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*International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (criticizing comparativism).

<sup>24</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . ."); *Atkins v. Virginia*, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people.").

<sup>25</sup> For examples of recent use of comparativism, see *supra* note 3 and *infra* note 36. For examples from nineteenth century jurisprudence, see *Fong Yue Ting v. United States*, 149 U.S. 698, 709-11 (1893) (discussing England's power to expel aliens); *Pennoyer v. Neff*, 95 U.S. 714, 729-30 (1877) (referencing public international law to decide the scope of a sovereign state's personal jurisdiction).

<sup>26</sup> See *Pennoyer*, 95 U.S. at 729-30. Justices also used comparativism in early cases to extol the virtues of "practices of other 'civilized' nations (especially when they support[ed] a governmental practice that [was] being attacked)." Vicki C. Jackson, *Narratives of*

impression, though novel to American law, had often been adjudicated by various European courts or by international law.<sup>27</sup> These foreign sources reflected how other jurists had approached the issues, and whether their solutions had proven effective in practice.<sup>28</sup>

One of the earliest and most famous cases in which constitutional comparativism informed the Court's thinking about a novel issue was *Pennoyer v. Neff*.<sup>29</sup> In determining the limits of an individual state's personal jurisdiction – an issue the Court had never before decided – the Court “tapped international concepts of territorial sovereignty to rule states judicially powerless outside of their borders.”<sup>30</sup> The Court used this concept of public international law – a concept adopted by most Western European countries – as a model for America's own federalist system of personal jurisdiction.<sup>31</sup> Proponents of constitutional comparativism laud the *Pennoyer* decision for demonstrating that “there's a difference between relying on alien cases and simply borrowing ideas from clever foreigners,” because “[t]he latter implies no future obligation.”<sup>32</sup>

In addition to citing public international law, Justices have referenced studies and statistical data compiled by international bodies. For example, in his dissent from a denial of certiorari regarding an Eighth Amendment challenge to a prison practice, Justice Goldberg cited a United Nations survey on “the laws, regulations and practices relating to capital punishment throughout the world.”<sup>33</sup> Recent death penalty decisions have similarly referenced international studies, but the practice remains relatively rare.<sup>34</sup>

The most common foreign sources cited by Justices are actual cases or statutes in other countries.<sup>35</sup> Even as today's Court seems hopelessly polarized over whether comparative analysis is appropriate, most of the Justices have

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*Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 247 (2001).

<sup>27</sup> *Pennoyer*, 95 U.S. at 729-30.

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

<sup>29</sup> 95 U.S. 714 (1877).

<sup>30</sup> Wu, *supra* note 2; *see also Pennoyer*, 95 U.S. at 730.

<sup>31</sup> *See Pennoyer*, 95 U.S. at 732-33 (“Whilst [the courts of the United States] are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty . . .”).

<sup>32</sup> Wu, *supra* note 2.

<sup>33</sup> *Rudolph v. Alabama*, 375 U.S. 889, 889 & n.1 (1963) (Goldberg, J., dissenting from denial of certiorari) (arguing that the Court should grant certiorari to consider whether, “[i]n light of the trend . . . throughout the world against punishing rape by death,” the practice should be declared unconstitutional).

<sup>34</sup> *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (plurality opinion) (referencing an Amnesty International amicus brief that surveyed foreign death penalty laws).

<sup>35</sup> *See Wu*, *supra* note 2 (mentioning that cases, treaties, and statutes are often referred to by the Court when dealing with international-law cases).

engaged in some form of it. As one scholar noted in 2001, “almost every Justice now on the Court has used comparative constitutional law in their opinions.”<sup>36</sup> These opinions illustrate the many ways in which Justices can use foreign precedent to resolve constitutional issues, and demonstrate the extent to which the current Court’s members are willing to rely on foreign law in their decisions.

B. *The Uses of Constitutional Comparativism*

Although cases like *Pennoyer* and *Rudolph* show that many types of foreign law can be used in many different ways, “[p]revious experimentation with comparative constitutional law has highlighted three different ways a court can use it: (1) in dicta; (2) to create a workable principle of law; or (3) to prove a ‘constitutional fact.’”<sup>37</sup>

The easiest and least controversial way in which Justices use constitutional comparativism is by referencing foreign law in dicta.<sup>38</sup> The Court mentions foreign law in dicta “as a way of providing context to the discussion of the facts and of the law relating to the facts.”<sup>39</sup> For example, Justice Rehnquist framed the right to die context of *Washington v. Glucksberg*<sup>40</sup> by using “comparative constitutional law simply to show that the issue the Court is addressing is one that many people are talking about around the world.”<sup>41</sup> Thus, Justices comparing legal systems in dicta do not rely on foreign law as a way of resolving novel issues or as persuasive precedent for a particular

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<sup>36</sup> Fontana, *supra* note 23, at 545. Fontana observed that Justice Scalia, in *Thompson v. Oklahoma*, conceded that “[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but . . . in our Constitution as well.” *Id.* at 547 n.40 (quoting *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting)). Fontana further noted that Justice Thomas looked to “the voting systems of many countries to assess the constitutional status of the American voting system.” *Id.* at 548 n.43 (citing *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring)).

<sup>37</sup> *Id.* at 552. Other ways to categorize judicial use of constitutional comparativism have been proposed. See, e.g., Larsen, *supra* note 23, at 1283 (contending that international law has been used for three purposes: “expository,” “empirical,” and “substantive,” or “moral fact-finding”). However, for purposes of this Note, I adopt David Fontana’s analysis.

<sup>38</sup> See Fontana, *supra* note 23, at 552-53 (explaining that, in this way, courts can use comparative analysis “without making the use of comparative constitutional law part of the actual decision”).

<sup>39</sup> *Id.* at 552.

<sup>40</sup> 521 U.S. 702 (1997).

<sup>41</sup> Fontana, *supra* note 23, at 552-53; see also *Glucksberg*, 521 U.S. at 785-87 (1997) (relating the Dutch experience with euthanasia).

position, but rather as a way of showing that certain legal issues do not exist in an American vacuum.<sup>42</sup>

The Court can also use constitutional comparativism to create a workable principle of law “when it is addressing an issue for the first time, and there are no helpful American judicial precedents,” or “when the American sources are unclear,” and the “constitutional answer” is hard to find.<sup>43</sup> For example:

Justice Breyer’s *Printz* dissent seems to argue that the American sources on federal commandeering of state executives are unclear – the constitutional text is ambiguous, and there are no clear precedents. Therefore, to help the Court reach a decision, it should use comparative constitutional insights to pick a solution that works.<sup>44</sup>

This use of comparativism is more controversial than merely referencing foreign law to frame the context of an issue; it suggests that Justices could simply plug foreign law into gaps in our domestic law.<sup>45</sup> To date, however, no Justices have advocated or approached this sort of reliance on foreign law.<sup>46</sup> Even Justice Breyer, in his *Printz* dissent, claimed that Justices should only use foreign law as an informative and instructive guide to aid in the development of their own uniquely American constitutional principles.<sup>47</sup>

Finally, some Justices use comparative constitutional law to prove “constitutional facts” – the actual effects of legal principles announced and applied in this country and others.<sup>48</sup> Justices canvass foreign law to “assess the

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<sup>42</sup> Evidence that the U.S. courts do not exist in a legal vacuum is in the fact that, as “U.S. isolation from transnational constitutional law” grows, “U.S. influence in constitutional developments elsewhere [has been] supplanted by such constitutional courts as Canada’s, South Africa’s, [and] Germany’s.” Jackson, *supra* note 26, at 262-63. This notion of interconnectedness challenges the Court’s recent return to “first principles” and its “assertion of judicial autonomy.” *Id.* at 245.

<sup>43</sup> Fontana, *supra* note 23, at 553-54.

<sup>44</sup> *Id.* at 554 n.70 (discussing *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting)).

<sup>45</sup> This, ultimately, is the fear of politicians like Rep. Feeney and groups like Conservative Alerts: that one day Americans will wake up and be bound by French law. See *supra* notes 17-19 and accompanying text; see also Wu, *supra* note 2.

<sup>46</sup> See Jackson, *supra* note 26, at 226 (“[E]ven when the Court has considered the constitutional experiences of other nations, it almost never has engaged the reasoning of other constitutional courts. In this respect . . . the Court’s interpretive methodologies are more self-contained and autonomous than those of many other constitutional courts.”).

<sup>47</sup> See *Printz*, 521 U.S. at 977 (1997) (Breyer, J., dissenting) (recognizing that “we are interpreting our own Constitution, not those of other nations,” even though the experience of other nations “may . . . cast an empirical light on the consequences of different solutions to a common legal problem”).

<sup>48</sup> Fontana, *supra* note 23, at 552 n.60 (“Constitutional facts are those facts that can be discovered by observing experience (legal and otherwise) to answer a particular legal question posed by a case.”).



rationality or acceptability of a legal practice.”<sup>49</sup> In theory, Justices find “constitutional facts” in foreign law by identifying countries with a particular legal practice, determining the goals of that practice, and observing whether the practice achieves those goals.<sup>50</sup> If a practice achieves its goals, this “constitutional fact” should be taken into account, and the practice should be followed by American courts within reason.<sup>51</sup>

Within the context of the Eighth Amendment, Justices most often invoke comparative analysis to prove a “constitutional fact.”<sup>52</sup> The Eighth Amendment requires that punishments be “graduated and proportioned to [the] offense,”<sup>53</sup> as determined by the “evolving standards of decency that mark the progress of a maturing society.”<sup>54</sup> Judges must decipher society’s “evolving standards of decency” and decide whether the punishment in question comports with those standards.<sup>55</sup> One way to accomplish this goal is by “assessing a means-end fit” to determine whether a given punishment “has

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<sup>49</sup> *Id.* at 554-55. When Justices “canvass” law, they simply look to the laws of other jurisdictions to see how courts and districts have handled similar situations. This process need not be limited to foreign law; Justices can evaluate the laws of other states to assess the rationality or acceptability of a practice. Indeed, this type of “canvassing” essentially describes a major portion of the Eighth Amendment’s proportionality requirement. *See infra* Part II.B.2 (discussing the objective evidence test).

<sup>50</sup> *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 785-87 (1997) (Souter, J., concurring) (rejecting respondents’ claim that euthanasia legislation “with teeth” would certainly prove effective, given the “substantial dispute” as to whether similar legislation had been effective in the Netherlands).

<sup>51</sup> The extent to which American judges should apply these foreign “constitutional facts” to domestic law is a subject of much debate, and a primary focus of this Note. The answer depends on the weight one affords comparative analysis. Some scholars have argued for a clear hierarchy of relevant interpretive sources, with comparativism falling somewhere in the hierarchy. *See, e.g.,* Fontana, *supra* note 23, at 557-62. Others have argued for the express inclusion of comparativism in judicial analysis, but have resisted declaring how much weight to afford it. *See generally* VICKI C. JACKSON & MARK V. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999). This Note argues for the express inclusion of constitutional comparativism in Eighth Amendment analysis, as well as a loosely structured interpretive hierarchy. *See infra* Part IV.B.

<sup>52</sup> *See* Fontana, *supra* note 23, at 555 (“This constitutional fact use of comparative constitutional law has been particularly common in cases deciding whether or not a particular legal practice was ‘cruel and unusual’ under the Eighth Amendment.”).

<sup>53</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

<sup>54</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>55</sup> *Id.*; *see also* *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“The prohibition against ‘cruel and unusual punishments,’ like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.”); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

worked in other countries.”<sup>56</sup> If most countries allow the practice, then the “constitutional fact” is that it comports with society’s evolving standards of decency; if most countries prohibit the practice, then the “constitutional fact” is that it does not.

## II. EIGHTH AMENDMENT JURISPRUDENCE AND ITS FLAWS

This section outlines the history and development of the Court’s cruel and unusual punishment jurisprudence,<sup>57</sup> and examines the conceptual and practical flaws in the existing proportionality requirement. This section also explains how constitutional comparativism can address those flaws when consistently applied to prove a “constitutional fact.”

### A. *Historical Antecedents*

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>58</sup> The Framers adopted this language from the 1688 English Bill of Rights, which declared that “‘excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’”<sup>59</sup>

Early courts did little to define the scope of the Eighth Amendment.<sup>60</sup> In 1878, the Court conceded that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision,” resolving only that “punishments of torture, such as those mentioned by [Blackstone], and all

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<sup>56</sup> Fontana, *supra* note 23, at 555.

<sup>57</sup> Much of this section is devoted to the historical evolution of Eighth Amendment doctrine. This analysis serves two functions. First, it fills a gap in Eighth Amendment scholarship, especially in the comparative context. Many authors have discussed the appropriateness of comparative analysis with regard to the Eighth Amendment, but have not thoroughly examined the historical underpinnings of the current proportionality requirement and its conceptual and practical problems. Second, this historical analysis provides the necessary background information for an Eighth Amendment comparative theory. The efficacy and relevance of comparativism depends in large part on the historical and legal similarities between the lending country and the borrowing country. See *infra* Part IV.B. Thus, one must understand the history of American Eighth Amendment law to effectively engage in comparative analysis.

<sup>58</sup> U.S. CONST. amend. VIII.

<sup>59</sup> *In re Kemmler*, 136 U.S. 436, 446 (1890) (“The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled ‘An act declaring the rights and liberties of the subject, and settling the succession of the crown,’ in which, after rehearsing various grounds of grievance . . . it is declared that ‘excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’”).

<sup>60</sup> For over a century, the Court dismissed constitutional challenges to state-imposed punishments, asserting that the Eighth Amendment applied only to the federal government. See, e.g., *O’Neil v. Vermont*, 144 U.S. 323, 332 (1892); *Pervear v. Commonwealth*, 72 U.S. 475, 480 (1866).

others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].”<sup>61</sup> Indeed, as late as 1903, the Court refused to announce a doctrinal approach to the Eighth Amendment, claiming that “it is unnecessary to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual.”<sup>62</sup> Instead, the Court decided to uphold a sentence against an Eighth Amendment challenge simply because it “does not seem to us deserving to be called cruel.”<sup>63</sup>

B. *The Proportionality Requirement*

The first case to examine the Eighth Amendment at length articulated the doctrine regarding cruel and unusual punishment that courts have used ever since. In *Weems v. United States*,<sup>64</sup> the Court considered a challenge to a sentence imposed on a low level government official convicted of falsifying records.<sup>65</sup> The official was sentenced to twelve years in irons at “hard and painful labor.”<sup>66</sup> The Court held that this sentence violated the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>67</sup> Acknowledging that “[n]o case has occurred in this court which has called for an exhaustive definition [of cruel and unusual punishment],”<sup>68</sup> the Court explained that it would regard the Eighth Amendment as “a precept of justice that punishment for crime should be *graduated and proportioned to [the] offense*.”<sup>69</sup> The Court then described the “progressive” nature of the Eighth Amendment, explaining that it “may acquire meaning *as public opinion becomes enlightened by a humane justice*.”<sup>70</sup> In determining public opinion, the Court considered how similar crimes were punished in other parts of the United States, and found that the sentence in this case exhibited “a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice.”<sup>71</sup>

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<sup>61</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878). The Court elaborated on the “punishments of torture . . . mentioned by [Blackstone].”

[Blackstone] admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female.

*Id.* at 135.

<sup>62</sup> *Howard v. Fleming*, 191 U.S. 126, 136 (1903).

<sup>63</sup> *Id.*

<sup>64</sup> 217 U.S. 349 (1910).

<sup>65</sup> *Id.* at 357.

<sup>66</sup> *Id.* at 364.

<sup>67</sup> *Id.* at 381.

<sup>68</sup> *Id.* at 369.

<sup>69</sup> *Id.* at 367 (emphasis added).

<sup>70</sup> *Id.* at 378 (emphasis added).

<sup>71</sup> *Id.* at 381.

This interpretation of the Eighth Amendment thus set out the definitive doctrinal approach to cases involving claims of cruel and unusual punishment.<sup>72</sup> The wording has changed, but the analysis remains the same. Currently, any punishment must be “graduated and proportioned to [the] offense,”<sup>73</sup> as determined by the “evolving standards of decency that mark the progress of a maturing society”<sup>74</sup> and informed by “objective evidence,”<sup>75</sup> the most reliable of which is “legislation enacted by the country’s legislatures.”<sup>76</sup>

1. “Evolving Standards of Decency”

The *Weems* Court described an Eighth Amendment whose meaning expands “as public opinion becomes enlightened by a humane justice.”<sup>77</sup> The Court in *Trop v. Dulles*<sup>78</sup> sharpened this language, explaining that the excessiveness of a particular punishment is determined by the “evolving standards of decency that mark the progress of a maturing society.”<sup>79</sup> *Trop* declared unconstitutional Section 401(g) of the Nationality Act of 1940, which provided that a citizen “shall lose his nationality by . . . [d]eserting the military or naval forces of the United States in time of war.”<sup>80</sup> The Court declared Section 401(g) facially invalid as cruel and unusual, based upon society’s evolving notions of citizenship and punishment.<sup>81</sup> Although the punishment “involved no physical mistreatment [or] primitive torture,” Chief Justice Warren explained that it involved “the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”<sup>82</sup> Thus, the Court held that the Eighth Amendment bars “denationalization as a punishment” for any crime.<sup>83</sup> This reasoning reflected the national community’s growing desire to protect citizenship, and thus society’s evolving standards of decency.<sup>84</sup>

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<sup>72</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311 (reiterating that “punishment for crime should be graduated and proportioned to [the] offense” (alteration in original) (quoting *Weems*, 217 U.S. at 367)).

<sup>73</sup> *Id.*

<sup>74</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

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

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

<sup>77</sup> *Weems*, 217 U.S. at 378.

<sup>78</sup> 356 U.S. 86 (1958) (plurality opinion).

<sup>79</sup> *Id.* at 101.

<sup>80</sup> *Id.* at 88 n.1 (quoting the Nationality Act of 1940, Pub. L. No. 76-853, § 401(g), 54 Stat. 1137, 1169 (1940), amended by Pub. L. No. 78-221, 58 Stat. 4, 4 (1944)).

<sup>81</sup> *Id.* at 103.

<sup>82</sup> *Id.* at 101.

<sup>83</sup> *Id.*

<sup>84</sup> This growing desire to protect citizenship was heavily influenced by the Communist Revolution and the “Red Scare,” two World Wars, and a burgeoning Cold War. *Cf. id.* at

Illustrative of the changing course in Eighth Amendment analysis is the fact that the Court could have declared the punishment unconstitutional as applied to petitioner's case, without reference to the changing social and political climate. Petitioner "had been gone less than a day [from his military unit] and had willingly surrendered to an officer on an Army vehicle while he was walking back towards his base."<sup>85</sup> Stripping one's citizenship for this minor infraction would strike even the most deferential minds as "obnoxious" to the Eighth Amendment.<sup>86</sup> But by basing its decision in part on the country's desire to protect citizenship, the Court charted a new course for the Eighth Amendment, a course that takes into account the evolving standards of society, and thus allows for an evolving definition of cruel and unusual punishment.<sup>87</sup>

## 2. The "Objective Evidence" Test

The Court has long held that "[the] task [of interpreting the Eighth Amendment] requires the exercise of judgment, not the reliance upon personal preferences."<sup>88</sup> Thus, having declared that the definition of cruel and unusual punishment changes with society's evolving standards, the Court needed a way to measure these evolving standards without simply injecting its own personal preferences.

Justice Scalia suggested how to objectively measure society's evolving standards in his dissent in *Thompson v. Oklahoma*,<sup>89</sup> positing that "[i]t will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives."<sup>90</sup> The Court extended this reasoning a year later, concluding in *Penry v. Lynaugh*<sup>91</sup> that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."<sup>92</sup> In *Penry*, the Court, considering an argument that the Eighth Amendment prohibits the execution of the mentally retarded,<sup>93</sup> explained that the Eighth Amendment bars cruel and unusual punishments in light of "objective evidence of how our society views a particular punishment today."<sup>94</sup> Applying this standard, Justice O'Connor, writing for the Court,

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102 n.36 (recalling the "intolerable situation" of *Shaughnessy v. United States*, 345 U.S. 206 (1953), in which a twenty-five year resident alien of the United States found himself barred from reentry after making a brief visit abroad).

<sup>85</sup> *Id.* at 87.

<sup>86</sup> *Id.* at 102.

<sup>87</sup> *Id.* at 101.

<sup>88</sup> *Id.* at 103.

<sup>89</sup> 487 U.S. 815, 859 (1988) (Scalia, J., dissenting).

<sup>90</sup> *Id.* at 865.

<sup>91</sup> 492 U.S. 302 (1989).

<sup>92</sup> *Id.* at 331.

<sup>93</sup> *Id.* at 307.

<sup>94</sup> *Id.* at 331.

rejected the petitioner's claim that objective evidence indicated a growing "national consensus against execution of the mentally retarded."<sup>95</sup> O'Connor observed that only two states explicitly prohibited the execution of the mentally retarded,<sup>96</sup> and concluded that "even when added to the 14 States that have rejected capital punishment completely, [these legislative enactments] do not provide sufficient evidence at present of a national consensus."<sup>97</sup> Therefore, society's mores had not yet evolved to encompass a prohibition against executing the mentally retarded.<sup>98</sup>

The *Penry* "objective evidence" test made explicit a decades-old informal rule in proportionality review: The most objective way to determine a society's evolving standards of decency is to tally up the states' respective legislative actions regarding the punishment in question.<sup>99</sup> If a majority of states allow the punishment for the given offense, then it comports with society's evolving standards of decency; if a majority of states prohibit the punishment, it violates the Eighth Amendment.<sup>100</sup> For over a century, the Court has relied on tallying state statutes both to uphold punishments and to strike them down.<sup>101</sup>

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<sup>95</sup> *Id.* at 333-34.

<sup>96</sup> *Id.* at 334 (observing that Georgia "bans execution of retarded persons" and Maryland "has enacted a similar statute which will take effect on July 1, 1989").

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Troubling in Justice O'Connor's analysis is the fact that she did not explain why legislative enactments more objectively indicate national consensus than do public opinion polls, or why one merits recognition and reliance while the other does not. For example, the petitioner offered a Texas poll which found that "86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded." *Id.* at 334-35. Justice O'Connor concluded that this "public sentiment" would only constitute "objective evidence" if it were to "ultimately find expression in legislation," but she did not discuss why this was so. *Id.* at 334-35. For an argument that Justices cannot trust the "reliability or validity" of public opinion polls, see *Atkins v. Virginia*, 536 U.S. 304, 326-27 (2002) (Rehnquist, C.J., dissenting) (citing categorical questions, sampling techniques, and sample size/mix as some of the inherent problems with opinion polls).

<sup>99</sup> As early as 1866, the Court held that a punishment was not cruel and unusual because "the mode [of punishment] adopted . . . is the usual mode adopted in many, perhaps, all of the States." *Pervear v. Commonwealth*, 72 U.S. 475, 480 (1866).

<sup>100</sup> See *infra* notes 102-14 and accompanying text.

<sup>101</sup> In *Moore v. Missouri*, 159 U.S. 673 (1895), the Court upheld enhanced sentences for recidivists in part because "[s]imilar provisions have been contained in state statutes for many years." *Id.* at 676. In *Graham v. West Virginia*, 224 U.S. 616 (1912), the Court upheld heavier penalties for repeat offenders after acknowledging that "[s]tatutes providing for such increased punishment were enacted in Virginia and New York . . . and in Massachusetts . . . and there have been numerous acts of similar import in many States." *Id.* at 623. In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court upheld a state law authorizing capital punishment for participation in a felony with reckless indifference to life, because only eleven of the thirty-seven states that permitted the death penalty prohibited this use of it. *Id.* at 154. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court upheld a state law

In recent years, the Court has relied heavily on the objective evidence test to determine the constitutionality of two controversial practices: executing the mentally retarded and executing minors.<sup>102</sup> Thirteen years after a divided *Penry* Court held that sentencing mentally retarded defendants to death did not violate the Eighth Amendment, the *Atkins* Court overruled *Penry* and declared the practice unconstitutional.<sup>103</sup> The Court reversed *Penry* precisely because the objective evidence indicated a significant shift in society's "evolving standards of decency."<sup>104</sup> Whereas only sixteen states had prohibited the execution of mentally retarded persons in 1989, thirty-two states had abolished the practice by 2002.<sup>105</sup> The *Atkins* Court further acknowledged that "the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition," and that in the eighteen states that still allow execution of mentally retarded criminals, "the practice is uncommon."<sup>106</sup>

A similar legislative shift occurred between 1989 and 2005 with respect to the juvenile death penalty. In 1988, the Court in *Thompson v. Oklahoma*<sup>107</sup> held that the Eighth Amendment prohibited the death penalty for anyone who was under the age of sixteen at the time of his or her offense, primarily because the practice was "impermissible in 32 States."<sup>108</sup> A year later, however, in

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permitting execution of sixteen-year-olds, because only fifteen of the thirty-seven states that permitted the death penalty prohibited this use of it. *Id.* at 370.

On the other hand, in *Weems v. United States*, 217 U.S. 349 (1910), the Court concluded that twelve years hard labor for falsifying documents was unconstitutionally excessive, after considering how other states punished similar crimes. *Id.* at 380-82. In *Robinson v. California*, 370 U.S. 660 (1962), the Court prohibited "status" offenses that make it a crime to be addicted to drugs, observing that "[s]ome States punish addiction, though most do not." *Id.* at 672 (Douglas, J., concurring). In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court prohibited the death penalty as a punishment for raping an adult, after recognizing that Georgia was the only state to prescribe such punishment. *Id.* at 595-96. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court invalidated the death penalty for robbery when an accomplice commits murder, because only eight states permitted such a punishment. *Id.* at 789. Finally, in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court observed that Alabama was the only state with chain gangs and hitching post punishments, and declared such punishments unconstitutional. *Id.* at 733, 737 (2002).

<sup>102</sup> See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Atkins*, 536 U.S. at 315-16 ("[T]he large number of states prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.").

<sup>103</sup> *Atkins*, 536 U.S. at 321.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 314-15 (listing the sixteen states that enacted bans on executing mentally retarded persons after *Penry*).

<sup>106</sup> *Id.* at 316.

<sup>107</sup> 487 U.S. 815 (1988) (plurality opinion).

<sup>108</sup> *Id.* at 829 n.29 (emphasis omitted).

*Stanford v. Kentucky*,<sup>109</sup> the Court upheld a statute allowing the execution of offenders who were between the ages of sixteen and eighteen at the time of the offense.<sup>110</sup> The Court concluded that no national consensus had emerged against this punishment, because twenty-two of the thirty-seven states with the death penalty allowed it to be imposed on sixteen-year-olds.<sup>111</sup> However, the next time the Court considered the issue, in 2005, it pointed out that thirty states had banned the death penalty for all minors.<sup>112</sup> This shift, along with the fact that only three states had executed juveniles in the ten years preceding *Roper*,<sup>113</sup> convinced five Justices to overrule *Stanford* and ban the execution of all individuals who were under the age of eighteen at the time of their offense.<sup>114</sup>

C. *Problems with the "Objective Evidence" Test*

1. *Offers Little Guidance in Close Cases*

*Stanford* and *Roper* illustrate that, in close cases, the objective evidence test can lead to an unprincipled manipulation of "objective" data. In *Stanford*, the majority concluded that no national consensus existed against the juvenile death penalty because a majority of states *with the death penalty* allowed the execution of sixteen- and seventeen-year-olds.<sup>115</sup> As Justice Brennan pointed out in dissent, however, only a minority of *all states* allowed the juvenile death penalty.<sup>116</sup> Whichever statistical reading one finds more salient, it is clear that the states had not "overwhelmingly disapproved"<sup>117</sup> of the juvenile death penalty: Forty percent of all states allowed the execution of sixteen-year-olds, and forty-six percent allowed the execution of seventeen-year-olds.<sup>118</sup> Justice O'Connor concurred in the judgment for this exact reason, arguing that, unlike in *Thompson*, where "[t]he most salient statistic . . . [was] that every single American legislature that has expressly set a minimum age for capital

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<sup>109</sup> 492 U.S. 361 (1989).

<sup>110</sup> *Id.* at 380.

<sup>111</sup> *Id.* at 370.

<sup>112</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005) ("30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.").

<sup>113</sup> *Id.* at 565.

<sup>114</sup> *Id.* at 568.

<sup>115</sup> *Stanford*, 492 U.S. at 371-72.

<sup>116</sup> *Id.* at 384 (Brennan, J., dissenting) ("The Court's discussion of state laws concerning capital sentencing . . . gives a distorted view of the evidence of contemporary standards . . . [because] it appears that the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty.").

<sup>117</sup> *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

<sup>118</sup> See *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).



punishment has set that age at 16 or above,”<sup>119</sup> the closeness of the inquiry here made it “sufficiently clear that today no national consensus forbids the imposition of capital punishment [on sixteen- and seventeen-year-olds].”<sup>120</sup>

When the Court overruled *Stanford* in *Roper*, it did so because a clear “majority of states” now rejected the juvenile death penalty: “30 States prohibit the juvenile death penalty,” including “12 that have rejected the death penalty altogether.”<sup>121</sup> However, this objective evidence suffered from the same lack of clarity as in *Stanford*: A majority of the states that allowed the death penalty at all (twenty out of thirty-eight) still allowed the execution of minors.<sup>122</sup> As Justice Scalia observed in his dissent, “[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.”<sup>123</sup> Nevertheless, Justice Kennedy saw fit to change his vote in *Roper*, in large part because “[f]ive States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years,”<sup>124</sup> adding that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>125</sup> Justice O’Connor took issue with this reliance on “trend” data, explaining that “the States have not moved uniformly towards abolishing the juvenile death penalty . . . two States have expressly reaffirmed their support for this practice by enacting statutes setting 16 as the minimum age for capital punishment.”<sup>126</sup> Interestingly, O’Connor found “no national consensus” against the juvenile death penalty in *Roper*, even though three years earlier she had found a national consensus against executing the mentally retarded based on identical

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<sup>119</sup> *Id.* at 381 (O’Connor, J., concurring) (first alteration in original) (quoting Thompson v. Oklahoma, 487 U.S. 815, 849 (1988) (O’Connor, J., concurring in judgment)).

<sup>120</sup> *Id.* at 381.

<sup>121</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (emphasizing that the statistics were almost identical to those that had led the *Atkins* Court to abolish the death penalty for mentally retarded persons).

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* at 609 (Scalia, J., dissenting) (adding that “previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time”).

<sup>124</sup> *Id.* at 565 (majority opinion).

<sup>125</sup> *Id.* at 566 (alteration in original) (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).

<sup>126</sup> *Id.* at 596 (O’Connor, J., dissenting). Justice O’Connor further commented:

[T]he pace of legislative action in this context has been considerably slower than it was with regard to capital punishment of the mentally retarded . . . the extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.

*Id.* at 596-97.

data: In both *Atkins* and *Roper*, thirty states banned the practice in question, and the remaining twenty states “infrequently” engaged in the practice.<sup>127</sup>

These cases demonstrate that Justices can read many different results into supposedly “objective evidence.” In close cases where Justices cannot decipher a clear “national consensus” for or against a punishment based only on state laws, reference to foreign precedent can help to inform the analysis.<sup>128</sup> Indeed, “at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”<sup>129</sup> Precedent from other nations, though “not controlling,” can provide “respected” and often “significant” insight into society’s evolving mores, and can help refine the analysis of the objective evidence provided by the state legislatures of this country.<sup>130</sup>

For instance, Justice Kennedy referenced foreign precedent to illuminate the muddled statistical analysis in *Roper*.<sup>131</sup> He argued that the determination that “the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>132</sup> His inclusion of the names of the seven other countries that had executed juvenile offenders since 1990 (Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China) is certainly suggestive of the world’s moral stance against the juvenile death penalty, especially when one considers that “[s]ince then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.”<sup>133</sup> Finally, Justice Kennedy mentioned the fact that the United Kingdom banned the execution of juveniles in 1948, explaining that “[t]he United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”<sup>134</sup>

Justice Stevens, writing for the Court in *Atkins*, made similar reference to foreign law and international opinion.<sup>135</sup> Looking for guidance to ascertain society’s evolving moral norms, Stevens noted that “within the world community, the imposition of the death penalty for crimes committed by

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<sup>127</sup> See *id.* at 564 (majority opinion) (commenting on the parallels between *Atkins* and *Roper*).

<sup>128</sup> Jackson, *supra* note 26, at 254.

<sup>129</sup> *Roper*, 543 U.S. at 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion)); see also *Trop*, 356 U.S. at 102 (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”).

<sup>130</sup> *Roper*, 543 U.S. at 578.

<sup>131</sup> See *id.* at 575-78 (detailing the world’s disavowal of juvenile capital punishment).

<sup>132</sup> *Id.* at 575.

<sup>133</sup> *Id.* at 577.

<sup>134</sup> *Id.*

<sup>135</sup> See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

mentally retarded offenders is overwhelmingly disapproved.”<sup>136</sup> This recognition, combined with the fact that thirty states in the U.S. had abolished the practice, led Stevens and the majority to conclude that the execution of mentally retarded criminals offended this country’s evolving standards of decency.<sup>137</sup>

## 2. Frustrates the Purpose of the Bill of Rights

A conceptual problem also plagues the objective evidence test. Eighth Amendment cases indicate that Justices rely heavily (some exclusively)<sup>138</sup> on the legislative enactments of the states to determine whether a given punishment is constitutionally sound.<sup>139</sup> In essence, this practice is an exercise of deference to the states on the question of a punishment’s constitutionality.<sup>140</sup> Yet the Bill of Rights (including the Eighth Amendment), since the addition of the Fourteenth Amendment, has been construed to protect individual liberties from offensive state action.<sup>141</sup> The Bill of Rights defines a zone of individual liberty into which a state may not enter, and it is the province of the Court to articulate the scope of this zone of liberty. By redefining the zone of Eighth Amendment liberty based on the actions of the states, the Court has eviscerated the efficacy of the Eighth Amendment. In short, states can decide for themselves when and whether their actions violate an individual’s liberties, in contravention of the historically understood goals and purposes of the Bill of Rights.<sup>142</sup>

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<sup>136</sup> *Id.* at 317 n.21.

<sup>137</sup> *See id.* at 313-17 (discussing the number of states since *Penry v. Lynaugh*, 492 U.S. 302 (1989), that have abolished the death penalty for the mentally retarded, the overwhelming support these legislative enactments had in their respective states, the “consistency of the direction of [legislative] change,” numerous research studies demonstrating the reduced culpability of mentally retarded offenders, and the “overwhelming disapproval” of the practice in the “world community”).

<sup>138</sup> *See, e.g., Roper*, 543 U.S. at 616 (Scalia, J., dissenting) (“The reason for insistence on legislative primacy is obvious and fundamental: ‘[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.))).

<sup>139</sup> For early examples of this judicial practice, see *supra* note 101 and accompanying text. For more recent examples, see *supra* Part II.B.2.

<sup>140</sup> *See, e.g., Enmund v. Florida*, 458 U.S. 782, 792-93 (1982) (basing its ruling regarding the constitutionality of the death penalty primarily on the states’ legislative judgments about the punishment).

<sup>141</sup> *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (observing that a state must not subject an individual to cruel and unusual punishment, because the Eighth Amendment applies to states under the Due Process Clause of the Fourteenth Amendment).

<sup>142</sup> *See, e.g., Letter from Thomas Jefferson to James Madison* (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 659, 659 (Julian P. Boyd ed., 1958) (“[T]he arguments in favor of a declaration of rights [include] . . . the legal check which it puts into the hands of

Defenders of the objective evidence test argue that a society's "evolving standards of decency" change over time, and in a democracy those changes are expressed through legislatures.<sup>143</sup> A change in the majority of legislatures on a given punishment reflects a change in society's standards of decency.<sup>144</sup> 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>145</sup> Consider the following: If, after a terrorist attack, states across the country passed sweeping legislation reinstating public hangings for convicted terrorists, would the practice once again become constitutional simply because a majority of legislatures willed it to be?<sup>146</sup>

While constitutional comparativism cannot cure the conceptual defect of the objective evidence test, reference to foreign precedent can provide a much needed independent source for proportionality analysis.<sup>147</sup> When the Justices reshape and redefine the zone of liberty protected by the Eighth Amendment, they need some independent point of departure that comes neither from the dictates of the states nor their own subjective preferences.<sup>148</sup> Foreign law satisfies this need by providing an objective index of society's attitudes and values, separate from the very state action sought to be constrained by the analysis.<sup>149</sup> Though not controlling, foreign precedent can serve as another

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the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.").

<sup>143</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").

<sup>144</sup> See *id.* at 330-31.

<sup>145</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 127 n.† (1998).

<sup>146</sup> One might argue that the Court could strike down this form of extreme punishment as "obnoxious" to the Eighth Amendment, regardless of society's apparent views towards it. See *Trop v. Dulles*, 356 U.S. 86, 100-02 (1958) (plurality opinion). However, the long history of cruel and unusual punishment jurisprudence strongly suggests that overwhelming public sentiment in favor of a punishment carries the day. See *supra* note 101.

<sup>147</sup> One scholar referred to this argument as "objectivity theory," and gave a helpful sketch of the theory before going on to criticize it. See Larsen, *supra* note 23, at 1303 ("The objectivity theory holds that judges should look to comparative and international law for substantive constitutional content because foreign and international law rules are readily ascertainable and are formulated by sources external to the judiciary itself."). For further discussion of the objectivity theory, see *infra* note 224.

<sup>148</sup> See Larsen, *supra* note 23, at 1303.

<sup>149</sup> See *id.* at 1302-03 (relating and then critiquing the argument that courts should "defer to international opinion when interpreting the Eighth Amendment," in order to avoid "the problem of judicial subjectivity in constitutional interpretation").

“data point” for Justices to consider when interpreting society’s values and determining the proper scope of Eighth Amendment protection.<sup>150</sup>

This ability of constitutional comparativism to limit the “self-regulating” nature of the objective evidence test can have particular importance when the cruel and unusual punishment challenge involves a federal practice.<sup>151</sup> In these situations, the Court has only one jurisdiction to rely on for its objective evidence – the federal government.<sup>152</sup> Thus, it is imperative that Justices have some other objective source of comparison so they do not merely echo the will of Congress. Such was the situation in *Trop*, when the Court declared unconstitutional the practice of denationalizing a citizen for ““deserting the military . . . in time of war.””<sup>153</sup> Writing for the plurality, Chief Justice Warren observed that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>154</sup> In support of this claim, Warren cited a United Nations study that revealed “that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.”<sup>155</sup> By referencing the laws of foreign countries, Chief Justice Warren could objectively assess the moral values of society without blindly deferring to Congressional judgment.

#### D. *Coker v. Georgia: The Independent Judgment Doctrine*

As a counterweight to the deferential effect of the objective evidence test, the Court adopted an additional requirement for proportionality analysis that allowed Justices to take into consideration their own independent judgment. In *Coker v. Georgia*,<sup>156</sup> the Court considered a challenge to Georgia’s capital offense statute, which allowed the imposition of the death penalty for the crime of rape.<sup>157</sup> The Court found that imposing the death penalty for rape was “grossly disproportionate and excessive punishment” barred by the Eighth

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<sup>150</sup> Where Justices typically compile data about state legislative enactments to garner information about the constitutionality of a certain punishment, they can similarly compile data about foreign legislatures and courts. Neither should be dispositive of a “constitutional fact” regarding a punishment, but both are relevant and can help Justices make more objective and informed decisions in close cases. For an argument that comparativism can provide factual or legal “data points” for judges, see Fontana, *supra* note 23, at 556.

<sup>151</sup> See, e.g., *Trop*, 356 U.S. at 87-88 (plurality opinion) (involving a challenge to the federal practice of stripping an individual’s citizenship as punishment for desertion).

<sup>152</sup> *Id.* at 103-04 (expressing the Court’s reluctance to overturn an Act of Congress and its respect for “the broad scope of legislative discretion”).

<sup>153</sup> *Id.* at 88 n.1 (quoting the Nationality Act of 1940, Pub. L. No. 76-853, § 401(g), 54 Stat. 1137, 1169 (1940), amended by Pub. L. No. 78-221, 58 Stat. 4, 4 (1944)).

<sup>154</sup> *Id.* at 102.

<sup>155</sup> *Id.* at 103.

<sup>156</sup> 433 U.S. 584 (1977) (plurality opinion).

<sup>157</sup> *Id.* at 586.

Amendment.<sup>158</sup> The Court observed that “the objective evidence of the country’s present judgment,”<sup>159</sup> as represented by the attitudes of state legislatures, indicated that the death penalty for rape did not comport with evolving standards of decency; Georgia was the only state to authorize such punishment.<sup>160</sup>

However, while the Court engaged in its traditional objective evidence analysis, it also announced a role for individual Justices to weigh in on the constitutionality of a given punishment. The plurality stated that “the attitude of state legislatures . . . do[es] not wholly determine this controversy, for 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.*”<sup>161</sup> The Court then expressed its independent judgment:

Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.<sup>162</sup>

Thus, the *Coker* plurality announced a two-part proportionality analysis for Eighth Amendment cases: an objective determination informed by state legislative enactments, and a subjective determination informed by the Justices’ own judgment.

In 1988, when the Court invalidated the death penalty for minors under the age of sixteen in *Thompson v. Oklahoma*,<sup>163</sup> it applied this new independent judgment standard.<sup>164</sup> It explained that “punishment should be directly related to the personal culpability of the criminal defendant,”<sup>165</sup> and determined that adolescent teens “as a class are less mature and responsible than adults.”<sup>166</sup> The Court based this finding on the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young

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<sup>158</sup> *Id.* at 592.

<sup>159</sup> *Id.* at 593.

<sup>160</sup> *Id.* at 594.

<sup>161</sup> *Id.* at 597 (emphasis added).

<sup>162</sup> *Id.* at 598.

<sup>163</sup> 487 U.S. 815 (1988) (plurality opinion).

<sup>164</sup> *Id.* at 833 (1988) (“Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty . . . .” (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982))).

<sup>165</sup> *Id.* at 834 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

<sup>166</sup> *Id.*

Offenders<sup>167</sup> and a report presented at the American Academy of Child and Adolescent Psychiatry.<sup>168</sup> Recognizing that adolescents are “more vulnerable, more impulsive, and less self-disciplined than adults,”<sup>169</sup> the Court concluded that “it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent.”<sup>170</sup>

The independent judgment doctrine was called into question in *Stanford v. Kentucky*,<sup>171</sup> but the Court “returned to the rule” in *Atkins* and *Roper*.<sup>172</sup> Citing “[t]hree general differences between juveniles under 18 and adults,” the Court concluded that “juvenile offenders cannot with reliability be classified among the worst offenders.”<sup>173</sup> In support of this conclusion, Justice Kennedy, writing for the majority, emphasized that “scientific and sociological studies . . . tend to confirm”<sup>174</sup> three things: (1) “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults;”<sup>175</sup> (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures;”<sup>176</sup> and (3) “the character of a juvenile is not as well formed as that of an adult.”<sup>177</sup> These differences, Kennedy argued, make it evident that the retributive and deterrent “justifications for the death penalty apply to [juveniles] with lesser force than to adults.”<sup>178</sup>

#### E. *Problems with the Independent Judgment Doctrine*

##### 1. Encourages Over-Reliance on Social Science Data

The independent judgment doctrine requires only that Justices take into account their own judgment on a particular punishment; it offers no guidance and imposes no limitations. Wanting to make an informed judgment not based purely on subjective preferences, Justices naturally turn to research studies.<sup>179</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 835 n.42.

<sup>169</sup> *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)).

<sup>170</sup> *Id.* at 825 n.23.

<sup>171</sup> 492 U.S. 361, 378 (1989) (“[W]e emphatically reject petitioner’s suggestion that the issues in this case permit us to apply our ‘own informed judgment . . .’”).

<sup>172</sup> *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (stating that in *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), the Court had “returned to the rule” of independent judgment).

<sup>173</sup> *Id.* at 569.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

<sup>176</sup> *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

<sup>177</sup> *Id.* at 570 (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)).

<sup>178</sup> *Id.* at 571.

<sup>179</sup> See David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1006-08 (1989) (commenting that “the arts and sciences of understanding human behavior,” including the social sciences, have become “indispensable” to lawmakers).

For instance, the Justices who wrote majority opinions in *Thompson* and *Roper* justified their holdings with reference to psychiatric and other social science studies contained in amicus briefs.<sup>180</sup> Whatever the merits of those particular research studies, the independent judgment doctrine risks Justices relying on faulty or questionable data to determine whether a particular punishment is cruel and unusual.<sup>181</sup> This type of reliance on potentially questionable social science data has traditionally been shunned as not well-grounded in judicial reasoning,<sup>182</sup> partly because the Court never has to explain “why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.”<sup>183</sup> As Chief Justice Rehnquist observed in his *Atkins* dissent, “[a]n extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about opinions and attitudes of a population derived from various sampling techniques.”<sup>184</sup>

Moreover, one rarely needs to “look far to find studies contradicting the Court’s conclusions.”<sup>185</sup> In *Roper*, Justice Scalia pointed out that the American Psychological Association, the very organization that supplied one of the studies on which the majority relied, asserted in a previous case: “[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.”<sup>186</sup> Scientific studies contain methodological nuances and conflicting views, and because Justices “can only consider the limited evidence on the record before them . . . [they] are ill equipped to determine which view of science is the right one.”<sup>187</sup>

Reference to foreign precedent can alleviate some of the concerns that reliance on social science data presents. By using constitutional comparativism to inform one’s independent judgment, a Justice can point to a

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<sup>180</sup> See *Roper*, 543 U.S. at 569-70; *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988) (plurality opinion).

<sup>181</sup> See Faigman, *supra* note 179, at 1009, 1012 (lamenting the fact that the Court has created no standards for weeding out irrelevant social science evidence, because “some social science findings are so unreliable as to provide no assistance whatsoever”).

<sup>182</sup> See *id.* at 1008 (“Critics of social science question whether the distinction between the humanities and the social sciences is real, with many doubting the reliability of current social science research . . .”); see also Fahr, *Why Lawyers Are Dissatisfied with the Social Sciences*, 1 WASHBURN L.J. 161, 168 (1961) (“[The] reasonable unanimity which the lawyer . . . thinks he ought to get from the social sciences is in fact hard to find.”).

<sup>183</sup> *Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

<sup>184</sup> *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting).

<sup>185</sup> *Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

<sup>186</sup> *Id.* at 617-18 (alterations in original) (quoting Brief for APA et al. as Amici Curiae Supporting Petitioners/Cross-Respondents at 18-20, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-805)).

<sup>187</sup> *Id.* at 618.



source that has commented on the punishment in question and contains none of the questionable or conflicting characteristics of research studies.<sup>188</sup> No ambiguities exist with foreign law because either the country allows the punishment or it does not.<sup>189</sup>

The only questions arising about the “reliability or validity” of foreign precedent regard whether the law was legitimately enacted and whether it was enacted in a context similar enough to the U.S. context so as to be relevant.<sup>190</sup> As to legitimacy, the Court should only reference foreign laws enacted through proper democratic means.<sup>191</sup> As to context, it has long been recognized that “one of the central reasons that the American court looks to comparative constitutional law is . . . the historical, legal, and/or cultural relationship between [another] country and the United States.”<sup>192</sup> The Court acknowledged this “genealogical comparativism”<sup>193</sup> in *Loving v. United States*,<sup>194</sup> when Justice Kennedy argued that “[t]he historical necessities and events of the English constitutional experience . . . were familiar to [the framers] and inform our understanding of the purpose and meaning of constitutional provisions.”<sup>195</sup> Therefore, Justices should closely examine the contexts of individual countries before referencing their laws in American opinions.

The *Thompson* majority used this type of “genealogical comparativism” to inform its own judgment about the constitutionality of executing juvenile offenders under the age of sixteen.<sup>196</sup> Faced with objective evidence that was less than conclusive and conflicting social science data, the Court explained:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European Community.<sup>197</sup>

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<sup>188</sup> See *supra* notes 147-49 and accompanying text (discussing “objectivity theory”).

<sup>189</sup> See *supra* notes 147-49 and accompanying text.

<sup>190</sup> See Tushnet, *supra* note 20, at 339 (stating that when courts look to countries with dubious political histories, “there are significant obstacles to gleaning useful information”).

<sup>191</sup> See Jackson, *supra* note 26, at 258 n.164.

<sup>192</sup> Fontana, *supra* note 23, at 550.

<sup>193</sup> *Id.* (“In a system of *genealogical comparativism*, a court indicates that it looks to comparative constitutional law because some relationship exists between the lender country – the country supplying the idea or fact the American court is considering borrowing – and the United States.”).

<sup>194</sup> 517 U.S. 748 (1996).

<sup>195</sup> *Id.* at 766.

<sup>196</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

<sup>197</sup> *Id.*

Thus, the Court relied on the objective, legitimate, and contextually similar laws of other countries to inform its own independent judgment, rather than on “unreliable” social science data.<sup>198</sup>

## 2. Establishes No Guidelines to Restrain Judicial Discretion

Over-reliance on social science data is one symptom of a larger problem surrounding the independent judgment doctrine: The doctrine imposes no limits on how Justices should bring their own judgment to bear on the acceptability of a given punishment.<sup>199</sup> The standard only requires Justices to consider the issue independently of state legislatures.<sup>200</sup> With this sweeping language, argues Justice Scalia, “[t]he Court thus proclaims itself sole arbiter of our Nation’s moral standards.”<sup>201</sup> Though the *Coker* Court likely did not intend to create an “Imperial Judiciary”<sup>202</sup> with respect to the Eighth Amendment, its lack of guidance or limitation threatens to allow “nine lawyers . . . to be the authoritative conscience of the Nation” with respect to cruel and unusual punishment.<sup>203</sup>

The results of this unchecked subjectivity can be seen in the *Coker* opinions themselves. While the plurality declared the death penalty a disproportionate punishment for rape,<sup>204</sup> two Justices wrote separately to argue that the death penalty constituted cruel and unusual punishment in all circumstances (despite thirty-five states allowing the death penalty in some form),<sup>205</sup> two Justices

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<sup>198</sup> See *id.* (relying on the opinion of “the Western European Community” to inform the Court’s decision); Faigman, *supra* note 179, at 1009 (“The role of social science in the legal process remains confused . . . due to the lack of a standard by which to measure its relevance.”).

<sup>199</sup> In his *Coker* dissent, Chief Justice Burger quoted from Justice Powell’s dissent in *Furman v. Georgia* to express his concern about the independent judgment doctrine:

“[W]here, as here, the language of the applicable [constitutional] provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. *It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.*”

*Coker v. Georgia*, 433 U.S. 584, 611 (1977) (Burger, C.J., dissenting) (alterations in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting)).

<sup>200</sup> *Id.* at 597 (plurality opinion) (declaring 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” without announcing guidelines to restrain this analysis).

<sup>201</sup> *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

<sup>202</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

<sup>203</sup> *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

<sup>204</sup> *Coker*, 433 U.S. 584, 597 (plurality opinion).

<sup>205</sup> *Id.* at 600 (Brennan, J., concurring in judgment); *id.* (Marshall, J., concurring in judgment).

argued that imposing the death penalty for rape was clearly proportionate (despite forty-seven states prohibiting such a penalty),<sup>206</sup> and one Justice concurred only in the judgment based on the particular facts of the case.<sup>207</sup> In his dissent, Chief Justice Burger attacked the independent judgment doctrine as an example of “the Court . . . substituting its policy judgment for that of the state legislature,” emphasizing that “rape is not a minor crime; hence, the Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States.”<sup>208</sup> In theory, the independent judgment doctrine entitles Justices to “overstep[] the bounds of proper constitutional adjudication” and tread into areas traditionally reserved to the states.<sup>209</sup> Since *Coker*, the Court has bitterly divided over a number of cruel and unusual punishment cases, with each majority, concurring, and dissenting opinion reflecting the subjective (and often wildly different) preferences of the respective Justices.<sup>210</sup>

Justices applying the independent judgment doctrine need some consistent, objective measure by which to inform themselves about society’s “evolving standards of decency.” Judges and academics argue over whether social science can ever be consistent or consistently reliable,<sup>211</sup> yet Justices cannot simply inject their own personal preferences into the Constitution.<sup>212</sup> Foreign precedent does not cure the subjectivity inherent in the independent judgment doctrine, but it does, at the least, provide one consistent and reliable guide by which Justices can objectively analyze the proportionality of a punishment.<sup>213</sup> Foreign precedent exists for many cruel and unusual punishment cases (especially considering the English origins of the Eighth Amendment),<sup>214</sup> and while precedent may differ from country to country, the questions of validity and interpretive ability attendant to social science data do not exist when

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<sup>206</sup> *Id.* at 604 (Burger, C.J., dissenting).

<sup>207</sup> *Id.* at 601 (Powell, J., concurring in judgment in part and dissenting in part).

<sup>208</sup> *Id.* at 604 (Burger, C.J., dissenting).

<sup>209</sup> *Id.*

<sup>210</sup> At least seven cruel and unusual punishment cases before the Court since *Coker* have been decided by a five-four vote. See *Roper v. Simmons*, 543 U.S. 551, 554 (2005); *Jones v. United States*, 527 U.S. 373, 375 (1999); *Harmelin v. Michigan*, 501 U.S. 957, 960 (1991); *Stanford v. Kentucky*, 492 U.S. 361, 363 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 817 (1988) (plurality opinion); *Whitley v. Albers*, 475 U.S. 312, 313 (1986); *Rummel v. Estelle*, 445 U.S. 263, 264 (1980). Four of these cases could not even muster the support of a majority of Justices for every part of the opinion. See *Jones*, 527 U.S. at 375; *Harmelin*, 501 U.S. at 960; *Stanford*, 492 U.S. at 363; *Thompson*, 487 U.S. at 817.

<sup>211</sup> See Faigman, *supra* note 179, at 1007 & n.5, 1010 & n.15.

<sup>212</sup> See Larsen, *supra* note 23, at 1309 (“[C]onstitutional interpretation that invites judicial discretion threatens self-governance because it allows the unaccountable judiciary to substitute its own policy preferences for those of the representatives of the people.”).

<sup>213</sup> See Jackson, *supra* note 26, at 254.

<sup>214</sup> See *supra* note 59 and accompanying text.

considering foreign law.<sup>215</sup> In short, constitutional comparativism provides at least one measure of objectivity to an otherwise subjective judicial doctrine.

### III. CRITICISMS OF CONSTITUTIONAL COMPARATIVISM

As discussed in the Introduction, the use of constitutional comparativism has met with vicious criticism from opponents.<sup>216</sup> While some of this criticism undoubtedly is the result of political hyperbole and pandering,<sup>217</sup> there have been many legitimate and persuasive critiques of comparative constitutional analysis as well.<sup>218</sup> This section addresses the criticisms most relevant to Eighth Amendment analysis and this Note's proposed use of limited comparativism.

#### A. *Legal Primacy Concerns*

Some might argue that "American constitutional experience has been distinctly American, and to use comparative constitutional sources violates the constitutive nature of American constitutional law."<sup>219</sup> William P. Alford contends that our laws reflect "assumptions and values that may not be shared by others," thus making legal borrowing untenable and unreliable.<sup>220</sup> This concern assumes that comparative analysis will supplant existing American doctrines. In the Eighth Amendment context, this criticism would have force if one advocated abolishing the death penalty simply *because* another country had abolished it, or scrapping the proportionality requirement altogether *because* other countries had adopted a different approach.

However, neither this Note nor comparative theorists in general propose to "use comparative constitutional law in such a radical way as to displace the

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<sup>215</sup> For a discussion of the problems caused by reliance on social science data to make legal judgments, see *supra* notes 181-87 and accompanying text.

<sup>216</sup> See *supra* Introduction. For classical arguments against constitutional comparativism, see G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 313 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) ("[A] constitution is not simply made: it is the work of centuries, the Idea and consciousness of the rational (in so far as that consciousness has developed in a nation)."); CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748) ("Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another."). Mark Tushnet contends that these philosophers' claims are "clearly overstated." Tushnet, *supra* note 20, at 333.

<sup>217</sup> See *supra* notes 17-19 and accompanying text.

<sup>218</sup> See, e.g., sources cited *supra* note 23.

<sup>219</sup> Fontana, *supra* note 23, at 615 (relating the view of the "cultural particularist"); see also Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 *CARDOZO L. REV.* 865, 877 (1993) (asserting the centrality of "cultural experience and cultural history" in constitutional law).

<sup>220</sup> William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 *WASH. L. REV.* 945, 947 (1986).

centrality of American sources.”<sup>221</sup> No constitutional comparativism should supplant wholesale the laws of one country for another, nor should it replace one country’s judicial doctrines with another’s. Instead, this Note advocates the limited use of comparative analysis to augment and improve the Court’s existing proportionality doctrine.<sup>222</sup> Where the objective evidence test grants too much deference to states, comparativism allows Justices to limit this deference in a consistent and principled manner.<sup>223</sup> Where the independent judgment doctrine grants Justices too much unfettered discretion, comparativism creates an objective check on that discretion.<sup>224</sup> Constitutional comparativism should improve the existing Eighth Amendment approach; it should not replace it.

A second criticism of importing foreign precedent is that hard cases reflect an “element of yearning” in a culture, and it is therefore problematic to borrow legal solutions.<sup>225</sup> In the cruel and unusual punishment context, close cases represent divisions within American society, and any possible change in our society’s “evolving standards of decency” should come from within; it should not be artificially grafted onto us from abroad.<sup>226</sup> However, the limited comparative theory advanced in this Note does not allow for “legal borrowing.”<sup>227</sup> The Court cannot approach a close case and resolve it by relying exclusively or even primarily on foreign law. The Court must still engage in its traditional proportionality review, informed primarily by the objective enactments of state legislatures and by its own independent judgment.<sup>228</sup> Reference to foreign precedent merely augments the analysis. If, for instance, a Justice finds the arguments for and against a certain punishment in equipoise, and her comparative analysis tips her in favor of prohibiting the punishment, she has not borrowed the prohibitory rule of another country. Rather, she has been led to her conclusion by the entire body of evidence – the state legislatures, her own judgment, and the foreign precedent.

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<sup>221</sup> Fontana, *supra* note 23, at 616.

<sup>222</sup> See *infra* Part IV.

<sup>223</sup> This check is necessary to further the principles of the Bill of Rights. See *supra* note 145 and accompanying text.

<sup>224</sup> Jordan Paust and Nadine Strossen have described the effect that foreign precedent has on judicial discretion as the “objectivity theory.” See Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 258-60 (1975); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 837-38 (1990).

<sup>225</sup> George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 739 (1993).

<sup>226</sup> Cf. *id.* (suggesting that some Eastern European countries have rejected capital punishment not due to their own societal standards but simply to “express adequate regard for the values now dominant in Western Europe”).

<sup>227</sup> See *infra* Part IV.B.2.

<sup>228</sup> See *supra* Part II.B (detailing traditional proportionality review).

B. *Cultural Concerns: Relevance, Transferability*

Comparative law theorists have long debated the efficacy and relevance of relying on one legal system to analyze another because each system has evolved over time within a distinct historical and cultural context.<sup>229</sup> For instance, if one country has abolished the death penalty because of a long history of racially disproportionate application, what relevance would that precedent have to a country with no history of racism or unequal treatment? Moreover, many foreign court decisions (just like American decisions) turn on highly specific fact patterns or contexts that prevent them from being easily transferred to other countries.<sup>230</sup>

As an initial matter, American Justices should never reference or rely on foreign law that did not arise through a democratic process, whether that law consists of a legislative enactment or a judicial decision.<sup>231</sup> Our legal system was born from, and its continued legitimacy is premised on, our democratic system; our jurisprudence simply cannot accept laws created through undemocratic means. Further, Justices “should view . . . contextual differences on a sliding scale: The more contextual differences, the less desirable utilizing comparative constitutional law will be.”<sup>232</sup> For example, Justice Breyer, in *Knight v. Florida*,<sup>233</sup> wrote:

[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.<sup>234</sup>

With respect to culture, as long as the foreign court exists within a democratic structure, “[t]he institutions that American courts are borrowing from are not that different from our courts – they are engaged in some of the

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<sup>229</sup> Tushnet, *supra* note 20, at 332 (“[I]t will be difficult to determine whether any results one observes occur because of the institutional characteristics of the constitutional provisions borrowed, their interaction with other constitutional arrangements (which may eliminate the possibility of productive comparison), or the historical peculiarities of the systems in which those provisions are located.”).

<sup>230</sup> See Tushnet, *supra* note 20, at 338-39 (cautioning against reference to laws of Eastern European countries, given the distinct political context in which those countries developed constitutional structures).

<sup>231</sup> It is something of a simplification to insist that a foreign law “arise through a democratic process.” After all, “proportional representation systems vary significantly in the details of their operation.” Tushnet, *supra* note 20, at 332. No two democratic processes are identical. However, a law that arises through a democratic process different from ours will still be more relevant than a law created under another system of government.

<sup>232</sup> Fontana, *supra* note 23, at 559.

<sup>233</sup> 528 U.S. 990 (1999).

<sup>234</sup> *Id.* at 997 (Breyer, J., dissenting from denial of certiorari).

same basic tasks. Constitutional courts around the world are all reflective institutions.”<sup>235</sup> All of these courts struggle with “where to draw the line between the liberties of the individual and the power of the state.”<sup>236</sup> Moreover, differing social contexts have “taken on a different dynamic given social conditions in the early twenty-first century.”<sup>237</sup> In addition to the relatively heterogeneous makeup of the United States, the world has become so interconnected that “[t]he cultural linkages between [other countries’] constitutional courts and our courts are even more obvious now than they have been in the past.”<sup>238</sup> One cannot deny the special historical, cultural, and legal link the United States shares with England, and a prudent comparative analysis should begin there.<sup>239</sup> This Note suggests that, after England, the Court should look to other former Commonwealth nations for the same linkage reasons,<sup>240</sup> and then consider the precedents of other constitutional democracies.<sup>241</sup>

#### IV. TOWARD A CONSISTENT EIGHTH AMENDMENT COMPARATIVE ANALYSIS

This section sketches a framework for limited constitutional comparativism in Eighth Amendment analysis. This framework leaves in place the existing proportionality jurisprudence, but augments it with comparative analysis in a narrow range of cases. The purpose of this section is to provide a clear, consistent approach to comparativism that both limits deference to states and restrains judicial discretion.

##### A. *Apply Foreign Precedent Only in “Close Cases”*

Just as concerns about judicial discretion within the context of the independent judgment doctrine are valid, so too are concerns about judicial discretion when judges use comparative analysis.<sup>242</sup> While foreign precedent can be informative about society’s evolving standards of decency, at the end of the day the Justices must evaluate the moral contours of American society.<sup>243</sup> Thus, when ample evidence exists of a “national consensus” regarding

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<sup>235</sup> Fontana, *supra* note 23, at 616.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 617.

<sup>238</sup> *Id.* at 616.

<sup>239</sup> See *infra* Part IV.B.1.

<sup>240</sup> See *infra* Part IV.B.2.

<sup>241</sup> See *infra* Part IV.B.3.

<sup>242</sup> See Larsen, *supra* note 23, at 1309 (“[R]eliance on foreign and international law, ‘over which the American people have no control – either directly through the power of election or even indirectly through the process of judicial appointment,’ may actually exacerbate the countermajoritarian problem.” (quoting Hon. J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL’Y 423, 426 (2004))).

<sup>243</sup> See *Roper v. Simmons*, 543 U.S. 551, 616 (Scalia, J., dissenting) (“[T]he only legitimate function of this Court is to identify a moral consensus of the American people.”).

American society's views on a certain punishment, there is no need to reference or rely on foreign law.

For example, if a challenged punishment is prohibited in forty-nine states, and research studies uniformly conclude that the punishment unnecessarily harms individuals and serves no legitimate punishment objective, one can safely conclude that a national consensus has formed.<sup>244</sup> Justices need not reference foreign law to reach this decision; both the objective evidence test and the independent judgment doctrine point in the same direction. There is arguably no harm in referencing foreign law to support this overwhelming national consensus, but it certainly would be inappropriate to rely on foreign precedent to argue against it.

Therefore, Justices should only apply comparative analysis when the issue presents a "close case," as determined by the objective evidence test and, to a lesser extent, the independent judgment doctrine.<sup>245</sup> The classic "close case" exists when twenty-five states allow the punishment and twenty-five states prohibit it. One can also call a case "close" if slightly more than half of the states allow or prohibit the punishment in question, but the majority is not so overwhelming as to form a "national consensus."<sup>246</sup> It would not, however, be instructive or appropriate to create a bright-line rule requiring a certain numerical value before calling the case "close."<sup>247</sup> As *Roper*, *Atkins*, and other cases illustrate, other objective factors can weigh into the analysis, including the rate of change among state legislatures and "the consistency of the direction of change."<sup>248</sup> Though these factors lend themselves to manipulation, they can be relevant in determining the strength of society's

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<sup>244</sup> Justice Scalia has referred to prohibition in forty-nine states as "overwhelming opposition to a challenged practice." *Id.* at 609 (discussing *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)).

<sup>245</sup> One might contend that, given the skill with which the Court has manipulated "objective evidence" to reach various conclusions about evolving standards of decency, a "close case" requirement does little to limit the range of cases in which Justices can apply comparative analysis. Even if this is true, other limitations on comparative analysis ensure that foreign precedent does not take too central a role in U.S. constitutional jurisprudence. *See infra* Part IV.B.

<sup>246</sup> This is particularly true in the context of the death penalty, where there is disagreement on the Court over whether to consider all fifty states in the analysis, or only the thirty-eight states that authorize the death penalty in some circumstances. *Compare Roper*, 543 U.S. at 564 (counting all fifty states), *with id.* at 610-11 (Scalia, J., dissenting) ("Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue.").

<sup>247</sup> The creation of a bright-line rule would be particularly unwise given the muddled nature of the statistical data surrounding the death penalty. *See id.* at 617 (Scalia, J., dissenting).

<sup>248</sup> *Id.* at 566 (majority opinion) (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).



division.<sup>249</sup> In essence, a close case exists when, looking at all the objectively relevant factors, one cannot confidently adduce a clear national consensus.

To a lesser degree, the independent judgment doctrine can also highlight the closeness of a case, though concerns about the “reliability and validity” of social science studies limit its usefulness.<sup>250</sup> For instance, if a clear majority of states allowed a certain punishment, but the overwhelming body of scholarly research argued that it did not achieve its intended goals, then the constitutionality of that punishment could be considered a close question.<sup>251</sup> Or, more likely, if no clear majority existed within the states and the scholarly literature similarly conflicted, the independent judgment doctrine could confirm the existence of a close case.

B. *Apply Only the Laws of Similarly Situated Countries*

Critics of comparativism argue that laws reflecting one country’s distinct historical and legal context have no relevance to another country.<sup>252</sup> This argument has merit, but the Justices can ensure the relevance of foreign precedent by limiting their comparative analysis to the laws of similarly situated countries.<sup>253</sup>

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<sup>249</sup> While it may be possible to manipulate data to assert that a case is more or less “close” than it actually is, it is hard to imagine how a Justice would manipulate the data to manufacture a “close case” if, for example, forty-nine states prohibited a practice. *See supra* note 244 and accompanying text. With respect to determining whether a close case exists, it is far less harmful to over-include than to under-include. Over-inclusion simply means that the Justices take a longer, harder look at the issue, whereas under-inclusion risks Justices quickly determining national consensus where a legitimate debate still exists.

<sup>250</sup> *See supra* Part II.E.1.

<sup>251</sup> The death penalty itself might fall into this category. Currently thirty-eight states have the death penalty in some form, but one scholar points out that “there is a wide consensus among America’s top criminologists that scholarly research has demonstrated that the death penalty does, and can do, little to reduce rates of criminal violence.” Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996). However, inclusion of the death penalty as a “close case” under this rationale assumes that the death penalty serves no purpose other than deterrence.

<sup>252</sup> *See* Alford, *supra* note 220, at 946-47 (“Our very distance from other societies may yield helpful perspectives not readily available to insiders, but that vantage point also imposes upon us an obligation to be vigilant as to the ways in which the constructs that we have developed for ordering the world reflect assumptions and values that may not be shared by others.”).

<sup>253</sup> Joan Larsen describes the practice of restricting comparativism to similarly situated countries as “limiting the community.” She observes that proposals have been put forward to “limit the relevant community to ‘civilized countries,’ the ‘English-speaking peoples’ of the world, the nations of ‘Continental Europe,’ or perhaps ‘industrialized’ or ‘Western’ nations.” Larsen, *supra* note 23, at 1322-23 (footnotes omitted).

### 1. Look to English Law First

English law has particular relevance to our system, because “[t]his is the system we come from, therefore this is who we are, therefore this is relevant to interpreting our Constitution.”<sup>254</sup> This is especially true for the Eighth Amendment, as the Framers derived its wording directly from the English Bill of Rights.<sup>255</sup> Because these laws have the same origin, one can conclude that they have the same purpose. Therefore, American judges can rely on English precedent, knowing that the English legislators and judges creating those precedents have in mind the same goals as they do.<sup>256</sup> This closeness allows American judges to more easily adduce “constitutional facts” coming from the English experience. For these reasons, Justices should always begin their comparative analysis with reference to the laws of England. While no rigid rules should govern the strength of the English experience over other foreign countries, the Justices should certainly afford more weight to English laws.

### 2. Then Consider the Laws of Other Commonwealth Countries

Just as the United States derived its legal heritage from England, so too did many other countries in the world. These countries, having similar ties to the English Bill of Rights and the evolution of English constitutional law, often advance similar goals with their own constitutional jurisprudence. Justices can therefore look to the laws of these nations for guidance. However, an important caveat exists regarding Commonwealth countries: Not all descendants of the British Crown carried on England’s constitutional legacy, and some of these countries are no longer (or never were) democratic. For example, Lesotho operates as a constitutional monarchy and does not protect the right to trial by jury, while Swaziland operates as an absolute monarchy. As discussed in Part III, Justices should never rely on foreign law created through undemocratic means; these illegitimate precedents bear no relevance to our constitutional jurisprudence.<sup>257</sup> Moreover, we must also recognize that some laws may have been enacted during undemocratic periods of a country’s history, even though the country is now democratic. Commonwealth countries that have had undemocratic periods include Nigeria, Pakistan, and South Africa. Thus, Justices should closely study the Commonwealth countries to which they look to ensure that their laws were democratically derived and reflect the basic principles of England and the United States.

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<sup>254</sup> Fontana, *supra* note 23, at 550 (relating one potential argument for reliance on English law); *see also* *Loving v. United States*, 517 U.S. 748, 766 (1996) (“The historical necessities and events of the English constitutional experience . . . were familiar to [the framers] and inform our understanding of the purpose and meaning of constitutional provisions.”).

<sup>255</sup> *See supra* notes 58-59 and accompanying text.

<sup>256</sup> *See* Larsen, *supra* note 23, at 1324 (admitting that “[t]here is some appeal to this approach [because] America’s legal, political, and cultural history owes much to England”).

<sup>257</sup> *See supra* note 231 and accompanying text.

### 3. Then Look to Other Foreign Democracies

After considering the laws of other British descendant countries, Justices should compare the laws of other democracies throughout the world. Though not cut from the same historical cloth, these institutions are “engaged in some of the same basic tasks . . . thinking about where to draw the line between the liberties of the individual and the power of the state.”<sup>258</sup> The legal heritage of the world’s constitutional democracies may be different, but the principles that define their political and judicial structures are the same.<sup>259</sup> Thus, the way in which these foreign judges handle similar cases can inform American judges about the “rationality or acceptability” of a constitutional practice.<sup>260</sup>

Moreover, when relying on the laws of Commonwealth nations and other foreign democracies, the Justices should have discretion in deciding how much force to give any particular country’s precedent in the analysis. Cultural and political contexts can influence this discretion, and sometimes a precedent from a non-Commonwealth country can have more relevance than one from a Commonwealth nation. For instance, although Pakistan descended from England, its militarily-controlled government and state-sanctioned establishment of Islam might suggest that its precedents bear little relevance to American law, especially compared to a non-Commonwealth country like France, which maintains a civilian government and protects the free exercise of religion. Whatever weight the Justices afford these countries’ precedents, however, it should be less than that given to English precedent.

### C. *Limit the Effect of Foreign Precedent on the Analysis*

Comparativism can limit the “self-regulatory” power of states to determine the constitutionality of a punishment, but without proper constraints it risks simply handing that regulatory power over to individual Justices.<sup>261</sup> The following guidelines can limit judicial discretion in a principled and consistent manner.

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<sup>258</sup> Fontana, *supra* note 23, at 616.

<sup>259</sup> *See id.* (“The cultural linkages between [other countries’] constitutional courts and our courts are even more obvious now than they have been in the past.”); Jackson, *supra* note 26, at 258 n.164 (“[T]he constitutional practices and the constitutional decisions of other constitutional democracies may be relevant and may be considered.” (emphasis omitted)). *But see* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794 (1997) (“Many institutions call themselves ‘constitutional courts,’ but that hardly makes them similar.”).

<sup>260</sup> Fontana, *supra* note 23, at 555.

<sup>261</sup> *See* *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (criticizing Justices who “invoke alien law when it agrees with one’s own thinking, and ignore it otherwise”).

### 1. Give Credence Only to Overwhelming International Consensus

Within this comparative framework, Justices should only reference foreign law where a close case exists – that is, only when the states are divided over a punishment.<sup>262</sup> Justices should not, then, look to a similarly divided world community and find that division dispositive of a societal consensus. If a division within American jurisdictions cannot provide guidance as to America's evolving standards of decency, neither can a division within foreign jurisdictions. Therefore, Justices should look for and give credence to only those comparative analyses that yield an overwhelming international consensus for or against a punishment. These precedents, like the ones relied upon in *Atkins* and *Roper*, for example, can inform the judiciary of a clear, evolving consensus where reference to American states alone cannot.<sup>263</sup> Further, because the potential for unfettered judicial discretion exists, Justices should only give consideration to an *overwhelming* foreign consensus. Just as a 26-24 split among states does not prove that standards of decency have evolved, neither does a 51-49 split among foreign countries.

### 2. Use Comparativism to Inform, Not Replace Proportionality Review

The proportionality requirement, with all its problems, is the law of the land.<sup>264</sup> Justices must apply the proportionality analysis to Eighth Amendment cases, even when informing that analysis with foreign law. Comparativism should help instruct Justices as they conduct their proportionality analysis; it should not replace the analysis entirely.<sup>265</sup> If Justices allowed foreign law to take such precedence in their proportionality review so as to rewrite the analysis altogether, we would truly risk losing our judiciary to “internationalist judges.”<sup>266</sup> Though no Justices to date have relied on comparativism in this way,<sup>267</sup> a prudent comparative theory should include express guidelines to prevent future over-reliance.

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<sup>262</sup> See *supra* Part IV.A.

<sup>263</sup> See *Roper*, 543 U.S. at 575 (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

<sup>264</sup> See *supra* Part II.

<sup>265</sup> Indeed, if Justices were to rely on comparativism to such an extent, they would “merely replace[] one domestically unaccountable decision-maker (the judiciary) with another (foreign governments, foreign or international courts, or the international community, as the case may be).” Larsen, *supra* note 23, at 1309.

<sup>266</sup> See *supra* note 19 and accompanying text.

<sup>267</sup> See Jackson, *supra* note 26, at 250 (remarking that the Court has “almost never, in a majority opinion, relied on the constitutional reasoning of other nations’ courts, though individual Justices on occasion have done so”).

Therefore, Justices should conduct the traditional proportionality analysis before making any reference to foreign law. They should examine the objective evidence, including legislative enactments, jury practices, and rates and directions of legislative change. They should then bring their own judgment to bear on the subject, informed by the most objective and reliable evidence the record presents. If they determine that a close case exists, only then should the Justices turn to a comparative analysis. Any findings that this comparative analysis yields, however, should be treated as secondary to traditional proportionality review. Justices should accord the existing framework primacy in the analysis, and treat comparative analysis as informing their proportionality judgment. By creating this hierarchy of reliance, a limited comparativism can improve upon the existing jurisprudence without supplanting it.

#### CONCLUSION

The Eighth Amendment's proportionality requirement is confusing and problematic, and it rests on conceptually dubious grounds. In its current form, the proportionality requirement leads to unprincipled and inconsistent results that either grant too much deference to states or rely too heavily on the subjective preferences of judges. A limited comparativism can rescue this troubled doctrine. By looking to the laws and practices of foreign countries in determining whether a punishment comports with "evolving standards of decency," judges can take the final decision of constitutionality out of state hands and ensure that their own subjective discretion is limited. But any comparative analysis must necessarily be limited, both to reinforce the primacy of American law and to restrain judges from injecting personal preferences under the guise of comparativism.

This Note has created a framework for a limited comparativism that can accomplish these objectives. First, judges should only invoke comparative analysis in truly close Eighth Amendment cases. Second, judges should look first to the laws of England and other former Commonwealth countries, and then to other constitutional democracies. The laws of non-democratic countries, or laws created through non-democratic means, should never factor into the analysis. Third, judges should only rely on overwhelming international consensus regarding the punishment in question. Finally, judges should continue to give primary weight to traditional proportionality review, using comparative conclusions as secondary evidence of a societal consensus.