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Comparative Law in the Age of Globalization

Mary Ann Glendon*

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T.S. Eliot, “Little Gidding,” *Four Quartets*

I. INTRODUCTION ................................................................. 1

II. COMPARATIVE LAW IN CONSTITUTIONAL ADJUDICATION 3
A. Roper v. Simmons ........................................ 5
B. Lawrence v. Texas ......................................... 9
C. Washington v. Glucksberg .............................. 12
D. Promise and Perils of Comparative Law in the Judicial Process .......... 14

III. COMPARATIVE LAW IN THE LEGISLATIVE PROCESS ....... 21

IV. CONCLUSION ................................................................. 23

I. INTRODUCTION

Comparative law has come a long way in the United States since the American Association for the Comparative Study of Law was founded in 1951 by a tiny band of law professors and attorneys to promote the understanding and comparative analysis of foreign legal systems.¹ Today, with the advance of globalization, law firms that used to regard study abroad as evidence of dilettantism are now aggressively recruiting young lawyers who can communicate easily with their counterparts elsewhere and who can be persuasive in foreign settings. Law schools are scrambling to

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meet student demand for courses that prepare them for professional life in a shrinking, interdependent world. More controversially, Supreme Court Justices have referred to foreign law to bolster their decisions in high-profile cases. Over a hundred law schools have become sustaining members of the American Association for the Comparative Study of Law (now the American Society of Comparative Law).

Looking toward the future, it is hard to dispute Thomas Friedman's prediction that law, along with other social systems that have traditionally been associated with our distinctive national identity, will be profoundly affected by the collection of economic and social phenomena known as globalization. For those of us in the field of comparative and foreign law, these developments should be a dream come true. American comparatists have long maintained that our legal system could benefit in manifold ways from attention to legal arrangements in countries at comparable levels of social and economic development and with comparable commitments to democracy, the rule of law, and fundamental rights. But were we correct, or might heightened interest in foreign law turn out to be a case of "Be careful what you wish for"? That is the question I explore in this lecture: what are likely to be the benefits or hazards of increased attention to foreign law in American courts, legislatures, and law schools?

I have devoted the bulk of this lecture to the Supreme Court's recent references to foreign law in constitutional adjudication, not only because these few scattered allusions have given rise to a surprising amount of controversy, but because they illustrate both the benefits and risks of comparative law in the judicial process. After reviewing three widely discussed decisions where foreign law figured in the Court's reasoning process, I conclude that in each case there was something to be learned from foreign materials, but that the difficulty of gaining an accurate understanding of foreign law, the burden on judges and lawyers in doing so, the issues of legitimacy, the problems of comparability, and the temptations to selectivity raise doubts about whether the benefits outweigh the drawbacks.

2. The schools and the professors who represent them on the Association's boards of directors and editors are listed on the masthead of the American Journal of Comparative Law.

I then turn briefly to the use of foreign law in the legislative process, where it seems to me that the risks are more manageable and the benefits potentially greater. In my concluding remarks, I suggest that whether American courts and legislatures can maximize the benefits to be derived from consulting foreign experience will depend to no small degree on how the rapidly developing field of international legal studies takes shape in American law schools.

II. COMPARATIVE LAW IN CONSTITUTIONAL ADJUDICATION

In 2005, a lively public debate between two Supreme Court Justices was sparked by the Court majority's references to foreign law in an opinion striking down the death penalty for older juveniles. Since so many commentators have since weighed in on the controversy, one may wonder whether there is anything more to be said on the subject. But there may be some value in adding the perspective of one who has spent much of her professional life working with foreign law, convinced of the benefits of comparative studies, but concerned about the pitfalls.

There are many situations, of course, where reference to foreign and international sources by U.S. courts is uncontroversial, notably in the interpretation and application of certain treaties and commercial agreements. There is also broad agreement that comparative research can provide useful information about how various legal measures have worked out in practice, what advantages they may offer, and what unintended effects or indirect consequences they may entail. On this point, both participants in the 2005 debate seem to agree. Justice Stephen Breyer has maintained that the experience of other countries may "cast an empirical light on the consequences of different solutions to a common

legal problem.' And Justice Antonin Scalia, who has been highly critical of many uses of foreign material, has acknowledged that it can be helpful in estimating the practical results of a particular ruling. As he once put it, “You can look to foreign law and say, gee, they did this in Germany and the skies didn’t fall. That’s certainly a very valid use of foreign law.”

The main issue between Justices Breyer and Scalia in their debate concerned the use of foreign material in constitutional adjudication. Justice Breyer continued the line he had taken in a 1999 dissent where he noted approvingly that “this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.” Scalia took the position that all foreign material (except pre-1787 English sources) is wholly irrelevant to the original meaning of the U.S. Constitution. But, well aware that many people, including Justice Breyer, do not share his originalist approach to constitutional interpretation, he emphasized the problem of comparability. The political, constitutional, procedural, and cultural contexts of other nations are so different from our own, he argued, that material from other legal systems will rarely if ever be relevant to constitutional issues faced by our courts.

Breyer acknowledged that comparability could be a problem. But he said, “If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.” There is “enormous value in any discipline,” he said, “of trying to learn from the similar experience of others.” With respect to Scalia’s observation that judges might be tempted to manipulate such material to serve their own ends, Breyer commented: “Nobody wants undemocratic judges substituting their view for that of the legislature.”

9. Scalia & Breyer, supra note 4, at 525.
10. Id. at 526.
11. Id. at 523.
12. Breyer, supra note 6, at 266.
13. Scalia & Breyer, supra note 4, at 539.
As an academic, I am drawn to the point of view expressed by my former colleague Justice Breyer. After all, how can anyone object to learning? But after examining a series of constitutional cases where foreign material has figured prominently, it seems to me that the comparability problems have been underestimated by the Court's foreign law enthusiasts, and that it has been more difficult for some judges to resist the temptation to use such material selectively than Justice Breyer's comment implied. The three Supreme Court decisions discussed below illustrate the seriousness of these concerns, as well as the possible advantages to be derived from comparative research, properly used.

A. *Roper v. Simmons*

The case that ignited the most sustained critique of the use of foreign law in constitutional adjudication was *Roper v. Simmons*, where a five-Justice Supreme Court majority held that Missouri's death penalty violated the Eighth Amendment's ban on "cruel and unusual" punishments when applied to sixteen- and seventeen-year-olds. One's first reaction to that decision might well be surprise that it provoked an outcry (even though it is hard to imagine a less sympathetic defendant than young Mr. Simmons). At age seventeen, Simmons broke into a woman's home at two a.m., covered her eyes and mouth with duct tape, and threw her from a bridge into a river where she drowned. He assured his two accomplices that they could "get away with it" because they were minors, and later bragged about the crime to friends.  

The debate sparked by the case was not over Simmons' escape from the death penalty. Rather, it concerned the Court majority's rejection of the position that it is up to each state to decide whether to leave it to a jury to determine whether the death penalty is appropriate in some cases involving older juveniles. That the majority seemed to have permitted foreign law to influence that decision was regarded by critics of *Roper* as adding insult to injury.  

In Eighth Amendment cases for nearly a half century prior to *Roper*, the Court had canvassed the practices of other states to ascertain whether a particular state's punishment was in line with the "evolving standards of decency that mark the progress of


15. 543 U.S. at 556.
a maturing society.” Applying that approach sixteen years before *Roper*, a Court majority had ruled that the Constitution did not bar the death penalty for sixteen- and seventeen-year-old offenders because the fact that the practice was permitted in twenty-five states indicated there was no national consensus.

So, what changed between 1989 and 2005 to cause five Justices to reach the opposite result in *Roper*? Well, five more states had abolished the juvenile death penalty, four by legislation and one by court decision, and enforcement of the penalty against juveniles was rare even where it was permitted. But twenty states, encompassing over forty-two percent of the U.S. population, still treated the youth of the offender as a factor to be considered on a case-by-case basis. It was a stretch for the majority to find there was now “evidence” of a national consensus.

The crucial change was in the increasingly expansive view of the judicial role taken by Justice Kennedy. It was he who had provided the key fifth vote to uphold the death penalty for older juveniles in 1989, and it was he who authored the five-to-four majority opinion striking it down in 2005. In the earlier case, he had joined an opinion insisting that judgments about what is “cruel and unusual” punishment “should not be, or appear to be, merely the subjective views of individual Justices; [but rather] should be informed by objective factors to the maximum possible extent.” Sixteen years and many international seminars later, however, Kennedy took the position that “objective indicia of consensus, as expressed in particular by the enactments of legislatures” merely provided a “beginning point” for analysis.

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16. *Id.* at 561 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
18. Twelve states had rejected the death penalty altogether, while eighteen states and Congress had prohibited it only for juveniles. See Ernest Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 154 (2005).
20. The majority in *Stanford* was composed of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia and White, with Justices Blackmun, Brennan, Marshall and Stevens dissenting. The majority in *Roper* was composed of Justices Breyer, Ginsberg, Kennedy, Souter, and Stevens, with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas dissenting.
21. 492 U.S. at 369.
23. 543 U.S. at 564.
then up to the Justices themselves, he wrote, to “determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for [older] juveniles.”24

Using their “own independent judgment,” the Roper majority ruled that it would violate the constitutional prohibition against cruel and unusual punishment if a state, in the case of a juvenile murderer, was to “extinguish his life and his potential to attain a mature understanding of his own humanity.”25 In so holding, they brushed off the legislatures of twenty states, the jury system, and the federal government, which had expressly preserved the rights of the states regarding capital punishment when the U.S. ratified the International Covenant on Civil and Political Rights.26

An inquisitive person might wonder how foreign law came into this picture. In an apparent effort to show that the ruling rested on something other than the personal views of five Justices, Justice Kennedy turned for support to data on what other countries had done. “[T]he overwhelming weight of international opinion against the juvenile death penalty,” he wrote, “provide[s] respected and significant confirmation for our own conclusions.”27 Justice Kennedy seems not to have noticed that the foreign experience upon which he relied arguably pointed in a very different direction from the one the Court majority took. For the “overwhelming weight” of the international data indicated that decisions about the death penalty had generally not been made by the courts but had been left to the elected representatives of the citizens.28

What drew the most criticism to the Roper majority opinion, however, was the degree of weight the Justices appeared to give to the foreign material. Though Justice Kennedy claimed that international opinion was not a decisive factor in Roper, his opinion came uncomfortably close to giving foreign material a controlling role in the decision of an American constitutional question.29

That was the gist of the dissent by Justice O’Connor. Although she had long been one of the Court’s strongest boosters of learning

24. Id.
25. Id. at 574.
26. Young, supra note 18, at 165.
27. Roper, 543 U.S. at 578.
29. See Young, supra note 18, at 154; Levy, supra note 5, at 371-72.
from foreign law, she firmly rejected the idea that international opinion could make up for the absence of an American consensus. A former state legislator herself, she objected that the majority Justices were simply substituting their personal views for the judgments of twenty state legislatures that juries are perfectly capable of determining to what extent the youth of a murderer should be taken into account. In my view, Justice O'Connor had it exactly right. As she has said on more than one public occasion, there is much that we Americans can learn from foreign law. The problem was not that the Court referred to what foreign countries do. It was how that foreign material was understood and used.

In fact, there was a lesson to be learned from foreign experience with the death penalty, but it was not the lesson the majority drew. It was a lesson about our own form of government that American judges once understood well. As Oliver Wendell Holmes Jr., put it in his famous dissent in *Lochner v. New York*:

I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Five years after the *Roper* decision, Justice Kennedy pushed the envelope further in *Graham v. Florida*, where a five-Justice majority held that life sentences without parole are cruel and unusual in the case of juveniles who commit noncapital crimes. Although such sentences were permitted by thirty-seven states, the

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31. 543 U.S. at 604-05 (O'Connor, J., dissenting).

32. Id. at 588. The shift toward openly basing Eighth Amendment decisions on the Justices' own views had been prefigured in *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (barring the death penalty for the mentally retarded) where the majority said that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty."


34. 130 S. Ct. 2011 (2010).
Graham majority held that a national consensus was not necessary to a finding that the sentences in question violated evolving standards of decency. The laws of other nations and international agreements, however, were deemed “relevant . . . because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.” Then, in 2012, a Court majority held all mandatory life sentences for juveniles unconstitutional on the basis of Roper and Graham, without making reference to the foreign sources that had played such a significant role in the decisions of the two earlier cases. Thus was the practice of other countries regarding juvenile sentencing first used to override the judgments of American legislatures, and later cemented into American constitutional law by stare decisis.

B. Lawrence v. Texas

Another case where the Supreme Court’s reasoning might have benefited from a closer study of the foreign material cited by the majority was Lawrence v. Texas. In striking down state criminal penalties for homosexual sodomy, Justice Kennedy correctly pointed out that, over the years, the right the petitioners were seeking had “been accepted as an integral part of human freedom in many other countries.” But as in Roper, he neglected to mention that most of those countries had eliminated sanctions for sexual behavior between consenting adults through ordinary democratic political processes, rather than by court decision. Then, Justice Kennedy went on to say this: “There has been no showing [by the state of Texas] that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent” than elsewhere. The novel implication of that statement is that the burden is on American legislators to justify a different view of human rights from that which is accepted in other countries. As Judge Richard Posner observed, that is something like subjecting American legislation “to review by the United

35. Id. at 2026.
36. Id. at 2034.
39. Id. at 577.
40. Id.
Nations General Assembly."\textsuperscript{41} A similar nose-counting approach to foreign law had been taken to support the opposite result in the case that \textit{Lawrence} overruled, \textit{Bowers v. Hardwick}, where Chief Justice Burger remarked that nearly all civilized countries at that time had statutes penalizing sodomy.\textsuperscript{42}

As a comparatist, I would suggest that there was something important that the Justices in both \textit{Bowers} and \textit{Lawrence} could have learned from foreign law if they had gone beyond tallying outcomes. In \textit{Dudgeon v. United Kingdom}, the leading European Court of Human Rights ("ECHR") decision on the subject of criminal penalties for homosexual sodomy, the holding of that supranational court was similar to the holding in \textit{Lawrence}, but the reasoning was strikingly different.\textsuperscript{43} The ECHR judges took care to recognize that both the privacy rights of the complainants and the protection of the community's traditional moral standards are legitimate and important interests.\textsuperscript{44} \textit{Bowers}, by contrast, gave short shrift to the former, and \textit{Lawrence}, to the latter. Although the ECHR's decision protected homosexuals from criminal prosecution, the Court specified that some degree of regulation of private sexual conduct could be justified under the European Human Rights Convention as "necessary in a democratic society . . . for the protection of health or morals, or for the protection of the rights and freedoms of others."\textsuperscript{45} Such regulation, they said, would be appropriate not only in the obvious case where protection of minors is involved, but also to protect "the moral ethos of society as a whole."\textsuperscript{46}

Since there has to be a winner and loser, one might ask whether it really matters how the losers are treated. As to that, I submit that a study of the opinions in \textit{Dudgeon} would have reminded the U.S. Justices that a court can usually decide between competing positions in hard cases without creating the impression that the

\textsuperscript{43} Dudgeon v. United Kingdom, 4 European Human Rights Reports 149 (1981).
\textsuperscript{44} Id. at 161-68. Compare Justice Harlan's dictum that "to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).
\textsuperscript{45} Dudgeon, 4 European Human Rights Reports at 160-61, 163-64; ECHR Art. 8-1.
\textsuperscript{46} Dudgeon, 4 European Human Rights Reports at 160-64.
view denied priority is entitled to little respect. After all, most cases that reach the Supreme Court involve choices between positions that are supported by weighty moral and legal arguments, and the Court more often than not must make choices that, either way, will entail substantial individual or social cost.

No one has explained better than Judge Guido Calabresi why a judge should, when possible, avoid rejecting the ideals of the losing party as invalid or outside the law, especially in a heterogeneous society like that of the United States. Judges should make that effort, Calabresi advises, because it helps to keep us from becoming callous with respect to the moralisms and beliefs that lose out . . . [and it] gives the losers hope that the values they cherish . . . will not ultimately be abandoned by the society . . . . In other words, it treats [the losers] as citizens of the polity and not as emarginated bigots or unassimilated immigrants.47

As in Roper v. Simmons, the most obvious lesson to be derived from foreign experience in Lawrence v. Texas was a lesson about judicial decision-making that American judges once knew well. If Chief Justice Burger in Bowers and Justice Kennedy in Lawrence had been more interested in learning from foreign law, they might have experienced a shock of recognition, for, in the course of exploring foreign territory, they might have been led back to the principled, modest techniques of judicial decision-making that have traditionally been hallmarks of the American legal tradition. They might have been reminded of how many of our greatest judges are respected for their habit of exposing the reader to the actual grounds of their decisions and their actual reasoning processes, including their doubts and uncertainties.48 One thinks of Robert Jackson, John Marshall Harlan, Henry Friendly, Learned Hand, and Augustus N. Hand, whose opinions were said to have been written not so much for the bench, bar, or university world as for "the particular lawyer who was about to lose the case and the

47. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 97-98 (Syracuse University Press 1985).

particular trial judge whose judgment was being reviewed and perhaps reversed."49

C. Washington v. Glucksberg

A third constitutional case where foreign material played more than a trivial role was 1997's Washington v. Glucksberg, where a unanimous Supreme Court upheld Washington's legislative prohibition of assisted suicide.50 The Ninth Circuit had struck down the ban, holding that the Due Process Clause of the 14th Amendment should be interpreted to encompass a “liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.'”51

In reversing that judgment, the Supreme Court held that the ban on assisted suicide was reasonably related to the promotion and protection of a number of legitimate state interests, including the preservation of human life, upholding the ethics of the medical profession, the protection of “vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes,” and avoiding “the path to voluntary and perhaps even involuntary euthanasia.”52 As evidence of the rational basis for the legislature's judgment, the Court cited studies of euthanasia in the Netherlands, indicating that the practice there has not been limited to competent, terminally ill adults who are enduring physical suffering, and that governmental attempts to regulate the practice may not have been fully effective in preventing abuses.53 The Court also observed, citing legislation from many European countries, that “[i]n almost every state—indeed, in almost every western democracy—it is a crime to assist a suicide.”54

Here we have an example of a type of judicial use of foreign law that has been long been accepted as relatively unproblematic. In the early 20th century, Louis Brandeis pioneered the use of empirical data, including foreign experience, to defend regulatory legislation against due process challenges by showing that the challenged statute was not arbitrary or irrational. In the landmark case of Muller v. Oregon, the Supreme Court accepted references

49. CHARLES E. WYZANSKI, JR., WHEREAS: A JUDGE'S PREMISES 71 (Little Brown 1965).
52. 521 U.S. at 731-32.
53. Id. at 734.
54. Id. at 710.
from a Brandeis brief as evidence that Oregon’s legislation on the working hours of women had a rational basis.\textsuperscript{55}

The reason the use of foreign data in \textit{Glucksberg} is more defensible than that in \textit{Roper} is this: it is one thing in a democratic republic to cite foreign data as evidence that the legislature's judgment has a rational basis, but quite another to use foreign data to support the Justices' decision to substitute their own opinion for the judgment of the people's elected representatives.\textsuperscript{56}

Then-Chief Justice Rehnquist emphasized this distinction in \textit{Glucksberg}. No foe of consulting foreign experience in constitutional cases,\textsuperscript{57} he pointed out that when judges substitute their own views for the legislature's judgment, they are, to a great extent, placing “the matter outside the arena of public debate and legislative action.”\textsuperscript{58} For that reason, he went on, judges “exercise the utmost care”\textsuperscript{59} when asked to recognize new rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.”\textsuperscript{60} He noted that Americans are currently “engaged in “an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”\textsuperscript{61} By upholding the Washington ban, he wrote, the Court “permit[ted] this debate to continue, as it should in a democratic society.”\textsuperscript{62} To strike it down on constitutional grounds would effectively place the issue beyond change through ordinary democratic processes.

From a comparative perspective, there is a further reason why American judges, in particular, should be cautious about striking

\textsuperscript{55} Muller v. Oregon, 208 U.S. 412, 419-20 (1908).
\textsuperscript{56} For a critique of using social and economic data to support the judges' own views as distinct from illustrating the rational basis of legislative action, see Henry J. Friendly, \textit{The Courts and Social Policy: Substance and Procedure}, 33 U. MIAMI L. REV. 21 (1978-1979).
\textsuperscript{57} “[N]ow that constitutional law is solidly grounded in so many countries . . . it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process.” William H. Rehnquist, \textit{Foreword to Defining the Field of Comparative Constitutional Law}, at vii–viii (Vicki Jackson & Mark Tushnet eds., Praeger 2002).
\textsuperscript{58} 521 U.S. at 720.
\textsuperscript{59} \textit{Id.} (quoting Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992)).

I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.
\textsuperscript{61} 521 U.S. at 735.
\textsuperscript{62} \textit{Id.}
down legislation in the absence of a clear constitutional warrant. In most other liberal democracies, the legislature, by a supermajority, can override a constitutional court decision; but of all the Constitutions in the world, the U.S. Constitution is one of the most difficult to amend. Our process is so cumbersome that, when the U.S. Supreme Court holds a statute unconstitutional, its ruling ordinarily will stand until the Court's composition changes or the minds of some of the Justices change. The unhealthy political effects of judicial overreach thus include incentives for legislatures to shift responsibility for dealing with controversial issues to the courts, and for interest groups to take their causes to the courts rather than to their fellow citizens and their representatives. As a result, political energy flows into litigation and into the judicial selection and confirmation processes.

D. Promise and Perils of Comparative Law in the Judicial Process

To sum up and elaborate upon the promise and perils exemplified by these three cases, let me first note the perils. Both Roper and Lawrence exhibit difficulties of comprehension, comparability, and selectivity.

The problem of gaining an accurate understanding of foreign material should not be underestimated. Many enthusiasts for increased judicial use of foreign law, including some Supreme Court Justices, do not seem to appreciate the ways in which the political, constitutional, procedural, and cultural contexts of other nations are different from our own. Several examples of the difficulties of comprehension can be found in a volume co-edited by Justice Stephen Breyer and Robert Badinter, a former President of the French Constitutional Council. The book is a transcript of a meeting among six eminent jurists (Breyer, Badinter, Professor Ronald Dworkin, and internationally minded high court judges from Germany, Italy and Spain). Their discussion was so replete with misconceptions that one reviewer, after listing several of the more egregious errors, concluded as follows:


The participants in the dialogue harbored many false assumptions and displayed an alarming lack of familiarity with the composition, institutional powers, and institutional role of the various constitutional courts. If judges as smart, sophisticated, and well traveled as these would have difficulty understanding a foreign precedent, one might well question whether any judges would be capable of successfully undertaking a borrowing exercise.\(^{65}\)

Guido Calabresi, one of the few American judges with deep knowledge of another legal system, has criticized the tendency to speak of the role of the Supreme Court and various constitutional courts “as if there were only one role, independent of where those judges are.”\(^{66}\) The problem of comparability is serious enough to have prompted comparative constitutional scholar Mark Tushnet to comment that “differences in constitutional cultures complicate the task of doing comparative constitutional law, perhaps to the point where the payoff in any terms other than the increase of knowledge is small.”\(^{67}\)

On that point, consider just five of the factors that limit the relevance of foreign court decisions to constitutional adjudication in the United States. First, as mentioned, the U.S. Constitution is far more difficult to amend than the constitutions of most other countries.\(^{68}\) Second, there is our unique form of federalism, which, as a former Canadian Supreme Court Justice put it, is the part of American constitutional law that has made “the smallest impression elsewhere.”\(^{69}\) Third, very few countries have adopted the American model of judicial review.\(^{70}\) Yet former Justice O'Connor

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\(^{66}\) Guido Calabresi, Courts and Judges and their Context, in Il Nuovo Ruolo delle Corti Supreme nell’Ordine POLITICO e Istituzionale 81, 82 (Vittoria Barsotti & Vincenzo Varano eds., Edizioni Scientifiche Italiane 2012).


\(^{68}\) Lutz, supra note 63, at 362, 369.


is probably not alone in believing what she once told a legal audience: that the American model of judicial review of legislation was spreading around the globe, and that as a result she and other Supreme Court Justices would be “looking more frequently to the decisions of other constitutional courts.”\textsuperscript{71} A fourth difference with a significant bearing on constitutional interpretation is that between explicitly value-oriented constitutions like those adopted by many countries after World War II and the U.S. Constitution, whose amendments enumerate a series of rights but do not establish a hierarchy among them.\textsuperscript{72}

Finally, there is a deep divide between the United States and most other western liberal democracies where legal attitudes toward the state and its functions are concerned.\textsuperscript{73} As Justice Ruth Ginsburg put it:

Modern human rights declarations . . . do not follow the United States Bill of Rights’ spare, government-hands-off style. Not only do contemporary declarations contain affirmative statements of civil and political rights; they also contain economic and social guarantees, for example, the right to obtain employment, to receive health care and free public education . . . Our courts . . . are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what government must do.\textsuperscript{74}

In the light of so many factors affecting comparability, it is disquieting to read casual statements by Supreme Court Justices that courts in other countries are struggling with “the same basic constitutional questions that we have.”\textsuperscript{75}

No doubt legal education over time could reduce the incidence of misunderstandings and lead to a better appreciation of compara-

\textsuperscript{71} O'Connor, Broadening Our Horizons, supra note 30.

\textsuperscript{72} See generally MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 175-76 (Random House 2001); EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (Praeger 2002); Law & Versteeg, supra note 70.

\textsuperscript{73} On American distinctiveness generally, see the results of Pew Foundation surveys reported in ANDREW KOHUT & BRUCE STOCKES, AMERICA AGAINST THE WORLD: HOW WE ARE DIFFERENT AND WHY WE ARE DISLIKED (Times Books 2006).


\textsuperscript{75} O'Connor, Broadening Our Horizons, supra note 30. Cf., Breyer, supra note 6, at 266: “Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances.”
But other problems of a practical nature would remain. If judicial reference to foreign materials were to become routine, litigators would have no way of knowing when, where, and how often judicial minds might wander to faraway lands. So, although I am keen on the idea of more people studying foreign law, I must concede that there is a real question whether the potential benefits of increased judicial resort to foreign materials would outweigh the increased amount and difficulty of research that would be required of practitioners and judges.

Another concern prompted by some recent judicial excursions into foreign law relates to selectivity. As Justice Scalia has pointed out, the Court's defenders of learning from other countries have shown little interest in increasing their knowledge of areas where most western democracies take a different view from theirs on such matters as the exclusion of illegally obtained evidence, the regulation of abortion, the regulation of speech, or public funding for religious education. Not without reason did Scalia, in his Roper dissent, compare the majority opinion's reliance on foreign law to the behavior of a person who goes to a party and "look[s] over the heads of the crowd," picking out his friends.

The problem of judicial selectivity, of course, is hardly peculiar to the use of foreign law. Rather, it is rooted in divergent conceptions of the judicial role. And that may explain why some judicial uses of foreign law touch a nerve with some observers, yet strike others as no big deal. The argument between those who maintain that the use of foreign law as persuasive authority in constitutional adjudication is illegitimate and those who see little or no harm in the practice is mainly about how one envisions the role of a

76. Rosenfeld, supra note 5, at 49: "The more good comparative scholarship there is, the more both litigants and judges will be in a position to become prepared to gauge the similarities and differences between diverse jurisprudences."

77. As Charles Fried has pointed out, if the use of comparative materials by judges becomes routine in constitutional cases, it will introduce "a whole new range of materials to the texts, precedents and doctrines from which the Herculean task of constructing judgments in particular cases proceeds." Charles Fried, Scholars and Judges: Reason and Power, 23 HARV. J. L. & PUB. POL'Y 807, 820-21 (2000). See also Posner, supra note 63, at 85-86 (use of foreign materials would vastly increase the amount and difficulty of research that lawyers and judges would have to do with little or no commensurate benefit in terms of better opinions).

78. On the problems of bias in the use of foreign law, see Rosenfeld, supra note 5, at 38-41.


80. 543 U.S. at 617.
judge in our constitutional system.\textsuperscript{81} To put it another way, it is about who should decide the most divisive questions in our society when there is little or no guidance in constitutional text, structure, or precedent. If one is not troubled when a Court majority substitutes its own opinion for that of the people’s elected representatives without warrant in constitutional text, structure, or precedent, then one is probably not going to be troubled when the Court throws in some foreign material to shore up its own opinion. But if one believes that our system of government and the health of our civic culture require most issues in our society to be hashed out through the ordinary democratic processes of bargaining, education, persuasion, and voting, then one will probably regard those references to foreign law as injurious to the body politic.

Anyone inclined to be anxious about such matters will not find reassurance in the arguments advanced by academic defenders of “transnational” law.\textsuperscript{82} Harold Koh, for example, has written approvingly of how participants in transnational dialogues create “international legal norms [that] seep into, are internalized, and become embedded in domestic legal and political processes.”\textsuperscript{83} Anne-Marie Slaughter has welcomed the “flood of foundation and government funding for judicial seminars” where judges from many countries acquire a sense of “participation in a common judicial enterprise, independent of the content and constraints of specific national . . . legal systems.”\textsuperscript{84} She looks forward to a time when judges will “see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders.”\textsuperscript{85} Now that judges from many countries meet more frequently and cite each other’s opinions, they are, to use her phrase, contributing to the formation of “a global jurisprudence.”\textsuperscript{86}

\textsuperscript{81} I would agree with Michel Rosenfeld, however, that the disagreement often involves differing attitudes toward American exceptionalism as well. See Rosenfeld, supra note 5, at 51.

\textsuperscript{82} As generally used, the term “transnational law” encompasses not only the quest for commonalities among legal systems, discussed in this article, but norms found in international instruments and customary international law, both of which are beyond the scope of the present discussion.

\textsuperscript{83} Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181, 183-84, 199, 205 (1996).


\textsuperscript{85} Id. at 1124.

\textsuperscript{86} Anne-Marie Slaughter, A Global Community of Courts, 44 Harv. Int’l L.J. 191, 192-93 (2003). One hopes that U.S. judges attending these gatherings are mindful of ABA
The sense that some American Justices have come to have more in common with like-minded judges on the international seminar circuit than they do with their fellow citizens is, of course, precisely what worries observers who think that the conditions under which Americans live, work, and raise their children should be determined primarily by ordinary American political processes rather than by the opinions of a few well-traveled Justices whose views happen to coincide with those that prevail among European elites and American legal academics. As critics have observed, the transnationalist project tends to formulate its objectives mainly in terms of its own dogmatic interpretations of human rights, and to treat international norms as a means to achieve results that have been rejected by national democratic political processes.\(^{87}\) Joseph Weiler, who is both a comparatist and an international law specialist, has called attention to the “ironic dissonance” between the tendency of many internationalists to moralize about their version of human rights and their contempt for any notion of democratic legitimation of the norms they favor.\(^{88}\)

John O. McGinnis and Ilya Somin point to another serious problem, namely, the “democracy deficits” in the processes through which international norms are generated. Arguing that “the political processes that produce U.S. law have stronger democratic controls and are less vulnerable to interest group capture” than those that produce international norms, they suggest that “only those international obligations that have been validated by [U.S.] domestic political processes should be part of our law because they alone can avoid the democracy deficit of raw international law.”\(^{89}\)

To sum up: in each of the controversial cases that I have discussed, there was something to be learned from foreign materials. Nevertheless, the difficulty of gaining an accurate understanding of foreign law, the burden on judges and lawyers in doing so, the

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problems of comparability, the issue of legitimation, and the temptation to selectivity raise doubts about whether the benefits to be gained from judicial use of foreign materials outweigh the drawbacks.

But since even the strongest critics of the Court's use of foreign law expect the practice to increase, it is worth considering how the advantages could be maximized and the risks minimized. To that end, I would advance four propositions. First, foreign data can provide useful information about how various legal arrangements have worked out in practice (as it did in the Glucksberg case). Since controlled experimentation is rarely possible in law, comparative investigation can be helpful in expanding the theater of observation—provided always that attention is paid to the problems of comparability and accuracy. Second, with the same caveats, foreign data used in the manner of the Brandeis briefs can be relevant in the same way as social science data to the issue of whether legislation has a rational basis. Just as with social science material, of course, there are risks of errors, misunderstandings, and selectivity (and of evaluating testimony by paid expert witnesses). Third, foreign law can never legitimately be used to support an interpretation of the U.S. Constitution that is not otherwise grounded in this country's constitutional text, structure, or precedent.

Finally, I would suggest that the greatest potential benefit of increased attention to foreign law in the constitutional area would be to bring us to a deeper understanding and a renewed appreciation of our own unique version of the democratic experiment. As the French social historian Fernand Braudel once wrote:

Live in London for a year, and you will not get to know much about the English. But through comparison, and in the light of your surprise, you will suddenly come to understand some of the more profound and individual characteristics of France.

90. Scalia, supra note 7.

Comparative Law

which you did not previously understand because you knew them too well.\textsuperscript{92}

Similarly, one might hope, for our judicial wanderers, that the more they begin to understand foreign law, they will, in the light of their surprise, find their way back to their own Constitution, to the traditions of judicial modesty that were neglected in \textit{Bowers} and \textit{Lawrence}, and to the respect for democratic decision-making that was slighted in \textit{Roper} and \textit{Graham}.

III. COMPARATIVE LAW IN THE LEGISLATIVE PROCESS

I now turn very briefly to an area where comparative legal studies have already demonstrated their practical value, namely, in connection with law revision and law reform efforts of the type presently carried on by groups like the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

As long ago as 1921, Justice Benjamin Cardozo suggested in the Harvard Law Review that lawmakers in the United States should adopt the well-established practice of several European countries to regularly canvass the experience of other countries in dealing with novel or intractable problems.\textsuperscript{93} The idea was not that there are devices in foreign lands that, like a new electrical appliance, can simply be fitted with an adapter and plugged in at home. It was, rather, that awareness of how other nations deal with similar situations could, at a minimum, give us a deeper understanding of the problems. Often it could do more, by providing insight into how various legal approaches work out in practice, what advantages they offer, and what risks or indirect consequences they are likely to entail. Since 1965, that type of inquiry has been mandatory for the English and Scottish Law Commissions. These bodies are required by statute to “obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.”\textsuperscript{94}

In the United States, legislators are still a long way from routinely expanding their field of inquiry to that extent. But Ameri-
can lawmakers have, on occasion, drawn upon foreign experiences with impressive results.\textsuperscript{95} For example, Workers' Compensation Acts in American states are largely based on 19th-century English and German statutes.\textsuperscript{96} Several measures facilitating the distribution of small and medium-sized estates with a minimum of expense and delay now closely resemble continental European models.\textsuperscript{97} British marital property law was the inspiration for a 1986 reform of Massachusetts divorce law requiring judges to take the needs of minor children into consideration when reallocating the assets and income of the parents.\textsuperscript{98}

One of the most successful American instances of legal borrowing is one of the least known. As Chief Reporter of the Uniform Commercial Code, Karl Llewellyn drew freely on German models, both as to form and substance.\textsuperscript{99} For obvious reasons, Llewellyn and his fellow drafters did not advertise that pedigree when they campaigned for the Code's adoption by state legislatures soon after the end of World War II.

Up to now, fuller use of comparative resources in the legislative process has been hampered by lack of expertise, and by a certain insularity. But with the advance of globalization, expertise can be expected to increase, and insularity can be expected to diminish. After all, when it comes to devising solutions to new legal problems, or to old problems that we do not handle very well, what matters more than where an idea comes from is whether the idea is a good one. One promising area is information-privacy law, where European models might suggest ways to afford individuals

\textsuperscript{95} For historical discussion, see ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 94 (Little, Brown & Co. 1938).


\textsuperscript{97} The continental model is described in MAX RHEINSTEIN & MARY ANN GLENDON, THE LAW OF DECEDE\textsc{nts'} ESTATES 13-14 (Foundation Press 1971), and the Uniform Probate Code model, now adopted in many American states is described in JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 46-47 (8th ed. 2009).


greater protection against data mining without depriving law enforcement agents of necessary tools. Americans could also learn a great deal about statutory drafting, currently one of the most neglected areas of U.S. legal education.

In sum, I believe that careful, well-informed, and intelligently targeted study of foreign law could bring benefits to American legislators and law reform bodies by expanding the laboratory of best practices to consult when struggling with new problems or with old problems that our system still does not handle very well. It is, of course, not enough to examine the law on the books; one must also be aware of how it functions in practice, and how its operation is affected by its political, economic, and procedural context. But unlike courts, law revision commissions can establish their own priorities, and target their investments in research to the areas where they have reason to believe they will get the best return.

IV. CONCLUSION

As globalization proceeds, it will be a challenge to figure out which legal arrangements should be modified to promote America’s ability to flourish in a more interdependent world, and which are sources of values that must be protected. Thomas Friedman has predicted that the countries that will have an advantage in that process will be those that can combine openness to foreign ideas with their own traditions. As the brief survey in this lecture indicates, however, that will not be a simple task.

Whether increased attention to foreign law by courts or legislatures can benefit the U.S. legal system without jeopardizing the distinctive goods associated with our democratic experiment will depend to no small degree on how American legal education adapts to globalization. Thus far, U.S. law schools are making great strides toward preparing future lawyers to adapt to the powerful economic and cultural forces that are transforming the world we live in. But legal education has been less attentive to the homogenizing, disrupting thrust of those forces on national, regional, and local cultures and traditions.

101. Friedman, supra note 3, at 237, 411.
In this new academic environment, comparatists, with their attention to particularity and their love of local knowledge, could play a useful role. Indeed, the comparatists' skill in mediating between the universal and the particular may be the greatest service they can offer to legal education at its present stage. As Paolo Carozza has pointed out, comparative law "has the paradoxical capacity to deepen our understanding and appreciation of the particularities of legal traditions while at the same time helping us to transcend their differences by relating them to one another."\textsuperscript{102} Carozza, who combines expertise in the law of continental European nations with public international law and human rights law, has called attention to the need for an integrated approach that "values the freedom and integrity of local cultures without reducing particularism to pure devolution," and that "affirms internationalism . . . without the temptation for a super-state or other centralized global authority."\textsuperscript{103}

At the present moment, although most American law schools have greatly increased their offerings in international business law, international tax, and public international law, it is not clear what role there will be for foreign and comparative law in the burgeoning field of international legal studies. For one thing, it has never been easy to find professors with expertise in foreign law. Just as it takes a considerable investment of time to acquire a working knowledge of one's own legal system, it takes similar time and effort to become familiar with that of another country, especially if other languages must be mastered. For another, there is a tendency on the part of many public international lawyers, human rights specialists, and international business law experts to be impatient with, or even dismissive of, national differences.

I would like to think, however, that those obstacles can be surmounted, and that the future of international legal studies will be marked by fruitful collaboration and interaction among comparatists, public international lawyers, international business law specialists, and all who labor on behalf of human rights.