

## FOUR MISTAKES IN THE DEBATE ON “OUTSOURCING AUTHORITY”

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### I. INTRODUCTION

It is a great honor for me to participate in this symposium on outsourcing authority and to share the podium with such luminaries as Mark Tushnet, Ken Kersch, Susan Karamanian, John Baker, and John McGinnis. Albany Law School has been a wonderful host and sponsor of this symposium. It has chosen a felicitous name to address a theme that is one of the more interesting in current discussions about constitutional interpretation.

As a skeptic of constitutional comparativism, I come to the debate from a surprising background. Most skeptics of the use of constitutional comparativism are not steeped in international law and do not describe themselves as international law scholars. But I, on the other hand, received my L.L.M. in international law from the University of Edinburgh, worked in international tribunals on two previous occasions in two European countries, and practiced public and private international law in Washington, D.C. The better part of my professional career has focused on international law. Accordingly, my skepticism is not about international law per se, but rather about the misuse of international law.

Much of my skepticism pertains to my sense of how constitutional decision-making should be undertaken.<sup>1</sup> But it also relates to my understanding of the purpose of international law. International law functions best as a bracketed discipline that recognizes its own limits. When international law overreaches, it is met with deep

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<sup>1</sup> See generally Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) [hereinafter *In Search of a Theory*] (arguing that the methodology of constitutional comparativism should be evaluated in light of constitutional theory).

skepticism. The frequent refrain I hear from lay skeptics about *Lawrence v. Texas*<sup>2</sup> and *Roper v. Simmons*<sup>3</sup> is “what possible relevance does some modern international treaty have for judges trying to interpret the text of our Constitution which was adopted over 200 years ago?” The criticism reflects a quite respectable and strong impression that international law is arrogantly overreaching, transgressing its proper role as a bracketed discipline.

If you will allow an imperfect analogy, the discipline of science functions so marvelously well because it focuses on discrete scientific questions and eschews metaphysical questions. Of course, no scientist lives in a philosophical or ethical vacuum, but the hard sciences are successful because they have the discipline to focus on scientific questions.

The renowned theoretical physicist John Polkinghorne has written much about this intersection between the physical and the metaphysical world.<sup>4</sup> On the interaction between science and religion, he writes that science and religion are “partners in the great human quest to understand reality.”<sup>5</sup> He then suggests that there are varieties of interaction that might arise between the two disciplines, including conflict,<sup>6</sup> independence,<sup>7</sup> dialogue,<sup>8</sup> integration,<sup>9</sup> consonance,<sup>10</sup> and assimilation.<sup>11</sup> These interactions represent a spectrum of possible relationships in the ongoing debate

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<sup>2</sup> 539 U.S. 558 (2003).

<sup>3</sup> 543 U.S. 551 (2005).

<sup>4</sup> See generally JOHN POLKINGHORNE, FAITH, SCIENCE AND UNDERSTANDING (2000); JOHN POLKINGHORNE, BELIEF IN GOD IN AN AGE OF SCIENCE (1998); JOHN POLKINGHORNE, QUARKS, CHAOS & CHRISTIANITY: QUESTIONS TO SCIENCE AND RELIGION (1996); JOHN POLKINGHORNE, REASON AND REALITY: THE RELATIONSHIP BETWEEN SCIENCE AND THEOLOGY (1991).

<sup>5</sup> JOHN POLKINGHORNE, SCIENCE AND THEOLGY: AN INTRODUCTION 20 (1998).

<sup>6</sup> Conflict “occurs when either discipline threatens to take over the legitimate concerns of the other. Examples would be scientism (the assertion that the only meaningful questions to ask or possible to answer are scientific questions . . .) or biblical literalism.” *Id.*

<sup>7</sup> Independence “treats science and theology as being quite separate realms of enquiry in which each discipline is free to pursue its own way without reference to, or hindrance by, the other.” *Id.* at 21.

<sup>8</sup> Dialogue is “a recognition that science and theology have things to say to each other about phenomena in which their interests overlap,” such as “the nature of the human person and the relationship between mind and body.” *Id.*

<sup>9</sup> Integration is “more ambitious, for it encourages the unification of science and theology into a single discourse.” *Id.*

<sup>10</sup> Consonance posits that “[s]cience and theology retain their due autonomies in their acknowledged domains, but the statements they make must be capable of appropriate reconciliation with each other in overlap regions.” *Id.* at 22.

<sup>11</sup> Assimilation is “an attempt to achieve the maximum possible conceptual merging of science and theology. Neither is absorbed totally by the other . . . but they are brought closely together.” *Id.*

about the intersection of science and religion.

I find Polkinghorne's taxonomy useful in the current debate about outsourcing authority. One might say that with the growing prominence of international law and the proliferation of global constitutionalism, we are struggling to understand the interaction between our own cherished constitutional liberties and the growing body of international and global constitutional law. In short, the question to be raised is how do we understand constitutional law in an international age?

In my view, we need not embrace the most hostile approach of conflict or independence. We could and should have fruitful, good-faith dialogue between international law and constitutional law. The two disciplines are largely harmonious, for obviously the treaties we sign and the Constitution we honor are not incongruous. Likewise, our tradition of affording constitutional protections informs the content of our state practice under customary international law. Nor can you understand certain constitutional provisions, such as the "declare war" clause, without an appreciation for international or comparative law.<sup>12</sup>

But in my view, we should avoid the current, more extreme efforts at deeper interaction. At bottom, international law and constitutional law use different methods, ask different questions, and find answers in different source material. In short, they explain different spheres of legal epistemology. The two disciplines may inform one another on the margins, but the goal should not be integration (unifying international and constitutional law into a single discourse), consonance (reconciling the two disciplines in overlapping regions), or assimilation (attempting the maximum possible conceptual merging of international and constitutional law). It is a grievous error to share Justice Blackmun's longing for a "day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind."<sup>13</sup>

Thus, the debate about outsourcing authority is ultimately one about the appropriate interaction between these two legal disciplines. My strong sense is that there is a sharp distinction that

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<sup>12</sup> See *Brown v. United States*, 12 U.S. 110, 125 (1814) ("In expounding th[e] constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere . . .").

<sup>13</sup> Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994).

needs to be maintained, and that distinction broadly explains my own skepticism about constitutional comparativism.

This brings us to the current discussion about the debate itself. Thus far my participation in the discussion of constitutional comparativism has focused on the substance of the dispute.<sup>14</sup> This article is a departure from the norm for me, and will focus on the contours of the debate itself. Having followed the subject closely since first reading a footnote in *Atkins v. Virginia* in June 2002 that discussed the world community's opinion on the death penalty for mentally retarded offenders,<sup>15</sup> I have seen the discussion explode on the legal scene following the decisions in *Lawrence v. Texas*<sup>16</sup> and *Roper v. Simmons*.<sup>17</sup>

The purpose of this Article is to discuss common mistakes in the current debate on outsourcing authority. Those mistakes pertain to (1) confusion about the voices in the debate, (2) underestimation of the genuine novelty of the current practice of outsourcing authority, (3) ignorance of the key distinction between using foreign authority in constitutional and statutory interpretation, and (4) misunderstandings about the likely outcomes of robust constitutional comparativism. This Article will focus on mistakes about voices, history, statutes, and outcomes.

## II. THE MISTAKE ABOUT VOICES

The first mistake in the debate on outsourcing authority is about the protagonists. Given the prominence of the Breyer-Scalia

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<sup>14</sup> See generally Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy* (2006) [hereinafter *Foreign Relations as a Matter of Interpretation*] (unpublished article, on file with Albany Law Review) (arguing against the use of a constitutional *Charming Betsy* doctrine); Roger P. Alford, *Roper v. Simons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1 (2005) [hereinafter *Roper v. Simmons and Our Constitution*] (discussing the use of comparativism in *Roper* and the consequences of this approach); *In Search of a Theory*, supra note 1; Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT'L L. 913 (2004) (examining the possible increase in deference to human rights tribunals after *Lawrence*); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) [hereinafter *Misusing International Sources*] (examining the potential misuse of international materials in constitutional adjudication); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003) [hereinafter *International Tribunals*] (advocating the use of specific methods of deference to international materials, depending upon the tribunal).

<sup>15</sup> 536 U.S. 304, 316 n.21 (2002).

<sup>16</sup> 539 U.S. 558 (2003).

<sup>17</sup> 543 U.S. 551 (2005).

debates,<sup>18</sup> there is a tendency to assume that this discussion revolves around a few Supreme Court Justices who are simply singing a new verse to an old tune about the propriety of originalism. But to focus solely on the fact that Justices Ginsburg and Breyer espouse this approach,<sup>19</sup> while Justices Scalia and Thomas do not,<sup>20</sup> distorts the true picture of the rich debate that is ongoing at the bar, the bench, the academy, and beyond. Mistaking the voices in the debate will distort what is at issue in the discussion.

The reality is much more complex. On the bench, the voices are far from predictable. A pragmatist like Justice Breyer embraces comparativism,<sup>21</sup> while a pragmatist like Judge Posner vehemently does not.<sup>22</sup> Justice Scalia is an outspoken (and surprising) proponent of comparativism to understand the shared meaning of a treaty,<sup>23</sup> despite his truculent refusal to rely on foreign experiences in the constitutional context.<sup>24</sup> In extra-judicial writings, Justice O'Connor often expresses strong support for comparative references,<sup>25</sup> but in her opinions she has proven to be far more conservative. In *Roper*, for example, she stated that international opinions should not play a confirmatory role in Eighth Amendment jurisprudence because there is no American consensus on the issue.<sup>26</sup> In *McCreary County v. ACLU*, she went further and articulated a presumption against comparativism in First Amendment jurisprudence: “[t]hose who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”<sup>27</sup> Not so long ago

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<sup>18</sup> See generally *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005) [hereinafter *Relevance of Foreign Legal Materials*] (reporting the views of Justices Scalia and Breyer on the issue of foreign law citation in a dialogue format).

<sup>19</sup> See *id.* at 522–24; John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 305 (2006).

<sup>20</sup> See *Relevance of Foreign Legal Materials*, *supra* note 18, at 528, 533–34.

<sup>21</sup> *In Search of a Theory*, *supra* note 1, at 694–98.

<sup>22</sup> *Id.* at 694–95, 698.

<sup>23</sup> See *Olympic Airways v. Husain*, 540 U.S. 644, 660–61 (2004) (Scalia, J., dissenting) (stating that in the context of interpreting a modern treaty “[f]oreign constructions are evidence of the original shared understanding of the contracting parties”).

<sup>24</sup> *Relevance of Foreign Legal Materials*, *supra* note 18, at 521.

<sup>25</sup> See generally Sandra Day O'Connor, Commentary, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20, 21.

<sup>26</sup> 543 U.S. 551, 604–05 (2005) (O'Connor, J., dissenting).

<sup>27</sup> 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).

Justice Kennedy appeared to be a comparative skeptic,<sup>28</sup> while Chief Justice Rehnquist was thought to be warming to the trend.<sup>29</sup> Recent years have shown them to be precisely the opposite.<sup>30</sup> The thinking of both evolved, but in different directions.

In the academy, wonderful scholars on the left and right are steeped in the debate. Outspoken proponents include eminent scholars such as Harold Koh, Mark Tushnet, Gerald Neuman, Vicki Jackson, Anne-Marie Slaughter, Michel Rosenfeld, and Jeremy Waldron. These authors make a variety of arguments in favor of comparativism, including Slaughter's arguments for judicial cross-fertilization,<sup>31</sup> Neuman's advocacy of suprapositive constitutionalism,<sup>32</sup> Waldron's arguments for a modern *ius gentium*,<sup>33</sup> Jackson's arguments for comparative engagement,<sup>34</sup>

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<sup>28</sup> See Tony Mauro, *Visiting Justices Get an Earful in London*, LEGAL TIMES, July 31, 2000, at 10, 10 [hereinafter *Visiting Justices*]; Tony Mauro, *U.S. Supreme Court vs. The World*, USA TODAY, June 20, 2005, at 15A [hereinafter *U.S. Supreme Court*].

<sup>29</sup> See William Rehnquist, *Constitutional Courts—Comparative Remarks*, reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 412 (Paul Kirchhoff & Donald P. Kommers eds., 1993).

<sup>30</sup> See Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301, 346 (2004); *U.S. Supreme Court*, *supra* note 28.

<sup>31</sup> See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 201–02 (2003). Slaughter observed that

For [Supreme Court Justices], looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign authority is persuasive because it teaches them something they did not know or helps them see an issue in a different and more tractable light. . . .

. . .

Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to a visible international consensus on various issues—a consensus that, in turn, carries compelling weight.

*Id.*

<sup>32</sup> See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 87 (2004).

From the suprapositive perspective, the interpretive value of international human rights norms and decisions derives from the normative insight that they provide. The interpreter should carefully examine whether the international conception of the right (or the feature at issue) rests primarily on consensual or institutional factors rather than on normative considerations, and whether its normative foundations are compatible with the basic assumptions of the U.S. constitutional system.

*Id.* (footnote omitted).

<sup>33</sup> See generally Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005) (arguing that *ius gentium*, or the law of nations, provides a theory to justify the practice of using foreign law).

<sup>34</sup> See Vicki C. Jackson, Comment, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116–18 (2005) [hereinafter *Constitutional Comparisons*] (maintaining that engaging foreign and international law may assist in questioning our own understanding of the U.S. Constitution by (1) comparing the consequences of different

Koh's argument for transnational legal process,<sup>35</sup> Rosenfeld's arguments about the primacy of judicial fairness,<sup>36</sup> and Tushnet's argument for judicial bricolage.<sup>37</sup> All of the scholars seek to legitimize the reference of comparative experiences in constitutional interpretation and discount the concerns that others have expressed about this trend.

Critics include heavy-weights such as Richard Posner, Charles Fried, Ernest Young, Daniel Halberstam, Mary Ann Glendon, Robert Bork, Jed Rubenfeld, Michael Ramsey, and Kenneth Anderson. These authors make a variety of arguments, including Posner's concern about "promiscuous" persuasive authority,<sup>38</sup> Young's concern about the "denominator problem,"<sup>39</sup> Fried's concern about expanding the constitutional canon,<sup>40</sup> Bork's concern about a

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interpretive approaches, (2) clarifying "the distinctive function of one's own system;" and (3) illuminating the dimensions of the universal constitutional rights).

<sup>35</sup> See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991). Two distinct characteristics of the transnational legal process are (1) "a prospective focus" that concentrates on asserting transnational norms and (2) the ability to strategically transport norms to other forums during litigation. *Id.* (emphasis omitted).

<sup>36</sup> See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 649 (2004). While constitutional adjudication relies on

precedents as part of its common law methodology, [it] must ultimately be faithful to the constitutional provision involved rather than to the precedents. As a result, when precedents appear patently unfair or circumstances have changed significantly, the U.S. Supreme Court is empowered—perhaps obligated pursuant to its constitutional function—to overrule precedent, thus putting fairness above predictability.

*Id.*

<sup>37</sup> See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1300 (1999) ("Thinking about constitution-making as a process of bricolage casts doubt on a form of textualism that attributes to the constitution's writers a purpose of creating a tightly integrated document governed by a form of conceptual determinism.")

<sup>38</sup> See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 85–86 (2005) [hereinafter *A Political Court*] ("One objection to the search [for international consensus] is the promiscuous opportunities that relying on foreign decisions opens up. . . . If foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's corpora juris to find it."); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40, 41 ("The . . . problem with according even limited precedential weight to foreign or international decisions is the promiscuous opportunities that are opened up . . .").

<sup>39</sup> See generally Ernest A. Young, Comment, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005). Young argues that

The size of the denominator *matters* in constitutional cases, and therefore the Court's inclusion of foreign jurisdictions in that denominator matters as well. Whether one ultimately concludes that domestic practices should be measured against a national or an international "consensus," the Court's foreign citations should not be defended by downplaying their significance.

*Id.* at 161 (emphasis added).

<sup>40</sup> See Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y

global bill of rights,<sup>41</sup> Glendon's concern about judicial tourism,<sup>42</sup> Rubinfeld's concern about democratic constitutionalism,<sup>43</sup> Ramsey's concern about comparative empiricism,<sup>44</sup> Halberstam's concern about institutional dynamics,<sup>45</sup> Anderson's concern about constitutional provenance,<sup>46</sup> and, not to mention, my own concern

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807, 819 (2000). Fried argues that while

Justice Breyer's foray [in *Printz v. United States*] was an attempt (probably not successful—at least not this time) to expand the universe of relevant legal materials to include the structures and judgments of other constitutional systems[,] [t]he dispute is particularly striking because it would be one of the few instances of a deliberate attempt by a Justice to expand the canon of authoritative materials from which constitutional common law reasoning might go forward.

*Id.*

<sup>41</sup> See Robert H. Bork, *Travesty Time, Again: In Its Death-Penalty Decision, the Supreme Court Hits a New Low*, NAT'L REV., Mar. 28, 2005, at 17, 18 (arguing that “[w]hat is really alarming about [*Roper v. Simmons*] and other cases citing foreign law . . . is that the Court, in tacit coordination with foreign courts, is moving toward a global bill of rights. . . . It hardly matters what particular constitutions say or were understood to mean by those who adopted them”).

<sup>42</sup> See Mary Ann Glendon, *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14 (arguing that “[w]hat has been overlooked in these debates is the crucial difference between the legitimate use of foreign material as mere empirical evidence that legislation has a rational basis, and its use to buttress the Court's own decision to override legislation”).

<sup>43</sup> See Jed Rubinfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1999 (2004). Rubinfeld argues that

[d]emocratic constitutionalism regards constitutional law as embodying a particular nation's fundamental, democratically self-given legal and political commitments. At any given moment, these commitments operate as checks and constraints on national democratic will, but in its creation and over time, constitutional law is not anti-national, and it is emphatically not antidemocratic. Rather, it aims at democracy over time. Hence it is critical for constitutional law to be made and interpreted not by international experts, but by national political actors and judges.

*Id.*

<sup>44</sup> See Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 77–79 (2004) [hereinafter *International Materials and Domestic Rights*]. Ramsey argues that while “[e]mbracing international materials also entails a commitment to serious empirical research . . . [i]f we (and the Court) cannot bring ourselves to do the empirical project right, that seems further evidence that we are in it only for the results.” *Id.* at 77, 79. See generally Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243 (2004) (discussing the problems and disadvantages of empirical investigation in international law).

<sup>45</sup> See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION 213, 216–17, 249–51 (Kalypso Nicolaidis & Robert Howse eds., 2001) (discussing critical flaws in Justice Breyer's analysis of structural comparativism in *Printz v. United States*); see also Young, *supra* note 39, at 166 (agreeing with Halberstam that Justice Breyer failed to consider the institutional dynamics that may result in different outcomes in the United States and Europe).

<sup>46</sup> See Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1307 (2005) [hereinafter *Squaring the Circle*] (reviewing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004)). Anderson argues that “[c]onstitutions are unique insofar as they are the constitutive document of a political community. As such, the issue is not so much the content of doctrine



about the international counter-majoritarian difficulty.<sup>47</sup> The concerns of these scholars reflect varied reasons for disquiet regarding the trend toward constitutional comparativism.

What is perhaps most remarkable, however, is that this debate has now spilled over into contemporary political parlors, with politicians and pundits expressing strong opinions about the trend. Attorney General Alberto Gonzalez has openly criticized the use of constitutional comparativism, contending that reliance on foreign authority undermines the Court's legitimacy, usurps the role of the political branches, and creates serious advocacy problems for litigators appearing before the Court.<sup>48</sup> In the Senate, Supreme Court nominees are grilled on their views of the trend, with Chief Justice Roberts<sup>49</sup> and Justice Alito<sup>50</sup> recently testifying that each

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but instead its provenance—the fact that it comes out of the constitutional and constitutive processes of a particular community.” *Id.* (footnote omitted).

<sup>47</sup> *Misusing International Sources*, *supra* note 14, at 59.

The difficulty for international majoritarians is that, while certain constitutional provisions have been interpreted to embrace community standards, those standards have been interpreted consistently with—not counter to—majoritarian values reflected in our national experience. The international countermajoritarian difficulty would suggest that international norms cannot be internalized within our Constitution unless such norms are first internalized by our people as our community standards. That is, international standards cannot serve as community standards unless they reflect our own national experience. To conclude otherwise would grant countermajoritarian international norms constitutional relevance as a community standard.

*Id.*

<sup>48</sup> Alberto R. Gonzalez, U.S. Attorney Gen., Prepared Remarks of Attorney General Alberto R. Gonzales at the University of Chicago Law School (Nov. 9, 2005), *available at* [http://www.usdoj.gov/ag/speeches/2005/ag\\_speech\\_0511091.html](http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511091.html) [hereinafter Prepared Remarks of Attorney General].

<sup>49</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr.). During his confirmation hearing, Roberts observed that

there are a couple of things that cause concern on my part about the use of foreign law as precedent. . . . The first has to do with democratic theory. Judicial decisions: In this country, judges, of course, are not accountable to the people, but we are appointed through a process that allows for participation of the electorate.

. . . .

If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country. . . . The other part of it that would concern me is that, relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. And that actually expands the discretion of the judge. It allows the judge

had deep skepticism about the use of foreign authority in constitutional interpretation. In the House of Representatives, there are thirty-eight members who have sponsored and co-sponsored a resolution stating “it is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution . . . should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions.”<sup>51</sup> Some members are so infuriated by the practice that they are investigating the foreign travels of the justices<sup>52</sup> and even going so

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to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they’re finding precedent in foreign law—and use that to determine the meaning of the Constitution.

*Id.*

<sup>50</sup> See *Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Alito Hearing*] (statement of Samuel Alito). In response to a Senator’s question as to whether the Supreme Court should use foreign law, Alito said:

Well, I don’t think that we should look to foreign law to interpret our own Constitution. I agree with you that the laws of the United States consist of the Constitution and treaties and laws and, I would add, regulations that are promulgated in accordance with law. And I don’t think that it’s appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans. And I think we should interpret our Constitution—we should interpret our Constitution. And I don’t think it’s appropriate to look to foreign law. I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey. And then it’s often difficult to understand exactly what you are to make of foreign court decisions. All countries don’t set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. They may be given a policy-making role. And, therefore, it would be more appropriate for them to weigh in on policy issues. When our Constitution was being debated, there was a serious proposal to have members of the judiciary sit on a council of revision, where they would have a policy-making role before legislation was passed. And other countries can set up their judiciary in that way. So you’d have to understand the jurisdiction and the authority of the foreign courts. And then sometimes it’s misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it’s located. If you focus too narrowly on that, you may distort the big picture. So for all those reasons, I just don’t think that’s a useful thing to do.

*Id.*

<sup>51</sup> H.R. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005).

<sup>52</sup> Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 44.

[I]n August [2005], Representative Steve King, a Republican from Iowa, completed an investigation of the Justices’ foreign trips, based on the disclosure forms that they are required to file. “Between 1998 and 2003, the Justices took a total of ninety-three foreign trips” . . . . “And the implication is that there are at least a couple of Justices,

far as to openly and controversially suggest that one or more justices should be impeached.<sup>53</sup> These congressional and executive leaders are obviously making much ado about *something*.

The debate is not limited to Washington political circles. It has now reached the broader public marketplace. Most vocal in the debate are movement conservatives that view the trend toward reliance on foreign authority as another example of “judges reflect[ing] a secular, liberal elite [who] are making rulings . . . contrary to the will of the majority of Americans.”<sup>54</sup> But it is far more complex than criticism from the right. National newspapers and magazines have addressed the topic of reliance on foreign authority, and public intellectuals are divided on the question.<sup>55</sup> The topic has received attention in major national newspapers and magazines such as *The Atlantic Monthly*,<sup>56</sup> *The New Republic*,<sup>57</sup> *First Things*,<sup>58</sup> *Policy Review*,<sup>59</sup> *The Nation*,<sup>60</sup> and *The New Yorker*.<sup>61</sup>

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chiefly Kennedy and Breyer, who are more enamored of the ‘enlightenment’ of the world than they are bound by our own Constitution.”

*Id.*

<sup>53</sup> See *Roper v. Simmons and Our Constitution*, *supra* note 14, at 26 n.153 (discussing calls for the impeachment of Justice Kennedy); see also Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A03 (noting that conservative political leaders have called for the impeachment of Justice Kennedy).

<sup>54</sup> Shailagh Murray, *Filibuster Fray Lifts Profile of Minister; Scarborough Has Network and Allies*, WASH. POST, May 8, 2005, at A01 (describing sentiments of Christian conservatives regarding courts’ attitudes toward religion).

<sup>55</sup> For example, in a *USA Today* column this past summer, Tony Mauro openly embraced the trend, noting that this controversy reflects

[a]n important debate about the court’s role. Conservatives who believe in a limited role for judges say the Supreme Court should stick to its knitting, namely interpreting the U.S. Constitution as written, and should ignore current fads here or abroad. But the counter-argument is strong. If globalization has flattened the world in terms of the economy and culture, isn’t it time that our legal system also look beyond our borders?

*U.S. Supreme Court*, *supra* note 28. By contrast, Jeffrey Rosen in *The New Republic* expressed great skepticism, noting that

[s]ocial conservatives view it as the latest symptom of the internationalization of the culture wars, with U.S. courts striking down traditional practices in the name of purported international moral values. But there is a liberal case against *Roper* as well. It is analytically sloppy and glib in its attempt to impose an international consensus where none in fact exists. And liberals should be wary about relying too heavily on international consensus. To the degree that foreign authorities do agree about moral values in other cases involving basic rights, they tend to be far less consistently progressive than liberals assume.

Jeffrey Rosen, *Court Outsourcing: Juvenile Logic*, NEW REPUBLIC, Mar. 21, 2005, at 11, 11.

<sup>56</sup> See generally Emily Bazelon, *What Would Zimbabwe Do?*, ATLANTIC MONTHLY, Nov. 2005, at 48 (discussing both proponents and critics of constitutional comparativism, including Supreme Court Justices and members of the academic community).

<sup>57</sup> See Rosen, *supra* note 55, at 11.

<sup>58</sup> See Michael M. Uhlmann, *The Supreme Court Rules: 2005*, FIRST THINGS, Oct. 2005, at 35, 37.

Richard Posner cites this attention in the national press and concludes that “the imprudence” of this “egregious departure from conventionality” is underscored “by the surprising antipathy that it has provoked—surprising because the citations in judicial opinions rarely receive attention in the lay press.”<sup>62</sup>

In short, the critics of constitutional comparativism are not limited to a few nationalist judges and scholars who are advancing “bizarre[]” and “remarkabl[e]” positions.<sup>63</sup> There is a groundswell of opposition to this trend from various corners and for a variety of reasons. It would be a mistake to discount the importance of this debate based on antipathy toward one or more justices or their constitutional persuasion. The debate is far deeper and richer.

### III. THE MISTAKE ABOUT HISTORY

The second mistake in the debate on outsourcing authority is about the novelty of constitutional comparativism. Many proponents feel threatened by recent criticism of this movement as something new and different. They seek comfort in the embrace of history.

This reliance on history comes in two varieties. The more dubious version is a distortion of Jefferson’s reference to a “decent respect to the opinions of mankind” in the Declaration of Independence.<sup>64</sup> Remarkably, Supreme Court Justices and respected scholars have relied on this passing reference to support the use of constitutional comparativism.<sup>65</sup> The frequent allusion to this brief mention in the

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<sup>59</sup> See generally Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL’Y REV., June & July 2005, at 33, 33 (discussing Justice Kennedy’s endorsement of the use of foreign law to interpret the constitution in *Roper*).

<sup>60</sup> See generally Editorial, *Too Young To Die*, NATION, Mar. 21, 2005, at 3 (noting “Justice Kennedy’s unapologetic embrace of international human rights standards” in *Roper*).

<sup>61</sup> See generally Toobin, *supra* note 52.

<sup>62</sup> *A Political Court*, *supra* note 38, at 84–85 (footnote omitted).

<sup>63</sup> See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 45, 56 (2004) [hereinafter *International Law*].

<sup>64</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>65</sup> See Ruth Bader Ginsburg, U.S. Supreme Court Assoc. Justice, Speech to the Annual Meeting of the American Society of International Law: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (April 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html> [hereinafter “A Decent Respect”]; *International Law*, *supra* note 63, at 43–44; Vicki Jackson, *Yes Please, I’d Love to Talk With You*, LEGAL AFF., July–Aug. 2004, at 43, 44; Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329, 337 (2004) [hereinafter *Looking Beyond Our Borders*]; David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 617 (2002);

Declaration of Independence is surprising given its obvious misappropriation. As Eugene Kontorovich has convincingly argued, the reference in the Declaration of Independence to “decent respect” is not about importing foreign opinion but rather about exporting our views to an interested foreign audience, in the form of a Declaration.”<sup>66</sup>

It is facile to suggest that the Founding Fathers intended for a passing reference in the 1776 Declaration to be used centuries later to justify a reading of the 1791 Bill of Rights that would satiate foreign opinion. Indeed, even allowing a liberal borrowing from the founding generation, a far better barometer of the Founders’ sentiments may be Washington’s Farewell Address, which warned “[a]gainst the insidious wiles of foreign influence” whose intrigues should be resisted by all patriots and whose “tools and dupes usurp the applause and confidence of the people, to surrender their interests.”<sup>67</sup> The sentiments of Washington (and Hamilton, the draftsman) were for Americans to be constantly awake and ever watchful that partiality toward other nations will veil their deceptive arts of influence and compromise our republican government.<sup>68</sup> Discussing the Farewell Address, his biographer Joseph Ellis notes that

Washington’s isolationist prescription rests atop a deeper message about American foreign policy, which deserves more recognition than it has received . . . . Washington was saying that the relationship between nations was not like the relationship between individuals, which could periodically be conducted on the basis of mutual trust. Nations always had and always would behave solely on the basis of interest.

. . . .

Th[is] realistic message . . . was Washington’s eternal principle, intended to endure forever.<sup>69</sup>

The extra-constitutional evidence notwithstanding, it certainly is

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Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1086 (2002) [hereinafter *Paying “Decent Respect”*]; Blackmun, *supra* note 13, at 39–40.

<sup>66</sup> Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”: International Law in Constitutional Interpretation*, 8 GREEN BAG 2d 261, 265 (2005).

<sup>67</sup> GEORGE WASHINGTON, FAREWELL ADDRESS (1796), reprinted in GEORGE WASHINGTON: A COLLECTION, at 524 (W.B. Allen ed., 1988).

<sup>68</sup> See JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 234–35 (2004).

<sup>69</sup> *Id.* at 235–36.

more accurate to say that a profound concern to protect against the risks of foreign invasion, not an affinity for enlightened foreign opinion, was a critical factor in the decision to include a Bill of Rights in the Constitution.<sup>70</sup> It is extraordinarily difficult to argue that we should interpret the Bill of Rights consistent with contemporary foreign opinion because that is what the Founding Fathers would have wanted us to do. As Justice Alito bluntly put it, “the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.”<sup>71</sup>

The second version of the argument for the historical pedigree of constitutional comparativism is less easily dismissed. This version suggests that reliance on foreign opinion is nothing new and that there is a long and storied tradition of Supreme Court citation to foreign sources.<sup>72</sup> This argument posits that references to foreign and international sources occur episodically in constitutional decisions throughout the Court’s history and that decisions such as *Lawrence*, *Roper*, and *Grutter v. Bollinger* simply return the Court to its prior practice.<sup>73</sup> Harold Koh has forcefully advocated this position, noting that “[f]rom the beginning . . . American courts regularly took judicial notice of both international law and foreign law” and it would mark a “stunning reversal of history” for United States constitutional interpretation to “now ignore international law standards and the practices of other countries.”<sup>74</sup>

There are several replies to this argument. First, scholars have now canvassed the entire corpus of Supreme Court decisions.<sup>75</sup> They conclude that the Court has relied upon foreign sources of law to some extent throughout its history, but that only recently has the Court relied with greater frequency on foreign precedent in

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<sup>70</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 318 (2005). Amar notes that national security was a principal motivation in the adoption of the Bill of Rights: “[c]o-opting the opposition agenda could . . . help achieve national cohesion and enhance national security. A thoughtfully drafted set of amendments could both cement the loyalty of Anti-Federalists across the continent and woo North Carolina and Rhode Island back into the union.” *Id.*; see Foreign Relations as a Matter of Interpretation, *supra* note 14, 42–44.

<sup>71</sup> *Alito Hearing*, *supra* note 50.

<sup>72</sup> See *Constitutional Comparisons*, *supra* note 34, at 109–11 & 109 n.4.

<sup>73</sup> *Id.* at 110–11.

<sup>74</sup> *International Law*, *supra* note 63, at 45.

<sup>75</sup> See generally 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 (2005) (detailing the Supreme Court’s use of foreign precedent throughout its history).

important constitutional cases.<sup>76</sup> What the Court has not done until very recently is rely on foreign sources where the decision of the Court depends primarily on the interpretation of the meaning of the Constitution or where the decision depends upon our country's own distinctive structure of government and unique form of federalism.<sup>77</sup> In short, a general historical practice by the Court of occasionally relying on foreign sources in specific contexts does not justify a reliance on foreign sources in novel ways, such as referencing the decision of a European human rights tribunal to divine what substantive due process requires.<sup>78</sup>

Second, the argument from history ignores one of the most momentous developments of the past fifty years: the global march of constitutionalism and the rise of international human rights. When the Supreme Court in 1908 relied on comparative experiences in *Muller v. Oregon*,<sup>79</sup> the basis for comparison was sparse. The Court borrowed liberally from the Brandeis Brief and cited working practices in six European countries.<sup>80</sup> It had little else to rely upon, for the world was a dramatically different place at that time. There was not a single international tribunal in existence, prompting Elihu Root in his 1912 Nobel Peace lecture to yearn for the day when an international court might be established to peacefully resolve disputes between nations.<sup>81</sup> Nor were there peer nations with constitutional courts. Parliamentary sovereignty reigned supreme throughout Europe, and attempts to import judicial review from the United States fell on deaf ears.<sup>82</sup> For decades, the prospects for global constitutionalism, much less constitutional comparativism, were grim.<sup>83</sup>

But the comparative landscape is radically different a century later. The modern era has seen a proliferation of international

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<sup>76</sup> *Id.* at 755.

<sup>77</sup> *Id.* at 755–56.

<sup>78</sup> *See id.* at 907–08 (noting Justice Scalia's rejection of the use of foreign precedent in most constitutional cases); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (finding that the decision of the European Court of Human Rights recognizing protection of consensual homosexual conduct informed the determination of whether such conduct was acceptable in "our Western civilization").

<sup>79</sup> 208 U.S. 412, 419–20 & 419 n.1 (1908).

<sup>80</sup> *Id.*

<sup>81</sup> *See* Elihu Root, *Nobel Lecture: Towards Making Peace Permanent* (1912), available at <http://nobelprize.org/peace/laureates/1912/root-lecture.html>.

<sup>82</sup> Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2744–45 (2003).

<sup>83</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 771 (1997).

tribunals and constitutional courts. By some estimates there are over one hundred international tribunals.<sup>84</sup> Likewise constitutional courts are more numerous than ever before in history,<sup>85</sup> as “[t]he Enlightenment hope in written constitutions is sweeping the world.”<sup>86</sup> The proliferation of constitutional courts and international tribunals has created new opportunities and risks for comparative reference. If in past decades the Supreme Court has occasionally courted with comparativism, today the suitors are more plentiful than ever, and many are unworthy of the match.

It is not simply the number of tribunals that is noteworthy. It is also the nature of their jurisprudence. These constitutional courts and international human rights tribunals are addressing analogous issues relating to individual liberties that provide historically unique opportunities for comparative reference.<sup>87</sup> As a result, the Bill of Rights is more susceptible than ever to comparative reference. The proliferation of international human rights tribunals has forced constitutional courts throughout the world to consider what accommodation, if any, should be given to international human rights norms in constitutional interpretation.<sup>88</sup> This effort at accommodation is a decidedly new enterprise in the history of constitutional interpretation.

Third, this global movement toward constitutionalism has in turn led to a concerted effort by internationalists to encourage federal judges, particularly Supreme Court Justices, to dialogue with other constitutional court judges with a view toward embracing international and comparative law and practice.<sup>89</sup> One could describe it as an organized campaign of judicial transnational norm internalization. International organizations, universities, and private groups routinely sponsor events and programs between American and foreign judges to encourage the exchange of

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<sup>84</sup> *International Tribunals*, *supra* note 14, at 680.

<sup>85</sup> Richard Posner has identified at least forty-seven constitutional courts. *A Political Court*, *supra* note 38, at 89 n.167.

<sup>86</sup> Ackerman, *supra* note 83, at 772.

<sup>87</sup> See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1900 (2003).

<sup>88</sup> See *id.* at 1890–99.

<sup>89</sup> See JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 133–74 (Robert Badinter & Stephen Breyer eds., 2004); see also Ronald J. Krotoszynski, Jr., “*Td Like to Teach the World to Sing (In Perfect Harmony)*”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. (forthcoming May 2006) (reviewing JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter & Stephen Breyer eds., 2004)).



opinions.<sup>90</sup> For example, New York University hosts an international judges' conference in Florence, Italy, and Yale Law School annually hosts senior judges from around the world in New Haven, Connecticut.<sup>91</sup> Participants in these events have often included Supreme Court Justices.<sup>92</sup>

Occasionally, this effort at proselytizing has had some remarkable converts. Nearly six years ago, Justice Kennedy attended a conference of the American Bar Association in London and "he objected in terms quite unequivocal... to the idea that the judgments of foreign constitutional courts could contribute in any meaningful way to the development of American constitutional law."<sup>93</sup> Today, this same Justice is the author of *Roper* and *Lawrence*, the two most important decisions that advance the cause of constitutional comparativism. As Jeffrey Toobin has noted, "Kennedy's unlikely transformation into a tribune of legal multiculturalism offers a striking lesson in the unpredictability of the Court."<sup>94</sup> It is difficult to assess the genesis of this transformation, but Justice Kennedy's frequent participation in these global exchanges with other constitutional judges likely contributed to his conversion.<sup>95</sup>

Finally, the modern era is unique in that we have Supreme Court Justices who are not simply relying on foreign authority to resolve cases and controversies, but actively embracing global constitutionalism in an effort to perform functions akin to foreign diplomats. Undoubtedly, the intellectual leader in the movement toward constitutional comparativism is Justice Breyer. Remarkably, Justice Breyer openly admits that he references "fledgling constitutional courts" in Supreme Court decisions in part to assist those courts by bolstering their legitimacy.<sup>96</sup> Likewise, as Justice Kennedy became an evangelist for freedom abroad, he recognized his efforts were more likely to succeed if he "listen[ed] as

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<sup>90</sup> Toobin, *supra* note 52, at 46.

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

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

<sup>93</sup> Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1637-38 (2004).

<sup>94</sup> Toobin, *supra* note 52, at 44.

<sup>95</sup> See Young, *supra* note 39, at 156-57; see also ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 99 (2004).

<sup>96</sup> See *In Search of a Theory*, *supra* note 1, at 706 & n.411; *Squaring the Circle*, *supra* note 46, at 1306 & n.87.

well as lectur[ed].”<sup>97</sup> Such judicial diplomacy has ruffled feathers at the White House, with Attorney General Alberto Gonzalez warning Supreme Court Justices about interfering with Executive Branch prerogatives on matters pertaining to foreign relations: “some justices seem to acknowledge that they refer to foreign law as an attempt at diplomacy. . . . [T]he Judiciary is not supposed to have a foreign policy independent of the political branches” and it “is not the job of the Supreme Court” to give some fledgling constitutional courts a “leg up” and others a “leg down.”<sup>98</sup>

So to those who maintain that there is nothing novel about the current rage of constitutional comparativism, my response would be that the following aspects are new and different: (1) the manner in which foreign authority is utilized by the Court; (2) the quantity and quality of foreign and international authority; (3) the move toward global constitutionalism and international human rights; (4) the concerted effort to lobby Supreme Court Justices to become internationalists; and (5) the willingness of Supreme Court Justices to expand their function beyond the simple and prosaic task of resolving cases before them.

It is a mistake to argue that there is nothing new in the current use of foreign authority. To his credit, Justice Breyer for one does not pretend otherwise. He recognizes that the Court is engaging in an enterprise of comparative constitutionalism that is novel and different.<sup>99</sup> At the annual meeting before the American Society of International Law he concluded his speech by waxing poetic about “the global legal enterprise that is now upon us.”<sup>100</sup> Of this age he remarked, “Wordsworth’s words, written about the French Revolution, will, I hope, still ring true: ‘Bliss was it in that dawn to be alive. But to be young was very heaven.’”<sup>101</sup> We are, Justice Breyer concedes, embarking down a path that has the hallmarks of a global constitutional revolution.

#### IV. THE MISTAKE ABOUT STATUTES

A third mistake in the debate on outsourcing authority is to fail to

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<sup>97</sup> Toobin, *supra* note 52, at 50.

<sup>98</sup> Prepared Remarks of Attorney General, *supra* note 48 (internal quotations omitted).

<sup>99</sup> See Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 266 (2003).

<sup>100</sup> *Id.* at 268.

<sup>101</sup> *Id.* (quoting WILLIAM WORDSWORTH, FRENCH REVOLUTION, THE COMPLETE POETICAL WORKS (1888)).

distinguish between statutory and constitutional interpretation. Some proponents of constitutional comparativism note approvingly the longstanding tradition of interpreting statutes consistent with international norms.<sup>102</sup> A proper appreciation for outsourcing authority would make a sharp distinction between this relatively uncontroversial practice of importing international law through statutory presumptions, and the quite controversial practice of interpreting constitutional liberties consistent with international law.

Statutory interpretation has long employed presumptions that are animated by concerns for international law. The presumption against extraterritoriality, for example, counsels “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>103</sup> The purpose of this canon is “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>104</sup> The scope of this presumption reflects international law principles of prescriptive jurisdiction, reflecting the assumption that “legislators take account of the legitimate sovereign interests of other nations when they write American laws.”<sup>105</sup>

In a similar vein, the *Charming Betsy* canon of statutory interpretation provides that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>106</sup> The purpose of the canon has been debated.<sup>107</sup> The rule of construing statutes to avoid violations of the law of nations supports the “cardinal principle” rooted in *Charming*

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<sup>102</sup> See, e.g., Prepared Remarks of the Attorney General, *supra* note 48.

<sup>103</sup> *Equal Employ. Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1077-78 (codified as amended in scattered sections of 42 U.S.C.).

<sup>104</sup> *Id.*; see also *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), *cert. denied*, 126 S.Ct. 1043 (2006).

<sup>105</sup> *F. Hoffman-LaRoche*, 542 U.S. at 164.

<sup>106</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

<sup>107</sup> See Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 211-17 (1993); see generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (concluding that the use of the *Charming Betsy* canon today should be limited to preserving the governmental separation of powers); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (evaluating the *Charming Betsy* canon and advocating the consideration of international law in statutory interpretation).

*Betsy* that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>108</sup>

[T]he substantive reach of an ambiguous statute must be construed in light of the implications that an international law violation would have for the executive branch. Consistent with separation of powers concerns, it reflects a desire to interpret statutes to avoid inter-branch usurpations of power in an effort to carefully husband the complex relationship of the federal branches in the international context.<sup>109</sup>

These statutory presumptions afford numerous opportunities to import international law into ambiguous statutory provisions. The success of these presumptions at internalizing international law has engendered enthusiasm for the application of international law in the constitutional context. Numerous scholars, for example, have proposed a constitutional *Charming Betsy* doctrine.<sup>110</sup> Making no distinction between constitutional and statutory interpretation, Justice Blackmun for example famously argued that “it . . . is appropriate to remind ourselves that the United States is part of the global community . . . and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with ‘the customs and usages of civilized nations.’”<sup>111</sup>

There is little basis to support transplanting a doctrine founded on separation of powers to the protection of constitutional liberties. To argue that constitutional guarantees must be interpreted to take account of foreign and international law presumes a greater role for foreign affairs in our constitutional system than is permitted. In order to support a constitutional *Charming Betsy*, proponents essentially must argue that separation of powers concerns justify interpreting constitutional liberties consistent with international obligations. A few proponents of this approach have made just such

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<sup>108</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>109</sup> Foreign Relations as a Matter of Interpretation, *supra* note 14.

<sup>110</sup> See Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 427 (2004); Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 335–37 (2003); see also Paying “Decent Respect”, *supra* note 65, at 1128–29.

<sup>111</sup> Blackmun, *supra* note 13, at 49 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

arguments. In an Amici Curiae brief in *Roper*, for example, Harold Koh maintained that we should interpret the Eighth Amendment to avoid diplomatic tensions stating that

[t]he United States is needlessly placed on the defensive in diplomatic missions. Instead of focusing on advancing U.S. interests, U.S. diplomats abroad are increasingly called into meetings to answer foreign criticisms of the death penalty. . . .

. . . .

[T]his continuing state practice [of executing juvenile offenders] seriously disserves this nation's broader foreign policy objectives and undermines this nation's leadership role in the world.<sup>112</sup>

Likewise, in *Roper*, Nobel Peace laureates filed an Amici Curiae brief citing *Charming Betsy* for the proposition that “[t]his Court always has maintained that United States courts must construe domestic law so as to avoid violating principles of international law.”<sup>113</sup> They argued that:

By continuing to execute child offenders in violation of international norms, the United States is not just leaving itself open to charges of hypocrisy, but also is endangering the rights of many around the world. Countries whose human rights records are criticized by the United States have no incentive to improve their records when the United States fails to meet the most fundamental, base-line standards.<sup>114</sup>

Thus, the remarkable position of these proponents is that international discord should inform constitutional guarantees. In essence, constitutional law must conform to international values to avoid foreign relations difficulties for the Executive Branch. Such a *Charming Betsy* gloss on the Constitution empowers diplomatic demarches to have constitutional relevance in interpreting the scope of constitutional guarantees. The call is not for the Constitution to

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<sup>112</sup> Brief for Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Respondent at 23–26, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636448 at 23–26.

<sup>113</sup> Brief for President James Earl Carter, Jr. et al. as Amici Curiae Supporting Respondent at 5 & n.13, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636446 at 5 & n.13.

<sup>114</sup> *Id.* at 29.

be countermajoritarian or even democratically majoritarian.<sup>115</sup> The call is for the Constitution to be internationally majoritarian.<sup>116</sup>

It would be a mistake in the debate on outsourcing authority to make no distinction between constitutional and statutory interpretation. Conformity to international law in statutory interpretation has a respected and quite legitimate structural role in our constitutional system. But it is a different proposition altogether to embrace a constitutional *Charming Betsy*. Fortunately, few proponents of outsourcing authority have taken this position seriously. It is one of the least likely comparative arguments to garner support from the Court. Indeed, thus far there is no judicial or extrajudicial support for a constitutional *Charming Betsy* among current members of the Court.

#### V. THE MISTAKE ABOUT OUTCOMES

The final mistake in the debate on outsourcing authority is to assume that the outcome of constitutional comparativism will be an expansion of individual liberties. That has not proven to be the case in the United States, and there is no reason to assume it will be so in the future.

Richard Goldstone, a former justice of the South African Constitutional Court who was quoted in a recent article of the *New Yorker*, reflected this mistaken assumption when he surmised that

The United States is probably the most conservative democracy in the world . . . . The death penalty, gender, welfare—you name it . . . . So, in looking at what other democracies are doing, it would mean looking to the left, not to the right. I think conservatives in the United States are saying, ‘Don’t do it, because it gives us bad answers.’<sup>117</sup>

He may be right in one sense, for it appears the recent kerfuffle over constitutional comparativism has reflected as much angst among social conservatives as it has among proponents of judicial restraint.<sup>118</sup>

Likely this is because the recent celebrated examples of constitutional comparativism have all represented an expansion of individual liberties. *Lawrence* interpreted the requirements of

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<sup>115</sup> See *Misusing International Sources*, *supra* note 14, at 59.

<sup>116</sup> See *id.* at 58–59.

<sup>117</sup> Toobin, *supra* note 52, at 50 (internal quotation marks omitted).

<sup>118</sup> See *id.* at 43–44.

substantive due process in light of foreign experiences to strike down an anti-sodomy law,<sup>119</sup> and *Roper* and *Atkins* prohibited the imposition of the death penalty on juveniles and the mentally retarded.<sup>120</sup> One might add to this list the landmark case of *Miranda v. Arizona*, which relied on foreign experiences to impose limits on police interrogations.<sup>121</sup>

But using comparative experiences to broaden constitutional guarantees is not necessarily the norm. The Court frequently has relied on foreign authority to curtail, not expand individual liberties. The United States Reports are replete with instances in which the Court has relied on foreign experiences to uphold the constitutionality of government action that limits individual rights. In *Eldred v. Ashcroft*, the Court relied on international experiences to curtail the general freedom to publish and extend the term of copyright.<sup>122</sup> In *Burson v. Freeman*, the Court relied on international practices to justify a restriction on core political speech around the voting booth.<sup>123</sup> In *Washington v. Glucksberg*, the Court relied on the criminality of physician-assisted suicide in western democracies to refrain from authorizing a constitutional right to the procedure.<sup>124</sup> In *Roth v. United States*, the Court relied on international law to justify restrictions on sexual speech.<sup>125</sup> In *Adamson v. California*, a case involving prosecutorial commentary on a defendant's refusal to testify, the Court's opinion and Justice Frankfurter's concurrence relied on Anglo-American experiences to conclude that the right was not so fundamental as to be applicable to the states.<sup>126</sup> In *Palko v. Connecticut*, the Court examined foreign experiences to conclude that double jeopardy protection was not implicit in ordered liberty and applicable to the states by virtue of the Fourteenth Amendment.<sup>127</sup> In *Muller v. Oregon*, the Court relied on foreign experiences to limit the freedom and equality of

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<sup>119</sup> See 539 U.S. 558, 576–78 (2003).

<sup>120</sup> 543 U.S. 551, 575–79 (2005); 536 U.S. 304, 316 n.21, 321 (2002).

<sup>121</sup> See 384 U.S. 436, 442–43 (1966).

<sup>122</sup> See 537 U.S. 186, 205–06, 208 (2003). Of course, in so doing the Court curtails the freedoms of the general public and simultaneously expands the freedom of copyright holders.

<sup>123</sup> See 504 U.S. 191, 202–03, 211 (1992).

<sup>124</sup> See 521 U.S. 702, 718 n.16, 735 (1997).

<sup>125</sup> See 354 U.S. 476, 484–85 (1957).

<sup>126</sup> See 332 U.S. 46, 48–49, 55–56, 59 (1947), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>127</sup> See 302 U.S. 319, 326–28, 326 n.3 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

women in the workplace.<sup>128</sup> In *Hurtado v. California*, the Court relied on foreign experiences to conclude that grand jury indictment was not a constitutional requirement applicable to the states.<sup>129</sup> In *Reynolds v. United States*, the Court noted that polygamy was detested throughout Europe and held that a statute punishing bigamy was constitutional.<sup>130</sup> In *Dred Scott v. Sandford*, several justices concurring in the judgment of the Court relied on comparative experiences to justify the conclusion that Scott was not a citizen of Missouri subject to the jurisdiction of the Court.<sup>131</sup> It is simply ahistorical to conclude that constitutional comparativism is a vehicle for the relentless march toward broader horizons of limitless hope and freedom.

Looking to the future, the Court will continue to receive invitations to reference foreign experiences in order to uphold government restrictions on individual freedoms or curtail the expansion of rights. Much has been written already about constitutional comparativism and the protection of free speech and the right to abortion.<sup>132</sup> Few doubt that the likely consequence of reliance on foreign authority in those contexts would be to confirm the reasonableness of further government restrictions.<sup>133</sup>

But there are other issues rarely addressed by constitutional comparativists. For example, the experience abroad with regard to gay marriage is, in many respects, the factual converse of the experience in *Roper* with the juvenile death penalty. In *Roper*, the Court concluded that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant

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<sup>128</sup> See 208 U.S. 412, 419–21, 419 n.4 (1908).

<sup>129</sup> See 110 U.S. 516, 530–32 (1884).

<sup>130</sup> 98 U.S. 145, 164–66 (1878).

<sup>131</sup> See 60 U.S. 393, 468, 484–85, 497–99 (1856) (Nelson, J., concurring) (Daniel, J., concurring) (Campbell, J., concurring), *superseded by* U.S. CONST. AMEND. XIII; see also Calabresi & Zimdahl, *supra* note 75, at 794–99.

<sup>132</sup> See *Roper v. Simmons*, 543 U.S. 551, 624–26 (2005) (Scalia, J., dissenting); see also Krotoszynski, *supra* note 89; *Relevance of Foreign Legal Materials*, *supra* note 18, at 521; *Roper v. Simmons and Our Constitution*, *supra* note 14, at 23–24; *International Materials and Domestic Rights*, *supra* note 44, at 77 & n.45; *Misusing International Sources*, *supra* note 14, at 67–68.

<sup>133</sup> At the Fall 2005 Symposium at Albany Law School, Mark Tushnet was explicit: “If contemporary U.S. liberals have gotten off the rails they should get back on the rails. So what.” When asked whether this meant we might need to revisit cases such as *Mapp v. Ohio*, *Skokie*, *New York Times v. Sullivan*, and *Roe v. Wade* in light of international norms that provide lesser protections, he unequivocally said, “Yes.”  
Roger Alford, “Outsourcing Authority?": Symposium at Albany Law School, *Opinio Juris*, Oct. 27, 2005, <http://lawofnations.blogspot.com/2005/10/outourcing-authority-symposium-at.html>.



confirmation for our own conclusions.”<sup>134</sup> That world opinion led the Court to conclude that “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>135</sup> By contrast, only a handful of countries sanction gay marriage,<sup>136</sup> and there is no international treaty imposing an obligation to guarantee that right. The comparative experience with gay marriage is far closer to *Glucksberg* than *Roper*.

A recent case from South Africa may be a harbinger of just how difficult the issue of gay marriage will be for internationalists in the United States.<sup>137</sup> The South African Constitutional Court recently addressed the issue of gay marriage, and the South African government argued that international and foreign authority should be referenced to uphold the status quo banning same-sex marriage.<sup>138</sup> Although the South African Constitutional Court had previously relied extensively on international and comparative law in the celebrated death penalty case of *State v. Makwanyane*,<sup>139</sup> the Court in *Fourie* ignored comparative experiences and severely discounted the importance of international law.<sup>140</sup> It noted that

while it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.<sup>141</sup>

Thus, unlike the courts in *Roper* or *Makwanyane*, the Constitutional

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<sup>134</sup> 543 U.S. 551, 578 (2005).

<sup>135</sup> *Id.* at 577.

<sup>136</sup> Same-Sex Marriage FAQ, <http://marriage.about.com/cs/samesexmarriage/a/samesex.htm> (last visited Mar. 8, 2006).

<sup>137</sup> On the use of comparative and international law in support of gay marriage in the U.S. context, see generally Robert Wintemute, *The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe, and South Africa Help the SJC?*, 38 NEW ENG. L. REV. 505 (2004). The issue is percolating through various state and federal courts. Most recently in a pending California state appellate court case, advocates intend to file an amicus brief citing comparative experiences, particularly the South African and Canadian cases. See *In re Coordination Proceeding*, 2005 WL 583129 (Cal. Sup. Ct. Mar. 14, 2005); E-mail from Noah Novogrodsky, Director, International Human Rights Clinic, University of Toronto, to Roger Alford, Associate Professor of Law, Pepperdine University School of Law (Jan. 2, 2006) (on file with Albany Law Review).

<sup>138</sup> See *Minister of Home Affairs v. Fourie* 2006 (3) BCLR (CC) at 27 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/5257.PDF>.

<sup>139</sup> See *State v. Makwanyane* 1995 (3) SA 391 (CC) at ¶¶ 33–79 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2353.PDF>.

<sup>140</sup> See *Fourie*, (3) BCLR at 29.

<sup>141</sup> *Id.* at 66.

Court did not look to international law to supply a standard—it provided a floor that was rejected.<sup>142</sup> After dismissing the importance of foreign authority as an interpretive aid, the Court found the right of gay marriage to be constitutionally required.<sup>143</sup>

But as outlined above, the United States Supreme Court is far less prone to use international law as a one-way ratchet only to expand rights. One should anticipate that efforts to expand the right of marriage to same-sex couples through constitutional decision-making will be met, as in *Glucksberg*, with conservative arguments that the weight of foreign and international authority is against the practice and that the opinion of the world community, while not controlling, provides respected and significant confirmation of the *status quo*.

In short, a genuine embrace of constitutional comparativism requires a certain attitude about United States exceptionalism. To the extent that the United States has been at the forefront in expanding civil liberties, this movement questions the legitimacy of that approach.<sup>144</sup> With this methodology, what we are seeking are “common denominators of basic fairness governing relationships between the governors and the governed.”<sup>145</sup> The hidden message is that aberrant practices that expand or curtail rights outside the international norm are suspect. Outlier behavior is subject to challenge simply because it departs from the opinions and practices of the world community.

Of course, all of the celebrated examples of constitutional comparativism have been rights-enhancing. Unwittingly, the Court thereby has laid a trap for itself. By relying only on foreign authority to expand rights in contentious cases, in the future it will

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<sup>142</sup> See *id.* at 64–66. The Constitutional Court held that even if the purpose of the [international] instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection. Indeed, rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity.

.....  
It would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right.

*Id.*

<sup>143</sup> *Id.* at 66, 72.

<sup>144</sup> See *Misusing International Sources*, *supra* note 14, at 58.

<sup>145</sup> “A Decent Respect”, *supra* note 65 (internal quotation marks omitted).

be accused of hypocrisy and results-oriented jurisprudence if it does not rely on foreign authority to limit constitutional rights. As Justice Scalia noted in *Roper*,

[t]he Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.<sup>146</sup>

Justice Breyer is quite sensitive to this criticism, noting defensively: "I hope that I, or any other judge, would refer to materials that support positions that the judge disfavors as well as those that he favors."<sup>147</sup> Therefore, one should anticipate internationalists on the Court to receive withering rebuke if they do not rely on foreign authority to restrict constitutional liberties the next time a hot-button issue like partial birth abortion is on the docket.<sup>148</sup>

In conclusion, it is a mistake to assume that advocates of constitutional comparativism will be limited to those who wish to expand constitutional liberties. The Court has not, should not, and will not rely on foreign authority as a one-way ratchet that only broadens constitutional liberties.

## VI. CONCLUSION

The debate on outsourcing authority will continue as long as the Supreme Court maintains its current practice of referencing international and comparative law to resolve contentious constitutional questions. The debate has proven instrumental in forcing internationalists on the Court to more carefully defend the practice. For example, Justice Breyer now admits he made a "tactical error" in promiscuously citing Zimbabwe as authority, recognizing it is "not the human rights capital of the world."<sup>149</sup> Justice O'Connor has declared comparativism off-limits for Establishment Clause jurisprudence<sup>150</sup> and illegitimate as a

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<sup>146</sup> 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

<sup>147</sup> *Relevance of Foreign Legal Materials*, *supra* note 18, at 523.

<sup>148</sup> When Justice Ginsburg was asked at the recent American Society of International Law annual meeting "whether constitutional comparativism was appropriate for questions such as abortion, she conceded that here too we should 'look abroad for negative examples.'" *Roper v. Simmons and Our Constitution*, *supra* note 14, at 22.

<sup>149</sup> *Relevance of Foreign Legal Material*, *supra* note 18, at 528.

<sup>150</sup> See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring),

standard in the absence of a national community standard.<sup>151</sup> Justice Ginsburg now concedes that there is no logical reasons for her not to “look abroad for negative examples” on abortion.<sup>152</sup> Justice Kennedy in *Roper* displayed sensitivity to the risks of the “international countermajoritarian difficulty”<sup>153</sup> by cabining reliance on comparative experiences to a “confirmatory” role.<sup>154</sup> Thus, every Supreme Court justice who advocates the use of constitutional comparativism is now making significant concessions. In short, internationalists on the Court are conceding that constitutional comparativism cannot be done haphazardly, selectively, or undemocratically.<sup>155</sup>

Equally significant, a judge’s willingness to rely on comparative experiences in constitutional interpretation quickly has become an important test for many senators in judging a judicial nominee’s qualifications. Both Chief Justice Roberts and Justice Alito were asked on more than one occasion their views of the propriety of constitutional comparativism.<sup>156</sup> One wonders whether a new Supreme Court nominee can openly embrace the practice and not risk the dreaded label of a judicial activist. Also, it is questionable whether district court or appellate court judges with aspirations of higher judicial official will be willing to take the risk of citation to foreign authority in constitutional interpretation.

In the near future, the Court repeatedly will be invited to reference foreign authority in constitutional cases. How the Court responds to those overtures will be a signal of the vitality of the movement for the Roberts Court. One suspects that the internationalists on the Court are in quiet retreat, as they hope to garner the vote of Chief Justice Roberts or Justice Alito and cannot do so if they season their decisions with exotic foreign references.

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*cert. denied*, 125 S. Ct. 2988 (2005) (“Those who would renegotiate the boundaries between church and state must . . . answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”).

<sup>151</sup> See *Roper*, 543 U.S. at 604 (O’Connor, J., dissenting) (“Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed . . . I can assign no such *confirmatory* role to the international consensus described by the Court.”).

<sup>152</sup> See note 148 *supra*.

<sup>153</sup> See *Misusing International Sources*, *supra* note 14, at 59.

<sup>154</sup> 543 U.S. at 578.

<sup>155</sup> These were all early criticisms about the practice of relying on foreign authority. See *generally Misusing International Sources*, *supra* note 14.

<sup>156</sup> See *Roberts Hearing*, *supra* note 49 (statements of Sen. Sam Brownback, Sen. Tom Coburn, Sen. John Cornyn, Sen. Mike DeWine, Sen. Jon Kyl, Sen. Jeff Sessions); *Alito Hearing*, *supra* note 50 (statements of Sen. Tom Coburn, Sen. Jon Kyl, Sen. Jeff Sessions).

So the only Supreme Court decisions that afford a vehicle for reference to comparative experiences are ones that do not include the names of four skeptical justices. And another 5-4 decision by the internationalists on the Court to expand constitutional liberties in consonance with the evolving norms of international practice seems rather unlikely given the bracing storm of protest that *Lawrence* and *Roper* engendered. Justices, even cosmopolitan ones, do not fancy serious ridicule for being overtly political in their decision-making,<sup>157</sup> which is one of the gravest indictments one can level against a judge.<sup>158</sup>

In short, the current debate has succeeded in crystallizing meritorious concerns about the practice of constitutional comparativism. Hopefully those who propose continued use of foreign authority in constitutional decision-making will do so with greater effort at avoiding common mistakes that have been so disappointingly on display thus far. Going forward, proponents should be striving for bounded rationality,<sup>159</sup> not the unbounded enthusiasm of the recent past.

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<sup>157</sup> See *A Political Court*, *supra* note 38, at 88–90.

<sup>158</sup> See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 267 (2005) (“The perceived need to cabin judges from politics [has] motivated most of constitutional theory in the second half of the twentieth century.”).

<sup>159</sup> I borrow the term from Russell Korobkin. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1243 (2003) (“Because of cognitive limitations, as well as external constraints on time and effort, all plausible decisionmaking approaches are necessarily boundedly rational.”). Just as with consumer choice for products, consumers in the marketplace of ideas do not have the cognitive ability, time, or energy to fully appreciate the choices they are making. Proponents of constitutional comparativism might reassess the rationality of their choice if they could envision the full consequences of their position. Lacking such an understanding, they should greet the proposed methodology with a greater degree of caution.