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Cover Page Footnote

Professor of Law, Pepperdine University School of Law. I gratefully acknowledge the help of research assistant Jake Nare and research librarian Jennifer Allison. This essay was supported by a generous grant from Pepperdine University School of Law.

LOWER COURTS AND CONSTITUTIONAL COMPARATIVISM

Roger P. Alford*

INTRODUCTION

The issue of constitutional comparativism has been a topic of significant commentary in recent years. Given that there are literally thousands of articles on the subject, one would have expected this subject matter to be exhausted.¹ Despite extensive analysis, there is one aspect of this subject that has been almost completely ignored by scholars: the reception, or lack thereof, of constitutional comparativism by state and lower federal courts.

In *Roper v. Simmons*, the U.S. Supreme Court warmly embraced the use of international and foreign sources in interpreting the Constitution.² The Court concluded that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”³ If such opinions purportedly provide respected and significant confirmation, it could logically be expected that state and federal courts would follow the Supreme Court’s lead and share in the embrace. However, they most decidedly have not. In fact, if one were to identify the single most important development in constitutional comparativism since *Roper* was decided on March 1, 2005, it would be the story of what has not happened; the story of over three years of neglect, indifference, and detachment. This essay briefly summarizes the unappreciated tale of how state and federal courts have declined the Supreme Court’s invitation to rely on international and comparative material to decide constitutional cases. The response of lower courts to

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1. A search in Westlaw’s JLR (i.e., “journals and law reviews”) database for “*Roper v. Simmons*” or “*Lawrence v. Texas*” and either “international,” “foreign,” or “comparative,” returned over 3000 articles.

2. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (discussing the laws of other countries and international authorities as “instructive” in deciding that execution of an individual who was younger than eighteen when he committed a capital crime is a violation of the Eighth and Fourteenth Amendments). In *Roper*, the “Supreme Court spent perhaps 20 percent of its legal analysis discussing the laws of Great Britain, Saudi Arabia, Yemen, Iran, Nigeria and China.” *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370 (2006).

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

these overtures could be described using an anthropomorphism rather simply: “We’re just not that into you.”

This is not how advocates of constitutional comparativism thought the plot line would advance. The plan, developed by “an emerging vanguardist intellectual movement,” was to transform American constitutional law and its interpretation by convincing judges to reject traditional notions of sovereignty and become key participants in the construction of a new global system.⁴ As one commentator put it in 2004, “[e]ventually, and possibly sooner than we think, the nature and path of American constitutional development will be radically altered.”⁵ That was the plan anyway. What was not planned was the domestic backlash against comparativism. That backlash was swift and immediate. In the weeks and months following *Lawrence v. Texas*⁶ and *Roper*,⁷ proponents of constitutional comparativism were challenged like never before. Just days after *Roper* was decided, Sarah Cleveland, a strong advocate of constitutional comparativism, approached Justice Sandra Day O’Connor at a cocktail party to praise her for embracing this new trend. Justice O’Connor responded rather sharply, “Well, it certainly has gotten us into a lot of trouble!”⁸ Trouble indeed. Academics loudly and repeatedly admonished the justices for being sloppy, selective, disingenuous, and antidemocratic.⁹ Leaders from the judicial, executive, and political branches joined in the chorus of condemnation.¹⁰

4. Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 5.

5. *Id.* at 16.

6. 539 U.S. 558 (2003). In *Lawrence*, the U.S. Supreme Court held that a Texas statute “making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional” because it impinged on their “exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 558. In the majority opinion, Justice Anthony Kennedy asserted that the right to sexual freedom “has been accepted as an integral part of human freedom in many other countries” and cited European law, including a decision of the European Court of Human Rights, to support the Court’s holding. *Id.* at 573, 577; see also 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, 915 (2004) (“For the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution.”).

7. 543 U.S. 551 (citing to foreign and international sources to support the conclusion that the juvenile death penalty constitutes “cruel and unusual punishment” under the Eighth Amendment).

8. Posting of Roger Alford to *Opinio Juris*, Quotable Quotes from the Fordham Law Review Symposium, <http://opiniojuris.org/2007/10/08/quotable-quotes-from-the-fordham-law-review-symposium/> (Oct. 8, 2007, 11:56 EDT) (quoting Sarah Cleveland’s description of her interaction with Justice O’Connor).

9. For a summary of these different criticisms, see Roger Alford, *Four Mistakes in the Debate on “Outsourcing Authority”*, 69 ALB. L. REV. 653, 659–63 (2006).

10. See, e.g., H.R. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005) (proposed congressional resolutions condemning the use of “foreign judgments, laws, or pronouncements” by the courts in determining the meaning of the Constitution); Diarmuid F. O’Scannlain, U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?* (Oct. 11, 2004), in 80 NOTRE DAME L. REV. 1893, 1898–1900 (2005) (explaining how “recent examples of comparative constitutionalism in the Supreme Court’s jurisprudence have drawn

During their confirmation hearings, Supreme Court nominees John Roberts and Samuel Alito expressed their firm opposition to the interpretive approach.¹¹ Original leaders of the movement now sound more defensive than ever, as demonstrated by Justice John Paul Stevens's statement from the bench conceding that, "I know it is not popular to refer to international commentary on issues like this"¹²

This backlash has severely dampened the enthusiasm for constitutional comparativism. Since *Roper*, the Supreme Court has been conspicuously silent on the subject and has repeatedly rejected opportunities to rely on international and comparative material in constitutional cases. Despite deciding over fifty constitutional cases since *Roper*, the Supreme Court has not once relied on contemporary foreign or international law and practice to interpret constitutional provisions. This is notwithstanding the obvious opportunities to do so in contexts such as abortion,¹³ free speech,¹⁴ free exercise of religion,¹⁵ due process,¹⁶ equal protection,¹⁷ and the death

harsh responses from adherents to the traditional view that American courts should place exclusive reliance upon domestic sources of law"); *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); Alberto R. Gonzales, 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/archive/ag/speeches/2005/ag_speech_0511092.html (criticizing the use of constitutional comparativism by arguing 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).

11. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005) (expressing concern about the use of foreign law as precedent and arguing that, if you use foreign law, "you can find anything you want"); see also *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370–71 (2006) (expressing his belief that foreign law is not helpful in interpreting the Constitution and arguing that, because the United States was one of the first and foremost to develop individuals' rights, judges should only look to United States precedent in interpreting the Bill of Rights).

12. Transcript of Oral Argument at 41, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343) (referencing an amicus brief filed by the English law lords "discussing the international principle that nations that retain the death penalty may not extend the death penalty to crimes to which it does not presently apply").

13. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007) (considering the "validity of the Partial-Birth Abortion Ban Act of 2003 . . . , a federal statute regulating abortion procedures" (citation omitted)).

14. *Morse v. Frederick*, 127 S. Ct. 2618, 2630 (2007) (addressing whether a public school's prohibition of speech advocating illegal drug use violates a student's First Amendment rights).

15. *McCreary County v. ACLU*, 545 U.S. 844 (2005) (discussing whether a county's posting of the Ten Commandments at courthouses violates the First Amendment).

16. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (addressing whether an award of punitive damages, based in part on a jury's desire to punish defendant for harm caused to nonparties, amounts to a taking of property from defendant without due process).

17. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (determining whether a school district's decision to adopt "student assignment plans that rely

penalty.¹⁸ The Supreme Court's silence on this issue is deafening. The only notable examples of constitutional comparativism since *Roper* have been in the Second Amendment case of *District of Columbia v. Heller*¹⁹ and the Guantánamo habeas corpus case of *Boumediene v. Bush*.²⁰ Of course, in both those cases the approach adopted was of the variety Justice Antonin Scalia advocates: historical comparisons used to understand the original meaning of constitutional text.²¹

While the Supreme Court's enthusiasm for constitutional comparativism has waxed and now waned, lower state and federal courts have remained resolutely agnostic about this new movement. By any measure, the effort to encourage inferior state and federal courts to embrace constitutional comparativism has been an abject failure. This is of tremendous practical significance because over ninety-nine percent of all cases are resolved by lower state and federal courts.²² “[A]lthough the United States Supreme Court is technically the final word on federal law and cases,” as a practical matter, lower courts are “the courts of last resort for most litigants and the

upon race to determine which public school certain children may attend” violates the Fourteenth Amendment guarantee of equal protection).

18. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646, 2649–65 (2008) (considering whether imposing the death penalty for the crime of raping a child violates the Eighth Amendment “where the crime did not result, and was not intended to result, in death of the victim”); *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (discussing whether “a State’s refusal to change its method [of execution] can be viewed as ‘cruel and unusual’ under the Eighth Amendment” if it “rejects an alternative method that is ‘feasible’ and ‘readily available’ and would ‘significantly reduce a substantial risk of severe pain,’” absent a “legitimate penological justification”).

19. 128 S. Ct. 2783, 2797 (2008) (deciding whether the Second Amendment protects an individual right to possess firearms and whether the city’s ban on handguns violated that right by considering English law in interpreting the meaning of the text of the Second Amendment).

20. 128 S. Ct. 2229, 2245–46 (2008) (discussing the origin of the writ of habeas corpus in English law in order to determine whether detention of aliens designated as enemy combatants have the constitutional privilege of habeas corpus).

21. See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 655 (2005) (“Whether interpreting a constitution, treaty or statute, Justice Scalia seeks to understand original meaning. Accordingly, in interpreting a modern treaty, Justice Scalia will not hesitate to examine contemporary judicial decisions in Britain and Australia because, in his view, ‘[f]oreign constructions are evidence of the original shared understanding of the contracting parties.’” (quoting *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting))).

22. See Richard Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 36 (2005) (“If one assumes, very conservatively, that the total number of decisions reviewable by the Supreme Court was at least 75,000 in 2003 (remember that there were more than 55,000 federal appellate decisions alone that year), then since certiorari was granted in only 87 cases, the percentage of final decisions potentially eligible for review that the Supreme Court did review was only 0.12%.” (citing *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 505 (2004))); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 171 (2001) (“The Rehnquist Court has granted certiorari to less than four percent of petitions, accounting for less than one percent of all cases decided by courts of appeals.”).

sources of doctrinal development for most legal issues.”²³ Accordingly, if lower courts eschew constitutional comparativism, then this constitutes the rejection of a comparative interpretive methodology in virtually all cases.

I. STATE SUPREME COURTS

In considering all the state and federal courts below the Supreme Court, it could be expected that state supreme courts would be the most comfortable in relying on constitutional comparativism. State supreme courts are the final arbiter of the content of state constitutional rights and have experience using decisions of the Supreme Court and sister state supreme courts for persuasive authority in interpreting state constitutional guarantees. It was, after all, the Missouri Supreme Court in *Simmons v. Roper* that attached significance to comparative experiences before the U.S. Supreme Court’s ringing endorsement of the practice on appeal.²⁴ But the expectation that state supreme courts would rely on comparative constitutionalism has not been borne out by recent experience.

There have been over 3500 decisions rendered in constitutional cases in state supreme courts since *Roper* was decided on March 1, 2005.²⁵ Of those decisions, only forty make any reference to *Roper* at all, and of these, only six make any reference to foreign or international law. That is less than one percent of all state supreme court constitutional cases decided since March 1, 2005. Incorporating references to *Lawrence* does not appreciably change the results, with the number reaching twenty constitutional cases, which is still well below the one percent threshold. From a quantitative perspective, the highest courts of our fifty states are utterly disinterested in constitutional comparativism.

If one examines the handful of state supreme court cases that reference *Roper* and/or *Lawrence*’s reliance on foreign or international law, the results are even more depressing for comparativists. For the state supreme court constitutional cases that reference *Roper*, not a single case has relied on constitutional comparativism to strike down a law or overturn a conviction. One state supreme court acknowledged the Supreme Court’s reliance on international law in *Roper*, but declined to rely on international

23. Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1636 (1998).

24. *Simmons v. Roper*, 112 S.W.3d 397, 402 (Mo. 2003) (en banc), *aff’d*, 543 U.S. 551 (2005).

25. *Roper*, 543 U.S. 551. This number includes all state supreme courts, the New York Court of Appeals, as well as the Texas and Oklahoma Courts of Criminal Appeal. The search terms used to reach this number were the following: Allstates library, To(92) & date(aft 3/1/2005 & bef 6/15/2008) & pr(“supreme court”) & “*Roper v. Simmons*” & “international” “foreign,” plus Ny-cs library, To(92) & date(aft 3/1/2005 & bef 6/15/2008) & pr(“court of appeals”) & “*Roper v. Simmons*” & “international” “foreign,” plus TX-cs library, To(92) & date(aft 3/1/2005 & bef 6/15/2008) & pr(“court of criminal appeals”) & “*Roper v. Simmons*” & “international” “foreign,” plus OK-cs library, To(92) & date(aft 3/1/2005 & bef 6/15/2008) & pr(“court of criminal appeals”) & “*Roper v. Simmons*” & “international” “foreign.”

law when the question presented was whether someone who was eighteen at the time he committed the murders should be spared from the death penalty.²⁶ In two other state supreme court decisions, the courts refused to consider comparative material in the absence of a national consensus against the death penalty.²⁷ The Supreme Court of California expressed the reasoning supporting this national consensus requirement succinctly: “Although the practices and norms of other nations can be relevant in determining whether a punishment is cruel and unusual under the Eighth Amendment, they are not controlling. What matters are the standards of decency of the American people.”²⁸ Arguably the best candidate for recourse to constitutional comparison since *Roper* was the case of *State v. Kennedy*, where a man was sentenced to death for the aggravated rape of a child.²⁹ In that case, the Louisiana Supreme Court acknowledged the use and endorsement of foreign law by the Supreme Court in *Roper*, but completely ignored this methodology in its own analysis of the issue.³⁰

To the extent state supreme court judges have opined on *Roper*’s recourse to international and foreign law in interpreting constitutional protections, those opinions have been negative. The most eloquent example of this view came from Chief Judge Michael Heavican of the Nebraska Supreme Court. In *State v. Mata*, he argued that reliance on conventional standards of decency invites judges to inject subjective values into their decisions, and that reliance on foreign law should be a matter left to the legislative branches:³¹

[A]ll pretense of state or federal constitutional interpretation is lost the moment a judge looks to foreign law. *Roper* shows that a concern with contemporary standards of decency will inevitably lead to reliance on

26. *Jordan v. State*, 918 So. 2d 636, 656 (Miss. 2005). The court distinguished *Jordan v. State* from *Roper* based on the ages of the respective defendants, because unlike the defendant in *Roper*, Kelvin Jordan was eighteen years of age at the time of the murders. *Id.* After establishing grounds for differentiating *Jordan* from *Roper*, the Mississippi Supreme Court declined to “rely on international laws, covenants and treaties in determining whether the death penalty is appropriate.” *Id.* at 656.

27. *People v. Blair*, 115 P.3d 1145, 1189 (Cal. 2005), *cert. denied*, 547 U.S. 1107 (2006) (“Eighth Amendment analysis instead hinges upon whether there is a national consensus in this country against a particular punishment.” (citing *Roper*, 543 U.S. at 562–66)); *People v. Kennedy*, 115 P.3d 472, 504 (Cal. 2005), *cert. denied*, 547 U.S. 1076 (2006) (“Whether a form of punishment is cruel and unusual under the Eighth Amendment is determined based on an evaluation of evolving standards of decency.” (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))).

28. *Kennedy*, 115 P.3d at 504–05 (citing *Roper*, 543 U.S. at 575).

29. *State v. Kennedy*, 957 So. 2d 757 (La. 2007), *reh’g denied*, No. 98-1425, 2003 WL 25278316 (La. Dist. Ct. Oct. 2, 2003), *rev’d*, 128 S. Ct. 2641 (2008). The Supreme Court of Louisiana affirmed the defendant’s conviction and sentence to death. *Kennedy*, 128 S. Ct. 2641. Upon grant of certiorari, the Supreme Court of the United States held that the Eighth Amendment prohibits the state “from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.” *Id.* at 2646.

30. *Kennedy*, 957 So. 2d at 783–84 n.30.

31. *State v. Mata*, 745 N.W.2d 229, 288–90 (Heavican, C.J., concurring in part and dissenting in part), *cert. denied*, No. 08-5204, 2008 WL 2753427 (U.S. Oct. 6, 2008).

foreign law. After all, although our nation has a unique experience with constitutional interpretation, we have no monopoly on humanity.

Of course, it would be naïve to assume that the influence of foreign law will always result in an “expansion” of personal liberties Therefore, the specter that judges will rely on foreign law when interpreting our state and federal Constitutions is a broad-based concern.³²

The curtailment rather than expansion of individual liberties is precisely what occurred in the case of *State v. Romano*.³³ In *Romano*, the Hawaii Supreme Court addressed a claim that prostitution laws were an unconstitutional invasion of privacy.³⁴ The Hawaii Supreme Court held that there was a rational basis for prostitution laws and noted that there is a general consensus in the international community against the practice of prostitution.³⁵ The court cited two international treaties in support of the proposition that countries take all appropriate measures to suppress the exploitation and prostitution of women.³⁶ The *Romano* decision is the latest example of how courts have relied on comparative experiences to curtail individual liberties. Thus, even in those extremely rare instances when a state court does rely on international or foreign law, it often does so to uphold government restrictions on private conduct.³⁷

Finally, in *State v. Roque*, the Supreme Court of Arizona addressed the issue in the bizarre context in which the defendant argued it was constitutionally impermissible for a prosecutor to consult foreign opinion in seeking the death penalty.³⁸ On September 12, 2001, one day after the terrorist attacks on the United States, defendant Frank Roque declared his intent to “shoot some ‘rag heads.’”³⁹ A few days later Roque murdered a Sikh of Indian descent.⁴⁰ In Arizona, the state may seek the death penalty if it can prove the defendant committed aggravated first degree murder.⁴¹ Therefore, in seeking the death penalty, prosecutors consulted with the Indian government to help determine if the murder was aggravated based on the race, ethnic background, or religion of the victim.⁴² Defendant argued that such consultations with foreign officials were unconstitutional.⁴³ The

32. *Id.* at 288–89.

33. 155 P.3d 1102 (Haw. 2007).

34. *Id.* at 1109–15.

35. *Id.* at 1114 n.14.

36. *Id.* (citing Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; Convention for the Suppression of the Traffic in Person and the Exploitation of Others, Dec. 2, 1949, 96 U.N.T.S. 271).

37. See Alford, *supra* note 9, at 675.

38. *State v. Roque*, 141 P.3d 368, 401–02 (Ariz. 2006) (en banc).

39. *Id.* at 377.

40. *Id.*

41. *Id.* at 402 (citing ARIZ. REV. STAT. ANN. § 13-703 (2001)).

42. *Id.* at 401.

43. *Id.* at 402.

Arizona Supreme Court rejected the challenge, finding that the defendant made

no effective argument that a state may not consider the views of the government of a foreign country with respect to the murder of someone born there. Because the State has wide discretion in deciding whether to seek a death sentence and had a legitimate reason to seek the penalty in this case, the State did not violate the Eighth Amendment or the Fourteenth Amendment by consulting with the Indian government.⁴⁴

The cases that rely on *Lawrence* also offer little hope for comparativists. This is most aptly illustrated in the California Supreme Court's recent gay marriage case.⁴⁵ In order to strike down California's same-sex marriage laws under state equal protection grounds, the court had to reject the state's reliance on traditional practices in the United States and the world. The court noted that only six jurisdictions in the world—Massachusetts and five foreign nations (Canada, South Africa, the Netherlands, Belgium, and Spain)—authorize same-sex marriage.⁴⁶ Thus, ninety-eight percent of the countries of the world continue the traditional approach of only allowing marriage between couples of the opposite sex. In justifying the rejection of the practices of the overwhelming majority of the world, the court made the following argument:

In defending the state's proffered interest in retaining the traditional definition of marriage as limited to a union between a man and a woman, the Attorney General and the Governor rely primarily upon the historic and well-established nature of this limitation and the circumstance that the designation of marriage continues to apply only to a relationship between opposite-sex couples in the overwhelming majority of jurisdictions in the United States and around the world. Because, until recently, there has been widespread societal disapproval and disparagement of homosexuality in many cultures, it is hardly surprising that the institution of civil marriage generally has been limited to opposite-sex couples and that many persons have considered the designation of marriage to be appropriately applied only to a relationship of an opposite-sex couple.

Although the understanding of marriage as limited to a union of a man and a woman is undeniably the predominant one, if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. . . . [T]he interest in retaining a tradition that excludes an historically disfavored minority group from a status that is extended to all others—even when the tradition is long-standing and widely shared—does not necessarily

44. *Id.*

45. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

46. *Id.* at 450–51 n.70.

represent a compelling state interest for purposes of equal protection analysis.⁴⁷

In other words, longstanding and widespread comparative experiences should be rejected when they are thought to mask unfairness and inequality. Contrast this with the Supreme Court's reliance on comparative experiences in *Lawrence*, where the Court emphasized that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."⁴⁸ Or contrast this with the Court's language in *Roper* that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."⁴⁹ The California Supreme Court case illustrates that comparativism is of little value when a court chooses to be at the forefront of a social movement. It is one thing for constitutional comparativists to argue—as they did in *Lawrence* and *Roper*—that our “aberrant” practices should fall into line with the prevailing views of the rest of the world. But it is quite another thing when advocates argue that we should be at the cutting edge of a new social movement.⁵⁰ With the former approach, comparativism is a tailwind that moves the ship with the prevailing winds; with the latter approach, comparativism is an anchor that prevents the ship from moving from its present position.⁵¹ In either case, any court choosing to adopt a post hoc utilitarian approach can readily find excuses to rely on or reject this interpretive methodology as expediency requires.

The point of this brief foray into state supreme court jurisprudence is to underscore that even in those extremely rare moments when state supreme courts do rely on comparative material in deciding constitutional cases, the results are anything but hopeful for comparativists. The overwhelming posture of state supreme courts toward constitutional comparativism is disinterest. Less than one percent of all constitutional cases decided by

47. *Id.* at 450–51 (footnotes omitted).

48. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

49. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

50. For example, in a recent gay marriage case in Arizona, petitioners cited to growing international recognition of same-sex marriage or unions, but the Arizona Supreme Court concluded that, “[a]lthough same-sex relationships are more open and have garnered greater societal acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty.” *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 459 (Ariz. Ct. App. 2003).

51. See Posting of Roger Alford to *Opinio Juris*, *Gay Marriage and Constitutional Comparativism*, <http://opiniojuris.org/2006/07/27/gay-marriage-and-constitutional-comparativism/> (July 27, 2006, 13:22 EDT). It is worth noting that the Massachusetts Supreme Judicial Court and the California Supreme Court both rely on two Canadian cases in support of their holdings that same-sex marriage laws are unconstitutional. See *Standhardt*, 77 P.3d at 459 n.11 (“Courts in two Canadian provinces recently declared that confinement of marriage to opposite-sex couples violates the Canadian Charter of Rights and Freedoms.”); *Marriage Cases*, 183 P.3d at 442–43; *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 966 n.31, 969 (Mass. 2003). But the fact that both state supreme courts rely on Canadian cases in support of their argument does not belie the fact that in so doing they are rejecting the practices of the overwhelming majority of other countries in the world. California does so explicitly, while Massachusetts does so without admission.

state supreme courts rely on constitutional comparativism.⁵² In those occasional instances when they recognize the Supreme Court's embrace of comparativism, they almost always refuse to join the embrace.

II. FEDERAL COURTS

Both the federal appeals and district courts have proven even less receptive to constitutional comparativism than state supreme courts. Since *Roper* was decided, the federal courts of appeals have decided 5200 constitutional cases. Of those cases, less than one percent cited either *Lawrence's* or *Roper's* reliance on international or foreign experiences.⁵³ During that same period, federal district courts have decided 3300 constitutional cases and, again, less than one percent made any reference to either *Lawrence's* or *Roper's* use of comparative material.⁵⁴

As for federal appeals courts, there are few significant cases addressing the subject of constitutional comparativism since *Roper*.⁵⁵ One of the most significant is the U.S. Court of Appeals for the Ninth Circuit case of *Allen v. Ornoski*,⁵⁶ a case in which the defendant argued that the Eighth Amendment prohibited execution of the aged and infirm.⁵⁷ Clarence Ray Allen reasoned that execution of the elderly does not comport with evolving standards of decency in that it violates, among other things, norms of domestic and international law.⁵⁸ In a footnote, the Ninth Circuit rejected this argument, concluding that, "[w]hile international norms may also be instructive in this analysis, in light of the nonexistence of domestic authority supporting Allen's claim, and the lack of definitive international authority provided by Allen, we, as an intermediate court, decline to consider the asserted practices of foreign jurisdictions."⁵⁹ In some respects this conclusion seems unremarkable. The absence of a national consensus obviates any need to rely on international opinion to support such a consensus.⁶⁰ And the absence of any international consensus suggests that whatever benefit one might otherwise enjoy from comparative references

52. See *supra* note 22 and accompanying text.

53. The search terms used to reach this number were the following: CAP library, To(92) & date(aft 3/1/2005 & bef 6/15/2008) & "Lawrence v. Texas" "Roper v. Simmons" & "international law" "foreign law" "international norms" "foreign norms."

54. The search terms used to reach this number were the following: DCT library, To(92) & date(aft 3/1/2005 & bef 6/15/2008) & "Lawrence v. Texas" "Roper v. Simmons" & "international law" "foreign law" "international norms" "foreign norms."

55. Most of the lower federal courts' experience with constitutional comparativism involves one party referencing foreign material and the court refusing to consider it in their analysis. See, e.g., *Ramirez v. Gonzales*, 247 F. App'x 782, 786 (6th Cir. 2007); *United States v. McClure*, 241 F. App'x 105, 107 (4th Cir. 2007); *Allen v. Ornoski*, 435 F.3d 946, 952 n.8 (9th Cir. 2006); *Gordon v. Mule*, 153 F. App'x 39, 40 (2d Cir. 2005).

56. 435 F.3d at 946.

57. *Id.* at 954.

58. *Id.* at 952.

59. *Id.* at 952 n.8.

60. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 604–05 (2005) (O'Connor, J., dissenting); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58 (2004).

would not apply with respect to the question presented. But the conclusion is significant in that it suggests that a federal appellate court believed that there are reasons unique to its status as a lower court to be cautious about relying upon appeals to constitutional comparativism.

As for federal district courts, there are two decisions that are particularly significant examples of constitutional comparativism. The first is *Khouzam v. Hogan* which concerns due process violations and extraordinary rendition to Egypt.⁶¹ Sameh Sami Khouzam argued that his deportation to Egypt would result in torture there and that this violated his constitutional rights.⁶² The district court focused on Khouzam's right to be free from torture and the constitutional requirement that "the Government cannot return an alien to a country where there is a likelihood he will be tortured without affording the alien an opportunity to be heard."⁶³ The court then surveyed the practices of other countries in securing diplomatic assurances against torture from the receiving country before deporting the alien to that country.⁶⁴ The district court cited expert opinions that "Austria, Canada, Germany, Netherlands, Russia, Sweden, Switzerland, Turkey and the United Kingdom, all parties to [the Convention Against Torture], provide for judicial review of the reliability and sufficiency of diplomatic assurances."⁶⁵ The district court then cited *Lawrence* and *Roper* for the proposition that, "[a]lthough the opinions of international tribunals and courts of other countries have no binding effect in the United States, they are nonetheless often viewed as relevant in determining whether certain action in the United States violates fundamental interests."⁶⁶

The other significant federal district court case involving constitutional comparativism was *Thomas v. Baca*.⁶⁷ *Thomas* addressed the question of whether "floor-sleeping" due to prison overcrowding violated the inmate's Eighth Amendment right against cruel and unusual punishment.⁶⁸ The district court concluded that forcing inmates to sleep on the floor due to prison overcrowding rose to the level of a constitutional violation.⁶⁹ The court then argued that,

International guidelines support this basic right. . . . For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners . . . provide that "[e]very prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and

61. *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008).

62. *Id.* at 547.

63. *Id.* at 565.

64. *Id.* at 565–66.

65. *Id.*

66. *Id.* at 566.

67. 514 F. Supp. 2d 1201 (C.D. Cal. 2007).

68. *Id.* at 1205 n.1.

69. *Id.* at 1219.

sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness."⁷⁰

These two cases represent vastly different examples of constitutional comparativism. *Khouzam* represents a carefully drafted analysis of the due process rights of aliens applied to the difficult question of what diplomatic assurances regarding torture must be secured before an alien is deported. The court examined the experiences and case law in numerous other countries and, combined with extensive analysis of our own due process jurisprudence, reached the conclusion that the United States must afford minimum due process rights to aliens facing the specter of torture if deported.⁷¹

Thomas, by contrast, is among the worst possible examples of constitutional comparativism. The court does not purport to consider or analyze international or foreign law or practice. It could not do so, of course, and find support for a constitutional violation for the conduct at issue. So instead, the district court referenced the international guidelines adopted by the United Nations Economic and Social Council and gave those guidelines constitutional significance.⁷² This is notwithstanding the fact that the guidelines themselves expressly disclaim that they are legally binding.⁷³ Thus, *Thomas* conspicuously highlights the dangers of constitutional comparativism, which empowers judges to scan the international horizon for any possible authority to interpret constitutional guarantees. The international guidelines are not a treaty. They do not reflect customary international law,⁷⁴ but through the magic of

70. *Id.* at 1217–18 (quoting United Nations Standard Minimum Rules for Treatment of Prisoners, E.S.C. Res. 663 C (XXIV), ¶ 19, U.N. Doc. E/3048 (July 31, 1957) (amended May 13, 1977)).

71. See *Khouzam*, 529 F. Supp. 2d at 564.

72. *Thomas*, 514 F. Supp. 2d at 1217–18.

73. See E.S.C. Res. 663 C (XXIV), *supra* note 70, ¶ 19. The guidelines state that, In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavor to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

Id.

74. See Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 785–86 (1994) (“A determination that a customary norm has evolved with respect to the standards for the treatment of prisoners depends, in large part, on how one defines ‘humane treatment.’ While some aspects pertaining to the treatment of prisoners have quite clearly evolved into international customary law, others are far from the level of general acceptance, and may never achieve customary status. If ‘humane treatment’ means freedom from torture, then there is already near-universal recognition of a binding norm of international law. However, once the definition of ‘humane treatment’ is expanded to include a prohibition on ‘cruel, inhuman and degrading treatment,’ the status as customary international law is less clear. And if ‘humane treatment’ includes the right to a library, a single cell, or dental services, which are among the numerous Standard Minimum Rules, then it most certainly has not been generally accepted as a binding norm.” (footnotes omitted)).

constitutional comparativism, they have now become grafted into what is required under our Constitution. Prisoners' rights to recreation, physical exercise, cultural activities, education, dental hygiene, and libraries are all among the other recommendations in the international guidelines waiting to be anointed as constitutional guarantees.⁷⁵

The experience in federal courts since *Roper* regarding constitutional comparativism reflects an attitude of pervasive disinterest. Federal courts *almost never* decide constitutional cases by incorporating some analysis of international and foreign law or experience. In some cases, as with *Allen*, the court is expressly invited to engage in comparativism but declines the invitation. In rare cases, as with *Khouzam* and *Thomas*, federal courts engage in constitutional comparativism with decidedly mixed results, underscoring the promise and the peril of this interpretive methodology.

III. DECONSTRUCTING LOWER COURT DISINTEREST

Few, if any, comparative scholars will challenge the proposition that, since *Roper*, lower courts have displayed almost no interest in constitutional comparativism. But this disinterest is masked by the breathless scholarly fixation on the subject. Indeed, for every lower court reference to *Lawrence's* or *Roper's* recourse to constitutional comparativism there are dozens of law review articles on the subject.⁷⁶ You would never know it if you spent all your time reading secondary instead of primary sources, but the project of "bring[ing] international law home"⁷⁷ at the retail level of lower courts has been an abject failure.

While few will challenge the empirical conclusion that lower courts have declined the invitation to embrace constitutional comparativism, one suspects that scholars will differ sharply when it comes to deconstructing lower court disinterest. There are several possible explanations for the lower courts' current posture toward constitutional comparativism. None of these rationales can be established with any certainty, but they each are plausible explanations.

A. *Insufficient Time for Adoption*

One possible explanation for lower court disinterest is premised on the notion that the movement of constitutional comparativism is a new phenomenon and it is simply too early to tell whether they will embrace it. As one who espouses the view that the current wave of constitutional comparativism really is a new phenomenon, I am sympathetic to this argument.⁷⁸ But there are two reasons to reject this argument. First, this

75. See E.S.C. Res. 663 C (XXIV), *supra* note 70, ¶¶ 21, 22, 40, 77, 78.

76. There have been over 1269 articles published in the Westlaw JLR database with the search query "Roper v. Simmons" "Lawrence v. Texas" & "International Law" "International Norms" "Foreign Law" "Foreign Norms."

77. Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Human Rights Home (Apr. 8, 1998), in 35 Hous. L. Rev. 623, 642 (1998).

78. See Alford, *supra* note 9, at 667.

argument is of little value for proponents of comparativism. In order to underscore the legitimacy of this approach, comparative advocates have long argued that this interpretive methodology is not new but rather reflects a long and well-established tradition.⁷⁹ Those who argue that there is nothing new to comparativism will be at pains to argue that it is too early to assess whether lower courts will embrace this approach. If this methodology has a long tradition, it is a tradition of general and pervasive disuse. It is a bit like the tradition of Groundhog Day: we are told it happens, but we almost never see it happening. One cannot argue for the historical pedigree of this methodology and also maintain that it is too early to tell whether lower courts will adopt this approach.

Second, even if constitutional comparativism is a new phenomenon, the movement crystallized almost five years ago with the Supreme Court's decisions in *Lawrence* and *Roper*. Those momentous decisions sparked a tremendous amount of commentary at the bar, the bench, and the academy. If lower courts wished to seize the opportunity and follow in the path of those decisions, they have had more than enough opportunity to familiarize themselves with the debate and act upon it. Thus, this rationale, while plausible, is not a particularly convincing explanation for lower court disinterest in comparativism.

B. Institutional Legitimacy

A better explanation for why lower courts have been reluctant to embrace this interpretive methodology is because of concerns for institutional legitimacy. The backlash against *Lawrence* and *Roper* has been so intense that the Supreme Court has walked away from its earlier position. Lower courts undoubtedly share the same concern for institutional legitimacy as the Supreme Court. It is likely that courts balance the potential institutional costs of embracing this approach with the potential benefits and conclude that, in the overwhelming majority of cases, the costs outweigh the benefits.

The Ninth Circuit in *Allen* appeared to be voicing this concern when it stated that intermediate courts should decline the invitation to rely on foreign authority.⁸⁰ I recently had a conversation with one Ninth Circuit judge who expressed great caution about relying on any persuasive authority, much less authority from outside the United States. Most

79. See, e.g., Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 5–6 (2006) (“A broader view of U.S. constitutional history, however, indicates that international law has always played a substantial, even dominant, role in broad segments of U.S. constitutional jurisprudence.”); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004) (“From the beginning, then, American courts regularly took judicial notice of both international law and foreign law (the law and practice of other nations) when construing American law.”); Vicki Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF., July–Aug. 2004, at 43, 44, available at http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp (“In many early cases, the [Supreme Court] referred to the ‘law of nations’ (today called ‘international law’) or other countries’ practices.”).

80. *Allen v. Ornoski*, 435 F.3d 946, 952 n.8 (9th Cir. 2006).

constitutional cases can be resolved through the existing interpretive canons of text, structure, history, precedent, and national experience. For those cases that cannot, persuasive authority from other U.S. jurisdictions will often be available. Thus, those instances in which it will be useful to rely on comparative experiences to fill a void will be extraordinarily rare.

The Supreme Court, of course, shares this commitment to judicial precedent but has greater freedom to depart from precedent. It is worth noting that the three most significant instances of constitutional comparativism in recent years—*Atkins v. Virginia*, *Lawrence*, and *Roper*—were all examples of the Supreme Court reversing its own precedent. Even assuming lower courts were sympathetic to this methodological approach and the outcome that flowed therefrom, it is doubtful that lower courts perceive themselves as having the same institutional freedom to depart from precedent. Unlike the Supreme Court, lower courts will almost never rely on foreign or international law to depart from binding Supreme Court precedent.⁸¹

C. Institutional Competency

A third possibility for their reluctance is that lower courts lack the institutional competency to effectively engage in constitutional comparativism. State and federal judges rarely have been trained to deal with foreign or international material, either on the job or prior to joining the bench. Constitutional comparativism is an extraordinarily difficult task to do well, even in the best of circumstances. But when judges and their staff lack the training, and the lawyers fail to assist them, one is not surprised by lower courts' reluctance to employ this approach.

This concern really is another way of highlighting the cost-benefit analysis that overwhelmingly weighs against constitutional comparativism. Even assuming the benefits of this approach are significant (which is an uncertain proposition), the costs of effective use of this methodology are also extraordinarily high. These sources are never dispositive and are only useful as persuasive authority if they are easily accessible and readily digestible. In short, unlike almost every other type of persuasive authority, these sources are rarely low-hanging fruit ripe for the harvest.

It is no accident that in those cases in which lower courts do rely on comparative material, they are assisted in the task by extremely able counsel and/or amici. The American Civil Liberties Union was counsel in *Khouzam*, and Erwin Chemerinsky was counsel in *Thomas*. The California Supreme Court in the gay marriage case benefited from numerous amici and the able counsel of the Alliance Defense Fund. Obviously in the typical case in which courts confront constitutional issues, judges do not profit from expert amici or the most preeminent lawyers in the country.

81. The Missouri Supreme Court's decision in *Roper* is a notable exception. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 407 (Mo. 2003) (en banc).

D. Institutional Sanctions

Another possible explanation for lower court reluctance to rely on this methodology is that they are subject to greater institutional sanction than the Supreme Court. State court judges in twenty-two states are elected, and in an additional sixteen states, merit commissions are used.⁸² Traditionally, it is thought that state court judges lack the same degree of independence that federal judges with lifetime appointments enjoy.⁸³ But federal district and appellate court judges must consider their own institutional sanctions, the two most important of which are the possibility of elevation to a higher court and the specter of reversal. As a result of these institutional sanctions, lower courts may be more hesitant to rely on constitutional comparativism, especially given the controversy that has flowed from the Supreme Court's reliance upon it.

Those sanctions, of course, are extreme. Softer sanctions may also influence the decision by lower courts to decline the invitation to rely on comparative material. The most obvious soft sanction that a lower court faces is criticism regarding the quality or reasoning of the decision. That criticism may come from a higher court when the decision is on appeal, from other courts reviewing or distinguishing the decision, or from scholars or practitioners. Criticism may have less salience if a judge is acting within the confines of his or her core areas of competency. But given the institutional limitations on effective engagement with comparative material, it is quite plausible that lower court judges will exercise extreme caution in deciding whether to venture into unfamiliar territory.

E. Lower Court Determination of Foreign Law

Another possible reason that lower courts are reluctant to adopt comparativism, especially the quixotic and haphazard approach to it that the Supreme Court adopted in *Lawrence* and *Roper*, is that lower courts are accustomed to determining foreign law through the procedures set forth in the Federal Rules of Civil Procedure. Rule 44.1 provides that,

82. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary* 3 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 357, 2d series, 2007), available at <https://www.law.uchicago.edu/files/357.pdf> (“[J]udges in 9 states run for election—and reelection—as members of political parties. In between, there are two systems that combine partisan and nonpartisan elements. In 16 states, merit commissions are used: typically, an independent commission provides nominees whom the governor may appoint, while a retention election is used at the end of a judge’s term (rather than a competitive election). In 13 states, non-partisan elections are held: the public votes but judges are not permitted to advertise themselves as members of particular political parties.”).

83. Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226 (2007); see also Aman L. McLeod, *A Comparison of the Criminal Appellate Decisions of Appointed State Supreme Courts: Insights, Questions, and Implications for Judicial Independence*, 34 FORDHAM URB. L.J. 343 (2007).

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.⁸⁴

In other words, lower courts often encounter situations in which foreign law is the governing law, and in those situations their approach to determining the content of that law is highly refined, systematic, and careful. Lower courts, especially at the trial level, will be quite reluctant to rely on foreign law if the parties to the dispute have not been given proper notice of its intent to do so. Lower courts' determination of foreign law under rule 44 typically allows both parties to brief the issue, permits written submissions by foreign law experts appointed by the parties or the court, and sometimes includes oral testimony on the content of foreign law.⁸⁵ One would expect that this procedure acculturates federal judges to treat foreign law with great care, and not haphazardly select cases from the global corpus that support a particular result.

F. *Inputs and Outcomes*

Another possible rationale for lower court reluctance to rely on comparative experiences relates to inputs and outcomes. Judges from the left and the right will only use this approach if the methodological input and the practical outcome are both acceptable. Conservative judges are unlikely to utilize this approach because of fidelity to the particular philosophy of judicial restraint. In many respects, comparisons of contemporary foreign and international law are simply the latest variation of a longstanding tradition of living constitutionalism. Thus, even if the outcome may be a result they desire, as is likely the case on numerous issues,⁸⁶ conservative judges will be reluctant to engage in a methodology that does not comport with their notions of the judicial function. For many conservative judges, the refusal to adopt this approach often may be a matter of right result, but wrong method.

By contrast, liberal judges are more likely to find this interpretive approach consistent with their judicial philosophy, but they often will not rely on it because the results that flow from such comparisons will not be consistent with their preferred outcome. The California Supreme Court's gay marriage case arguably is one such example of judges rejecting comparativism for this reason.⁸⁷ Justice Stephen Breyer's rejection of pragmatic comparativism in the recent Second Amendment case, *Heller*,

84. FED. R. CIV. P. 44.1.

85. See Peter D. Trooboff, *Proving Foreign Law*, NAT'L L.J. Sept. 18, 2006, at 13.

86. Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 25 (2005).

87. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

arguably is another example.⁸⁸ Because experiences from abroad often reflect lesser, rather than greater, commitment to civil liberties, this methodological approach provides no guarantee that it will support the expansion of human rights in this country. For many liberal judges, the refusal to adopt this approach often may be a matter of right method, but wrong result.

CONCLUSION

Despite the tremendous academic interest in the subject, scholars typically have ignored the question of what role, if any, lower courts should play with respect to constitutional comparativism. This is surprising, because as a practical matter, the Supreme Court can do little to bring international law home at the retail level. If proponents of constitutional comparativism have serious aspirations of internalizing international norms into constitutional jurisprudence, greater focus must be given to the issue of lower courts' disinterest in this interpretive methodology.

A few scholars have addressed the issue of the role of lower courts in adopting this methodology. David Fontana, for example, has argued that trial and appellate court judges should use comparative material, especially when the American sources do not provide a clear factual or legal answer to a question the judge must answer. "Within the framework of a trial or appeal, a judge should encourage litigants to argue comparative constitutional law to courts (when appropriate), sometimes even using expert witnesses on foreign law who can help the judge determine the relevant comparative constitutional law and its transferability."⁸⁹ Thus, Fontana argues for a "bottom-up" approach to comparativism, with trial and appellate courts relying on foreign sources as persuasive authority to assist with "hard cases."⁹⁰

Vicki Jackson, by contrast, argues that engaging in comparativism involves opportunity costs, and those costs are particularly significant with lower courts.⁹¹ She notes that lower courts differ from the Supreme Court in several respects: their dockets are much broader; they have many more cases and issues to decide; and they persistently must be concerned with delays in the disposition of pending litigation.⁹² In addition, the benefits of recourse to comparativism are fewer because in many cases there is controlling Supreme Court authority, and the task of lower courts is simply to follow and apply binding precedent.⁹³ Consequently, Professor Jackson argues that, absent a particularly interested or knowledgeable lower court

88. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2847 (2008) (Breyer, J., dissenting).

89. David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. REV.* 539, 556 (2001).

90. *See id.* at 557–62.

91. VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (tentative title, forthcoming 2009) (manuscript ch. 6, at 76–79, on file with author).

92. *Id.* (manuscript ch. 6, at 77).

93. *Id.* (manuscript ch. 6, at 76–77).

judge, the opportunity costs of developing expertise are great and the likely returns are low.⁹⁴

While both Fontana and Jackson are proponents of constitutional comparativism, their perspectives on lower court recourse to this methodology differ sharply. Thus, the fact that lower courts are not relying on comparative and international law will not be a point of significant concern for Jackson and other scholars who share her perspective. But for Fontana and other comparativists who take a bottom-up approach, the fact that lower courts remain disinterested in constitutional comparativism should be cause for serious concern. This is especially true given that the Supreme Court also has backed away from its warm embrace of the practice five years ago. It suggests that the project of constitutional comparativism is fizzling and that much more work will be required simply to convince courts to include comparative material in the interpretive canon.

From the perspective of one who is quite cautious about the merits of constitutional comparativism, I view continued lower court disinterest with a combination of satisfaction and relief. Comparativism works best when undertaken by legislative or executive branch officials who are making hard choices on issues that transcend cultures. But it is dangerous if it simply enables judges to engage in a methodology that is exceedingly difficult to do well and exceedingly dangerous if done poorly. Lower courts, consciously or unconsciously, have done the calculus and concluded that the costs of engaging in constitutional comparativism far outweigh the benefits.

94. *Id.* (manuscript ch. 6, at 76–79).

Notes & Observations