Controversy over Citations to Foreign Authorities in American Constitutional Adjudication and the Conflict of Judicial Philosophies: A Reply to Professor Glendon, The

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INTRODUCTION ........................................................................................................ 26
I. RESTRICTIVE VERSUS EXPANSIVE PHILOSOPHIES OF CONSTITUTIONAL ADJUDICATION AND THEIR IMPACT OVER CITATIONS TO FOREIGN AUTHORITIES ................................................................. 28
II. REVISITING RELEVANT U.S. SUPREME COURT CONSTITUTIONAL CASES WITH A BEARING ON THE CONTROVERSY OVER CITATIONS TO FOREIGN AUTHORITIES .......................................................... 37
   A. National and Transnational Comparisons, Levels of Abstraction and the Dynamic between Analogical and Contextual Reasoning. 37
   B. Revisiting the Relevant Cases ................................................................. 39
      1. Roper .................................................................................. 39
      2. Lawrence ................................................................. 42
      3. Glucksberg ................................................................. 47
      4. Printz ................................................................. 49
      5. Hate Speech Cases .......................................................... 50
III. SETTING A PROPER FIT BETWEEN CITATION TO FOREIGN AUTHORITIES AND JUDICIAL PHILOSOPHY ..... 54
   A. On the Expansiveness of Operative Judicial Approaches in U.S. Constitutional Adjudication and on the Optimal Expansiveness to Tackle Foreign Authorities ................................................................. 55
   B. Foreign Materials and the Problem of “Translation” ........................................ 59
   C. When, Why, How Much, and for what Purpose Are References to Foreign Law

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INTRODUCTION

The controversy concerning citation to foreign authorities in U.S. Supreme Court cases adjudicating constitutional issues has been exceptionally vehement. On the one hand, Justice Kennedy’s reference to a European Court of Human Rights (“ECtHR”) decision in his majority opinion in Lawrence v. Texas and his reference to foreign law in Roper v. Simmons unleashed a veritable furor culminating in calls for his impeachment and in proposed legislation prohibiting federal judges from referring to foreign authorities when adjudicating constitutional cases. On the other hand, several scholars have advanced the view that constitutional adjudication is or ought to be the same worldwide while others have insisted that international norms have been absorbed into, and internalized, within domestic constitutional law. Moreover, even U.S. Supreme Court Justices are closely and vigorously divided over the issue.

Although much has been written on this controversy, Professor Glendon’s article in this issue of the Duquesne Law Review is a much welcomed addition to the literature for two principal reasons: first, it offers a rich, subtle and complex analysis of the question and does not conclude with a flat “yes” or “no” answer, but

5. See DAVID BEATTY, THE ULTIMATE RULE OF LAW 159-88 (2004) (arguing that the ultimate goal of all constitutional adjudication is to subject constitutional controversies to resolution according to the dictates of the principle of proportionality).
8. For a sampling of the various positions within the debate, see NORMAN DORSEN, ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 19-33 (2d ed. 2010).
instead with a nuanced approval of the practice for certain purposes in certain cases and a measured disapproval in other cases; and second, it provides a thorough and enlightening close examination of relevant cases that forces the reader to focus on practical concerns in addition to engaging with the broader theoretical debates. Furthermore, I agree with much of Professor Glendon’s analysis and with many of her conclusions. Specifically, I share her insight that good comparative work should be as much about relevant differences as about relevant identities; that looking to foreign constitutional systems may be, at times, most useful in allowing one to better understand her own constitutional system; that comparative work is inherently perilous as access to foreign cultures confronts difficult hurdles that are inexistent or attenuated in the case of one’s own culture; and, that the comparativist is almost never likely to achieve the same level of expertise regarding a foreign constitutional system as she has with respect of her own. In spite of these substantial areas of agreement and of the fact that I have already weighed in on the overall controversy, however, I have accepted the Law Review’s kind offer to reply to Professor Glendon because I have a major disagreement with her that goes to the heart of her thesis. I believe that the conflict over citations to foreign authorities is ultimately a sideshow. It is parasitic on a much larger and enduring controversy involving two clashing judicial philosophies—not to say ideologies—regarding the proper bounds of constitutional adjudication that has long be-deviled the Bench, the American polity, and the legal academy. My claim is essentially that once it is accepted that the main divide is over whether restrictive or expansive judicial interpretation of the U.S. Constitution is optimal, then the foreign authorities citation controversy should recede as a relatively minor area of disagreement. In other words, except in cases of sheer xenophobia or of blind preference for what is not American, differ-

10. See Michel Rosenfeld, Principle or Ideology? A Comparatist Perspective on the U.S. Controversy over Supreme Court Citations to Foreign Authorities, 2009 ANALISI E DIRITTO 291; MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 119-23 (2010); Michel Rosenfeld, Comparative Constitutional Analysis in United States Adjudication and Scholarship, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 38 (Michel Rosenfeld and András Sajó, eds., 2012).

11. See the Oklahoma Sharia Law Amendment, State Question 755 (2010), which was approved by voters and would have prohibited courts from using or considering Sharia law when making rulings. A federal judge issued a preliminary injunction against the state constitutional amendment, and ruled this year that that the amendment’s references to Sharia, or Islamic law, violated the Establishment Clause of the U.S. Constitution, writing
ences over reliance on foreign materials should be amenable to being subsumed as instances of the all-encompassing clash between proponents of restrictive constitutional interpretation and their expansive counterparts.

The controversy over citations to foreign authorities has been exacerbated by confusion or glossing over what is really at stake—a charge from which Professor Glendon is, of course, completely exempt. In order to identify those forces which place serious issues in play, and to sharpen the contrasts and similarities between Professor Glendon’s views and mine, Part I of this Reply concentrates briefly on the key terms and concepts that figure most importantly in the controversy, and outlines the principal features of the contrast between restrictive and expansive philosophies of constitutional interpretation. Part II revisits the cases discussed by Professor Glendon and briefly discusses a few others to highlight the differences between her approach and mine. Finally, Part III lays the legitimate scope and limitations of citations to foreign authorities in light of the broader conflict over judicial interpretation, to which I claim constitutional interpretation is subordinate.

I. RESTRICTIVE VERSUS EXPANSIVE PHILOSOPHIES OF CONSTITUTIONAL ADJUDICATION AND THEIR IMPACT OVER CITATIONS TO FOREIGN AUTHORITIES

Given the vituperative tone of its most strident critics, one might think that judicial citation to foreign authorities is a sign of betrayal of the U.S. Constitution in favor of foreign constitutions or of international treaty-based norms, including those to which the U.S. had explicitly refused to adhere. Yet, focusing on Justice Kennedy’s citations to foreign authorities in Lawrence and in Roper, it becomes obvious that his concern was confined to consideration of foreign positions bearing in terms of subject-matter on

that “it is abundantly clear that the primary purpose of the amendment was to specifically target and outlaw Sharia law and to act as a preemptive strike against Sharia law to protect Oklahoma from a perceived ‘threat’ of Sharia law being utilized in Oklahoma courts.” See also Awad v. Ziriax, CIV-10-1186-M, 2013 WL 4441476, 6 (W.D. Okla. Aug. 15, 2013).

12. For example, the United States is one of only seven U.N. member nations (including Iran, the Sudan and Somalia) to have not ratified the U.N.’s Convention to Eliminate All Forms of Discrimination Against Women, and is the only country in the Western Hemisphere and the only industrialized democracy that has not ratified this treaty. See Lisa Baldez, U.S. Drops the Ball on Women’s Rights, CNN (Mar. 8, 2013), http://www.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/.
the constitutional question that the U.S. Supreme Court had to decide and over which there had been a longstanding, vigorous domestic controversy. Specifically, in Lawrence, Justice Kennedy had a twofold purpose for referring to the ECtHR and a UK parliamentary special report on criminalization of homosexual sex: first, to refute, based on reference to actual positions held in contemporary Western Europe, the sweeping statements concerning Western civilization's condemnation of homosexuality made by Chief Justice Burger in Bowers; and second, to draw additional support for the position already articulated without reliance on foreign authorities by the four dissenting justices in Bowers.

This took place in the context of changing attitudes regarding homosexuality within the U.S. from 1986 until 2003, and of the fact that Justice Powell, who was in the majority in Bowers, revealed upon his retirement from the Court in 1987 that his vote in that case had probably been wrong. Accordingly, it strains credulity to maintain that the reference to Europe had any decisive effect on the reversal of the constitutional jurisprudence in Lawrence. At best, the European reference in question was meant to buttress the already articulated argument in favor of one of the two contending judicial positions on the constitutional issue at stake, which had already been clearly drawn out in Bowers.

Justice Kennedy's reference to foreign authority in Roper was certainly more dramatic: the U.S. stood alone in the world together with Somalia in refusing to ratify international covenants prohibiting the execution of those who committed capital crimes between the ages of sixteen and eighteen. No doubt, focus on the United States' isolation on this issue and on its pairing with Somalia would provide added fodder for U.S. opponents of the execution of juvenile offenders and put proponents of the constitutional legitimacy of the practice on the defensive. Notwithstanding

14. See id. at 199-220 (Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, dissenting).
16. Roper, 543 U.S at 576. The U.S. and Somalia were the only countries that failed to ratify the UN Convention on the Rights of the Child, and the U.S. entered reservations to other covenants, including the UN International Covenant on Civil and Political Rights ("ICCPR") to refuse acceptance of prohibitions on the execution of juvenile offenders. Id.
17. Justice Scalia's dissent in Roper, though dismissive in tone is indicative of a defensive attitude in substance, particularly in his chastising the UK for its "submission to the jurisprudence of European courts dominated by continental jurists" and his drawing attention to the UK's abandonment of the trial by jury requirement in cases involving serious
this, in Justice Kennedy’s view, the reference was meant for a relatively much more modest purpose: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

Professor Glendon criticizes Justice Kennedy, who in 1989 was the fifth vote in favor of upholding the constitutionality of the very practice challenged in *Roper*, for having changed his mind and for having adopted a more activist role after much exposure to foreign law. Justice Kennedy, for his part, stresses in his opinion that since 1990, Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China abolished the death penalty for juveniles. Perhaps, upon reflecting on this development, Justice Kennedy paused to look inward and revisited the American debate on the issue that had divided his Court five to four in 1989. Be that as it may, it is clear that the debate in question is closely associated with the different judicial philosophies of the judges involved. Justice Scalia’s originalism, as he makes clear in his dissent in *Roper*, requires that the judge interpret “cruel and unusual punishment” as it was understood in 1791 when the Eighth Amendment was adopted. And under that standard no present day foreign view could be relevant, but for that matter neither would any prevailing view within the U.S. unless it took hold by 1791. Hence, if ninety percent of the U.S. population and the legislatures of forty-nine states were to find the execution of juvenile offenders morally repulsive, but a single state by a bare majority adopted such a law and American society had accepted such punishment as just and fair in 1791, then a logically consistent originalist would have to uphold that single state’s law as constitutional. On the other hand, for a non-originalist who believes that what is deemed “cruel and unusual” must be assessed in terms of currently prevalent social mores, a virtually unanimous rejection of a particular punishment outside

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30 Duquesne Law Review Vol. 52

22. Consistent with that originalist view, the execution of a seven-year-old would be currently constitutional. See *id.* at 587 (Stevens, J., and Ginsburg, J., concurring).
the U.S. should at least warrant some inward inquiry and reflection, if not some downright reconsideration.

As briefly mentioned already, the key distinction in the present context is that between an expansive and a restrictive judicial philosophy. That distinction, as I conceive it here, transcends the ones between originalists and non-originalists and between politically conservative and politically progressive judges. It is certainly true that a restrictive judicial approach will leave more room for majoritarian decision-making than an expansive one. Take, for example, the expansive view of the majority justices in *Griswold v. Connecticut,* who recognized an unenumerated constitutional right to privacy, and contrast it to the restrictive view of Justice Black, who in his dissent made it clear that, in his interpretation, the Constitution did not protect a right of privacy, and that hence no law, no matter how silly or personally offensive, could be struck down on privacy grounds. Now, consistent with the expansive majority view in *Griswold,* one may certainly argue that it would be both legitimate and fruitful to look to foreign authorities in the context of judicially handling a privacy issue for the first time in the U.S. courts, if privacy had already been the subject of well-reasoned judicial decisions abroad. But, of course, no such possibility for consultation would arise if Justice Black's restrictive view had prevailed. In short, had the U.S. Constitution been held not to protect any privacy right, then no consultation of

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23. There is no inherent incompatibility between originalism and an expansive judicial philosophy as legitimacy of the latter as opposed to that of its restrictive counterpart would depend on the actual views of the framers, ratifiers of the Constitution, and/or of the understandings of the latter's contemporaries.

24. In this respect, it is noteworthy that the Roberts Court and its (politically) conservative majority have been characterized as being among the most judicially activist ones. See Erwin Chemerinsky, *Supreme Court—October Term 2009 Forward: Conservative Judicial Activism,* 44 Loy. L.A.L. Rev. 863, 863 (2011).

25. I deliberately use "majoritarian" rather than "democratic" as some conceptions of democracy require the protection of certain anti-majoritarian rights as a prerequisite to the establishment of a functioning and viable democracy. See Australian Capital Television v. The Commonwealth of Australia, 177 C.L.R. 106 (High Court of Australia 1992) (even in the absence of a bill of rights in Australia, the High Court invalidated a law restricting certain speech immediately prior to an election, on the grounds that a genuine democracy requires free discussion of political alternatives before votes are cast).


27. Id. at 508-10.

28. For example, in a case in which the U.S. Supreme Court was confronted with the obligation to decide on the merits whether there is a constitutional right to same-sex marriage, it would make sense for the justices to consult (for both similarities and differences) the already existing well-reasoned decisions by the Supreme Court of Canada and the Constitutional Court of South Africa. See *Reference re Same-Sex Marriage,* 3 S.C.R. 698 (2004); *Minister of Home Affairs v. Fourie,* 1 SA 524 (CC 2006).
foreign authorities on the subject would seem either relevant or appropriate.

Professor Glendon's argument against citation of foreign authorities in cases like *Lawrence* and *Roper* is principally based on two considerations: first, a plea in favor of a restrictive conception of judicial review;\(^2^9\) and second, a preference for judicial deference to democratic decision-making through elected officials wherever possible.\(^3^0\) Moreover, Professor Glendon seeks to reinforce her argument by emphasizing how difficult it is to amend the U.S. Constitution as compared to those of most other Western democracies.\(^3^1\) Granting all that, it seems clear that it is the restrictive conception of the legitimate role of judges combined with the large role reserved for legislators in Professor Glendon's vision that accounts above all else for her mistrust of citations to foreign authorities. This seems unmistakably confirmed by her endorsement of the citations at stake in cases such as *Washington v. Glucksberg*\(^3^2\) where, in her assessment, the foreign reference is used to buttress judicial deference to the legislator's choice.\(^3^3\)

Even under the most restrictive views of the proper judicial role, such as those articulated by Robert Bork, there is necessarily some room left—as narrow as it may be—for legitimate anti-majoritarian adjudication in constitutional cases.\(^3^4\) For example, no genuine originalist who espouses a restrictive judicial philosophy would deny that the First Amendment requires judicial invalidation of a law endorsed by a political majority (however large it may be) criminalizing the expression of citizen support for the policy objectives espoused by a minority of elected representatives in the relevant legislature. Moreover, whereas proponents of the restrictive view may seek to restrain judicial discretion even within the confines of legitimate anti-majoritarian constitutional adjudication—through requiring strict conformity to original intent or original meaning and strict confinement to the plain meaning of the text of the Constitution\(^3^5\)—it defies reason to assume that there will not be *some* instances in which a judge will both be

\(^{29}\) See Glendon, supra note 9, at 14.

\(^{30}\) Id.

\(^{31}\) Id. at 15.

\(^{32}\) 521 U.S. 702 (1997).

\(^{33}\) See Glendon, supra note 9, at 13.


called upon to render an anti-majoritarian decision and have some legitimate room for discretion in choosing among plausible outcomes for the case before her. Indeed, original intent may not always be clear and original meaning may at times be contested rather than transparent.  

Professor Glendon's second consideration evoked above, namely her preference for judicial deference to democratic decision-making, particularly in view of how difficult it is to amend the Constitution, may well seem on target upon first impression. Upon further analysis, however, once it is admitted that some constitutional rights are at least in part anti-majoritarian and that it is for judges to uphold them against majoritarian infringements, then under-protection of the rights in question seems no more justified than over-protection. Moreover, the difficulty in overcoming judicial error, be it due to omission or to overreach, through a constitutional amendment would be as serious in cases of overly restrictive judicial interpretations as in those of overly expansive ones. This can be illustrated in terms of the gender-based equality issue under the Equal Protection Clause adjudicated in United States v. Virginia. At stake in that case was whether VMI, an elite state military college in Virginia was constitutionally entitled to persist in its traditional policy of being exclusively open to men. The Court in an opinion written by Justice Ginsburg held that VMI's men-only policy was unconstitutional. Justice Ginsburg stressed that "inherent differences" between men and women are "cause for celebration," but not for "denigration" or for "artificial constraints" based on sex. In contrast, in his dissent Justice Scalia argued that VMI's policy was constitutional and that the exclusion of women from the college's "adversative" approach was

36. It is plain that the contemporary understanding of key constitutional concepts such as "Due Process" or "Equal Protection" are highly contested—one need only consider the sharp differences between the majority and the dissents in Bowers and Lawrence as well as in the context of Equal Protection in the sharply divided affirmative action decisions by the Court. See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003). Why assume that eighteenth century America was any less divided over the meaning of "due process" or nineteenth century America over that of "equal protection"? Also, at some crucial constitutional crossroads, the most ardent defenders of originalism confront the unpalatable choice of having to veer away from their commitment in order to avoid embarrassment. See David Strauss, THE LIVING CONSTITUTION 78 (2010) (arguing that the constitutional invalidation of racial segregation in Brown v. Board of Education, 347 U.S. 483 (1954) contradicts the original intent behind the Fourteenth Amendment).

38. Id. at 519.
39. Id. at 546.
40. Id. at 533.
not violative of the latter's equality rights. Clearly, if Justice Scalia were right, then the Court would have exceeded its anti-majoritarian mandate and unduly trampled on the democratic rights of Virginians. But had Justice Scalia been in the majority and Justice Ginsburg proven to have been right, then the Court would have failed to honor the legitimate right of women to constitutional equality to the full extent warranted. Both of these arguably plausible outcomes would be equally objectionable, and neither of them would presumably stand a better chance of correction through successful adoption of a constitutional amendment.

There is one further argument from democracy that seemingly buttresses Professor Glendon's position in privacy right cases such as Lawrence. Going back to Griswold, the constitutional right to privacy has been construed as an unenumerated right derived from the Ninth Amendment, which specifies that the rights specified in the Bill of Rights are not exclusive and as a (substantive) "due process" right under the Fourteenth Amendment. To refute charges that they were engaging in pure judicial subjectivism, the Justices who appealed to either of the two above-mentioned amendments insisted that the privacy right involved and its proper contours were so deeply rooted in "the traditions and [collective] conscience" of the American people as to be "ranked as fundamental." In the same vein, references were made to "basic values 'implicit in the concept of ordered liberty'" and to the traditions of the "English-speaking peoples." The "collective conscience," "basic values" and "traditions" at stake have been interpreted as being both historically grounded and as being democratic in the sense of being imprinted in, and endorsed by, a vast majority of Americans. Consistent with this, the proper sources of inquiry for judges adjudicating privacy rights cases would appear to be

41. Id. at 535.
44. Griswold, 381 U.S. at 487 (Goldberg, J., concurring).
45. Id. at 500 (Harlan, J. concurring).
46. Id. at 512 n.4 (Black, J., dissenting).
47. The Court in Griswold stresses that regarding marriage "we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system," 318 U.S. at 486.
48. This view has been expressed by Justice Scalia. See The Relevance of Foreign Legal Materials in U.S. Constitutional Court Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, supra note 7, at 526, 533-34.
confined to American history (which would incorporate some pre-1787 English history) and American values and convictions endorsed by relevant majorities within the country.

This, however, is only one among the prevailing interpretations of the Ninth and Fourteenth Amendment in the context of privacy. As Justice Harlan has explained, what the judge confronts is the need to strike a balance between individual liberty and the demands of organized society. That balance is struck by this country having regard for what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.\(^49\)

Thus, once tradition is regarded as changing and the focus is shifted from the values held by the majority to a proper balance between individual autonomy and societal objectives, the legitimate task of the judge expands. Indeed, distilling the relevant course of an evolving tradition requires reconciling the present with the past instead of merely considering past mores as frozen in time. Furthermore, in order to strike a balance between individual rights and societal interests, the judge cannot rely exclusively on majoritarian considerations, but must instead find a defensible way to harmonize majoritarian and anti-majoritarian values.

Debate continues over the appropriate level of abstraction at which tradition ought to be gauged for purposes of assessing the sustainability of constitutionalizing a particular liberty interest. This debate sharply divided the justices in *Michael H. v. Gerald D.*\(^50\) At stake was whether a genetic father who had had a child with a woman married to another enjoyed a constitutional right to visitation.\(^51\) A closely divided Court held that there was no such right, and writing for a plurality Justice Scalia asserted that, taking the relevant tradition at "the most specific level,"\(^52\) out-of-wedlock fathers enjoyed no constitutional right to visitation. In his dissent, Justice Brennan differed sharply: under Justice Scalia's criterion, only those traditions protected by legislative majorities would be vindicated, thus making constitutionalization re-

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50. 491 U.S. 110 (1989). For an extended discussion of the controversy over the appropriate level of abstraction for determining the meaning and scope of a tradition, see Rosenfeld, supra note 10, at 78-81.

51. 491 U.S. at 113.

52. 491 U.S. at 128 n.6.
dundant. Justice Brennan, the relevant tradition had to be conceived at a much higher level of abstraction, namely that of the relationship between parent and child. Justice Brennan stressed that in a pluralistic society like the then-prevailing one in the U.S., there were different conceptions of the family and of the good life. More specifically, two important changes had taken place between the late eighteenth century and the late twentieth century: paternity could be scientifically established with near certainty in 1989 but not in 1791 or 1868; and the model of the traditional family had given way to a current proliferation of intimate association arrangements.

Michael H. did not involve citations to foreign authorities, but under Justice Brennan's approach it could have easily included some. Indeed, once one combines conceptions of tradition at higher levels of abstraction with a construction of the latter in relation to liberty or privacy rights understood as requiring some measure of anti-majoritarian judicial protection, there seems to be no impediment to references to traditions commonly shared with societies beyond the U.S.—or at least with those other countries that are English speaking. Had there been a judicial decision on the evolution of intimate associations and their impact on the relationship between parent and child in a society similar to that of the U.S. taken at a high enough level of abstraction—say Australia, (Anglophone) Canada or the UK—then it would seem perfectly appropriate for a judge imbued with Justice Brennan's judicial philosophy to consider and, if she found it sufficiently illuminating, to make reference to the said foreign decision. Once again, as in the other situations discussed above, the key divide proves to be the one between restrictive and expansive approaches to constitutional interpretation.

53. Id. at 140-41 (Brennan, J., dissenting).
54. Id. at 142.
55. Id. at 141.
57. See supra note 46 and accompanying text.
II. REVISITING RELEVANT U.S. SUPREME COURT CONSTITUTIONAL CASES WITH A BEARING ON THE CONTROVERSY OVER CITATIONS TO FOREIGN AUTHORITIES

Even under an expansive judicial philosophy, not all references to foreign authorities would be justified, and some would be to underscore differences rather than to stress similarities. In some cases, the constitutions of two countries being considered may be so diametrically opposed on a subject—for example, a constitution establishing an official state religion versus one prescribing strict separation between state and religion—that there ought to be a presumption against the benefits of comparison outweighing the pitfalls. In other cases, contextual differences may be so pronounced—again, for example, millennial ethnic strife versus longstanding ethnic homogeneity—that the same presumption also ought to prevail. Moreover, in some cases involving important contextual variants, references to foreign authorities may be fruitful to draw attention to differences that buttress the case for jurisprudential divergences. For instance, the constitutional protection of Holocaust denial in the U.S. stands in contrast with its criminalization in Germany, and this difference tracks the contrast between Germany’s Nazi past and the lack of any significant Nazi influence in the U.S.  

A. National and Transnational Comparisons, Levels of Abstraction and the Dynamic between Analogical and Contextual Reasoning

Just as in a purely national setting, comparisons across time or space depend, for relevance and persuasiveness, on approaching that which is to be compared at an appropriate level of abstraction. That emerged vividly in Michael H. (discussed above) and played a key role in Griswold, in which the Court derived a twentieth century constitutional marital right to use contraceptives from an eighteenth century deeply rooted commitment to the sanctity of marriage that preceded the adoption of the 1787 U.S. Constitution. Similarly, in a transnational context in which a

58. See Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE 242, 244 (Michael Herz and Peter Molnar, eds 2012).  
59. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). Whereas the sanctity of marriage was firmly embedded in eighteenth century U.S. tradition, marital use of contraceptives was certainly not. See Brandon R. Johnson, ‘Emerging Awareness’ After the Emer-
comparison regarding the death penalty or the criminalization of consensual sex is at stake, consider, for example, the cases of two individuals, one an American the other a Frenchman, facing punishment for the same kind of murder or for engaging in the same kind of homosexual sex. Should the comparison in question focus mainly on the differences between nationalities, cultures, constitutional, legal and political systems? Or should they instead underscore the common concerns in two constitutional secular democracies steeped in similar Christian and individualistic traditions, confronting the need to reconcile punishment and respect for human dignity and to find the proper balance between individual privacy and entrenched social mores?

As made manifest given the divisions among justices in *Griswold* and *Michael H.*, there are likely disagreements over the optimal level of abstraction at which a particular comparison across time or space ought to be approached in the context of constitutional review. And that applies to both domestic and transnational comparisons. The only important difference between the two in this respect is that in the national context, comparison seems appropriate even at the lowest conceivable level of abstraction, as indicated by Justice Scalia in *Michael H.*. That does not appear to be the case in a transnational context. Indeed, in contrast to his stance in *Michael H.*, in *Roper* Justice Scalia forecloses comparison at any level of abstraction: "Either America's principles are its own, or they follow the world; one cannot have it both ways."  

Beyond that, however, there may be judicial agreement that transnational comparison is appropriate, but disagreement about the right level of abstraction at which it would be best to tackle it in a particular case. Thus, Justice O'Connor, who like Justice Scalia dissented in *Roper*, agreed with Justice Kennedy that reference to foreign authorities in that case was entirely appropriate. Nevertheless, Justice O'Connor did not go along with the Court's majority as she deemed the differences separating the U.S. from the countries that had abolished the death penalty for juvenile offenders to be greater than the similarities between them.

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60. *491 U.S. at 123-30.*
61. *Roper v. Simmons, 543 U.S. 551, 627 n. 9 (2005).*
62. *Id. at 604-05.*
63. *Id.*
Disputes concerning the appropriate level of abstraction for purposes of undertaking comparisons across time and space in both national and transnational settings may be resolved depending on how expansive the judicial philosophy involved may be. Significantly, both in the determination of which level of abstraction is likely to be optimal for a particular interpretive purpose, and in sorting out the relevant importance of clusters of similarities and differences within a chosen level of abstraction, heavy reliance must be placed on the dynamic between analogical and contextual reasoning in judicial interpretation.\textsuperscript{64} That dynamic, moreover, plays a key role in common law adjudication as both judges and litigants must sort out what is analogous and disanalogous in previous judicial decisions that might constitute precedents in the case at hand. Very frequently, disanalogy is established or reinforced through ever greater contextualization.\textsuperscript{65} Consistent with this, absent inherent hostility or unthinking attachment to foreign countries, the place and scope of citations to foreign authorities in constitutional adjudication should primarily depend on general principles of judicial interpretation. As we already saw, the difference between expansive and restrictive judicial philosophies is very important in this respect. But so are different conceptions of the proper uses of processes of abstraction and competing views on how to optimize the balance between analogical and contextual considerations. With this in mind, let us now briefly revisit the cases considered by Professor Glendon, as well as a few additional ones that seem particularly relevant in the light of the present discussion.

B. Revisiting the Relevant Cases

1. Roper

Beginning with Roper, two principal considerations, one inward looking and the other directed outward, militate in favor of con-

\textsuperscript{64} I have characterized the stringing together of similarities as a “metaphoric” process of interpretation, and uses of contextualization to highlight differences as a “metonymic” process. Based on that, and for an account of the uses of analogizing and contextualizing for purposes of developing the judicial account of “tradition” in Griswold and its progeny, see ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT, supra, note 10, at 73-125.

\textsuperscript{65} See id. at 104-15 (detailing use of contextualization, both historical to highlight moral objections, and physical, by contrasting homosexual sodomy to “normal” procreative heterosexual sex, by the justices in the majority in Bowers and in the dissent in Lawrence).
sidering how the rest of the world has dealt with the question of the death penalty for juvenile offenders. The inward concern is dramatically triggered by Justice Kennedy drawing attention to the U.S. and Somalia being on one side of the divide and the rest of the world on the other. In view of this, at the very least, American judges ought to go beyond counting the number of states that provide for the death penalty for juvenile offenders and determine whether they can mount a cogent and principled positive argument for justifying the conclusion that the punishment in question is neither "cruel and unusual" nor grossly disproportionate. The outward concern, on the other hand, should be prompted even if one does not entertain inward doubts, given the isolation of the U.S. vis-à-vis the rest of the world on this particular issue. In view of the near universal condemnation of the punishment involved, the conflict between maintaining respect for the dignity of the individual (no matter how heinous his crime) and society's need for proportionate and effective punishment presumably trumps cultural, political and historical differences. Accordingly, focus on the relation between the individual, society, the crime and the punishment across national borders above and beyond the above-mentioned differences would clearly seem to hit the appropriate level of abstraction. It also follows from this, that the comparison should be undertaken and foreign authorities ought to be factored in either to alter the national approach or to reaffirm it fully cognizant of the widespread worldwide criticism of it. Both Justices Kennedy and O'Connor approach the question presented in Roper at a level of abstraction congruent with the one advocated above, and they both insist on the appropriateness of considering relevant foreign authorities. They differ in their conclusions, however, at least in part because Justice Kennedy places greater emphasis on analogical factors and Justice O'Connor on contextual ones, with the consequence that the former downplays majoritarian considerations while the latter gives them significantly greater weight. In any event, it is noteworthy that neither of the two justices invokes the majoritarian versus anti-majoritarian conundrum to reject consideration of foreign

66. In order to be unconstitutional as "cruel and unusual," a punishment must be grossly disproportionate. See Coker v. Georgia, 433 U.S. 584 (1977). Cf. 1948 UN Universal Declaration of Human Rights (no one should be subjected to "cruel, inhuman or degrading treatment or punishment"); 1950 European Convention on Human Rights, Art. 3 (prohibiting "inhuman and degrading" punishment).

67. See Roper, 543 U.S. at 578, 604-05.
authorities. In contrast, Justice Scalia rejects such consideration on both majoritarian and (categorical) contextual grounds. What is striking about Justice Scalia's position is not his originalism—he could have filed a dissent comprised of a couple of sentences stating that since the punishment at issue was not deemed cruel and unusual in 1791 America, it is without a doubt constitutional in the twenty-first century—but his seeming runaway contextualism, without any apparent regard for the ongoing dynamic between similarities and differences. As already noted, Justice Scalia is particularly critical of the UK, which may be the most similar to the U.S. among the nations of the world and which yet has abolished the death penalty notwithstanding that a majority of its citizens may still be in favor of it.

Among the differences that Justice Scalia underscores to support his conclusion that the Court looking to the laws of the UK "is perhaps the most indefensible part of its opinion," are the UK submission to the jurisprudence of European courts dominated by continental judges, and its trial of those accused of the most serious crimes without a jury. These are indeed differences among the two countries and they are certainly apt for use for contextualization. It seems inescapable that Justice Scalia's use of them in *Roper* amounts to misplaced and misleading contextualization. The suggestion is that the UK's attitude toward the death penalty is untrustworthy because the country has fallen under the sway of judges whose standards are different from (perhaps even inferior to?) those of their common law counterparts; and because the UK seems less concerned than it once was concerning the dignity of criminal defendants. None of this seems relevant, however, to a comparison between the U.S. and the UK on the impact of the death penalty for juvenile offenders on human dignity and society's standards of decency. In terms of the latter issue and of constitutional and human rights-based dignity and societal decency concerns in general, there actually seems to be little significant difference between European (continental) and common law judg-

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68. See supra note 17.
69. See *The Relevance of Foreign Legal Materials in U.S. Constitutional Court Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, supra note 7, at 529 (Justice Scalia asserting that every public opinion poll in the UK indicates that the country's people are in favor of the death penalty).
70. *Roper*, 543 U.S. at 626.
71. *Id.* at 626-27.
72. *Id.* at 627.
es, including American ones. Similarly beside the point are departures from jury trials in the UK, which does not have the equivalent of the U.S. Seventh Amendment jury trial guarantee, and which has departed from jury trials motivated by reliability and efficiency considerations without any design to weaken or disregard the dignity concerns of criminal defendants.

2. **Lawrence**

Turning to *Lawrence*, what clearly comes to the fore is an evolving “tradition” concerning acceptance and inclusion of homosexuals within the mainstream of society both in the U.S. and in Europe, though not in certain other parts of the world, as noted by Justice Scalia in his dissent. Three principal positions relating to criminalization of consensual homosexual sex among adults are assertively brought forth not only in *Lawrence*, but also in *Bowers* and in *Dudgeon*, the ECtHR case cited by Justice Kennedy. The first is the (now overwhelmingly discredited) position that homosexual sex is somehow devious, abnormal or dangerous based on beliefs that homosexuals are prone to having sex with minors. The second position is the religious condemnation of homosexual sex by the West’s three major religions, and the moral condemnation derived from the latter. And, finally the third position is

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73. See generally Michel Rosenfeld, *Comparing Constitutional Review By The European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. OF CONST. L. 618 (2006). There are certain rights, such as social and welfare rights, with respect to which there are important differences in approach between common law and continental judges. There are also differences in approaches to constitutional interpretation that separate the U.S. from other common and civil law countries, such as the inclusion of limitation clauses in bills of rights, e.g., Section 1 of the 1982 Canadian Charter of Rights, that have no equivalent in the U.S. However, none of these differences have any discernible bearing on the issues involved in *Roper*.

74. See US CONST., amend. VII (1791).


78. See Chief Justice Burger’s concurring opinion in *Bowers* citing to Blackstone’s reprehensible dictum describing homosexual sex as “the infamous crime against nature,” an offense “of deeper malignity” than rape, *Bowers* v. Hardwick, 478 U.S., 186-196-97 (1986); Judge Zekia’s dissenting opinion in *Dudgeon*, asserting that “all civilized countries” have “till recently” penalized homosexual sodomy “and akin unnatural practices”, 4 EHRR, at para. 2, and Judge Matscher’s dissenting opinion in *Dudgeon* claiming that “it is well known” that homosexual relations with minors “is a widespread tendency,” 4 EHRR, I(b).

79. See Chief Justice Burger’s concurring opinion in *Bowers* referring to condemnation of sodomy in “Judeo-Christian moral and ethical standards,” 478 U.S. at 196; Judge Zekia’s dissenting opinion in *Dudgeon* specifying that “Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy”, 4 EHRR, at para. 1.
that asserted by the dissenters in Bowers, the majority in Lawrence and that in Dudgeon: homosexuals are as entitled as heterosexuals to conduct their intimate sex life in full privacy without interference by the state.\textsuperscript{80} Moreover, this last position is backed by a direct refutation of the assertions made by proponents of the first position. Indeed, already many years before Bowers, professional associations of psychologists and of public health specialists had repudiated earlier stances that characterized homosexual sex as deviant and officially reclassified it as normal.\textsuperscript{81}

Even without any reference to foreign law, Bowers and Lawrence highlight two fault lines among the principal judicial approaches manifest in the various opinions filed in the two cases. The first of these fault lines is the predictable one between restrictive and expansive judicial approaches, but the second one is much more remarkable as it pits two expansive views on privacy rights against one another. Under a restrictive view, such as that of Justice Black in Griswold, there is no more a constitutional right to homosexual intimacy than there is one to marital privacy.\textsuperscript{82} But that is not the case for Justice White, whose view was expansive in that he concurred with the majority in Griswold and yet he wrote the opinion of the Court in Bowers. It may seem that Justice White was inconsistent with respect to these two cases, but closer analysis does not bear that conclusion out.

In relation to traditions entitled to constitutional protection, Justice White distinguishes marriage and contraception in the context of marital sex, on the one hand, from homosexual sex, on the other.\textsuperscript{83} In contrast, the dissenters in Bowers and the majority in Lawrence place homosexual sex on the same side of the ledger as they do marriage and contraception, and treat all three as equally deserving of constitutional protection.\textsuperscript{84} What differentiate the latter justices from Justice White are not their equally expansive judicial approaches, but the fact that they rely primarily on analogical reasoning, while he correspondingly engages in con-

\begin{footnotesize}
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    \item \textsuperscript{80} Lawrence, 539 U.S. at 578-79; Bowers, 478 U.S. at 206 (Blackmun, J., dissenting); 4 EHHR at para. 69.
    \item \textsuperscript{81} The dissenting justices in Bowers cited the \textit{amici} briefs to that effect of the American Psychological Association and of the American Public Health Association, 478 U.S. at 203.
    \item \textsuperscript{82} See Griswold, 381 U.S. at 509.
    \item \textsuperscript{83} Bowers, 478 U.S. at 190-91.
    \item \textsuperscript{84} Lawrence, 539 U.S. at 577-78; Bowers, 478 U.S. at 217-18.
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textual reasoning. Once homosexual sex is determined to be normal by the relevant experts, then all intimate relationships involving consensual sex among adults should be deemed equivalent for purposes of determining what is analogous today to what marriage represented in the eighteenth century. This conclusion is reinforced by the Court's extension of protection to the kind of intimate sex recognized in Griswold to apply to non-marital heterosexual sex in Eisenstadt. Justice White and those in his camp in Bowers, however, contextualize homosexual sex by referring to it in historical terms and refusing to approach it at the same high level of abstraction, as they were willing to tackle marriage, contraception and non-marital heterosexual sex.

Can this inconsistency in the use of levels of abstraction be justified? Presumably, it cannot, unless positions one or two listed above, involving respectively categorical objections based on the conviction that homosexual sex is in some relevant sense not as normal as its heterosexual counterpart and religious objections are advanced as reasons for the seeming discrepancy relating to levels of abstraction. Reliance on religious objections is problematic to the extent that the latter also extends to heterosexual non-marital sex and, in some cases, even to contraception. Reliance on the conviction that homosexual sex is not normal is also questionable to the extent the overwhelming weight of expert opinion strongly militated against this position already more than a decade before Bowers was decided.

In view of the preceding observations, the three judicial approaches that happened to weigh in on the American constitutional debate over the criminalization of homosexual sex managed to elaborate distinct positions that are independent from any foreign authorities or influences. Moreover, the restrictive approach had no need or use for foreign authorities. The two expansive positions did have such use, however, but each for its own reasons.

85. For a detailed account of the contrasting analogical and contextual—or, in other words, metaphoric and metonymic—approaches in Bowers and Lawrence, see Rosenfeld, The Identity Of The Constitutional Subject, supra note 10, at 104-15.
87. For example, in 1974 the American Psychological Association changed its position to declare that homosexuality is not per se a mental disorder, and "[s]ince 1974, the American Psychological Association (APA) has opposed stigma, prejudice, discrimination, and violence on the basis of sexual orientation and has taken a leadership role in supporting the equal rights of lesbian, gay, and bisexual individuals." See Resolution on Appropriate Responses to Sexual Orientation Distress and Change Efforts, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/about/policy/sexual-orientation.aspx (last visited Dec. 8, 2013).
The majority justices in *Bowers* who were bent on contextualizing to reinforce their approach, but also seemingly (whether intentional or not) to dissimulate the inconsistencies produced by their shifts in levels of abstraction, invoked past foreign authorities. They did this to overplay the historical, long passed, groundings of the tradition at stake while underplaying its more recent evolution and adaptation. Thus, Chief Justice Burger’s allusion to millennial Judeo-Christian morality and to Blackstone’s characterization of homosexual sex as being “against nature” places the U.S. in a Western civilization context that long predates it. The allusion also aligns the U.S. to the legal system of which it is the heir, by referring to a common tradition invoked by one of its most celebrated commentators. What this reference to foreign authorities overemphasizes is continuity; what it dissimulates is the substantial erosion of positions one and two above within the precincts of the U.S. Supreme Court and within the larger social landscape comprising the relevant experts and American society at large.

In contrast, Justice Kennedy’s reference to foreign authorities in *Lawrence*, as already noted, had both a negative and a positive purpose. The negative purpose, which seems unobjectionable and which Justice Scalia has also used to the same end in both *Roper* and *Lawrence*, is to dispel the erroneous impression concerning current attitudes in the rest of the Western world conveyed by Chief Justice Burger in *Bowers*. The positive purpose, on the other hand, far from seeking dissimulation, confirms and amplifies the judgment of the majority in *Lawrence* in ways that are uniquely relevant and weighty. Both Chief Justice Burger and Justice Kennedy agree that the question concerning a constitutional privacy right covering homosexual sex arises in a cultural, religious, moral, and political setting that encompasses an entire Western tradition, of which the U.S. is a part. All three positions alluded to above have equally gathered support throughout this broader culture (at least in Western Europe and North America). The “tradition” in question has evolved in the same direction, with the third position now predominant (and the other two in full retreat) in constitutional cultures that protect certain anti-

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88. See *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).
89. See *Lawrence*, 539 U.S. at 573.
90. To avoid misunderstanding, the position based on religion is clearly in rapid retreat in the context of constitutional reasons for upholding laws discriminating against homosexuals. This does not imply any change within the ambit of those religions that forbid homosexual sex.
majoritarian fundamental rights against majoritarian encroachments.

Accordingly, Justice Kennedy's citation in *Lawrence* to the ECtHR's *Dudgeon* is not only apt, but probative and quite persuasive on the question of the evolution of the commonly shared Western "tradition" regarding the proper relationship between homosexual sex and the right to privacy in one's intimate life. Justice Kennedy does not allude to this in *Lawrence*, but the invalidation of Northern Ireland's criminalization of homosexual sex was only decreed by the ECtHR after the clearing of a major hurdle set by that court. The court had to reconcile respect for the rights protected by the ECHR and the divergences in constitutional, legal, political and ideological culture that set apart the (now) forty-seven European countries subject to the ECHR. The hurdle in question has been established through use of the judicially devised standard known as "the margin of appreciation." In a nutshell, this standard is designed to allow the ECtHR to insure that all countries party to the ECHR equally enforce the core of an applicable right under the Convention, while leaving room for differences and divergences meant to accommodate the diversity of cultures comprised within the forty-seven members of the Council of Europe at the periphery. In response to the complaint lodged against the UK for maintaining the criminalization of homosexual sex among consenting adults in Ireland while having decriminalized it in the rest of the country, the UK invoked the margin of appreciation in an endeavor to convince the ECtHR that the criminalization at stake was not violative of Article 8 of the Convention (which provides, in relevant part, that "Everyone has the right to respect for his private and family life ...”). While acknowledging that Northern Ireland was more morally and religiously conservative than the rest of the UK, the ECtHR refused to allow for any exemption or deviation based on the margin of appreciation. In so doing, the ECtHR stated:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council

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91. For a more extended discussion of this standard, see ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT, supra note 10, at 256-57.
93. *Id.* para. 57.
of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied...94

In other words, not only is the trend in the broader world that shares the same tradition with the US—both in terms of attitudes toward homosexual sex and of protecting anti-majoritarian fundamental rights—toward decriminalization, but also the change in this respect has been so thorough and dramatic that a laggard polity such as Northern Ireland can no longer be afforded any margin for deviation.

3. **Glucksberg**

Professor Glendon approves of Chief Justice Rehnquist's reference in *Glucksberg*95 to studies evaluating the Netherlands's experience with physician-assisted suicide and euthanasia in considering whether the challenged Washington's law banning assisted suicide met minimal scrutiny under the Due Process Clause.96 This approval is consistent with Professor Glendon's endorsement of legislative as opposed to judicial reliance on foreign authorities because the former do not raise the anti-majoritarian issues that the latter do.97 The purpose of the reference to the Dutch experience with assisted suicide was to determine whether the Washington law banning such practice satisfied the threshold of being minimally rational.98 The Dutch studies taken as a whole were inconclusive, as some asserted that there had been abuses leading to involuntary euthanasia while others concluded that no such abuses had occurred.99 Because one of the purposes of the Washington law was to protect individuals from involuntary euthanasia,100 the very inconclusiveness of the Dutch studies lent support to the conclusion that the Washington legislature had acted rationally.

Given the very low threshold under minimal scrutiny, the reference to the Dutch studies added very little. Even had these stud-

94. Id. para. 60.
96. See Glendon, supra note 9, at 12.
97. Id. at 12-13.
100. Id. at 782.
ies been unanimous in showing no abuses, Washington could have still met its constitutional obligations by arguing that it aimed at a zero risk of involuntary euthanasia, or that conditions in the U.S. could not be assumed to be in all relevant respects identical to those in the Netherlands. The key issue in *Glucksberg* was whether there is a constitutional privacy right to control one's death in the U.S. that would render laws banning assisted suicide unconstitutional. Had the Court decided in favor of such right, then the Washington law would have had to be subjected to strict scrutiny and the inconclusive Dutch studies would have been of no discernible help. Washington would have to prove a compelling interest for banning assisted suicide. Dutch studies indicating that there may or not be abuses in that country would certainly not satisfy the applicable strict standard.

Reference to foreign authorities in relation to the key issue before the Court in *Glucksberg* did figure in the Court's opinion by Chief Justice Rehnquist although this is not mentioned by Professor Glendon. In discussing the evolving trend in the U.S. and changed conditions due to advances in medicine, the Chief Justice pointed out that "[o]ther countries are embroiled in similar debates." Specifically, the Chief Justice cited to a decision of the Supreme Court of Canada, and legislative action by the British House of Lords and the parliaments of Australia and New Zealand, all against recognition of a right to assisted suicide. In addition, he also cited a decision by Colombia's Constitutional Court upholding a right to euthanasia for the terminally ill as the only foreign authority headed in the opposite direction. These citations are introduced in the course of making the case that American tradition had not evolved to the point that any recognition of a right to assisted suicide would be warranted.

Chief Justice Rehnquist's citation to foreign authorities in *Glucksberg* seems completely similar to that of Justice Kennedy in *Lawrence*. The only difference between the two is that Chief Justice Rehnquist has recourse to foreign authority in support of his refusal to provide a more expansive interpretation of the constitutional right to privacy whereas Justice Kennedy does so for purposes of a more expansive interpretation of that right. Once again, the citations to foreign authorities play but a secondary

101. *Id.* at 718 n.16.
102. *Id.*
103. *Id.*
role. The important issue is that between restrictive and expansive approaches—in the case of the comparison at hand, more expansive versus more restrictive conceptions of constitutional rights as contrasted to expansive versus restrictive judicial philosophies.

4. Printz

I now turn to cases not considered by Professor Glendon with a view to sketching a more complete account of the nature and legitimate scope of judicial references to foreign authorities. The first of these cases is Printz v. United States,104 a federalism case in which Justice Breyer referred to foreign federal systems in his dissent. Comparisons in the area of federalism are presumptively more problematic than those in the area of individual rights as each constitutional federal arrangement may reflect a sui generis compromise concerning apportionment of powers, whereas relationships between men and women, or homosexuals and heterosexuals, may well be very similar, if not universally, across a large number of different polities.105 Nevertheless, as Justice Breyer illustrates in Printz, comparisons in the area of federalism may be quite useful, provided they are undertaken at the appropriate level of abstraction.

The issue in Printz was whether the federal government could enlist state executive personnel to conduct a federally required computer background check on prospective firearm purchasers within the relevant state. The Court’s majority in an opinion by Justice Scalia held that the obligation imposed by the federal government on state officials amounted to unconstitutional “federal commandeering.”106 Justice Breyer, in his dissent, emphasized that the key federalism issue raised in the case was whether delegation of enforcement to state officials or dispatching federal officials to the state for that purpose would be least intrusive on the state’s sovereignty.107 Pointing out that the U.S. Constitution was silent on the matter, Justice Breyer referred to the federal systems of Germany, Switzerland and the European Union, which, though different from one another and from that of the U.S., all

106. 521 U.S. at 925.
107. Id. at 976-77.
Duquesne Law Review

50

Vol. 52

provided empirical evidence that delegation to the executive of the federated unit proved least intrusive upon the latter's prerogatives.\textsuperscript{108} Underlying Justice Breyer's reference to foreign federal systems is the proposition that in spite of the significant differences among these various federal systems and between all the latter and their American counterpart, they all lend support to the empirical conclusion that delegation is less intrusive than direct enforcement by the federal authorities. In this context, the reference to foreign systems involved in \textit{Printz} seems equivalent to the common practice of a U.S. state's highest court looking to other U.S. state courts that have dealt with the issue it is considering for the first time in order to determine which of the various available alternatives developed in other jurisdictions is most likely to provide guidance or useful caveats.\textsuperscript{109}

\section{5. Hate Speech Cases}

Finally, I address cases that do not refer to foreign authorities, but that arguably should have for purposes of achieving a better look inward that might have led to a change of jurisprudence or to a strengthening or refinement of the latter. I also deliberately concentrate exclusively on First Amendment cases, perhaps the most distinct and deeply entrenched area of American exceptionalism.\textsuperscript{110} The two cases in question are \textit{R.A.V. v. City of St. Paul}\textsuperscript{111} and \textit{Virginia v. Black},\textsuperscript{112} both involving hate speech against African-Americans. Unlike international treaties, Western Europe and Canada, which do not afford constitutional protection to racial hate speech, the U.S. draws the line at speech that incites violence.\textsuperscript{113}

The two cases in question concerned cross burning, long a practice of white supremacists such as those belonging to the Ku Klux Klan, which has figured as a symbol of virulent racism much like the swastika has been associated with virulent anti-Semitism.\textsuperscript{114}

\textsuperscript{108} Id. at 976.
\textsuperscript{111} 505 U.S. 377 (1992).
\textsuperscript{112} 538 U.S. 343 (2003).
\textsuperscript{113} See Rosenfeld, \textit{supra} note 58, at 242.
\textsuperscript{114} The St. Paul ordinance successfully challenged in \textit{R.A.V.} criminalized, among other things, placing "a burning cross or Nazi swastika" on public or private property. 505 U.S. at 380.
In *R.A.V.*, young white extremists placed a burning cross inside the fenced yard of an African-American family that had moved to a neighborhood that was in the process of becoming more racially integrated. In a unanimous decision, the U.S. Supreme Court held that the cross burning at issue was constitutionally protected expression, as it did not amount to an incitement to violence.

In *Black*, a divided Court adjudicated a case comprising two cross burning incidents, one at a Ku Klux Klan rally attended by hooded members of the group, and the other by whites not affiliated to the latter group in the yard of an African-American neighbor. The Virginia statute at stake in this case made it a crime to burn a cross “with the intent of intimidating any person or group of persons,” and provided that a cross burning amounted to “prima facie evidence of an intent to intimidate.” The Court held that the “prima facie” presumption was unconstitutional, but that cross burning with intent to intimidate was not constitutionally protected expression. Based on that reasoning, the Court made it clear that consistent with this, the Klan rally, with its vicious racist rhetoric which unmistakably amounted to an incitement to racial hatred, was protected speech. In Justice O’Connor’s words, it amounted to a protected communication of “potent symbols of shared group identity and ideology.”

The second cross burning, however, appeared to have been carried out with an attempt to intimidate, and as such would not be protected speech. Because intimidation need not involve a threat of, or incitement to, violence—one can intimidate with threats of ridicule, public humiliation, social exclusion, and the like—it may seem that *Black* is internally inconsistent or at least irreconcilable with *R.A.V.* To ward off such a conclusion, Justice O’Connor specified in *Black* that throughout its history the Klan has used “cross burnings . . . to communicate threats of violence . . . .” Indeed,

115. 505 U.S. at 379.
116. 538 U.S. at 348-52.
118. *Id.*
119. 538 U.S. at 363.
120. *Id.* at 356.
121. *Id.* at 350-53. Because of its finding that the Virginia statute’s presumption of intent to intimidate was unconstitutional, the Court could not uphold the conviction of those responsible for the second cross burning. For purposes of present doctrinal analysis and critique, however, I will proceed as if the intent to intimidate had been established without any presumption at play.
122. *Id.* at 354.
as cross burnings have been frequently followed by beatings, lynchings, shootings, and killings of African-Americans, either they amount to incitements to violence or they create a reasonable fear in those whom they target of becoming victims of impending violence.

The link between intimidation and incitement to violence or reasonable fear of becoming the victim of violence seems logical. But then, why treat doctrinally differently the rally that whips up the virulent racist animus that prompts to, and precedes, intimidation and violence? And, what if that rally is not only before converts, but also before a white audience that far from being intimidated, may be comprised of potential Klan recruits? Furthermore, does Black blur the clear line drawn in R.A.V.? Also does Black sufficiently account for the concern of the marginalized and the oppressed who are disproportionately confronted by hatred and violence?123

Significantly, in his dissent in Black, Justice Thomas alludes to the "intolerable atmosphere of terror" produced by cross burnings in Virginia during the 1950s.124 Justice Thomas finds banning cross burning unequivocally constitutional, but surprisingly seeks to justify his conclusion by characterizing the latter as conduct rather than as symbolic speech.125 Indeed, not only does that characterization seem in direct contradiction to the unanimous treatment of cross burning as speech in R.A.V., but also seems to run counter to the Court's well-established jurisprudence affording protection to symbolic speech.126

This brief review of R.A.V. and Black reveals doctrinal inconsistency or strain and a seeming underestimation of the severe potential (cumulative) harm of hate speech on its targeted victims. In view of this, the U.S. Supreme Court could have benefited—and could certainly do so in future hate speech cases—from consideration of foreign judicial treatment of the subject. In this respect, the Canadian Supreme Court decision in Regina v. Keegstra127 seems particularly instructive. In that case, the Court upheld as

123. See MARY J. MATSUDA, ET. AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); CHARLES LAWRENCE, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKEL. J. 431, 474-75 (tolerance of hate speech fosters unconscious racism in the marketplace of ideas).
124. 538 U.S. at 393.
125. Id. at 388.
constitutional the criminal conviction of a high school teacher who communicated virulent anti-Semitic hate speech to his students, clearly inciting the latter to hatred of Jews.\textsuperscript{128} In many respects, the Canadian protection of speech shares much with the American one, relying on justifications from democracy, pursuit of the truth and autonomy.\textsuperscript{129} Unlike its American counterpart, however, the Canadian Constitution places greater emphasis on multicultural diversity and on social cohesion among diverse groups within the polity.\textsuperscript{130} While keeping this difference in mind, two points emphasized by the Canadian Court seem worthy of consideration from the standpoint of U.S. jurisprudence. The first of these is the observation—consistent with that of U.S. minority critics of current American hate speech doctrine—\textsuperscript{131} that the damage caused by hate speech on its intended victims may be gradual and yet profoundly demeaning and eventually devastating.\textsuperscript{132} The second observation, which the Canadian Court puts forth in knowing disagreement with prevailing American assumptions, is that in an era of pervasive and sophisticated propaganda, hate speech can be fine-tuned to play on the emotions and to bypass reason. Citing a study commissioned by the Canadian Parliament, the \textit{Keegstra} Court stated:

\begin{quote}
The success of modern advertising, the triumphs of impudent propaganda such as Hitler's have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by historical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.\textsuperscript{133}
\end{quote}

These two considerations do not necessarily militate in favor of American hate speech jurisprudence emulating the Canadian example, but they seem particularly apt for prompting an inward look by the U.S. Supreme Court in view of its current doctrinal unease and the pleas of those who have disproportionately endured hate speech as members of minority groups that have been targeted by hate propaganda. Should the line between incitement

\begin{thebibliography}{9}
\bibitem{128} \textit{Id.} at 713-14.
\bibitem{129} \textit{See ROSENFELD, supra} note 58, at 261.
\bibitem{130} \textit{3 S.C.R.} at 736.
\bibitem{131} \textit{See LAWRENCE, supra} note 123, at 474-75.
\bibitem{132} \textit{3 S.C.R.} 746-47.
\bibitem{133} \textit{Id.} at 747.
\end{thebibliography}
to racial hatred and to racial violence be struck down or further blurred? Or, should it be firmly maintained or restored? Both the American and the Canadian approach have strengths and weaknesses. Be that as it may, whatever may eventually prove optimal in the American context, it appears that further self-inquiry in light of similarities and differences with the Canadian constitutional approach could prove quite useful and productive as the U.S. Supreme Court continues to confront hate speech cases in the future.

III. SETTING A PROPER FIT BETWEEN CITATION TO FOREIGN AUTHORITIES AND JUDICIAL PHILOSOPHY

Absent xenophobia as the reason for refusal to look beyond one's own borders, the preceding analysis indicates that the legitimacy of references to foreign authorities in U.S. constitutional adjudication is above all a function of judicial philosophy. Moreover, from the standpoint of the most restrictive philosophies, there is little or no room for the references in question. In contrast, the more expansive a judicial philosophy happens to be, the more it is likely to carve out a very broad scope of legitimacy for such references. That said, the use of references to foreign authorities by Chief Justice Rehnquist in *Glucksberg* plainly suggests that even a relatively restrictive judicial approach may suffice for purposes of legitimating references to authorities beyond America's shores.

As the legitimacy of references to foreign authorities is parasitic on the expansiveness of the corresponding judicial approach, it becomes necessary to settle on the relevant judicial approach that is best suited to determine when, why, how much, and for what purpose, such references might be useful and legitimate. Before proceeding any further, however, there are two important threshold questions which must be briefly addressed. First, in terms of expansiveness, what range of judicial approaches are actually in use in relevant U.S. Supreme Court constitutional adjudications? And second, in light of present day constitutional controversies and changing circumstances, including the proliferation of

134. See ROSENFELD, supra note 58, at 281-82.
136. I emphasize "relevant" as there are presumably prescriptions under the U.S. Constitution, such as to be qualified to be President of the U.S. a person must have attained the age of thirty five, U.S. CONST. art. II, § 1, cl. 5 (1787), with respect to which looking to foreign authorities would make little sense no matter how expansive one's judicial approach.
transnational legal regimes that affect the U.S. directly or indirectly, how expansive must judicial approaches to the U.S. Constitution be to achieve a proper balance between efficiency, coherence and legitimacy?

A. On the Expansiveness of Operative Judicial Approaches in U.S. Constitutional Adjudication and on the Optimal Expansiveness to Tackle Foreign Authorities

As Professor Glendon observes, the use of foreign law is here to stay and is likely to increase. Already at present, all judicial approaches, except those predicated on a conception of originalism akin to that embraced by Justice Scalia, make use of foreign citations. Ironically, even Justice Scalia, who repeatedly professes his preference for originalism, has felt obliged in cases like Roper and Lawrence to have significant recourse to foreign authorities to buttress his dissents. Indeed, in addition to stressing that if he had its way the Court would stick to originalism, Justice Scalia has made liberal use of references to foreign authorities in an effort to prove that those cited by justices in the majority are unpersuasive, countered or overshadowed by others that Justice Scalia brings to the attention of his fellow justices and to readers of the Court's opinions. Taking together the references to foreign authorities made by Chief Justice Rehnquist in Glucksberg and the liberal use of them by Justice Scalia clearly indicates that even judges who view themselves as proponents of very restrictive judicial philosophies seem inevitably drawn to the fray. In short, in response to the first question above, at least in the context of Due Process cases, as a practical matter even the most restrictive judicial approaches in constitutional adjudication have regular recourse to references to foreign authority.

Reasonable minds may disagree about where to draw the line in answering the second question above. For example, depending on how exceptionalist and isolationist one may be, the scope of convergence between U.S. and foreign constitutional norms may be

137. See Glendon supra note 9, at 20.
139. See Glucksberg, 521 U.S. at 787.
140. I leave aside how restrictive judicial philosophies such as those of Chief Justice Rehnquist and of Justice Scalia actually are. Suffice it to point out that, at least in the eyes of some, the philosophies in question tend to be much more expansive than their proponents would have us believe. See supra note 24.
viewed as narrower or broader and the internationalization of constitutional law beyond the borders of the U.S. as highly relevant or wholly irrelevant for American constitutional interpretation. In view of these apparently irreconcilable positions, it seems best to circumvent them as much as possible in the course of framing a principled approach suited to the discovery of the judicial philosophy with the optimal expansiveness needed to best deal with new and evolving challenges. Most notably, the latter include those posed by the globalization, transnational spread and cross-fertilization of constitutional norms, as well as by the spread of international norms with substantive content that is for all practical purposes constitutional in nature, such as the individual rights protected by the UN's International Covenant on Civil and Political Rights (ICCPR).

A particularly attractive way to further the objective at hand, in light of the consensus over the ubiquity and endurance of reference to foreign authorities in American constitutional adjudication, is by starting from a presumption that references to foreign authorities are always warranted. This requires openness to inquiring into the relevance of both similarities and differences between the American and the foreign circumstances, materials, and authorities brought to the attention of the adjudicator. Moreover, it should be the burden of the party introducing the foreign material to point to the relevant similarities and differences in play and to make out a prima facie case why these ought to be considered or factored in the adjudication of the American constitutional issue in dispute. Thus far, under this proposal, introduction of foreign materials should be treated in much the same way as that of relevant judicial, legislative and administrative authorities from one U.S. state in the course of adjudication in another U.S. state. This is particularly true where the latter lacks a developed jurisprudence on the subject, or where its existing precedents are

141. See Rosenfeld, The Identity Of The Constitutional Subject, supra note 10, at 246-47 (discussing the internationalization of constitutional law and the constitutionalization of international law).
143. Based on the discussion above, both Justice Kennedy and Justice Scalia lay out a prima facie case respectively for and against the relevance of foreign materials in Roper and Lawrence. As we have seen, although Justice Scalia forcefully argues against the relevance of foreign materials, he nevertheless refers to some for purposes of refuting the relevance of others relied upon by Justice Kennedy.
challenged as no longer adequate to deal with salient changes better accounted for in the jurisprudence of certain sister states.\textsuperscript{144}

There is, of course, one major difference between relying on materials of a sister U.S. jurisdiction and drawing upon foreign materials. The latter poses a problem of "translation" in both a literal and a figurative sense that the former does not.\textsuperscript{145} Leaving "translation" aside for the moment, as I will return to it below,\textsuperscript{146} it bears emphasizing from the outset that adoption of a policy based on an unlimited presumption of admissibility of references to foreign materials has one major advantage: it allows for avoidance of the at this point in time rather futile ideological debate over whether foreign materials should be banned, avoided or else not cited in U.S. constitutional adjudication. Aside from "translation," these ideological battles can be more usefully fought within the actual confines of adjudication, as are the differences in judicial philosophy (to which the battles in question are inextricably linked) bearing directly on the constitutional issues before the relevant court.

Furthermore, unlimited admissibility should cause no genuine "opening the floodgates" concerns. In many cases, foreign materials would be irrelevant, clearly dwarfed by domestic considerations, inconclusive or unhelpful to any litigation party or to advancing any of the judicial philosophies that divide the judges involved. Under such circumstances, neither the litigants nor the judges would have any reason to seek consideration of foreign materials. In other cases, these materials may be introduced, but then swiftly discarded as inapposite.

Finally, even where foreign materials are admittedly relevant, they need not automatically help either side of the judicial ideological divide. Although much of the discussion focused on \textit{Roper} and \textit{Lawrence} links reliance on foreign materials with the more progressive justices, the examples set by Justice Scalia in the same cases and by Chief Justice Rehnquist in \textit{Glucksberg} suggest that reference to such materials can also bolster the positions of more conservative justices.

More specifically, Professor Glendon asserts that "foreign law can never legitimately be used to support an interpretation of the

\textsuperscript{144} See Flanders, \textit{supra} note 109.

\textsuperscript{145} See Richard Posner, \textit{Forward: A Political Court}, 119 HARV. L. REV. 31, 86 (2005) ("the judicial systems of the [US] are . . . readily accessible, while [those] of the world are immensely varied and most of their decisions inaccessible . . . to our mostly monolingual judges . . .").

\textsuperscript{146} See infra Part III.B (Foreign Materials and the Problem of "Translation").
U.S. Constitution that is not otherwise grounded in this country’s Constitutional text, structure or precedent". Based on the preceding analysis, I disagree with Professor Glendon regarding precedents—as should be plain given our differences over the use of foreign law in *Roper* and *Lawrence*—but agree with her with respect to text and structure, with one major qualification. Only foreign law that could not weigh in except to contradict the text of the Constitution, or to counter or undermine the distinct structures clearly prescribed by the Constitution, such as federalism and the federal separation of powers, should be excluded outright. This latter qualification is consistent with the proper reference to foreign law in *Printz*, where the Court dealt with a structural issue upon which the Constitution happened to be silent.

Even consistent with the broader scope of legitimacy of uses of foreign law deriving from the position I defend here, a large number of such uses would prove inappropriate, irrelevant or of barely marginal value. It is of course obvious that when the text of the Constitution is clear and determinative in a particular case, there is no legitimate place for contradictory or inconsistent foreign authority. Moreover, the same conclusion would extend to instances where the foreign authority at stake derives from a constitution that is textually directly at odds with that of the U.S. For example, consider a judicial decision extolling the virtues and unifying benefits of mandatory daily public school prayers conforming to the creed of the country’s majority religion that is consistent with a constitution declaring the majority religion as the official state religion. Clearly, citation to that decision could have no legitimate place in a U.S. case involving a controversy over the constitutionality of public school prayers under the Establishment

147. See Glendon, *supra* note 9, at 20.
148. This suggestion is not inconsistent with the position adopted above that all references to foreign authorities should be allowed to be introduced in the course of litigation. Accordingly, the foreign law in question here should be “excluded” in the same sense that a court would “exclude” by giving no consideration to domestic material that directly contradicted constitutional text, such as, for example, citation to a pre-Civil War court decision vindicating slavery which squarely contradicted the text of the Thirteenth Amendment.
150. See, e.g., *Folgero v. Norway*, 4 EHHR 47 (2008) (ECtHR) (assessing conformity with the *ECHR* of a law of Norway mandating public school teaching of Christian religion and philosophy in accordance with Evangelical Lutheran Faith propagated by the country’s constitutionally enshrined state religion).
Similarly, a judicial decision about the great benefits of unifying and centralizing all criminal law countrywide coming from a unitary country such as France would have no place in a U.S. case raising an issue of apportionment of powers relating to criminal law.

Beyond these obvious examples, whether use of foreign law would be legitimate, relevant or valuable should be left to the ordinary workings of the adversary system. Disagreements involving foreign authorities should be treated in the same way as those concerning domestic law: domestic cases can be introduced as persuasive in their reasoning, their doctrinal approach or their fair and judicious treatment of the conflicting interests fueling the litigation at stake; and empirical data and studies bearing on the legal issues can be presented for adjudication.\textsuperscript{52} In typical divided decisions, the Court's justices disagree on a whole range of relevant matters ranging from the meaning of the constitutional text, the proper interpretation of precedents, the particular fit of the case to be adjudicated within various plausible lines of precedents, and the relevance of certain data or fact patterns. As made manifest by the above-discussed disagreements between Justice Kennedy and Justice Scalia in \textit{Roper} and \textit{Lawrence}, at the level of actual discussion of the similarities and differences between foreign and domestic authorities, examples or experiences, the judicial \textit{modus operandum} appears to mirror quite closely that prevalent in purely domestic settings.

\textbf{B. Foreign Materials and the Problem of “Translation”}

One may object that even if one were in full agreement will all the observations made above, one would have to reject most uses of foreign law because of serious and even arguably insurmountable problems of translation. That is the position taken by Professor Glendon\textsuperscript{153} and others.\textsuperscript{154} Translation does indeed pose serious problems as what is not readily available to the American judge is not only the foreign language in which certain non-U.S. materials are couched, but also the legal, constitutional, social and cultural context in which the materials in question are produced and in

\begin{itemize}
\item \textsuperscript{152} On this last point, I am in full agreement with Professor Glendon.
\item \textsuperscript{153} See Glendon, \textit{supra} note 9, at 14-15.
\item \textsuperscript{154} See Posner, \textit{supra} note 145.
\end{itemize}
which they remain firmly embedded. Moreover, problems of translation are also responsible, at least in part, for the selectivity and partiality associated with citations to foreign law which has been forcefully decried by Justice Scalia.\textsuperscript{155} On the one hand, selectivity is fostered because some otherwise pertinent foreign materials remain untranslated; on the other hand, conscious selectivity by the proponent of foreign materials is facilitated because judges are less likely to be familiar with the full foreign legal landscape than they are with their own domestic one.

While the translation problem is serious, it is not insurmountable, or more precisely, it is susceptible to adequate handling within the ambit of constitutional adjudication. In other words, consistent with the position I have elaborated above, translation problems should not lead to exclusion, but should be dealt with as best as possible within the precincts of adjudication. To better understand the reasons for this suggested handling of the translation problem it is instructive to draw an analogy to translation in literature.

Certain great works of literature, whether poetry or prose, cannot be given full justice in any translation into a foreign language. Furthermore, even if such works could be translated fully satisfactorily, the foreign reader may miss out on some of the richness of the work because of lack of familiarity with the relevant culture and mores that are accessible to all native readers. Nevertheless, even if the translated work is not the same as the original, it can be appreciated as a great work of art even in translation. Shakespeare may not be the same in French or German translation as he is in the original English, yet translations of his plays have been studied, read and performed in non-English speaking countries for centuries. Presumably, what accounts for the endurance and success of certain great works of literature in translation is above all a combination of two factors: on the one hand, a profound insight into facets of human nature or experience that tend to be universal; and, on the other hand, adaptability for purposes of re-conceptualization within the social context delimited by the culture and mores of the country into whose language the work has been translated. Thus, for example, a novel about a great love threatened by potentially tragic impediments rooted in the social mores of the country in which it is set may well be appreciated by a reader in a foreign culture. The latter may be unfamiliar with

the social mores alluded to in the novel, and may not fully comprehend the import of these on the relationship at the center of the narrative, but may nonetheless be able to similarly benefit from the novel as would a native reader. The foreign reader can imagine the novel's tragic dilemmas in terms of social mores which could give rise to similar impediments within her own country.

In short, great works of literature are translatable and adaptable to remain effective in different linguistic and cultural contexts. Moreover, the adaptability in question not only stretches over space, but also over time. A contemporary English speaking audience at a performance of a Shakespeare play certainly does not have the same familiarity with the language of the play and the social mores it addresses as would have a sixteenth century audience. Nevertheless, the contemporary audience is able to adapt and to reconceptualize so as to appreciate the play's greatness.

The analogy between translation and reconceptualization in literature and in the case of foreign law is of course subject to important qualifications and limitations. The most important of these for present purposes is that presumably any topic can be addressed by great literature and thus made of universal interest, whereas the same is certainly not the case in law. Accordingly, the analogy to literature applies to certain subjects in law, but not to others. For example, the death penalty, the rights of homosexuals, and the right to choose one's death in the context of medicine's increasing ability to prolong life without improving its quality for the very old and the very ill, are subjects that pose similar questions and legal and moral concerns in a large number of countries, if not virtually throughout the globe. Other subjects, in contrast, such as the legal and constitutional peculiarities of particular structural architectures, do not generally fit within the scope of the analogy to literature. It is thus difficult to see how the particulars about apportionment of powers among the legislative and executive powers in a parliamentary democracy such as the UK or Germany would be of any use in adjudicating a separation of powers dispute between the U.S. President and Congress. With this in mind, I now turn to the question posed and left open above: namely when, why, how much, and for what purpose may references to foreign law be useful and legitimate in U.S. constitutional adjudication consistent with the position I have elaborated above?
C. When, Why, How Much, and for what Purpose Are References to Foreign Law Legitimate in U.S. Constitutional Adjudication?

When reference to foreign authorities might be relevant and legitimate depends on the dynamic between content and context. In a case in which the subject matter for adjudication is the same as that dealt with in the relevant foreign material, differences in context may be profitably downplayed through analogical reasoning at a justifiable level of abstraction. Printz presents a good illustration of this: in spite of differences between U.S. and the foreign federalisms referred to in Printz, the experience under the latter on the issue of whether intrusion on the sovereignty of federated entities is minimized through delegation of federal enforcement obligations would seem helpful to a court facing the same issue under U.S. federalism. In other cases, contextual similarities may outweigh differences, thus significantly diminishing the risks of material "mistranslation" when considering the foreign material. This situation is aptly illustrated by Lawrence in as much as changing attitudes toward homosexual sex in the U.S. appear substantially similar to those in Western Europe. Finally, in the context of the growing body of laws of universal application in an increasingly globalized world, certain legal norms, such as those prohibiting torture or crimes against humanity, known as jus cogens, impose obligations on all countries even in the absence of any applicable treaty obligations. In such cases, differences in context ought to be largely disregarded. Consistent with this, the universal prohibition of the death penalty for juvenile offenders, except in the U.S. and Somalia, could arguably have become part of jus cogens and thus proven persuasive in Roper at least to the extent that such prohibition did not contravene a clear textual U.S. constitutional provision to the contrary.

The reasons why references to foreign authorities may be useful and legitimate are manifold. Some of these may be technical and related to constitutional adjudication as a practical exercise. Thus, in Glucksberg, the Court dealt for the first time with the

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158. See Erika de Wet, The Constitutionalization of Public International Law, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1209 (Michel Rosenfeld and András Sajó eds. 2012).
159. See supra Part II.B.1.
question of whether a right to assisted suicide under certain limited circumstances ought to be recognized as a privacy and liberty right under the Due Process Clause. Domestic sources revealed no traditional protection of such right in the past, changing medical conditions, and a need for compassionate minimizing of the suffering experienced by the terminally ill. Under these circumstances, the Court was not prepared to end a difficult debate under evolving medical options and fluctuating attitudes towards active as opposed to passive end-of-life alternatives, by affording practically irreversible constitutional recognition to assisted suicide. The fact that the Court could point to foreign authorities that had already dealt with the issue overwhelmingly confirming the Court’s conclusion thus provided useful and legitimate reassurance that risk averseness against expansion of rights in this area was the better available judicial course at the time of the decision.

In contrast, in *Roper*, the reason for referring to foreign authority was above all substantive. Did the fact that the U.S. stood virtually alone against the rest of the world on as momentous a legal and moral issue as the death penalty for juvenile offenders, require a reexamination of, or perhaps even counseled a change in, America’s assessment of the proportionality of the punishment at issue? Finally, yet another reason would justify recourse to foreign authority to better look inward in cases such as those involving hate speech discussed above. Whereas no one would suggest that America abandon its First Amendment exceptionalism, perhaps its current hate speech doctrine, which is at odds with what it was in the mid-twentieth century, ought to be reconsidered to determine whether it would be better to alter it while remaining within the bounds of exceptionalism.

How much and for what purpose references to foreign authorities may be useful and legitimate seem to be closely related. On one end of the spectrum, such references may be purely illustrative and reassuringly confirmative of a domestic constitutional adjudication that stands exclusively on its own. That is what Justice Kennedy appears to intimate concerning his citation to foreign law in *Roper*. Consistent with the assessment of *Roper* in the

161. See supra—Part II.B.5.
162. See Beauharnais v. Illinois, 343 U.S. 250 (1953) (5-4 decision upholding criminalization of hate speech as group libel).
163. See *Roper*, 543 U.S. at 575.
context of *jus cogens* that was suggested above, however, the reference to it locates it at the other end of the spectrum. On that reading of *Roper*, the reference to foreign authority is crucial and close to determinative—something that Justice Scalia seems to have sensed given the vehemence of his dissent and of his misplaced and disproportionate attacks on the UK.  

Furthermore, *Lawrence*, for its part, seems to fall somewhere in the middle of the spectrum. Particularly in view of *Lawrence* overruling *Bowers*, its reference to the ECtHR's decision to hold that any criminalization of consensual adult homosexual sex was beyond the margin of appreciation can be fairly understood as furnishing more than mere confirmation or illustration. Indeed, in addition of confirmation, the reference to *Dudgeon* provides an additional reason which, together with the changing mores in the U.S., buttresses the Court's decision to reverse itself so as to constitutionalize the right to engage in homosexual sex.

In closing, a brief word about the claim that reference to foreign authorities should be banned or severely restricted because it is bound to be selective, drawing upon materials that support the user's position while ignoring or sweeping aside materials that would boost the case against that user's position.  

Selectivity is indeed inevitable, and it divides into a purely practical as against a substantive theoretical issue. Practically, not all foreign authorities bearing on a given issue will be available due to language barriers. That seems for the moment inevitable, but certainly not significant enough to counsel against references. There is a large body of foreign materials originally produced in English as well as a large number of English translations provided by foreign language courts, such as the German Constitutional Court, and by scholars for inclusion in casebooks and other materials. Accordingly, except in a case where the number of decisions worldwide on an issue would be considered a key factor, it is difficult to envisage why one would deprive courts of exposure to

164. See de Wet, *supra* note 158.
165. See *Roper*, 543 U.S. at 608, 627-28.
the rich, varied jurisprudence of other countries representative of a large number of countries, constitutional cultures, and approaches to constitutional issues solely because not all that is produced worldwide can be made equally accessible. Beyond that, selective references due to the self-interests of parties to litigation or to the ideological biases or judicial philosophy preferences of judges can be adequately dealt within the confines of America's adversary system of justice. In some cases selectivity may be successfully defended. Take, for example, Justice Kennedy's references to Europe rather than South America or Asia, which at the time of Lawrence had jurisprudence contrary to that of Europe on homosexual sex. That selectivity could be persuasively justified by showing that the United States' changing mores and constitutional culture were much more like those of Western Europe than those prevalent in other parts of the world. On the other hand, if Justice Kennedy had been selective because of a bias, then completing the picture as Justice Scalia endeavored to do in his dissent in Lawrence would be the best antidote and the best insurance against illegitimate abuses of selectivity. In short, the dangers posed by selectivity are best dealt with not by exclusion, but by the ordinary workings of the adversary system.

CONCLUSION

Globalization impacts American constitutional adjudication in many different ways and citations to foreign materials appear to be here to stay. Professor Glendon is to be commended for stirring the sometimes heated debate all too often veering to sloganeering towards reasoned, rich, nuanced and measured analysis that goes beyond generalities and offers a wealth of valuable insights into the most relevant particulars. Whereas she appears to adhere to a rather restrictive judicial philosophy, Professor Glendon nevertheless recognizes as legitimate certain references to foreign materials while counseling against certain others.

As made clear throughout the preceding analysis, I ultimately disagree with Professor Glendon and advocate much wider acceptance of references to foreign materials within the ambit of constitutional adjudication as practiced within the American adversary system of justice. In spite of my disagreement, however, I have sought to build upon Professor Glendon's insights on particu-

169. See 539 U.S. at 598-99 (Scalia, J., dissenting).
lars and emulated her nuanced approach to the dynamics between identity and difference, which I have considered to be of central importance in my previous work on the subject.170

As I have insisted throughout that differences regarding the legitimacy of citations to foreign law are parasitic on differences with respect to judicial philosophies, some may be inclined to conclude that my disagreement with Professor Glendon boils down to one over judicial philosophy. That, however, would be misleading. for regardless of my own judicial philosophy, I have sought to demonstrate that in spite of how restrictive a justice has professed his or her judicial approach to be, in fact all justices who have addressed the issue have dealt with it in an expansive enough manner to legitimate recourse to foreign materials more broadly than Professor Glendon has. The latter is a descriptive assertion, but the preceding analysis also leads to a prescriptive claim about how expansive a judicial approach ought to be in order to deal adequately with the challenges of an increasingly globalized world with greater transnational cross-fertilization.171 Jus cogens and human rights covenants ratified with or without reservations by the U.S. may require incorporation of foreign law in constitutional adjudication, so long as this would not contradict the Constitution itself as opposed to favored interpretations of it or constitutional precedents, as I suggested in connection with Roper.172

Furthermore, as evinced by Glucksberg and Lawrence, changes in mores with important consequences for national constitutional rights, and particularly such open-ended ones (consistent with purely domestic interpretations of them) as the U.S. Due Process clauses, may proceed on a transnational scale or in an atmosphere of cross-national fertilization. Accordingly, barring consultation of existing foreign authorities on point would needlessly deprive the U.S. judge of a valuable resource that may be instrumental because of similarities or differences in helping her reach the most appropriate result in view of all the relevant variables.

Finally, globalization tends to go hand in hand with balkanization.173 As globalization leads to increased exposure to, and con-

170. See Rosenfeld, Principle or Ideology, supra note 10.
171. For an extended discussion of these challenges, see Michel Rosenfeld, Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism, 6 INT’L J. CONST. L. 415 (2008).
172. See supra Part III.C.
173. See Rosenfeld, The Identity Of The Constitutional Subject, supra note 10, at 234-35.
frontation with, a great array of diverse cultures, it often results in feelings of threatened identity and in tendencies toward retrenchment to one's own core cultural essentials. Under such circumstances, constitutional values may be profitably garnered to search for a proper equilibrium between inward and outward tendencies. And because of its potential for aiding in both these tasks—outwardly as in *Lawrence* and inwardly as suggested in relation to the hate speech cases—references to foreign authorities ought definitely be made part of the available tools at the disposal of the constitutional adjudicator.

In the end, the prescriptive argument in favor of broad acceptance of references to foreign authorities is analogous to a purely domestic prescriptive argument that can be made from the standpoint of contemporary reality against an originalism, such as that endorsed by Justice Scalia. As noted above, in both *Roper* and *Lawrence*, Justice Scalia professes his preference for originalism, but engages Justice Kennedy in conformity with the latter's more expansive judicial approach. But if one imagined that Justice Scalia's originalism were to become strictly followed by the Court, it might well lead to consequences that would most certainly horrify most of its earnest proponents. Indeed, such originalism would justify under the Cruel and Unusual Punishment Clause the hanging of someone who had committed certain crimes at the age of seven; the return to racial segregation under the Equal Protection Clause; and the destruction of the national economy by confining the Commerce Clause to its eighteenth century pre-industrial "original understanding." It may be much less obvious, but a similar argument can be made, from the standpoint of contemporary reality, against overly restrictive judicial approaches as they would apply in the context of references to foreign law.

Finally, it bears reemphasizing that the prescriptive case for expansive acceptance of references to foreign law is not made here to dissolve America's distinct national and constitutional identity into those of the larger world. The prescribed openness is urged

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174. *Id.*
175. *See supra* Part II.B.5.
177. *See Roper*, 543 U.S. at 589.
178. *See discussion supra* note 36.
179. *Cf.* Gonzales v. Raich, 545 U.S. 1, 69 (2005) (Justice Scalia concurring opinion approving federal regulation under the Commerce Clause of California non-commercially produced marijuana for private non-commercial medicinal use in that state).
instead in order for the U.S. to better balance its inevitable increasing openness to the world at large and its ever more urgent need to preserve its core distinctiveness as a constitutional democracy and as a nation.