

## **RIGHTS WITHOUT A BASE: THE TROUBLING AMBIGUITY AT THE HEART OF CONSTITUTIONAL LAW**

STEPHEN A. SIMON\*

### **ABSTRACT**

It is not only the outcomes of rights controversies that matter, but also the kinds of reasons that count as legitimate in constitutional debate. A question of pivotal importance is whether rights are rooted in uniquely American sources, such as the will of the people, or in universal sources reaching beyond the unique context of American politics, such as the requirements of liberty and human dignity. The question is even more fundamental than the debate over originalism, because the views of the Framers might be considered authoritative either because they embodied popular will or because they reflected inherent truths about freedom. Since many scholars consider universal arguments illegitimate, simply identifying their use in constitutional interpretation often is treated as a conversation-ending accusation. But universal arguments continue to figure in the Supreme Court's jurisprudence regardless, which makes studying their role essential. By examining not just when but how the Justices have appealed to considerations transcending the American context, this Article demonstrates a troubling ambiguity at the heart of constitutional law. It matters a great deal whether rights are peculiarly American or universal in character; this Article shows how the Court undermines constitutional protections by fostering uncertainty over the basis of cherished rights.

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\* Assistant Professor of Political Science, University of Richmond; J.D., New York University School of Law; Ph.D., University of Maryland, College Park. Many thanks to Mark Graber, Wayne McIntosh, Richard Dagger, and Dan Palazzolo for helpful comments and suggestions at various stages of this research.

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## INTRODUCTION

It is not only the outcomes of rights controversies that matter, but also the kinds of reasons that count as legitimate in constitutional debate.<sup>1</sup> A question of pivotal importance is whether rights are rooted in uniquely American sources, such as the will of the people, or in universal sources reaching beyond the unique context of American politics, such as the requirements of liberty and human dignity. The question is even more fundamental than the debate over originalism, because the views of the Framers might be considered authoritative either because they embody popular will or because they reflect inherent truths about freedom. Since many scholars consider universal arguments illegitimate,<sup>2</sup> simply identifying their use in constitutional interpretation may be treated as a conversation-ending accusation. But universal arguments continue to figure in the Supreme Court's jurisprudence regardless,<sup>3</sup> which makes studying their role essential. By examining not just when but how the Justices have appealed to considerations transcending the American context, this Article demonstrates a troubling ambiguity at the heart of constitutional law.

As used here, "particular arguments" (or "non-universal arguments") refers to justifications that treat norms of decision as being generated by the choices of specific people, as reflected, for example, in the Framers' intentions, the binding force of enactments, traditional American practices, and the preferences and attitudes of the American people. By contrast, "universal arguments" reach beyond the context of any specific political community. In the Supreme Court's jurisprudence, universal arguments principally have taken the form of appeals to intrinsically valid principles that follow necessarily from

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1. RONALD C. DEN OTTER, *JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM* 2-3 (2009) (contending that judicial observers "must care more about the method than about the outcome" in studying the reasons that courts offer to justify decisions).

2. See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, *UCLA L. REV.* 639, 703 (2005) (referring to judicial reliance on "[m]odern varieties of the natural law tradition" as "discredited"); see also STEVEN D. SMITH, *THE CONSTITUTION & THE PRIDE OF REASON* 93 (1998) (noting that "[i]n judicial discourse 'natural law' has been used more as an epithet to assail decisions a judge dislikes than as a constructive or favored position, and the political controversy surrounding the charge that Supreme Court nominee Clarence Thomas had endorsed a natural law philosophy suggests that this attitude of hostility has not substantially softened.").

3. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (where the majority reasoned that liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Atkins v. Virginia*, 536 U.S. 304, 311, 321 (2002) (where the Court, in holding that the execution of mentally retarded persons violated the Eighth Amendment, asserted its prerogative to conduct an "independent evaluation" of whether a challenged practice comported with the requirements of "the dignity of man").

the meaning of certain concepts or highly general standards of evaluation, such as the requirements of freedom.<sup>4</sup> If the concept of freedom has meaning and implications that necessarily follow, then the resulting requirements do not depend on the expressed preferences of any particular people. Even if the Court's immediate concern (and jurisdiction) is limited to the implications of the cited standards within the United States, the justificatory argument is universal in character. While the reference to universality easily evokes terms like "natural law," "natural rights," or "natural justice," the Justices more commonly have used other formulations, with prominent examples including: limitations on government flowing from "the nature of society and of government";<sup>5</sup> rights following from the "very idea of a government, republican in form";<sup>6</sup> requirements "implicit in the concept of ordered liberty";<sup>7</sup> "principles which are the basis of all free government";<sup>8</sup> or standards for "determin[ing] whether a challenged punishment comports with human dignity."<sup>9</sup>

Judicial reliance on arguments that are unique to the American context are pervasive and taken for granted in American law,<sup>10</sup> which is not surprising given that the judges are institutional actors empowered by, and operating within, a particular community governed by its enacted laws. The question is whether judges ever may rely on universal arguments in discerning the meaning of constitutional rights. One major approach on the Court (championed today, for example, by Justice Antonin Scalia) has rejected universal reasoning entirely.<sup>11</sup> A competing approach (advocated by Justices

4. *E.g.*, *Wilkinson v. Leland*, 27 U.S. 627, 657–58 (1829).

5. *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

6. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

7. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

8. *Downes v. Bidwell*, 182 U.S. 244, 291 (1901) (White, J., concurring).

9. *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

10. Reliance on statutory enactments and common law traditions is so common and widely accepted that it does not occasion controversy, and judges do not feel the need to cite sources in support of the proposition that they are appropriate reference points in judicial decision-making. The controversial question is not whether judges may rely on sources reflecting American preferences, such as legislative acts and longstanding practices, but, rather, whether judges must rely exclusively on such sources. For example, in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028–30 (2010), Justice Samuel Alito's opinion for a five-member majority relied heavily on history and tradition in holding that the Second Amendment's right to bear arms applied against the states. In dissent, Justice Stephen Breyer did not challenge the appropriateness of Justice Alito's sources, but, rather, argued that they were not in themselves decisive. *Id.* at 3120 (Breyer, J., dissenting). Justice Breyer argued that it was also appropriate, for example, to consider a right's importance according to its substantive content. *Id.* at 3123 (Breyer, J., dissenting). *McDonald* is discussed further below. *See infra* Part II.A.

11. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (arguing that rights interpretations should be "deeply rooted in this Nation's history and traditions.").

Anthony Kennedy, Stephen Breyer, and others) has defended the use of universal arguments, but, as I show below, often has combined them with non-universal arguments in a confusing way that calls into question whether the universal arguments really are doing any work.<sup>12</sup> Regardless of one's views on the validity of universal arguments, this core ambiguity in the Court's jurisprudence is troubling for a legal system that depends on litigants engaging the arguments driving changes in constitutional law.

The significance of universal arguments frequently is overlooked, because they are associated with "natural law,"<sup>13</sup> a term which carries baggage that is unwelcome in constitutional discourse, including religious premises<sup>14</sup> and the prioritization of property rights.<sup>15</sup> But universal arguments need not carry with them the ideas associated with traditional conceptions of natural law. To avoid the distorting effects of false associations, this Article zeroes in on the crux of what makes universal arguments distinctive—the appeal to reasons that do not depend on the unique context of American politics. The remainder of the Article advances two main arguments: Part I argues that ambiguity in the Court's jurisprudence regarding the basis of rights is troubling in light of the

12. For example, as discussed below, *see infra* Part II, in *Lawrence*, the majority reasoned from the implications of liberty, while also citing statistics reflecting public attitudes, without clarifying the interrelationship, if any, between these two fundamentally distinctive kinds of sources. 539 U.S. at 570–71.

13. *E.g.*, JUSTIN BUCKLEY DYER, *NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION* 2 (2012); HADLEY ARKES, *CONSTITUTIONAL ILLUSIONS & ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW* 43 (2010); CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 172 (1992).

14. Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171, 180 (2008) ("Most, but not all, natural law theorists are theists. They believe that the moral order, like every other order in human experience, is what it is because God creates and sustains it as such."); *see generally* CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (1963).

15. The Founding generation believed that property rights were rooted in natural law, MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* 111 (1996), and the Constitution reflected an emphasis on property rights. (For example, Article I, Section 10 prohibited governmental interference with contracts. In addition, the Fifth Amendment prohibited seizure of private property without compensation, and deprivation of property without due process.) The Supreme Court paid attention principally to property until well into the twentieth century, often applying natural-law reasoning in protecting property rights. HAINES, *supra* note 13, at 160–65. In the late 1930s, however, the Court abandoned this line of jurisprudence and generally demoted property in its hierarchy of rights. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937). Natural law had been associated with the prioritization of property, and judicial reliance on natural law to strike down legislative acts has been seen as discredited since the Court shifted away from property and towards the protection of other categories of rights.

Court's leading role in signaling to litigants and other legal actors the kinds of reasons that count in constitutional interpretation; and Part II and the Conclusion show how this core ambiguity has been exacerbated in recent decades by the Justices' increasing tendency to mix universal and non-universal arguments in confusing ways.

# I. THE CORE AMBIGUITY IN THE COURT'S JURISPRUDENCE

The Justices have relied on universal arguments since the Court's first constitutional decisions.<sup>16</sup> Opposition to the use of universal arguments also dates back to the Court's earliest period.<sup>17</sup> Justices arguing for exclusive reliance on particular arguments have treated constitutional rights as reflections of popular will, with interpretation guided principally by constitutional text, the Framers' intentions, and traditional understandings.<sup>18</sup> Opponents of universal arguments have contended that judges lack the authority to ground decisions in universal reasoning (or "natural law," as they more commonly refer to it), which is too vague and speculative to guide interpretation.<sup>19</sup> In their view, purported reliance on universal arguments opens the door to the illegitimate imposition of the Justices' own subjective will on the nation.<sup>20</sup> In *Calder v. Bull* (1798), for example, Justice James Iredell, responding to another Justice's appeal to the "general principles of law and reason," denounced judicial reliance on principles of natural justice.<sup>21</sup> Another prominent proponent of an exclusively particular approach, Justice Hugo

16. In *Chisholm v. Georgia*, 2 U.S. 419, 453, 455–56 (1793), for example, Justice James Wilson examined the controversy first by "principles of general jurisprudence," and argued that states, like individuals, were subject to basic principles of right, justice, and equality, while Justice John Jay reasoned from the "obvious dictates of justice," and argued that administering justice "without respect of persons" formed part of "the promise which every free Government makes to every free citizen, of equal justice and protection." *Id.* at 472, 479.

17. In *Chisolm v. Georgia*, 2 U.S. 419 (1793), for instance, where Justice John Jay reasoned from the rights "which every free Government makes to every free citizen, of equal justice and protection," *id.* at 479, and Justice James Wilson relied on basic principles of right, justice, and equality, *id.* at 455–56, Justices John Blair (concurring) and James Iredell (dissenting) looked only to text, with Justice Blair saying the Constitution was "the only fountain from which I shall draw; the only authority to which I shall appeal." *Id.* at 430, 450.

18. Justice Hugo Black, for example, stressed the importance of hewing to the Constitution's commands, *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring), rather than allowing judicial will to displace the decisions of legislatures. *Adamson v. California*, 332 U.S. 46, 95 (1947) (Black, J., dissenting).

19. *E.g.*, *Calder v. Bull*, 3 U.S. 386, 398–99 (1798) (Iredell, J., concurring).

20. *E.g.*, *Loan Ass'n v. Topeka*, 87 U.S. 655, 668–69 (1874) (Clifford, J., dissenting) (arguing that judicial reliance on extra constitutional limitations in the form of "natural justice" would "convert the government into a judicial despotism").

21. *Calder*, 3 U.S. at 399 (Iredell, J., concurring).

Black, criticized the Court's use of universal standards, such as "civilized decency," and the "fundamental liberty and justice," which he referred to pejoratively as reliance on "natural law."<sup>22</sup> In a similar vein, Justice Scalia repeatedly has asserted that rights interpretations should be "deeply rooted in this Nation's history and tradition[s]."<sup>23</sup> Opponents of universal arguments most often have opposed evolutionary approaches to interpretation,<sup>24</sup> which is not surprising given the emphasis on specifically American enactments, traditions, and practices. At times, however, most notably in Eighth Amendment jurisprudence, they have allowed for shifts in rights interpretations, provided that those changes were discerned according to evolving popular sentiment as expressed through legislation.<sup>25</sup>

Since many Justices have disapproved of universal arguments altogether, their criticism has focused on the wholesale unacceptability of such arguments.<sup>26</sup> Unlike the criticism by advocates of an exclusively particular approach to interpretation, however, my objection is that the Justices who defend universal arguments too often have used them in a manner that undermines their distinctive contribution. If universal arguments serve a beneficial role, it is because they provide a basis for interpretation that does not reduce to political power. The Justices, however, often have combined universal and non-universal arguments in ways that call into doubt whether the former really are doing any work.<sup>27</sup> That is, the Justices have employed universal arguments in ways that produce confusion regarding the basis of rights.

*Lawrence v. Texas* (2003) serves as an illustrative example. In September 1998, John Geddes Lawrence and Tyron Garner were arrested, held overnight, and charged with violating a Texas law that made it illegal for two persons of the same sex to engage in certain sexual acts.<sup>28</sup> The police officer who made the arrest had entered Lawrence's apartment to investigate a report of a

22. *Adamson*, 332 U.S. at 69, 70, 91 n.18 (1947) (Black, J., dissenting).

23. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

24. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 629 (2005) (Scalia, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting); *Downes v. Bidwell*, 182 U.S. 244, 380–82 (1901) (Harlan, J. dissenting).

25. *E.g.*, *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989); *see also Roper*, 543 U.S. at 628 (Scalia, J., dissenting) (opposing an evolutionary approach, but arguing that if one were to be used, it should look exclusively to American practices).

26. In all of the cases discussed, the Justices opposing judicial reliance on natural rights arguments did not simply focus on the implications of natural rights arguments for the case at hand, but, rather, launched general attacks on what they considered the illegitimacy of such arguments. *See supra* notes 3–12 and 15–25.

27. *See infra* Parts I and II.

28. *Lawrence*, 539 U.S. at 562–63.

domestic disturbance.<sup>29</sup> The report turned out to be false, but the officer claimed to have observed the men engaging in sexual acts in violation of the statute.<sup>30</sup> The state proceedings resulted in a fine being imposed on Lawrence and Garner, and the Texas courts upheld the punishment against the defendants' constitutional challenge.<sup>31</sup>

Justice Anthony Kennedy's majority opinion (joined by Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens)<sup>32</sup> held that the Texas law deprived Lawrence and Garner of their liberty in violation of the Fourteenth Amendment, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>33</sup> Justice Kennedy did not seek to show that his interpretation of liberty followed simply from the text or intentions of the Amendment's framers, but, rather, maintained that the meaning of constitutional rights had to be understood as continuously evolving.<sup>34</sup> He stated that the Constitution allows "persons in every generation [to] . . . invoke its principles in their own search for greater freedom,"<sup>35</sup> and described the Court's decision as recognizing an "emerging awareness" of the rights at issue in the case.<sup>36</sup> The opinion suggested more than one approach to discerning the evolving meaning of rights. On the one hand, following a line of jurisprudence associated most famously with *Roe v. Wade* (1973),<sup>37</sup> Justice Kennedy seemed to be making a universal argument, resting the opinion on the implications of liberty. He asserted that liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>38</sup> This sphere of autonomy, Justice Kennedy found, included an individual's choice of partner in an intimate relationship.<sup>39</sup> More specifically, he wrote: "When sexuality finds overt expression in intimate conduct . . . the conduct can be but one element in a personal bond that is more enduring. The

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29. *Id.*

30. *Id.* at 563.

31. *Id.*

32. *Id.* at 562. Justice Sandra Day O'Connor also voted with the majority but wrote a concurring opinion arguing that she would have invalidated the Texas law as violative of the Fourteenth Amendment's Equal Protection Clause, rather than the Amendment's Due Process Clause, as the majority had reasoned. *Id.* at 579 (O'Connor, J., concurring).

33. *Id.* at 578-79; U.S. CONST. amend. XIV, § 1.

34. *Lawrence*, 539 U.S. at 562, 578-79.

35. *Id.* at 579.

36. *Id.* at 572.

37. 410 U.S. 113 (1973); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

38. *Lawrence*, 539 U.S. at 562.

39. *Id.* at 567.



liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>40</sup>

The opinion, however, also cited laws, practices, and commentary in the United States and overseas. The justification for overturning *Bowers v. Hardwick* (1986),<sup>41</sup> handed down only seventeen years earlier, included statistical information showing that between 1986 and 2003 the number of states with laws like those at issue in *Bowers* and *Lawrence* had dropped from twenty-five to thirteen.<sup>42</sup> Even among the states that retained such laws, four applied them only to acts between persons of the same sex, and there was “a pattern of nonenforcement with respect to consenting adults acting in private.”<sup>43</sup> Texas itself had not prosecuted in situations where the intimate acts were private and consensual.<sup>44</sup> Justice Kennedy noted that *Bowers* had been criticized by commentators and that courts in five states had not followed *Bowers* when interpreting the meaning of liberty under their own state constitutions.<sup>45</sup> Additionally, the American Law Institute in its 1955 promulgation of the Model Penal Code recommended against the adoption of legal prohibitions on “consensual sexual relations conducted in private,” and a number of states complied.<sup>46</sup> Justice Kennedy also cited overseas sources, observing that the British Parliament in the late 1960s had repealed laws criminalizing homosexual conduct, and that the European Court of Human Rights in 1981 had invalidated Northern Ireland’s laws criminalizing homosexual acts.<sup>47</sup> Other countries had “taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”<sup>48</sup>

*Lawrence* received a good deal of scholarly attention<sup>49</sup> and renewed debate on questions in constitutional theory, including whether constitutional rights

40. *Id.*

41. 478 U.S. 186 (1986).

42. *Lawrence*, 558 U.S. at 573.

43. *Id.*

44. *Id.*

45. *Id.* at 576.

46. *Id.* at 572.

47. *Lawrence*, 539 U.S. at 572–73.

48. *Id.* at 576.

49. E.g., Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 115–23 (2006); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 414–17 (2006); Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 927 (2006).

evolve,<sup>50</sup> and the proper role, if any, of foreign law<sup>51</sup> and traditional practices<sup>52</sup> in interpretation. While these questions are important in their own right, they are studied too often as discrete issues without adequate appreciation of their interrelation with the more fundamental, underlying question regarding the basis of rights. The problem with Justice Kennedy's opinion was not that it included unacceptable types of citations, but that it failed to clarify what role the variety of sources cited were supposed to play in the analysis. Without more, statistics on legislative trends and citations of foreign judicial opinions do not provide a justification for an interpretive position; their relevance can be assessed only when we know how they are supposed to fit into a justificatory line of argument. Justice Kennedy's opinion failed to establish a universal line of justification, because the swirl of unexplained citations called into question whether the universal arguments really were integral to the analysis after all. The opinion also failed to establish a particular line of justification, because it did not adequately explain how or why state or foreign practices were supposed to impact the content of constitutional rights.<sup>53</sup>

Consider the citations of state practices; how did they fit into Justice Kennedy's argument? Perhaps Justice Kennedy was advancing a particular line of argument, with trends in state practices demonstrating a shift in American attitudes. If this is what Justice Kennedy intended, however, then we would expect to see a greater marshaling of evidence regarding public attitudes at the time of *Bowers* and *Lawrence*, or an argument explaining why trends in state legislation were the most reliable indicator of public attitudes. On the other hand, Justice Kennedy might have been advancing a universal line of argument, with the increasing societal recognition of a right offered as evidence of its indispensability to liberty. Justice Kennedy, however, did not

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50. E.g., Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining Lawrence v. Texas*, 67 MD. L. REV. 25 (2007); Richard G. Wilkins & John Nielsen, *The Question Raised by Lawrence: Marriage, the Supreme Court and a Written Constitution*, 83 N.D. L. REV. 1393 (2007).

51. E.g., Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1582 n.7 (2007); Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying On Foreign Law*, 86 B.U. L. REV. 1335, 1398, 1412 (2006); William D. Araiza, *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, And Whose Law?*, 32 WM. MITCHELL L. REV. 455, 456 (2006); Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004).

52. E.g., Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey From Bowers to Lawrence*, 53 U. KAN. L. REV. 1, 1-4 (2004); Krotoszynski, *supra* note 49, at 927, 1018.

53. Reliance on state and foreign practices, generally, is discussed at length below. See *infra* Part II.D.

articulate that claim, which, in any event, would have been difficult to maintain given the degree of continued dissensus on the question.<sup>54</sup>

With respect to Justice Kennedy's foreign citations, we can envisage at least two ways in which they might support a universal line of analysis. First, foreign judicial opinions might offer persuasive arguments demonstrating why the right at stake in *Lawrence* followed necessarily from a commitment to liberty, but Justice Kennedy did not offer these arguments. Second, an overwhelming global consensus might be evidence of a right's indispensability to cherished freedoms, but Justice Kennedy did not articulate this view either. Moreover, he did not show anything like a consensus on the issue before the Court. Justice Kennedy's suggestion that the citations together reflected an "emerging awareness" of the right at stake simply pushed the question back one step,<sup>55</sup> because we want to know how an increase in the recognition of a right supports the claim that the right is protected by the Constitution. Moreover, while gesturing towards both universal and particular arguments, Justice Kennedy failed to explain their relationship. Did one line of argument serve the other? Did each reinforce the other, or did they just happen to come out the same way? If the two lines of argument were independent of one another, which would prevail in the event that they cut in opposite directions? The opinion did not begin to address these questions.

The sum effect of these deficiencies is an inability to discern the basis of decision, which is troubling in light of the Court's preeminent role as expositor of constitutional rights. We cannot expect judicial opinions to have the precision of a philosophical paper, and we should not be surprised if they sidestep certain issues. The question of concern here, though, is not a nice detail in reasoning, a discrete doctrinal issue, or a matter of peripheral interest; it concerns what kinds of justifications underlie the interpretation of rights.

Justice Kennedy's opinion in *Lawrence* was not an anomaly, but, rather, stands as an example of one of the two major approaches on the Court; it is an approach which allows for changes in constitutional meaning and approves of judicial appeals to universal standards, such as the requirements of liberty<sup>56</sup> or human dignity,<sup>57</sup> in discerning those changes. This interpretive school enjoys a long lineage, including late nineteenth-century due process cases<sup>58</sup> and the

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54. By Justice Kennedy's own account, for example, thirteen states still had laws like those at issue in *Bowers* and *Lawrence*. *Lawrence*, 539 U.S. at 573.

55. *Id.* at 572.

56. *E.g.*, *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

57. *E.g.*, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

58. *E.g.*, *Hurtado v. California*, 110 U.S. 516, 530–31 (1884); *Holden v. Hardy*, 169 U.S. 366, 387 (1898).

second Justice John Marshall Harlan's<sup>59</sup> influential dissent<sup>60</sup> in *Poe v. Ullman* (1961).<sup>61</sup> Justice Harlan's opinion in *Poe* drew on the privacy that was "basic to a free society" in arguing that the Court should have overturned Connecticut's contraception ban.<sup>62</sup> Justice Harlan knew that many opposed this kind of reasoning, because they believed that it allowed judges excessive discretion. After noting that the Justices were engaged in a "rational process" of "supplying . . . content" to the concept of liberty, he sought to head off a foreseeable line of objection in stating that this process "has not been one where judges have felt free to roam where unguided speculation might take them."<sup>63</sup> His attempt to defend this proposition included references to history, the Framers' purposes, and public attitudes, and he suggested that constitutional interpretation entailed the following:

regard to what history teaches are the traditions from which [due process] developed as well as the traditions from which it broke. That tradition is a living thing. A decision . . . which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute . . . for judgment and restraint.<sup>64</sup>

The opinion, though, did not indicate how the Justices were supposed to identify the traditions worth preserving. Justice Harlan said that interpretation involved drawing out the meaning of broad concepts, and he pointed to a variety of factors, including traditions and public attitudes, but the opinion did not explain how these factors figured in interpretation. The opinion did not clarify whether evolving public attitudes directly brought changes in constitutional meaning or were only relevant because prudence demanded that the Justices not stray too far from them. It contained the same kind of confusion that continues to characterize the Justices' use of universal arguments. Especially in recent decades, practitioners of the universal, evolutionary approach advocated by Justice Harlan have used universal arguments in a manner that is incomplete and hedged. It is incomplete because the Justices' references to universal standards too often are cursory, failing to fill in the gaps leading from the citation of universal standards to the

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59. The first Justice John Marshall Harlan served on the Court from 1877 until 1911. His grandson, the second Justice John Marshall Harlan, served on the Court from 1955 until 1971. *Members of the Supreme Court of the United States*, SUPREMECOURT.GOV, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Aug. 18, 2012).

60. The opinion had formative importance in the development of the right to privacy. See Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 85–87 (2003).

61. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

62. *Id.* at 550–53.

63. *Id.* at 542.

64. *Id.* at 542–43.

conclusions in individual cases. It is hedged because the opinions fail to clarify the relation between their universal and particular arguments, thus calling into question whether the former are doing any independent work.

These difficulties in the Justices' use of universal arguments are evident, for example, in the Court's Eighth Amendment jurisprudence.<sup>65</sup> In one prominent, recent decision, *Atkins v. Virginia*, a 5-4 majority suggested reliance on universal arguments in asserting its prerogative to conduct an "independent evaluation" of whether a challenged practice comported with the "the dignity of man."<sup>66</sup> Justice Stevens's opinion for the Court, however, also leaned heavily on recent shifts in public attitudes and state practices without making clear how these considerations related to the requirements of dignity.<sup>67</sup> Would the Court's decision have come out the same way if the nation's "evolving standards of decency"<sup>68</sup> did not cut in the same direction as the Court's own evaluation? If not, in what sense was the Court's evaluation independent? The majority did not say. Similarly, *Roper v. Simmons* concentrated on trends in state and foreign practices without explaining their relation to the requirements of dignity, thus leaving unclear how the particular and universal lines of justification interacted.<sup>69</sup> Though ambiguity regarding the basis of constitutional rights is not new, as discussed in the next Part, it has been exacerbated by an increasing tendency on the part of the Justices to rely on arguments appealing to popular attitudes without preserving an independent role for universal arguments.

## II. DEVELOPMENTS EXACERBATING THE CONFUSION IN THE COURT'S JURISPRUDENCE

While universal arguments are perhaps best known with respect to opinions regarding property rights in the early nineteenth century<sup>70</sup> and again during the *Lochner* era of the late nineteenth and early twentieth centuries,<sup>71</sup>

65. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

66. 536 U.S. 304, 311, 321 (2002) (disallowing the execution of mentally retarded persons).

67. *Id.* at 314-16; *see infra notes* 353-68.

68. *Id.* at 321.

69. 543 U.S. 551, 564-65 (2005) (disallowing the execution of juveniles); *see infra notes* 369-88.

70. *E.g.*, *Fletcher v. Peck*, 10 U.S. 87 (1810).

71. *E.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). The term "*Lochner* era" refers to a period roughly between the late 1890s and the late 1930s when the Supreme Court used the right to pursue a lawful calling and the liberty of contract, drawn from the Fourteenth Amendment's Due Process Clause, to strike down certain governmental regulations pertaining to business and economic matters. *See generally* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

they have played key roles in many other areas of jurisprudence, including procedural due process, the question of whether the Constitution applies in U.S. territories, and the Cruel and Unusual Punishments Clause. As discussed below, however, in recent decades the Justices in each of these areas have produced confusion by incorporating a greater stress on non-universal considerations without adequately clarifying their relation with the universal standards that they continue to reference.

#### A. *Procedural Due Process*

Although the first major decision on the meaning of due process,<sup>72</sup> decided under the Fifth Amendment, held that historical pedigree was a sufficient condition for the constitutionality of a criminal procedure,<sup>73</sup> the Court shortly afterwards established an approach to the procedural branch of its due process jurisprudence that relied on universal arguments in discerning the evolving meaning of due process protections. Soon after the Fourteenth Amendment's enactment, litigants argued that it constrained state criminal procedures, either because Bill of Rights provisions applied or the Due Process Clause directly imposed limitations.<sup>74</sup> In the first challenges brought under the Amendment, the Court suggested a move away from a purely historical approach by inquiring into whether procedures comported with essential requirements of due process.<sup>75</sup>

The Court explicitly adopted a universal, evolutionary approach in *Hurtado v. California*, holding the grand jury requirement<sup>76</sup> inapplicable in states despite its historical roots, because allowing development of new

72. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 311, 321 (2001) (describing *Murray's Lessee v. Hoboken Land & Improvement Co.* as the Supreme Court's first analysis of the Fifth Amendment's Due Process Clause).

73. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855).

74. *E.g.*, *Hurtado v. California*, 110 U.S. 516, 518–19 (1884) (where the defendant argued on appeal that his conviction on charges brought by a procedure other than by a grand jury violated the Fifth and Fourteenth Amendments).

75. *Kennard v. Louisiana*, for example, upheld challenged procedures, because they satisfied indispensable elements of due process, such as “the right to be heard . . . both in the court in which the proceedings were originally instituted, and, upon . . . appeal.” 92 U.S. 480, 483 (1875). Two years later, the Court found that due process was fulfilled where the parties challenging a tax assessment had been provided a “fair trial in a court of justice, according to the modes of proceeding applicable to such a case,” noting that the parties received personal service of notice, an opportunity to object, and a full and fair hearing. *Davidson v. New Orleans*, 96 U.S. 97, 105–06 (1877).

76. The relevant portion of the Fifth Amendment states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” U.S. CONST. amend. V.

procedures was necessary to “progress or improvement.”<sup>77</sup> In determining how the meaning of rights could change, *Hurtado* centered analysis on universal standards, appealing to the “rights in every free government beyond the control of the state,”<sup>78</sup> and stating that any procedure that “preserves these principles of liberty and justice, must be held to be due process of law.”<sup>79</sup> Due process served as a “bulwark[ ] . . . against arbitrary legislation,” and guaranteed “not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”<sup>80</sup> Broad requirements followed from these universal standards: legislation had to be general and “not a special rule for a particular person or a particular case,” and a valid law “hears before it condemns, . . . proceeds upon inquiry, and renders judgment only after trial.”<sup>81</sup> The omission of a grand jury indictment did not violate these requirements.<sup>82</sup>

The Court applied and built on the *Hurtado* framework in the following decades.<sup>83</sup> In applying this framework, the Justices during this period often cited predominant practices or popular beliefs (historical and contemporary) while making clear that these citations served supporting roles within an overarching analysis that was universal in character. In *Twining v. New Jersey*,<sup>84</sup> for example, the Court held that the Fifth Amendment’s privilege against self-incrimination<sup>85</sup> did not apply against the states, notwithstanding its long history of observance, declining to accept that “the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment.”<sup>86</sup> In his opinion for the Court, Justice William Moody stated that the central question was whether a right represented “a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government[.]”<sup>87</sup> Justice Moody’s use of history in applying that universal standard was notable; longstanding observance was significant if based in a belief that the practice represented an

77. 110 U.S. 516, 529 (1884).

78. *Id.* at 536–37 (quoting *Loan Ass’n v. Topeka*, 87 U.S. 655, 662 (1874)).

79. *Id.* at 537.

80. *Id.* at 532.

81. *Id.* at 535.

82. *Hurtado*, 110 U.S. at 538.

83. *E.g.*, *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Powell v. Alabama*, 287 U.S. 45 (1932); *West v. Louisiana*, 194 U.S. 258 (1904); *Brown v. New Jersey*, 175 U.S. 172 (1899).

84. 211 U.S. 78 (1908).

85. The Fifth Amendment states, in relevant part: “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

86. *Twining*, 211 U.S. at 99, 101, 114.

87. *Id.* at 106 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

“unchangeable principle of universal justice,”<sup>88</sup> but not if it merely had been thought “just and useful.”<sup>89</sup> Inclusion in the Bill of Rights was not decisive, because the question was whether the right enjoyed “a sanctity above and before constitutions themselves.”<sup>90</sup> The opinion’s historical examination included: pre-Constitutional America; “the great instruments in which we are accustomed to look for the declaration of the fundamental rights”;<sup>91</sup> and the practices of individual states.<sup>92</sup> Justice Moody also looked beyond American law, observing that the “wisdom of the [privilege] has never been universally assented to since the days of Bentham; many doubt it to-day . . . . It has no place in the jurisprudence of civilized and free countries outside the domain of the common law . . . .”<sup>93</sup> Thus, the absence of uniformity in American and foreign practices counted as evidence against the privilege’s status as a fundamental right. The examination of practices reflected on the requirements that followed from universal standards, as Justice Moody concluded that the privilege had not been understood as embodying a fundamental principle that was indispensable to the protection of liberty.<sup>94</sup>

The Court’s use of history within a universal framework also was illustrated by *Powell v. Alabama* (1932), in which the Court for the first time invalidated a state criminal procedure on Fourteenth Amendment grounds,<sup>95</sup> overturning rape convictions because the defendants were denied the right to counsel.<sup>96</sup> The community was so racially hostile that the young black defendants had to be accompanied by military guard, and the colloquy between trial judge and appointed counsel revealed an appalling indifference regarding the adequacy of the defense.<sup>97</sup> The Court found the right to counsel essential to a hearing because the “right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”<sup>98</sup> Arbitrary denial of the opportunity to retain counsel violated due process, since even well-educated defendants with a viable defense risked conviction without the

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88. *Id.* at 113.

89. *Id.* at 107.

90. *Id.* at 113.

91. *Twining*, 211 U.S. at 107.

92. *Id.* at 108–10.

93. *Id.* at 113.

94. *Id.* at 110.

95. William G. Ross, *The Constitutional Significance of the Scottsboro Cases*, 28 CUMB. L. REV. 591, 592 (1998). The rights the Court had declined to apply against the states included the right to a jury trial in a civil case, *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875), and the right to a twelve-member jury trial in a criminal case. *Maxwell v. Dow*, 176 U.S. 581, 595 (1900).

96. *Powell v. Alabama*, 287 U.S. 45, 71, 73 (1932).

97. *Id.* at 53–58.

98. *Id.* at 68–69.



benefit of representation.<sup>99</sup> Due to the defendants' youth and lack of education, and the severity of the charges, the Court concluded that the trial judge was required not only to permit the defendants to retain counsel but also to ensure the appointment of effective counsel if they could not afford it.<sup>100</sup> In a capital case with uneducated defendants in dire need of assistance, the right to appointed counsel followed as "a logical corollary from the constitutional right to be heard by counsel."<sup>101</sup> Justice George Sutherland's majority opinion used history as evidence of the right's fundamental status.<sup>102</sup> American law and practice always had afforded defendants the right to aid of counsel, and the federal government and every state required appointment of counsel for serious crimes: "A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."<sup>103</sup>

Without viewing history as decisive, then, the Court during this period found a role for it within a universal framework. Lack of uniformity in historical and contemporary practice militated against a procedure's inclusion in due process; that reasonable people could disagree suggested a procedure was not essential to fairness and justice.<sup>104</sup> Thus, in *Wolf v. Colorado* (1949), the Court held that the exclusionary rule<sup>105</sup> did not bind the states despite its applicability in the federal context.<sup>106</sup> States were bound by the Fourth Amendment's core principle ensuring "the security of one's privacy against arbitrary intrusion by the police," because it was "basic to a free society," and "implicit in the concept of ordered liberty,"<sup>107</sup> but this was not true of the

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99. *Id.* at 69.

100. *Id.* at 73.

101. *Powell*, 287 U.S. at 72.

102. *Id.* at 60–65.

103. *Id.* at 73.

104. Within an examination of whether uniform observance supported a finding of a right's fundamental status, even judicial opinions could count as evidence of the possibility for reasonable disagreement on the essential nature of a right. In *Kepner v. United States*, for example, the Court had held that the federal government violated the Fifth Amendment's Double Jeopardy Clause by instigating a second trial of the same case on its own motion. 195 U.S. 100, 133–34 (1904). When the Court declined to apply the *Kepner* rule against the states in *Palko*, it pointed to a dissenting opinion in *Kepner* as evidence that "right-minded men could reasonably believe" that allowing retrial on the prosecution's motion was not "repugnant to the conscience of mankind." *Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

105. The exclusionary rule prohibits the prosecution from using evidence at trial that was obtained in violation of the defendant's constitutional rights. BLACK'S LAW DICTIONARY 506 (5th ed. 1979).

106. 338 U.S. 25, 33 (1949).

107. *Id.* at 27.

exclusionary rule. Justice Felix Frankfurter's majority opinion observed that prior to *Weeks v. United States* (1914),<sup>108</sup> which applied the rule in the federal context, only one state of twenty-seven had adopted the rule, and at the time of *Wolf* a majority of the states (thirty-one of forty-eight) still rejected it.<sup>109</sup> International practices also failed to support the rule.<sup>110</sup> The investigation of state and foreign practices demonstrated that reasonable people continued to disagree, which cut against finding that the rule had risen to the level of a fundamental right.<sup>111</sup> The significant observation was not the trend towards adoption of the rule, but that substantial disagreement remained.<sup>112</sup>

However, the Court in the early 1960s moved to a new approach, selective incorporation,<sup>113</sup> which placed a greater emphasis on non-universal arguments.<sup>114</sup> Selective incorporation did retain an overarching appeal to universal standards; in determining whether a Bill of Rights provision applied against states, the Justices still would inquire whether the right was

108. 232 U.S. 383 (1914).

109. *Wolf*, 338 U.S. at 29.

110. *Id.* at 30.

111. *Id.* at 28–29. See also *Betts v. Brady*, where the Court inquired whether the right to counsel was “in all cases whatever dictated by natural, inherent, and fundamental principles of fairness,” and found guidance in the “common understanding of those who have lived under the Anglo-American system of law.” 316 U.S. 455, 464 (1942). As in *Twining*, the investigation of practices asked how widely the right had been considered essential to fairness. Justice Owen Roberts's historical examination did not reveal a uniform view in favor of providing counsel to all indigent defendants. *Betts*, 316 U.S. at 465–66. Common law required allowance of representation but not appointment of counsel. *Betts*, 316 U.S. at 466. Some states, both in 1789 and 1949, provided counsel by statute but did not secure the right constitutionally. *Betts*, 316 U.S. at 469–70. Dissensus on appointed counsel as a fundamental right supported a finding that it was not required by due process. *Betts*, 316 U.S. at 471.

112. See *Mapp v. Ohio*, 367 U.S. 643, 680 (1961) (Harlan, J., dissenting) (noting in his discussion of *Wolf* that “the relevance of the disparity of views among the States . . . lies simply in the fact that the judgment involved is a debatable one.”). It did not follow, however, that common recognition of a right necessarily brought it within due process. *Id.* The rule prohibiting prosecutorial comment on a defendant's failure to testify, for example, did not apply against the states despite its widespread observance. *Adamson v. California*, 332 U.S. 46, 54–58 (1947). Thus, *Adamson* did not turn on the prevalence of practices but on the nature of the right at stake and the application of universal standards to the circumstances of the case. *Adamson*, 332 U.S. at 54–58. Justice Stanley Reed's plurality opinion reasoned that California's policy did not deprive the defendant of the right to be heard, because it did not provide for any presumptions as to facts or guilt based on the failure to testify; it simply allowed the jury to draw inferences from undisputed facts. *Adamson*, 332 U.S. at 58. It was fair for the prosecution to note that a defendant chose not to contradict inculpatory evidence. *Adamson*, 332 U.S. at 56.

113. The first decision in which a majority adopted selective incorporation was *Mapp*. 367 U.S. 643. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2209 (2002).

114. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

“fundamental and essential to a fair trial,”<sup>115</sup> or “essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.”<sup>116</sup> Thus, when the Court in *Mapp v. Ohio* for the first time applied the exclusionary rule against the states, it linked the rule with principles implicit in the concept of ordered liberty.<sup>117</sup> In overruling *Wolf v. Colorado*, which had declined to apply the rule against the states,<sup>118</sup> *Mapp* did not reject that case’s reliance on universal standards but its manner of applying them.<sup>119</sup> *Mapp* found that the rule necessarily followed as an “essential part of the right to privacy.”<sup>120</sup> Similarly, when the Court overturned *Betts* in *Gideon* it stated that the earlier decision had correctly asked whether the right of an indigent criminal defendant to appointed counsel was “fundamental and essential to a fair trial,” but had incorrectly answered that question in the negative.<sup>121</sup>

Under selective incorporation, however, the Court “increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.”<sup>122</sup> As applied, the new approach placed so much weight on inclusion in the Bill of Rights that it amounted to a heavy presumption in favor of incorporation. By 1969, the

115. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (quoting *Betts*, 316 U.S. at 465).

116. *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968); see also *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). It also should be noted that the Court has retained an appeal to universal standards in procedural claims that appeal exclusively to the concept of due process itself without involving provisions in the Bill of Rights. This is a distinction that was, strictly speaking, irrelevant before the Court’s adoption of selective incorporation. In such “free-standing” due process claims, as before selective incorporation, the Court frames inquiry around overarching standards such as “avoidance of an unfair trial,” *Brady v. Maryland*, 373 U.S. 83, 87 (1963), or a “miscarriage of justice,” *United States v. Bagley*, 473 U.S. 667, 675 (1985); see Israel, *supra* note 72, at 311 (quoting *Murray’s Lessee* where the Court first carefully analyzed the Fifth Amendment’s due process clause).

117. 367 U.S. 643, 655.

118. 338 U.S. 25, 33 (1949).

119. 367 U.S. at 656.

120. *Id.*

121. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (overturning *Betts v. Brady*, 316 U.S. 455 (1942)); see also *Pointer*, 380 U.S. at 403 (“We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.”); *Washington v. Texas*, 388 U.S. 14, 17–18 (framing issue as “whether the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment.”).

122. *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Washington*, 388 U.S. at 18); see also *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (“In resolving conflicting claims concerning the meaning of this spacious language [in the Fourteenth Amendment’s Due Process Clause], the Court has looked increasingly to the Bill of Rights for guidance.”).

Court applied almost every Bill of Rights provision against the states.<sup>123</sup> The very notion of listing which Bill of Rights provisions were incorporated by the Fourteenth Amendment's Due Process Clause contradicted the earlier framework. Under the previous approach, a right might be fundamental to a fair trial in one set of circumstances but not another; the unit of analysis was the fairness of a specific trial. By contrast, the unit of analysis under selective incorporation was a specific constitutional provision, not the entire Amendment,<sup>124</sup> and the inquiry concerned whether the right as a rule was essential to fairness.<sup>125</sup>

The impact of this shift was magnified by another feature of selective incorporation: once the Court incorporated a Bill of Rights provision, it automatically applied it against the states in all existing rulings interpreting that provision in the federal context. *Mapp* illustrated the implications of this unitary approach. In *Wolf*, the Court had held that the core principle of the Fourth Amendment fell within due process but that the states were not bound by decisions interpreting the Amendment in the federal context.<sup>126</sup> Selective incorporation rejected this kind of differential application. *Mapp* noted that the Court did not allow differential application of other rights applied against the states via due process, such as free speech and press.<sup>127</sup> Just like those other rights, the Fourth Amendment's right to privacy was also "basic to a free society" and, thus, called for protection at the state level to the same degree as at the federal level.<sup>128</sup> Under selective incorporation, once a provision was

123. The only rights in the first eight Amendments that have not been fully incorporated are the Third Amendment's protection against quartering of soldiers, the Fifth Amendment's grand jury indictment requirement, the Sixth Amendment's right to a unanimous jury verdict, the Seventh Amendment's right to a jury trial in civil cases, and the Eighth Amendment's prohibition on excessive fines. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010).

124. Compare *Gideon*, 372 U.S. 335 (considering the Sixth Amendment's right to counsel), with *Pointer*, 380 U.S. 400 (considering that same Amendment's right to confront witnesses).

125. *Benton*, 395 U.S. at 795.

126. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

127. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

128. *Id.* (quoting *Wolf*, 338 U.S. at 27). Similarly, *Gideon* noted that a wide range of Bill of Rights protections had been held "equally protected against state invasion" due to their "fundamental nature." 372 U.S. at 341. Examples included the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances, the Fifth Amendment's prohibition on seizure of private property without compensation, and the Eighth Amendment's ban on cruel and unusual punishment. *Id.* at 341-42; see also *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (applying the privilege against self-incrimination on the same terms in the state and federal contexts, and noting that other Bill of Rights provisions, including the "guarantees of the First Amendment," had also been "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment").

incorporated, interpretations from the federal context came with it.<sup>129</sup> The Court refused to apply a “watered-down” version of the Bill of Rights against the states because it “would be incongruous to have different standards determine the validity of a claim . . . depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must [apply] . . . in either a federal or a state proceeding . . . .”<sup>130</sup>

Together, these changes meant that the Court would not in each case have to engage in an essentially universal analysis by inquiring into the fundamental fairness of a specific trial. Instead, once a specific Bill of Rights provision had been applied against the states, the Court could approach each case as an application of a textual provision that applied against the states via the Due Process Clause. By the late 1960s, selective incorporation entailed an additional modification to the earlier framework that further enhanced the new framework’s emphasis on non-universal arguments. Selective incorporation initially had inquired whether it was possible for any governmental system to ensure justice without recognizing the right at issue.<sup>131</sup> However, in *Duncan v. Louisiana*, the Court expressed dissatisfaction with this way of framing the question.<sup>132</sup> Due process challenges did not occur in a vacuum, the Court noted, but, rather, within the legal system of a specific state, with all its particular institutions and practices.<sup>133</sup> A procedure that was not indispensable in the abstract nevertheless might be essential to liberty within an Anglo-American regime of ordered liberty.<sup>134</sup> It was true, for example, that “a criminal process which was fair and equitable but used no juries is easy to imagine.”<sup>135</sup> The process “would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems.”<sup>136</sup> Nonetheless, since no American states had constructed such a process, the right to a jury trial remained essential to liberty in the American context.<sup>137</sup> Thus, the Court determined that the inquiry under selective incorporation should not be whether the right at issue was

129. *Malloy*, 378 U.S. at 10–11.

130. *See id.* But *see* *Apodaca v. Oregon*, 406 U.S. 404 (1972) (creating an exception by ruling that the Sixth Amendment requires a unanimous jury verdict in federal criminal trials but not in state criminal trials); *contra* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010) (finding that the *Apodaca* exception “was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation”).

131. Israel, *supra* note 72, at 383.

132. 391 U.S. 145, 149 n.14 (1968).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Duncan*, 391 U.S. at 149 n.14.

“fundamental to fairness in every criminal system that might be imagined,”<sup>138</sup> but whether it was “fundamental to the American scheme of justice.”<sup>139</sup> The change had significant implications, because, as the Court noted recently, “many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country.”<sup>140</sup> Thus, selective incorporation meant that the Court’s approach to procedural due process would retain an overarching universal framework, yet move in a direction that tended to de-emphasize universal analysis in the adjudication of individual cases. Indeed, as developed, the new approach placed so much stress in application on non-universal considerations that it called into question whether the analysis remained essentially universal in character.

The Court’s most recent major due process decision reflected both the enhanced emphasis on particular arguments and the resulting confusion with respect to the basis of interpretation. In *McDonald v. City of Chicago*, the Court held, 5-4, that the Second Amendment applied against the states.<sup>141</sup> Most of the decisions applying Bill of Rights provisions to the states were made in selective incorporation’s first decade, but the Second Amendment’s applicability had not been determined before *McDonald*.<sup>142</sup> Although the Amendment’s “right of the people to keep and bear Arms” is not a right of criminal procedure, Justice Samuel Alito’s majority opinion approached the case through the lens of selective incorporation, stating, “Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”<sup>143</sup> Justice Alito (joined by Chief Justice Roberts, and Justices Scalia and Kennedy, and in part by Justice Thomas)<sup>144</sup> framed the analysis at the broadest level around whether the core right at stake was fundamental, concluding that the right to keep and bear arms for individual self-defense was a “basic right.”<sup>145</sup> The relevant inquiry, though,

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138. *Id.*

139. *Id.* at 149; *see also* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

140. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3044 (2010).

141. The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

142. *McDonald*, 130 S. Ct. at 3026.

143. *Id.* at 3050. The statement came in a portion of Justice Alito’s opinion announcing the judgment of the Court that was joined by Chief Justice Roberts and Justices Scalia and Kennedy. (Justice Thomas joined other parts of Alito’s opinion but not the part containing this quotation.)

144. *Id.* at 3059 (Thomas, J., concurring) (“[T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges and Immunities Clause.”).

145. *McDonald*, 130 S. Ct. at 3036.

Justice Alito stressed, was whether the right was “fundamental to *our* scheme of ordered liberty,”<sup>146</sup> and whether it was “deeply rooted in this Nation’s history and tradition” (emphasis in original).<sup>147</sup> The analysis turned quickly and decisively to considerations that were particular in character, as Justice Alito determined that the right at stake had been “recognized by many legal systems from ancient times to the present day.”<sup>148</sup> His evidence included English history from before the Revolution, colonial history, constitutional ratification debates, early state constitutions, early legal commentary, and subsequent American history.<sup>149</sup> The investigation centered on what the American people and their cultural forbears believed about the right at stake, eschewing examination of the right’s intrinsic character and importance.

In dissent, Justice Breyer (joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor) was willing to work within the selective incorporation framework, but he criticized the majority for relying excessively on history.<sup>150</sup> While Justice Breyer challenged the majority’s interpretation of history, he argued more fundamentally that exclusive reliance on history was “both wrong and dangerous” because “our society has historically made mistakes.”<sup>151</sup> Justice Breyer made room for the Justices’ analysis of the right’s importance based on its substantive content. He was interested in how the right at stake fit in with “other or broader constitutional objective[s],” and whether any “broader constitutional interest or principle supports legal treatment of th[e] right as fundamental.”<sup>152</sup> The analysis identified basic principles and asked whether they implicated Second Amendment rights. More specifically, Justice Breyer could discern no close interrelationship between Second Amendment rights and “assur[ing] equal respect for individuals” or the protection of politically marginalized minorities.<sup>153</sup> Unlike rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, which had been found applicable against the states, the “private self-defense right” at issue in *McDonald* did “not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority.”<sup>154</sup>

Justice Breyer, however, did not rely exclusively on analysis of the nature of the rights at stake. He also deemed it “essential to consider the recent

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146. *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

147. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (emphasis in original).

148. *Id.* at 3036.

149. *Id.* at 3036–42.

150. *McDonald*, 130 S. Ct. at 3122 (Breyer, J., dissenting).

151. *Id.* at 3123.

152. *Id.* at 3125, 3136.

153. *Id.* at 3125.

154. *Id.*

history” of the right at stake to determine if it “remained fundamental over time.”<sup>155</sup> Thus, he found exclusion of Second Amendment rights supported by contemporary societal indicators, including the prevalence of state regulations of firearms and the absence of a “popular consensus that the private self-defense right . . . is fundamental.”<sup>156</sup> The investigation demonstrated that “every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation.”<sup>157</sup> Although Justice Breyer criticized the majority for relying exclusively on particular arguments, his opinion produced confusion regarding the basis of his interpretive method, as he employed particular arguments without explaining their interrelation with his apparently universal arguments. That is, he included universal arguments but weakened them by failing to explain how they related to the opinion’s myriad citations. In sum, then, *McDonald* reflected the broader ambiguity in the Court’s jurisprudence; one camp (in this instance, the majority) marginalized universal analysis, while the dissenters undermined their own use of universal arguments by failing to establish that they played a role that was independent of popular opinion.

*B. The Constitution’s Applicability in Overseas Territories*

Like due process, the issue of the Constitution’s applicability in U.S. territories is another area in which the Court early on established an approach that carved out a substantial role for universal analysis. Also, as in due process, the Court’s jurisprudence in this doctrinal area would later engender confusion by incorporating a greater stress on non-universal considerations without adequately clarifying how these fundamentally distinct lines of reasoning interacted with one another.

Article IV, Section 3 provides the only constitutional language that speaks to the governance of U.S. territories, stating: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”<sup>158</sup> It was established early on that Congress had general sovereign powers to govern territories, but questions arose about whether constitutional limitations applied in this context.<sup>159</sup> The issue figured

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155. *McDonald*, 130 S. Ct. at 3123, 3134 (Breyer, J., dissenting).

156. *Id.* at 3124.

157. *Id.*

158. U.S. CONST. art. IV, § 3.

159. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 181–82 (2002).



prominently in political battles leading up to the Civil War, with pro-slavery partisans arguing that the Constitution precluded congressional interference with slavery in the territories, and slavery opponents advocating congressional discretion over the matter.<sup>160</sup> Chief Justice Roger Taney's opinion in *Dred Scott v. Sanford* (1857) adopted the former position.<sup>161</sup> Although the Civil War overturned or rendered irrelevant critical elements of *Scott*, questions persisted regarding constitutional applicability in territories. Nineteenth-century cases adjudicating constitutional claims in territories did not settle the issue, because Congress typically enacted legislation providing for the Constitution's applicability. Consequently, when the Court enforced provisions in territories, it was not clear if they would have applied in the absence of congressional legislation.<sup>162</sup>

The issue took on new significance when the United States acquired territories in the Pacific Ocean and Caribbean Sea in 1898 through the treaty ending the Spanish-American War.<sup>163</sup> The desirability of the American acquisition of overseas territories became a subject of political contention, with President William McKinley's election in 1900 signaling substantial support for expansion.<sup>164</sup> The controversy was stoked by differing opinions on the extent and import of cultural differences between the United States and the new territories.<sup>165</sup> The country had never before annexed faraway territories with large nonwhite populations,<sup>166</sup> and many viewed these populations as

160. Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 824–25 (2005).

161. *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856).

162. See, e.g., *Webster v. Reid*, 52 U.S. 437 (1850) (decision invalidating legislation adopted by the territory of Iowa eliminating jury trials for certain civil actions referred both to the Seventh Amendment, which guarantees jury trials for civil suits, and to congressional legislation explicitly providing for jury trials in the territory); see also *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 466 (1897) (noting that it could be a matter of dispute whether the Seventh Amendment operated *ex proprio vigore* to invalidate a territorial statute upon which the action at issue relied). Similarly, the import of decisions suggesting Congress was bound by the First Amendment, *Reynolds v. United States*, 98 U.S. 145, 162 (1878), and the Eighth Amendment, *Wilkerson v. Utah*, 99 U.S. 130, 136–37 (1878), in the Utah territory was muddled by organic acts explicitly extending these protections. The Court, at times, did suggest that constitutional provisions applied of their own force in territories, e.g., *Thompson v. Utah*, 170 U.S. 343, 347 (1898), but at others noted that the question was unresolved, e.g., *Fisher*, 166 U.S. 464 (1897). See also Burnett, *supra* note 160, at 824–31 (“Nevertheless, the very act of statutory extension had raised doubts all along about whether the Constitution applied of its own force in the territories . . .”).

163. Edward C. Carter, III, *The Extra-Territorial Reach of the Privilege Against Self-Incrimination or Does the Privilege ‘Follow the Flag?’*, 25 S. ILL. U. L.J. 313, 317–18 (2001).

164. Burnett, *supra* note 160, at 805–06.

165. Cleveland, *supra* note 159, at 208–09.

166. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2526 (2005).

incapable of operating according to American ideas and institutions.<sup>167</sup> The common assumption of American superiority could be used either to argue that territories should be acquired without extending constitutional protections or that expansion was infeasible.<sup>168</sup> Political and legal considerations intersected in the debate over whether constitutional provisions automatically extended to residents of the territories.<sup>169</sup> The question arose in a different form than it had previously because it was not assumed that these territories would become states.<sup>170</sup>

The Court confronted the question early in the twentieth century in a series of decisions known as the *Insular Cases*.<sup>171</sup> Although the earliest of these cases principally concerned whether territories were to be treated as foreign countries for purposes of constitutional and statutory provisions regarding tariffs,<sup>172</sup> they were seen as raising the question of whether the Constitution “follow[ed] the flag.”<sup>173</sup> Only a handful of the *Insular Cases* dealt with individual rights issues, but they established a general approach that largely remains in force.<sup>174</sup>

The immediate issue in the first of the *Insular Cases*, *Downes v. Bidwell* (1901), was the constitutionality of tariffs on oranges from Puerto Rico.<sup>175</sup> The case presented the question of whether the Constitution applied of its own force, because no congressional legislation made the entire Constitution applicable in Puerto Rico.<sup>176</sup> While a five-member majority upheld the tariff on the grounds that Puerto Rico was not part of the United States, the opinions offered a variety of approaches to the problem of constitutional applicability.<sup>177</sup> Justice Henry Brown’s opinion announcing the Court’s decision asserted that constitutional applicability principally fell within congressional discretion,

167. Cleveland, *supra* note 159, at 209.

168. *Id.*

169. T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 24–25 (1994); John P. Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 134 (1964).

170. Cleveland, *supra* note 159, at 209–10.

171. The term “Insular Cases” is commonly used to refer to a little over twenty decisions that the Court handed down between 1901 through 1922, although the precise list of cases included sometimes varies. Burnett, *supra* note 160, at 809.

172. Burnett, *supra* note 160, at 835.

173. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 872–73, 872 n.103 (1990).

174. Burnett, *supra* note 160, at 835–36.

175. 182 U.S. 244, 247 (1901). The tariffs were challenged as violations of Article 1, section 8, which provides that “all Duties, Imposts, and excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8.

176. *Downes*, 182 U.S. at 249.

177. *Id.* at 244, 249.

stressing the need for flexibility due to varying conditions in the territories.<sup>178</sup> He found that Congress had not meant to extend the Constitution to Puerto Rico.<sup>179</sup> Yet Justice Brown suggested that certain constitutional rights, “indispensable to a free government,” might apply of their own force.<sup>180</sup> There were, he wrote, “principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.”<sup>181</sup> These principles included due process, equal protection of the laws, access to courts of justice, and the freedoms of religion, speech, and press.<sup>182</sup> Justice Brown distinguished these natural rights from:

artificial or remedial rights . . . peculiar to our own system of jurisprudence . . .  
 . [R]ights to citizenship, to suffrage . . . and to the particular methods of  
 procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon  
 jurisprudence, and some of which have already been held by the States to be  
 unnecessary to the proper protection of individuals.<sup>183</sup>

Justice Brown’s categorization of natural versus artificial rights effectively distinguished universally grounded rights from those with a basis that was exclusively particular in character.

Concurring, Justice Edward White drew a distinction between “incorporated” territories, which were an integral part of the United States, and unincorporated territories, which were “merely appurtenant [to the United States] as a possession.”<sup>184</sup> In plainer language, incorporated territories seemed to be those expected to become states.<sup>185</sup> On Justice White’s approach, the entire Constitution applied of its own force only in incorporated territories.<sup>186</sup> Since Congress decided whether to incorporate, Justice White’s approach was similar to Justice Brown’s in looking first to congressional intent.<sup>187</sup> Justice White’s opinion also was similar to Justice Brown’s in suggesting that a special category of rights might apply of their own force regardless of

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178. *Id.* at 279–80, 282.

179. *Id.* at 279–80.

180. *Id.* at 282–83.

181. *Downes*, 182 U.S. at 280.

182. *Id.* at 282.

183. *Id.* at 282–83.

184. *Id.* at 342 (White, J., concurring).

185. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (referring to an unincorporated territory as “one not clearly destined for statehood . . .”); see Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 459–60 (1992); Carter, *supra* note 163, at 320; Lawson, *supra* note 173, at 873.

186. *Downes*, 182 U.S. at 293 (White, J., concurring).

187. *Id.* at 341–42.

congressional intent, that is, even in territories Congress had not chosen to incorporate. There might be, he wrote, “inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended,” and “restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”<sup>188</sup> Congress could not “destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied.”<sup>189</sup>

*Hawaii v. Mankichi* (1903) raised the question of whether specific Bill of Rights provisions applied in the territories.<sup>190</sup> The joint resolution of Congress making Hawaii a U.S. territory in 1898 had stated that existing laws would remain in force so long as they were not “contrary to the Constitution of the United States.”<sup>191</sup> Congress formally incorporated Hawaii into the United States in June 1900 and made provisions for the use of grand and petit juries requiring unanimous verdicts for conviction.<sup>192</sup> Between annexation and incorporation, the defendant was charged without a grand jury and convicted of manslaughter by a 9–3 jury verdict.<sup>193</sup> The question was whether the Fifth Amendment’s grand jury requirement and Sixth Amendment’s right to a jury trial (which at that time mandated unanimous verdicts) applied during the period before the congressional action in 1900.<sup>194</sup> Again writing for the Court in a 5–4 decision, Justice Brown conceded that the conviction would have been invalid if the 1898 congressional language were interpreted literally,<sup>195</sup> but concluded that immediate imposition of all constitutional protections would have been so impractical that Congress could not have intended it.<sup>196</sup> Applying the principle that only rights “fundamental in their nature” were applicable regardless of legislation, Justice Brown concluded that the rights at stake in *Mankichi* did not extend automatically, because they concerned “merely a method of procedure” that experience had proven beneficial.<sup>197</sup> Applying the same approach he had in *Downes*, Justice White reasoned that since Hawaii

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188. *Id.* at 291.

189. *Id.* at 298.

190. 190 U.S. 197, 209 (1903) (determining whether citizens of the territory of Hawaii had the right to a jury trial). The right to a jury trial is also provided for in Article III, section 2, which states, in relevant part: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” U.S. CONST. art. III, § 2.

191. *Mankichi*, 190 U.S. at 209.

192. *Id.* at 211.

193. *Id.* at 203, 234.

194. *Id.* at 211.

195. *Id.* at 209, 212.

196. *Mankichi*, 190 U.S. at 215.

197. *Id.* at 218.

was unincorporated at the time of the trial, the question was whether the rights at issue were fundamental.<sup>198</sup> Justice White observed that the Court had taken a similar tack in addressing which procedural protections applied against the states via due process.<sup>199</sup> The Court in those cases inquired whether rights necessarily were protected “in every free government,”<sup>200</sup> such that their denial would “work a denial of fundamental rights.”<sup>201</sup> In its due process jurisprudence, the Court already had determined that the rights at issue in *Mankichi* were not fundamental,<sup>202</sup> and Justice White considered these precedents binding in the territorial context as well.<sup>203</sup>

*Dorr v. United States* (1904) raised anew the applicability of the right to a criminal jury trial in a newly acquired territory, this time the Philippines.<sup>204</sup> The defendant had been charged with criminal libel under territorial law, which did not provide jury trials.<sup>205</sup> A majority for the first time adopted Justice White’s doctrine of incorporation<sup>206</sup> and endorsed the position developed by Justices Brown and White that a subset of constitutional rights applied of their own force even in unincorporated territories.<sup>207</sup> There were “fundamental right[s] which go[] wherever the jurisdiction of the United States extends.”<sup>208</sup> Since Congress had not extended the right to a jury trial through legislation, the outcome turned on whether the right to a jury trial was fundamental.<sup>209</sup> In addressing that question, Justice William Day cited the universal formulations articulated by Justices Brown and White, and an 1890 case stating that congressional regulation of territories was subject to:

those fundamental limitations in favor of personal rights which are formulated in the Constitution . . . but these limitations would exist . . . by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.<sup>210</sup>

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198. *Id.* at 221 (White, J., concurring).

199. *Id.* at 220.

200. *Hurtado v. California*, 110 U.S. 516, 536–37 (1884).

201. *Maxwell v. Dow*, 176 U.S. 581, 605 (1900).

202. *Mankichi*, 190 U.S. at 218 (White, J., concurring).

203. *Id.* at 220 (“The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them.”).

204. 195 U.S. 138, 139 (1904).

205. *Id.* at 143, 149.

206. *See Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979); Carter, *supra* note 163, at 319.

207. Carter, *supra* note 163, at 319.

208. *Dorr*, 195 U.S. at 148.

209. *Id.*

210. *Id.* at 146 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890)).

Justice Day examined the character of the right at stake and found that it was not fundamental.<sup>211</sup> Drawing on essential requirements that the Court had identified in its procedural due process jurisprudence, including a court with jurisdiction and the opportunity to be heard in one's own defense, Justice Day concluded that it was possible for a legal system to preserve these elements without providing jury trials, and the Philippines seemed to have such a system in place.<sup>212</sup> Consequently, the right to a jury trial did not automatically apply in the territories.<sup>213</sup>

Later decisions confirmed Justice White's incorporation doctrine. *Rasmussen v. United States* (1905), for example, held the right to a jury trial applicable in Alaska, because the territory was incorporated,<sup>214</sup> and *Balzac v. Porto Rico* (1922) held that the jury trial provisions in Article III, and the Sixth and Seventh Amendments, did not apply in Puerto Rico, an unincorporated territory, because they were not fundamental.<sup>215</sup> The Court treated it as a general proposition, "clearly settled," that jury trial rights "do not apply to territory belonging to the United States which has not been incorporated into the Union."<sup>216</sup> By contrast, the Court also indicated as a general proposition that other "fundamental personal rights" did apply of their own force, including "that no person could be deprived of life, liberty, or property without due process of law."<sup>217</sup>

While the Court has maintained the outlines of the approach it adopted in the *Insular Cases*, subsequent cases, however, have suggested a greater emphasis on considerations of a non-universal character in determining the applicability of rights in U.S. territories. The Court said little about the Constitution in the territories immediately after the *Insular Cases*,<sup>218</sup> but the problems they addressed reemerged decades later. *Reid v. Covert* (1957) raised the question of whether constitutional protections were available to dependents of American military personnel tried overseas by U.S. military courts for offenses allegedly committed outside the United States.<sup>219</sup> The Court held that

211. *Dorr*, 195 U.S. at 148.

212. *Id.* at 145–46.

213. *Id.* at 149.

214. 197 U.S. 516, 525–26 (1905).

215. 258 U.S. 298, 304, 313 (1922); *see also* *Ocampo v. United States*, 234 U.S. 91, 98 (1914); Rights pertaining to jury trials, nevertheless, apply today to Puerto Rico by statute. Aleinikoff, *supra* note 169, at 28.

216. *Balzac*, 258 U.S. at 304–05.

217. *Id.* at 312–13 The Court also implied that the First Amendment rights to freedom of speech and press applied of their own force, because they addressed a claim rooted in these rights, although they did not find merit in the claim. *Id.* at 314.

218. *Burnett*, *supra* note 160, at 810–11.

219. 354 U.S. 1, 15–16 (1957).

American citizens were entitled to a jury trial even when tried in a foreign country.<sup>220</sup> Justice Black's plurality opinion (joined by Justices William Brennan, William Douglas, and Chief Justice Earl Warren) recognized that the *Insular Cases* were inapposite but examined them as part of a broader look at the Constitution's applicability when the Government "acts outside the continental United States."<sup>221</sup> Though the opinion distinguished the *Insular Cases* rather than overruling them, Justice Black expressed disapproval with their approach, stating that "neither [the *Insular Cases*] nor their reasoning should be given any further expansion."<sup>222</sup> The notion that constitutional protections could be considered "inoperative when they become inconvenient . . . [was] a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."<sup>223</sup> Justice Black could "find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution."<sup>224</sup> He contended that the government never was free from the mandates of the Constitution, which was the source of government power.<sup>225</sup>

In concurring opinions, Justices Frankfurter and the second John Marshall Harlan each confirmed the continued validity of the *Insular Cases*, while emphasizing that questions about constitutional applicability had to be approached with an eye to the circumstances of each case.<sup>226</sup> Justice Frankfurter stressed the importance of the history, customs, and conditions pertaining to each situation in which questions about the Constitution's applicability arose.<sup>227</sup> Justice Harlan, too, argued that the *Insular Cases* called for careful contextual analysis.<sup>228</sup> The Court's task was not to decide across the board whether a specific right applied. Rather, the Court had to examine "the particular local setting, the practical necessities, and the possible alternatives," along with considering whether application of the right in the circumstances would be "impracticable and anomalous."<sup>229</sup>

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220. *Id.* at 40–41.

221. *Id.* at 8.

222. *Id.* at 14.

223. *Id.* at 14.

224. *Reid*, 354 U.S. at 9.

225. *Id.* at 5–6.

226. *Id.* at 52–54 (Frankfurter, J., concurring); *id.* at 67 (Harlan, J., concurring).

227. *Id.* at 64 (Frankfurter, J., concurring).

228. *Id.* at 75 (Harlan, J., concurring).

229. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

Unlike *Reid, Torres v. Puerto Rico* (1979) presented squarely the issue of constitutional applicability in the territories.<sup>230</sup> The question was whether Puerto Rico, still an unincorporated territory,<sup>231</sup> was bound by the Fourth Amendment.<sup>232</sup> Pursuant to Puerto Rican legislation authorizing police to search the belongings of anyone entering the Commonwealth from the United States, the defendant had been searched by officers at the airport despite the absence of articulable grounds for suspicion.<sup>233</sup> Although the Court unanimously invalidated the search, the decision manifested disagreement among the Justices regarding the proper approach to the issue. Chief Justice Warren Burger's opinion for a five-member majority indicated approval of the *Insular Cases*.<sup>234</sup> Like the majority in those cases, Chief Justice Burger expressed concern that immediate imposition of the entire Constitution in all territories "would create such severe practical difficulties under certain circumstances as to prohibit the United States from exercising its constitutional power to occupy and acquire new lands."<sup>235</sup> As a result, attempts to impose the full Constitution might lead to injustice. In deciding whether the Fourth Amendment's protections extended to Puerto Rico, Chief Justice Burger's analysis focused on local experience, inquiring whether imposition of the rights at stake would compromise national interests or produce unfairness.<sup>236</sup> In conducting that inquiry, Chief Justice Burger placed great weight on the determinations made by Congress and the people of Puerto Rico.<sup>237</sup> Observing that Congress had extended Fourth Amendment rights to Puerto Rico in the period before the Commonwealth had its own constitutional system, the Chief Justice wrote that a "legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight."<sup>238</sup> He also stressed that when Puerto Rico had the opportunity to adopt its own constitution, it chose to include those rights as well.<sup>239</sup> Rather than analyzing the intrinsic character and importance of the right at stake, the decision turned on whether application of the right was practical in the specific context. Moreover, even in addressing that question, the majority deferred to legislative judgments.

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230. 442 U.S. 465, 470–71 (1979).

231. Other U.S. territories that remain "unincorporated" include American Samoa, Guam, the Northern Marianas, and the U.S. Virgin Islands. Van Dyke, *supra* note 185, at 449–50.

232. *Torres*, 442 U.S. at 470–71.

233. *Id.* at 467.

234. *Id.* at 468–69.

235. *Id.* at 469.

236. *Id.* at 470.

237. *Torres*, 442 U.S. at 470.

238. *Id.*

239. *Id.*



Although the *Insular Cases* remain good law,<sup>240</sup> *Torres* showed that the subject remained controversial. Concurring, Justice Brennan (joined by Justices Potter Stewart, Thurgood Marshall, and Harry Blackmun) questioned the continued vitality of the *Insular Cases*,<sup>241</sup> and Justice Brennan (joined by Justice Marshall) again expressed dissatisfaction with the *Insular Cases* in *Verdugo-Urquidez v. United States*, citing Justice's Black opinion in *Reid* for the proposition that they were "limited to their facts long ago."<sup>242</sup> Dissenting in *Harris v. Rosario* (where the majority upheld an Aid to Families with Dependent Children program which provided lower reimbursements to Puerto Rico against an equal protection challenge),<sup>243</sup> Justice Marshall stated that "the present validity of [the *Insular Cases*] is questionable."<sup>244</sup> Referring to Justice Brennan's concurrence in *Torres*, he added: "At least four Members of this Court are of the view that all provisions of the Bill of Rights apply to Puerto Rico."<sup>245</sup>

The Court's limited post-*Insular Cases* jurisprudence has been characterized by a greater emphasis on the circumstances of the specific context. The *Insular Cases* had established a universal approach for determining if rights applied in unincorporated territories; rights only applied of their own force if they were "fundamental in their nature," or represented "inherent, although unexpressed, principles which are the basis of all free government."<sup>246</sup> The rights that satisfied these standards were deemed to apply in all territories regardless of congressional legislation.<sup>247</sup> Using this framework, the Court examined the character of rights regarding grand and petit juries, and concluded that they did not qualify since they were not indispensable to a fair system of justice.<sup>248</sup> Although the Court nominally has followed the *Insular Cases*, the post-*Insular Cases* touching on the issue have not engaged the universal component of the approach that the *Insular Cases*

240. Cases since *Torres* have cited the *Insular Cases* approvingly. *E.g.*, *Verdugo-Urquidez v. United States*, 494 U.S. 259, 268 (1990) (citing the *Insular Cases* broadly for the proposition that "not every constitutional provision applies to governmental activity even where the United States has sovereign power"); *Boumediene v. Bush*, 128 S. Ct. 2229, 2255 (2008) (stating that the *Insular Cases* "inform[ed]" the Court's "analysis in the present matter").

241. *Torres*, 442 U.S. at 475-76 (Brennan, J., concurring).

242. 494 U.S. at 291 (Brennan, J., dissenting). The majority in the case held, 6-3, that Fourth Amendment protections did not apply to the search of a Mexican citizen's home in Mexico despite the involvement of American drug enforcement agents. *Id.* at 274-75.

243. 446 U.S. 651, 651 (1980).

244. *Id.* at 653 (Marshall, J. dissenting).

245. *Id.* at 653-54.

246. *Dorr v. United States*, 195 U.S. at 144-45, 147 (1903) (quoting *Hawaii v. Mankichi*, 190 U.S. 193, 218 (1903); *Downes v. Bidwell*, 182 U.S. 244, 291 (1901)).

247. *See Dorr*, 195 U.S. at 147.

248. *See Mankichi*, 190 U.S. at 201.

established. In a number of cases, the Court has held that rights applied to Puerto Rico without explanation or analysis.<sup>249</sup> In *Torres*, the Court did not examine the intrinsic importance of the rights outlined in the Fourth Amendment, but instead focused on enactments by Congress and Puerto Rico, and the specific experience and history of the Commonwealth.<sup>250</sup> Although not itself involving U.S. territories, *Boumediene v. Bush* (2008) read the *Insular Cases* as linking the application of constitutional rights with the evolving conditions in a specific territory.<sup>251</sup>

The emphasis on specific circumstances in determining the applicability of rights was a departure from the approach established by the *Insular Cases*. The *Insular Cases* determined that Congress needed flexibility in deciding which rights extended to newly acquired territories due to the varying circumstances.<sup>252</sup> In order to afford Congress the necessary flexibility, the *Insular Cases* left a good deal of room for congressional discretion. While the entire Constitution would apply in incorporated territories, it was up to Congress to decide which territories to incorporate.<sup>253</sup> The first step in the Court's analysis was to determine if Congress intended to extend constitutional protections. Thus far, to be sure, the *Insular Cases* stressed the importance of accommodating specific circumstances and the determinations made by Congress. However, the approach also indicated that congressional discretion was not limitless, because some rights were so important that they applied in all territories regardless of legislation. The Court appealed to universal standards as a frame for identifying the set of rights that did not vary according to circumstance and congressional intent. Attention to circumstances and universality worked hand in hand, because universal considerations set bounds around the area within which legislative discretion would be allowed free rein. However, the approach used by the Court in *Torres* undermined the role that universal reasoning was supposed to play in this framework. Chief Justice

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249. *E.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668–69 n.5 (1974) (due process); *Examining Bd. of Eng'rs, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 600–01 (1976) (equal protection). Curiously, in applying rights in Puerto Rico, the Court has indicated that it need not determine whether these requirements applied via the Fourteenth Amendment or a specific Bill of Rights provision. *E.g.*, *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (“[W]e have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment.”).

250. *Torres*, 442 U.S. at 471–74.

251. 128 S. Ct. 2229, 2254–55 (2008). The case concerned the availability of certain procedural protections to aliens detained as enemy combatants at Guantanamo Bay. *Id.* at 2240. Justice Kennedy addressed the *Insular Cases* as part of a broader discussion of the Constitution's applicability outside the United States. *Id.* at 2254.

252. *See Dorr*, 195 U.S. at 142–43.

253. *See id.* at 143; *Downes v. Bidwell*, 182 U.S. 244, 293 (1901) (White, J., concurring).

Burger's opinion emphasized particular considerations not simply in determining whether Congress had intended to extend the Fourth Amendment to Puerto Rico, but even in determining whether it was one of the rights that applied in the absence of legislation to that effect.

The role of universal arguments also is unclear in the opinions of those Justices who have expressed dissatisfaction with the *Insular Cases*. Concurring in *Torres*, Justice Brennan wrote: "Whatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."<sup>254</sup> The short opinion could be read in either of two ways. Advancing a non-universal line of justification, Justice Brennan might have been advocating a "total incorporation" approach for the territories, applying all Bill of Rights provisions by virtue of their enactment. Alternatively, the opinion could be read as accepting the universal framework of the *Insular Cases* and determining that all of the Bill of Rights provisions qualified as essential to free government. The former argument would represent a repudiation of the *Insular Cases*; such a significant departure should be stated explicitly. The universal argument, if it is what Justice Brennan intended, also calls for explanation, especially since the Court's incorporation jurisprudence never has held that all Bill of Rights provisions enjoy protected status as fundamental rights.<sup>255</sup> Without explanation of why the rights apply of their own force in territories, opposition to the *Insular Cases* is undermined.

### C. *The Cruel and Unusual Punishments Clause*

No doctrinal area better captures the ambiguity at the heart of constitutional law than the Court's jurisprudence interpreting the Eighth Amendment. Early Eighth Amendment cases could be interpreted as incorporating citations of prevalent practices within an essentially universal analysis. More recently, however, Eighth Amendment jurisprudence has been characterized by a split between two competing approaches. One of these approaches has rejected reliance on universal arguments entirely. A competing approach has continued to insist on a role for universal analysis, but has called into question the independent role of that analysis by training the bulk of its attention on measuring fluctuations in public attitudes.

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254. *Torres*, 442 U.S. at 475–76 (Brennan, J., concurring) (citations omitted).

255. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3125 (2010) (Breyer, J., dissenting).

In its decisions interpreting the Cruel and Unusual Punishments Clause,<sup>256</sup> the Court early on introduced appeals to universal standards. In, for example, *In re Kemmler* (which upheld the electric chair as a method of execution), the Court stated that “cruel” implied “something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>257</sup> In an influential dissenting opinion in *O’Neil v. Vermont*, Justice Stephen Field used universal arguments to support his view that a sentence of over \$6,000 in fines for illegally selling liquor violated the Clause.<sup>258</sup> It was uncontroversial that the Clause applied to torturous punishments, but Justice Field maintained that it also prohibited disproportionate punishments.<sup>259</sup> Cumulatively punishing the defendant for hundreds of sales as separate offenses “was greatly beyond anything required by any humane law for the offences.”<sup>260</sup> Given the nature of the offense, it was:

hard to believe that any man of right feeling and heart can refrain from shuddering . . . [T]he judgment of mankind would be that the punishment was not only an unusual but a cruel one, and a cry of horror would rise from every civilized and Christian community of the country against it.<sup>261</sup>

Justice Field referred to existing practices in showing that the sentence was inhumanely disproportionate, noting that it was far more severe than what the defendant would have received for manslaughter, forgery, or perjury.<sup>262</sup>

The Court articulated an approach that was both universal and evolutionary in its first decision invalidating a sentence prescribed by a legislature. The defendant in *Weems v. United States* (1910) was convicted in the Philippines, then a U.S. territory, under a statute criminalizing the use of false documents by government officials.<sup>263</sup> The statute provided a minimum sentence of twelve years of hard labor while wearing chains, and a continuing loss of civil rights

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256. Since the Court did not consistently view the Amendment as binding on states until the late 1940s, *see Francis v. Resweber*, 329 U.S. 459, 463 (1947), many decisions leave unclear whether claims were rejected on the grounds of the Amendment’s inapplicability. Nevertheless, some early opinions shed light on the Justices’ interpretation of the Amendment, especially in cases brought against the federal government, where the Amendment clearly applied.

257. *In re Kemmler*, 136 U.S. 436, 447 (1890).

258. 144 U.S. 323, 338–39 (1892) (Field, J., dissenting). The majority did not reach the merits. *Id.* at 334–35. Regarding the opinion’s influence, *see Weems v. United States*, 217 U.S. 349, 371 (1910), and *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

259. *O’Neill*, 144 U.S. at 339–40 (Field J., dissenting).

260. *Id.* at 340.

261. *Id.*

262. *Id.* at 339.

263. 217 U.S. 349, 357–58 (1910). The Court interpreted the Clause because the case arose under a territorial provision with similar language. Regarding *Weems* being the first decision invalidating a legislatively prescribed statute, *see Furman*, 408 U.S. at 325 (Marshall, J., concurring).

after the prison term.<sup>264</sup> Since the Constitution was intended to endure indefinitely, the Court reasoned, its application had to expand beyond evils known at the time of enactment.<sup>265</sup> Constitutional provisions embodied general principles whose application had to evolve with changing conditions; otherwise, “[r]ights declared in words might be lost in reality.”<sup>266</sup> To discern the Clause’s evolving meaning, Justice Joseph McKenna’s majority opinion drew on universal principles, resting the opinion on the “precept of justice that punishment for crime should be graduated and proportioned to offense.”<sup>267</sup> Justice McKenna linked an evolutionary approach with both universal standards and societal attitudes, stating that the Clause “may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>268</sup> The opinion investigated practices to evaluate proportionality, considering laws from a variety of jurisdictions in the United States and the Philippines, finding it relevant that individuals convicted of more serious crimes had received less severe sentences.<sup>269</sup>

*Trop v. Dulles* (1958) built on the approach the Court had outlined in *Weems*, referring both to universal standards and existing practices in interpreting the changing meaning of rights.<sup>270</sup> *Trop*, a native-born American citizen, was convicted by court-martial of wartime desertion while serving in French Morocco during the Second World War.<sup>271</sup> The 5-4 decision invalidated a sentence depriving him of citizenship.<sup>272</sup> Chief Justice Warren’s opinion for the majority<sup>273</sup> introduced a universal standard that has remained central to the Court’s jurisprudence: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>274</sup> The Amendment imposed a “basic prohibition against inhuman treatment”<sup>275</sup> and mandated that the state’s “power to punish . . . [must] be exercised within the limits of civilized standards.”<sup>276</sup> Chief Justice Warren also reaffirmed an evolutionary approach, noting that the Clause’s words “are not precise, . . .” and “their scope

264. *Weems*, 217 U.S. at 364–65.

265. *Id.* at 373.

266. *Id.*

267. *Id.* at 367.

268. *Id.* at 378.

269. *Weems*, 217 U.S. at 380–81.

270. 356 U.S. 86, 101–03 (1958).

271. *Id.* at 87.

272. *Id.* at 91.

273. The opinion was joined only by Justices Black, Douglas, and Whittaker. *Id.* at 87.

274. *Trop*, 356 U.S. at 100.

275. *Id.* at 100 n.32.

276. *Id.* at 100.

is not static.”<sup>277</sup> The Amendment, he wrote, “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>278</sup> Citing a U.N. study showing that only two of eighty-four countries surveyed prescribed denationalization as a punishment for desertion, he concluded that statelessness was “a condition deplored in the international community of democracies” and that there was “virtual unanimity” among the “civilized nations of the world” that it should not be imposed.<sup>279</sup> Chief Justice Warren also engaged in his own consideration of the character of the punishment, finding that it was cruel because it amounted to a “total destruction of the individual’s status in organized society” and, thus, left an individual with no rights.<sup>280</sup> This condition, subjecting “the individual to a fate of ever-increasing fear and distress,” was “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”<sup>281</sup> Though the dissenters interpreted the evidence of practices differently, they accepted crucial elements of Chief Justice Warren’s approach,<sup>282</sup> including reliance on universal reasoning and international practices. Justice Frankfurter (joined by Justices Clark, Burton, and Harlan) spoke of the Clause as embodying “enlightened concepts of ‘humane justice,’”<sup>283</sup> and cited U.N. documents in his consideration of the practices of “civilized nations.”<sup>284</sup>

The Court’s earlier, major decisions on the Clause suggested that the citation of governmental practices could play a supporting role with an overarching universal analysis. Thus, universal standards required that punishments be proportional, and surveys of punishments could help in determining the proportionality of the punishment at issue.<sup>285</sup> Likewise, overwhelming consensus against a punishment’s acceptability could support a judgment that the punishment was inhumane.<sup>286</sup> More recently, however, the Court’s jurisprudence has been characterized by an ongoing clash between two competing approaches, with one approach repudiating universal arguments, and a competing approach ostensibly defending universal arguments while failing in practice to establish that they are integral to rights interpretation.

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277. *Id.* at 100–01 (footnote omitted).

278. *Id.* at 101.

279. *Trop*, 356 U.S. at 102 (citing *Study of Statelessness*, U.N. Doc. E/1112 (Aug. 1949)).

280. *Id.* at 101.

281. *Id.* at 101–02.

282. *See Furman v. Georgia*, 408 U.S. 238, 327 (1972) (Marshall, J., concurring) (noting that the dissenters adopted the same basic analytical approach as the plurality).

283. *Trop*, 356 U.S. at 127 (Frankfurter, J., dissenting).

284. *Id.* at 126.

285. *See Weems v. United States*, 217 U.S. 349, 380–81 (1910).

286. *See Trop*, 356 U.S. at 102–03.

The most prominent debates in recent decades over the Clause's meaning have arisen in cases challenging the constitutionality of the death penalty, beginning with *Furman v. Georgia* (1972), which invalidated death penalty statutes on the grounds that they applied the punishment in an arbitrary manner.<sup>287</sup> Many states amended statutes in response to *Furman*, seeking to address the Court's concerns, and in *Gregg v. Georgia* (1976), the Court upheld legislation providing standards to be applied at a separate sentencing trial following a guilty verdict.<sup>288</sup> Since *Furman* and the cases on states' attempts to meet its concerns, the Court has addressed a number of questions concerning the constitutionality of death as punishment for certain classes of crimes or defendants.

Five years after *Furman*, the Court held, 7-2, in *Coker v. Georgia* (1977) that death was excessive punishment for the crime of raping an adult woman.<sup>289</sup> In the opinion, Justice Byron White (joined by Justices Blackmun, Stewart, and Stevens) stated that a punishment violated the Amendment not only if it was barbaric, but also if it was "'excessive' in relation to the crime committed."<sup>290</sup> Citing *Gregg*, White stated more specifically that a punishment was excessive if it: "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."<sup>291</sup> The disproportionality analysis included contemporary societal values, and the question, specifically, was the public acceptability of death as punishment for raping an adult.<sup>292</sup>

The plurality in *Gregg* used practices in a notably distinctive manner. Justice White's opinion observed that a majority of states had not authorized death as a punishment for rape in the fifty years before *Coker*.<sup>293</sup> Moreover, while sixteen states had authorized death for rape before *Furman*, only three reinstated that penalty after *Furman*'s invalidation of all death penalty laws.<sup>294</sup> With these figures as support, Justice White considered that state legislation "weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."<sup>295</sup> Thus, Justice White counted the examination of state legislation against constitutionality notwithstanding a

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287. 408 U.S. at 239–40.

288. 428 U.S. 153, 164–66 (1976).

289. 433 U.S. 584, 592 (1977).

290. *Id.*

291. *Id.*

292. *Id.* at 592–97.

293. *Id.* at 593.

294. *Coker*, 433 U.S. at 594.

295. *Id.* at 596.

substantial degree of dissensus. As noted above,<sup>296</sup> the Court previously had pointed to uniformity of practice as evidence that a right had a universal basis and was protected. Conversely, the Court had counted absence of uniformity as counting against a right's protected status, viewing dissensus as a sign that reasonable people could disagree.<sup>297</sup> Here, Justice White viewed legislation as weighing against constitutionality on an issue where public attitudes were divided and in flux. While the opinion indicated that societal values analysis was not decisive (since "the Constitution contemplates that in the end our own judgment will be brought to bear"),<sup>298</sup> Justice White's analysis focused above all on the accounting of state practices.

The majority used a similar line of reasoning in *Enmund v. Florida* (1982) to hold death a disproportionate punishment for robbery where the defendant did not intend or commit homicide.<sup>299</sup> Again penning the Court's opinion, Justice White noted that of the thirty-six states with capital punishment only a "small minority" of eight imposed death for this category of crime.<sup>300</sup> In another nine states, the sentencing body could impose death for the crime depending on the circumstances.<sup>301</sup> Together, only about a third of the states authorized death for robbery without homicide.<sup>302</sup> Additionally, of the eight states that had enacted new death penalty statutes in the previous four years, none had provided death for non-homicidal robbery.<sup>303</sup> Justice White found that the evidence "weighs on the side of rejecting capital punishment for the crime at issue."<sup>304</sup> Thus, the majority again counted legislation as supporting unconstitutionality even where state practices were far from uniform.

The Court has employed a similar line of reasoning in cases addressing the constitutionality of death as a punishment for certain classes of offenders. In *Thompson v. Oklahoma* (1988), for example, the Court held, 5-3, that death could not be imposed on a person who was under sixteen years of age at the time of the crime.<sup>305</sup> In his opinion announcing the judgment of the Court, Justice Stevens (joined by Justices Brennan, Marshall, and Blackmun) found that the evidence supported an "unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the

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296. See *supra* Part II.A.

297. See *id.*

298. *Coker*, 433 U.S. at 597.

299. 458 U.S. 782, 801 (1982).

300. *Id.* at 789, 792.

301. *Id.* at 792.

302. *Id.*

303. *Id.*

304. *Enmund*, 458 U.S. at 793.

305. 487 U.S. 815, 817, 838 (1988).



conscience of the community.”<sup>306</sup> Fourteen states had no death penalty, and eighteen states with capital punishment had minimum ages of at least sixteen years, while nineteen states did not establish a minimum age.<sup>307</sup> Evidence concerning jury verdicts was persuasive too, as it had been forty years since a jury imposed death on a defendant under sixteen.<sup>308</sup> In addition, Justice Stevens referred to “the views that have been expressed by respected professional organizations,”<sup>309</sup> noting that the American Bar Association and American Law Institute opposed execution of juveniles.<sup>310</sup> Justice Stevens also pointed to evidence from other countries. American opposition to execution of juveniles was consistent with the views of “other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community.”<sup>311</sup> The United Kingdom and New Zealand, which retained the death penalty for some crimes, did not allow the execution of juveniles.<sup>312</sup> The death penalty had been abolished in a number of Western European countries, most of Australia, and (at least with regard to juveniles) the Soviet Union.<sup>313</sup> In his independent judicial assessment, Justice Stevens concluded that the death penalty for persons under sixteen did not “measurably contribute[]” to deterrence or retribution, stressing psychological differences between adults and juveniles.<sup>314</sup>

For Justice Scalia (joined in dissent by Justice White and Chief Justice Rehnquist), the crucial fact was that almost forty percent of the states, including a majority of death penalty states, allowed imposition of death when juveniles were tried as adults, which could include persons under the age of sixteen.<sup>315</sup> If forty percent of states did not rule out the punishment, there was no consensus against it. Justice Scalia rejected international sources, because only American attitudes mattered. The practice was constitutional “even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding.”<sup>316</sup> Justice Scalia argued against independent judicial assessment of the punishment’s appropriateness. Only original understanding of the Clause and evolving American standards of decency could support a finding of

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306. *Id.* at 832.

307. *Id.* at 826, 829.

308. *Id.* at 832.

309. *Id.* at 830.

310. *Thompson*, 487 U.S. at 830.

311. *Id.*

312. *Id.* at 830–31.

313. *Id.*

314. *Id.* at 833, 836–37.

315. *Thompson*, 487 U.S. at 868 (Scalia, J., dissenting).

316. *Id.* at 868 n.4.

unconstitutionality.<sup>317</sup> Justice Stevens had not addressed original understanding, and his consideration of international sources opened the door to subjective judging.<sup>318</sup>

While *Thompson* held death could not be imposed on persons under sixteen, *Stanford v. Kentucky* (1989) upheld capital punishment for persons sixteen or older.<sup>319</sup> Justice Scalia's opinion for a four-person plurality (joined by Justices Kennedy and White and Chief Justice Rehnquist) again stressed that the relevant standard was American attitudes, with legislation as the most significant evidence.<sup>320</sup> Of thirty-seven death penalty states, twenty-two allowed execution of sixteen-year-olds, and twenty-five allowed execution of seventeen-year-olds.<sup>321</sup> This data did "not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."<sup>322</sup> Justice Scalia limited the societal values investigation to legislation and sentences actually imposed, refusing to consider public opinion polls or positions adopted by professional associations:

We decline . . . to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.<sup>323</sup>

Urging that the Court must not "replace judges of the law with a committee of philosopher-kings,"<sup>324</sup> he reiterated his opposition to judicial assessment of a punishment's acceptability:

[O]ur job is to identify the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are* . . . . [W]e emphatically reject [the] suggestion that the issues . . . permit us to apply 'our own informed judgment' . . . regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.<sup>325</sup>

The Court upheld the execution of persons who were mentally retarded in *Penry v. Lynaugh* (1989),<sup>326</sup> but reversed itself in *Atkins v. Virginia* (2002) based on intervening changes in public attitudes and practices.<sup>327</sup> At the time

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317. *Id.* at 873.

318. *Id.*

319. 492 U.S. 361, 380 (1989).

320. *Id.* at 369–70.

321. *Id.* at 370.

322. *Id.* at 371.

323. *Id.* at 377.

324. *Stanford*, 492 U.S. at 379.

325. *Id.* at 378.

326. 492 U.S. 302, 340 (1989).

327. 536 U.S. 304, 321 (2002).

of *Penry*, two states prohibited execution of mentally retarded persons.<sup>328</sup> Even adding the fourteen non-death-penalty states, this did not show inconsistency with evolving standards of decency.<sup>329</sup> In *Atkins*, Justice Stevens' opinion for the Court observed that eighteen states barred the execution of the mentally retarded, sixteen more than at the time of *Penry*.<sup>330</sup> Since twelve states had no death penalty, this meant thirty states did not sanction execution of the mentally retarded.<sup>331</sup> The opinion emphasized "the consistency of the direction of change,"<sup>332</sup> observing that no state that prohibited the execution of the mentally retarded had removed the prohibition.<sup>333</sup> The majority also noted opposition to execution of the mentally retarded by a wide range of professional and religious organizations, and polling data that indicated "a widespread consensus among Americans . . . that executing the mentally retarded is wrong."<sup>334</sup> Citing evidence that the challenged punishment was "overwhelmingly disapproved" by the "world community," the Court stated that the consistency of international sources "lends further support to our conclusion that there is a consensus among those who have addressed the issue."<sup>335</sup> Finally, executing mentally retarded persons was excessive, due to lessened personal culpability.<sup>336</sup> The Court's opinion in *Atkins* bore significant similarities to its opinion in *Lawrence*. In both instances, the direction of recent changes in state legislation was considered most relevant. A trend towards observance could support a right's emergence even amidst dissensus.

In dissenting opinions, Chief Justice Rehnquist and Justice Scalia argued that the prohibition of executing mentally retarded persons by eighteen states, less than half of the states with a death penalty, did not establish a national consensus.<sup>337</sup> The data did not show anything close to the consensus shown in previous cases where the Court had invalidated punishments.<sup>338</sup> Moreover, many states with legislation prohibiting execution of the mentally retarded had adopted the legislation recently, suggesting that public attitudes were fluid.<sup>339</sup>

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328. *Id.* at 314.

329. *Id.*

330. *Id.* at 314–15.

331. *Id.*

332. *Atkins*, 536 U.S. at 315.

333. *Id.* at 315–16.

334. *Id.* at 317 n.21.

335. *Id.*

336. *Id.* at 319.

337. *Atkins*, 536 U.S. at 322, 342–43 (Rehnquist, C.J., dissenting) (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined each other's opinions, and Justice Thomas joined both opinions as well. *Id.* at 321, 337 (Rehnquist, C.J., dissenting) (Scalia, J., dissenting).

338. *Id.* at 343 (Scalia, J., dissenting).

339. *Id.* at 344.

The *Atkins* dissenters also continued their attack on the majority's reliance on societal values indicators beyond legislation and juries and on judicial assessment of moral acceptability. In their view, the majority opinion "rested . . . upon nothing but the personal views" of the Justices.<sup>340</sup> Yet, since the Justices lacked authority to impose their own feelings, only consideration of actions by legislatures and juries could "be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."<sup>341</sup>

Just as *Atkins* overturned a 13-year-old decision, *Roper v. Simmons* (2005) overturned *Stanford v. Kentucky* (1989), holding, 5-4, that execution of persons under eighteen violated the Clause.<sup>342</sup> Justice Kennedy's opinion for the majority in *Roper* used the same framework as *Atkins*, and the figures on state legislation were similar. By the time *Roper* was decided, 18 states barred execution of juveniles.<sup>343</sup> Since twelve states had no death penalty, thirty altogether did not authorize execution of juveniles.<sup>344</sup> Justice Kennedy viewed this evidence as supporting a finding that societal standards were no longer consistent with execution of minors.<sup>345</sup> Justice Kennedy's opinion in *Roper* also considered sentences in foreign countries. Only seven countries other than the United States had executed minors since 1990, and all of them had abolished or disavowed the practice.<sup>346</sup> The United Kingdom, whose practice was of special interest due to the "historic ties between our countries and in light of the Eighth Amendment's own origins," abolished death for juveniles decades before abolishing the penalty altogether.<sup>347</sup> A number of treaties banned execution of minors, including the U.N. Convention on the Rights of the Child, and the United States was one of only two countries that had not ratified it.<sup>348</sup> In short, "the United States now stands alone in a world that has turned its face against the juvenile death penalty."<sup>349</sup> Although the "opinion of the world community" was "not controlling," it did provide instruction and "respected and significant confirmation for our own conclusions."<sup>350</sup> The

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340. *Id.* at 338.

341. *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting).

342. 543 U.S. 551, 578-79 (2005).

343. *Id.* at 559-60.

344. *Id.* at 564.

345. *Id.* at 565-67.

346. *Id.* at 577.

347. *Roper*, 543 U.S. at 577.

348. *Id.* at 576.

349. *Id.* at 577.

350. *Id.* at 578.

Court's determination that death was disproportionate for minors found "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>351</sup> It did "not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."<sup>352</sup> The majority's independent judgment also led to the conclusion that death was disproportionate when imposed on juveniles.<sup>353</sup> Capital punishment for minors served neither deterrence nor retribution in light of the diminished culpability of minors for their crimes, due in part to psychological differences between juveniles and adults.<sup>354</sup>

In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Clarence Thomas, argued that the count of states opposing execution of minors should not include those with no capital punishment.<sup>355</sup> The inquiry concerned attitudes about executing minors, not capital punishment generally. Only 47% of death penalty states prohibited execution of minors: "Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."<sup>356</sup> Previous cases "required overwhelming opposition to a challenged practice, generally over a long period of time."<sup>357</sup> Justice Scalia renewed his argument against reliance on international sources. The majority's "basic premise . . . that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."<sup>358</sup> At any rate, the Court was inconsistent in the weight it accorded international practices. For example, the rest of the world rejected strict application of the exclusionary rule, and the United States was one of only six countries in the world that allowed abortion on demand up to the point of viability.<sup>359</sup> The majority, Justice Scalia charged, used foreign law to set aside established principles of American law, not to reinforce them.<sup>360</sup> The fact that the United States had not endorsed treaty provisions banning the execution of minors underscored the lack of an American consensus against execution of juveniles.

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351. *Id.* at 575.

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

353. *Id.* at 571–72.

354. *Id.*

355. *Id.* at 610 (Scalia, J., dissenting).

356. *Id.* at 609.

357. *Roper*, 543 U.S. at 609 (Scalia, J., dissenting).

358. *Id.* at 624.

359. *Id.* at 624–25.

360. *Id.* at 628.

Two competing frameworks, then, have emerged in the Court's jurisprudence on the Cruel and Unusual Punishments Clause. One has rejected independent judicial assessment and has rested adjudication entirely on particular arguments. The other has combined independent judicial assessment according to universal standards with particular arguments. Justices backing the role of universal arguments in the Court's recent Eighth Amendment jurisprudence have been careful to say that the Court should engage in its own normative assessment of a challenged punishment's validity,<sup>361</sup> suggesting that this assessment is independent of contemporary societal values. But the Court has not clarified adequately the relationship between the universal and non-universal elements of their opinions. For instance, what if the independent normative assessment and the analysis of contemporary societal values point in opposite directions?<sup>362</sup> The question remains unanswered. The resulting ambiguity jeopardizes the independence of the normative assessment, especially in light of the Justices' extensive debates over the proper way to measure public attitudes. The prolonged discussions on how to count the number of states approving of a punishment furthers the impression that shifts in public attitudes are playing the primary role in interpretation.

#### D. *Reliance on State Practices and Foreign Law*

Confusion regarding the basis of rights interpretations is magnified by a recent intensification in the Court's attention to state practices as a basis for rights interpretation. While citation of state practices is not new, scholars have begun recognizing its increasing role.<sup>363</sup> Indicators of legal policies as adopted and applied by states include jury behavior, prosecutorial decisions, and, especially, state legislation. Quantitative analysis of state practices as an interpretive tool is most familiar in Eighth Amendment cases,<sup>364</sup> but it is commonly used<sup>365</sup> by Justices across the ideological spectrum<sup>366</sup> in other areas

361. *E.g.*, *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (stating that it was "for [the Court] ultimately to judge" the punishment's constitutionality).

362. *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1103–04 (2006) (noting that the Court has not clarified how it would resolve a conflict if different interpretive methodologies in the same case pointed to different conclusions).

363. *See, e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 368–69 (2009) (noting the Court's majoritarian approach to the Eighth Amendment has been used in other arguments); Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1671 (2007).

364. Krotoszynski, *supra* note 49, at 987.

365. Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 17 (2009).

366. Lain, *supra* note 363, at 409.

as well, including substantive and procedural due process,<sup>367</sup> and the Fourth and Sixth Amendments.<sup>368</sup> The citation of state practices is not problematic in itself. The Justices at times have used state practices in a manner that produces no confusion regarding the basis of decision. For instance, state practices may support empirical claims, such as that a given policy has proven infeasible in implementation.<sup>369</sup> Reliance on state practices, however, can be problematic for either of two reasons. First, it is problematic if used in a manner suggesting that shifts in the popularity of practices can swing the meaning of rights.<sup>370</sup> Second, the citation of state practices alongside universal arguments without an explanation of the interrelation produces uncertainty regarding the basis of decision.<sup>371</sup>

Confusion in the Court's jurisprudence regarding the basis of rights also is exacerbated by the Justices' insufficiently explained references to foreign law. Foreign citations are less frequent than reference to state practices (although they have received greater attention from scholars)<sup>372</sup> but common enough to

367. Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 741–42 (2008); Hills, *supra* note 365, at 17; Krotoszynski, *supra* note 49, at 987; Lain, *supra* note 363, at 368–69.

368. See Lain, *supra* note 363, at 395.

369. See *id.* at 384 (citing *Ake v. Oklahoma*, 470 U.S. 68, 78–79 (1985)).

370. E.g., *Washington v. Glucksberg*, 521 U.S. 702, 710–11 (1997) (assisted suicide); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (exemplary damages); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (exclusionary rule); see Krotoszynski, *supra* note 49, at 1014–16; Lain, *supra* note 363, at 374–77, 386–88 (explaining that legislative consensus is not conclusive but quite persuasive).

371. E.g., *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Lawrence v. Texas*, 539 U.S. 558, 570, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 313–14 (2002); see Krotoszynski, *supra* note 49, at 952, 987 (contending state-counting results in an ad-hoc approach).

372. See, e.g., Alford, *supra* note 2, at 640; Daniel Bodansky, *The Use of International Sources in Constitutional Law*, 32 GA. J. INT'L & COMP. L. 421, 421 (2004); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 360 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005); Joan Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1286–87 (2004); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 353 (2004); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 171 (2006); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L LAW 69, 69 (2004); Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1277 (2006); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005).

merit attention, especially given their role in prominent cases<sup>373</sup> and their apparently increasing prevalence in Supreme Court opinions.<sup>374</sup> Judges are wise when considering empirical questions<sup>375</sup> to glean insights from the experiences of a variety of jurisdictions, both domestic and international.<sup>376</sup> The question is whether foreign practices shape the bounds that constitutional rights place around government actions.<sup>377</sup> We can envision ways of considering foreign law that would not amount to an expanded attitudinal survey. The decisions of foreign adjudicative bodies might provide insightful ways of thinking about rights. The Justices, however, generally do not engage the reasoning behind the foreign practices.<sup>378</sup> Foreign legal developments also might point to an overwhelming consensus, which would be seen as evidence that a right was indispensable to liberty. But the Justices have not articulated

373. *E.g.*, *Roper*, 543 U.S. at 576–78; *Lawrence*, 539 U.S. at 573–76; *Atkins*, 536 U.S. at 316 n.21.

374. *See* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 753–55, 838–39, 907 (2005); Glensy, *supra* note 372, at 372. Moreover, while citation of foreign sources is more common among Justices who view themselves as liberal, it is not limited to Justices from only one end of the political spectrum. Calabresi & Zimdahl, *supra* note 372, at 750–51; Krotoszynski, *supra* note 49, at 1020–21. Scholarly interest in the subject has also increased of late. *See* Alford, *supra* note 2, at 641 (observing “a notable increase in scholarly literature on the subject of constitutional comparativism”).

375. It is important to distinguish instances in which foreign practices are cited to support empirical claims, regarding, for instance, the likely outcome of a given policy, from instances in which they are cited to support legal arguments on non-constitutional issues. Young, *supra* note 372, at 150 (noting a distinction “between looking to foreign law to prove or disprove certain *factual* propositions and looking abroad for *normative* guidance”).

376. *See* Bodansky, *supra* note 372, at 422 (linking reliance on foreign sources with the “[t]he notion that we do not have a monopoly on wisdom and could learn from others”); Young, *supra* note 372, at 151 (noting that it “seems positively anti-intellectual and hubristic to say that we can learn nothing from foreign jurisdictions”).

377. *See* Larsen, *supra* note 372, at 1295 (noting that in recent opinions like *Lawrence* and *Atkins*, the Court has looked to foreign sources not merely “to determine what effect would be produced by adopting the foreign rule,” but “to determine what the content of the domestic constitutional rule should be”).

378. Levinson, *supra* note 372, at 372 (noting that the Justices often cite foreign legal developments sources without explaining the reasoning behind them); Larsen, *supra* note 372, at 1286 (noting that Justices Kennedy and Breyer often cite foreign legal developments sources without explaining the reasoning behind them); Young, *supra* note 372, at 152 (stating that a “lack of interest in the reasons underlying foreign practice is characteristic of the Court’s employment of foreign law”).



such an argument,<sup>379</sup> and the judges often cite foreign law even when considerable dissensus remains.<sup>380</sup> If foreign citations are supposed to support a particular argument, then we would expect to see an explanation of why popular preferences outside the United States bear directly on the collective decision-making authority of the American people. Indeed, while exclusive particularists are wrong to rule out any place for universal reasoning, they are right to suggest that only domestic popular preferences are relevant to interpretation rooted in popular will.<sup>381</sup> In the absence of an adequate explanation of how foreign law fits into the analysis, the Justices' citation of foreign law is problematic, because it reinforces the impression that rights interpretation is responsive to a tallying of public opinion, with the survey now extended beyond American borders. Moreover, as with state practices, the Justices have cited foreign law alongside universal arguments without explaining the interrelation.

As noted, Justices in an earlier time more often made clear how the investigation of prevalent practices served a subsidiary role within an overarching universal argument.<sup>382</sup> One approach was to examine practices in jurisdictions dedicated to the same universal standards the Justices were employing. That is, observing practices within free, republican societies could be helpful in discerning the essential requirements of free, republican government. The examination of practices sometimes extended beyond American borders. Uniform observance of a practice might count as evidence of its indispensability. Conversely, a lack of consensus might count as evidence against the right's indispensable nature. On this approach, the overarching standard was unambiguously universal, and practices served as evidence for or against a right's universal status. The Justices sometimes examined practices with an eye to the nature of the beliefs supporting them. In these instances, the investigation focused on how often the right was observed specifically because it was believed to enjoy universal status. The governing standard was universal, and practices served as evidence bearing on the standard's meaning and application. By contrast, in prominent contemporary decisions, like *Atkins v. Virginia* (2002), *Lawrence v. Texas* (2003), and *Roper v. Simmons* (2005), the Court has relied on recent shifts in public attitudes to support new interpretations of rights on issues where considerable dissensus

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379. See Tushnet, *supra* note 372, at 1301 (“[T]he actual practice that has generated discussion of references to non-U.S. law makes only the tiniest gestures toward the idea that non-U.S. judgments can help identify universal norms.”).

380. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

381. See, *e.g.*, *Lawrence*, 539 U.S. at 595 (Scalia, J., dissenting).

382. See *supra* Part II.

remained.<sup>383</sup> In such opinions, the investigation of practices was part of a broader investigation into evolving societal attitudes. The inquiry kicked off with data on recent trends in state legislation, and included additional sources, such as opinions of professional associations, public opinion, and international practices. This treatment of data suggested that attitudinal shifts directly altered the meaning of rights.<sup>384</sup>

Confusion regarding the basis of decision is exacerbated when Justices cite foreign and state practices in the same breath without explaining if, or how, they serve the same argument. Scholarship typically treats citation of state and foreign practices as separate topics. Yet the most important thing about them is what they share: they both are part of a judicial methodology that appeals to indicators of societal attitudes without explaining why rights should fluctuate with attitudinal trends or whether such trends trump universal arguments.

### CONCLUSION

Justices using universal arguments have defended them as representing an exercise of the Justices' independent judgment, essential to constitutional rights operating as an independent check on majority power that is not tied to errors of the past. That aim is undermined by the Justices' equivocation, which calls into question whether universal arguments are doing any work. The recitation of universal standards provides no normative force to the argument if analysis under those standards amounts to a reading of popular preferences. And universal arguments are rendered superfluous if opinions suggest that a non-universal line of reasoning alone would have been sufficient to reach the same conclusion.

The Court's jurisprudence as a whole is troubling if one accepts the premise expressed by many members of the Court that the judiciary must retain access to lines of reasoning about the meaning of rights that do not reduce to a reading of mass preferences. One major approach on the Court denounces judicial reliance on universal arguments altogether while another defends their use but frequently combines them with particular arguments in ways that undermine their independent normative force. Opinions that gesture towards universal arguments without adequately following through undermine them in an insidious way. The exclusively particular approach has the virtue of clarity in seeking to eliminate universal arguments, thus openly engaging discussion on their appropriateness. Hollow incantation of universal arguments threatens to undermine them as a vital component of judicial reasoning without acknowledgment. Thus, universal arguments are undermined not only by

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383. See *supra* notes 11–12 and accompanying text.

384. *Atkins* (2002) overturned *Penry* (1989), *Lawrence* (2003) overturned *Bowers* (1986), and *Roper* (2005) overturned *Stanford* (1989).

outright opposition but also by the tentative and unclear manner in which they are used.

Ambiguity regarding the basis of decision is troubling for a reason that applies regardless of one's views on the appropriateness of universal arguments. Not only is the character of constitutional discourse at stake, but also the people's ability to shape that discourse. Whatever one thinks about its appropriateness, the Justices have in fact appealed to universal standards in numerous issue areas. The content of judicial opinions is significant not only because it outlines the reasoning supporting the decision at hand, but also because it facilitates engagement with that reasoning by other participants in the legal system. This is especially important in a system that relies so heavily on the participation of actors other than judges. While the judiciary as an institution is not designed to be democratic in the same way as a legislature, it does depend for its legitimacy on the ability of combatants in an adversarial legal system to fully engage with judges over the justifications behind decisions. The development of law through adjudication requires an iterative discourse involving the input of parties and their counsel. The crafting of arguments by advocates is informed by the kinds of reasoning that judges have relied upon in previous cases. Universal reasoning, like all kinds of legal reasoning, is developed best through an ongoing discourse that probes weaknesses in positions and tests implications of principles. Participants should be able to contribute to the debate either by further elaborating details within the framework or by more precisely specifying the links in the chain of reasoning with which they disagree. The development of a coherent body of justificatory arguments, shaped significantly by parties other than judges, is hampered if the Justices' reasoning is not sufficiently clear to invite intellectual engagement by other players. Ironically, concerns over the appearance of illegitimacy may dissuade Justices from developing their universal arguments with greater clarity, but the absence of clarity is the greater threat to legitimacy. The confusion produced by the Justices' failure to specify the relationship between universal and non-universal bases of interpretation is damaging for a system that depends on litigants' participation in the process through which constitutional rights are developed.