

**JUDICIAL USE OF COMPARATIVE AND INTERNATIONAL AUTHORITY:
A COMPARATIVE ANALYSIS [or THE NATURE OF HUMAN RIGHTS?]**

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[This draft paper flows from work I have recently been doing – other aspects of which have focused much more specifically on the law's treatment of discrimination against sexual minority groups – which touches upon the use of comparative law- and international law-based arguments in national-level human rights claims.¹ The present draft paper seeks, in many ways, to provide a foundation for the more focused arguments found in my earlier writings (and for other arguments which support the use of comparative and international legal authority) by re-examining and comparing some of the key U.S. and non-U.S. case law and materials and by suggesting that the use of comparative and international arguments tends to be more context-focused than many theorists assume. Despite the perhaps narrow focus of the present draft paper, it is of course possible to expand its arguments and to use them when debating the relationship of law with imperialism, the role in relation to national law of presumptively universalistic or localized moral arguments, and understandings of citizenship (issues which I touched upon in earlier papers).]

¹ See Nicholas Bamforth, 'An "imperial" strategy? The use of comparative and international law in arguments about LGBT rights', ch.10 in Robert Leckey and Kim Brooks (eds.), *Queer Theory: Law, Culture, Empire* (Abingdon: Routledge, 2010); 'New Natural Law, Religion, and Same-Sex Marriage: Current Constitutional Issues' (2011) 1 Wake Forest J. Law and Policy 207; 'Legal protection of same-sex partnerships and comparative constitutional law', ch.30 in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham and Northampton, MA: Edward Elgar, 2011); and 'Sexuality and citizenship in contemporary constitutional argument', *International Journal of Constitutional Law (I-CON)*, forthcoming.

National courts sometimes or often employ comparative case law or international law norms when interpreting national-level constitutional, particularly human rights-related, provisions.² This phenomenon has attracted considerable controversy, whether at a level of principle – most obviously, in the form of argument about whether comparative and/or international material should be used at all – or at the level of detail, in the form of debate about how, when and to what effect such material should be used.³ Perhaps due to the widely-held view that this usage has increased greatly in the past twenty or so years,⁴ the phenomenon has been scrutinized at great length and often with considerable force,⁵ begging the question whether any additional contribution to the debate is necessary.

In the present draft, I seek to focus the debate *only* on recent case law from the United States of America. However, it should be acknowledged that the use of comparative authority in the U.K., India, South Africa and arguably Canada has been considerably bolder. As a result, the debate in the U.S. – when viewed in proper perspective – may come to seem somewhat parochial. What should nonetheless be clear is that it has inspired the constitutional passions of the participants, even if many of the views expressed have been somewhat exaggerated. What may in part be driving this, it will become clear, is the role of this debate in deeper constitutional debate about the proper role of the courts, and in notions of the ‘national’ if not the ‘imperial’. For one might say that the debate about the use of comparative and

² On the particular point, see A-M Slaughter, *A New World Order*, ch.2 [page refs?]; also Bamforth point on HRs from sexuality articles?

³ [General references].

⁴ See A-M Slaughter, *A New World Order*, esp. introduction and ch.2; [but note her comment (ch.2?) that the practice/debate does have a longer history]; Christopher McCrudden

⁵ Ref to the *really* best contributions.

international human rights authority is important for two connected reasons. First, it tells us how far national courts can best be seen as articulating and defending distinctively national interpretations of human rights, and how far they are better seen as part of a global community of courts engaged in the protection of broader, trans-cultural ideas of rights. Secondly, it links up to the broader and deeper debate about how far human rights *should* be seen as presumptively universal and how far they should be seen as tied to the culture of the society in which they operate: a debate with as many implications for the arguments which legislatures may use about human rights as for those which courts may use.

Comparative and international law arguments play an important role in judicial debates about how provisions of national law should be interpreted. In the United States, for example, majority judgments in the Supreme Court have used European Convention decisions as persuasive authority in the Eighth and Fourteenth Amendment contexts, provoking strongly-worded dissents from Justice Scalia (supported by like-minded members of the Court)⁶ and vigorous debate about the propriety of using ‘foreign’ sources when interpreting national provisions. Steven Calabresi, for example, criticizing *Lawrence v. Texas*, states that “foreign evidence ought not to carry the day” and that “foreign sources of constitutional law are not” (in the sense of ‘ought not to be’) “dispositive”,⁷ while Joan L. Larsen associates *Lawrence* with an approach whereby judges “looked to the judgments and practices of foreign nations and international agreements to determine what the content of the domestic

⁶ *Thompson v. Oklahoma* (1988) 108 S Ct 2687, n 4 (Scalia J, dissenting); *Lawrence v. Texas*.

⁷ Calabresi 2004: at 1125; see also 1122.

constitutional rule should be”.⁸ Interestingly, from a liberal perspective, the use of non-U.S. authority in *Lawrence* seems also to have been emphasized. Thus, William Eskridge suggested that, “The foreign precedents were both normative focal points, helping an American judge to evaluate the consistency of sodomy laws with fundamental and shared constitutional principles, and normative feedback, deepening concerns ... about the harmfulness as well as the incorrectness of *Bowers*” (the earlier Supreme Court decision over-ruled in the case).⁹ As we shall see, however, the opponents and supporters of *Lawrence* cited here may all have exaggerated the U.S. Supreme Court’s approach.

It may at first sight seem surprising, given the attention which the current debate about judicial use of non-U.S. authority has attracted within the United States of America, that it is not in itself a recent development for the U.S. Supreme Court to make reference to such authority. A classic early example is the 1881 Supreme Court decision in *Kilbourn v. Thompson*, a case concerning whether the House of Representatives could punish citizens for contempt of its authority notwithstanding the absence of any explicit power to do so in the text of the Constitution.¹⁰ In concluding for the Court that the House could in certain situations compel the attendance of witnesses but did not have the power to punish for contempt in the circumstances concerned,¹¹ Justice Miller conducted a lengthy analysis of English cases concerning the principle of Parliamentary privilege as it related to the

⁸ ‘Importing Constitutional Norms from a “Wider Civilization”: *Lawrence* and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation’ (2004) 65 Ohio St LJ 1283, 1295 (tied to *Lawrence* at 1296).

⁹ Eskridge 2004: 557 at 557.

¹⁰ (1881?) 103 U.S. 168.

¹¹ At 190-3.

Westminster Parliament¹² and of decisions of the Judicial Committee of the Privy Council concerning the privileges of the Legislative Assembly of Newfoundland.¹³ Although Justice Miller concluded that these cases provided no support for the proposition that the U.S. House of Representatives could punish a citizen for contempt of its authority or a breach of its privileges,¹⁴ no member of the Court raised an objection to his consideration of them – suggesting that had the cases appeared on the facts to offer more useful evidence, the Court would have been content to invoke them in support of whatever conclusion it had reached.

A more recent example is provided by the 1961 decision in *Culombe v. Connecticut*, in which the U.S. Supreme Court considered the compatibility with the Fourteenth Amendment Due Process Clause of murder confessions extracted from an illiterate suspect of very low intelligence.¹⁵ The judgment of the Court, delivered by Justice Frankfurter, cited on an almost page-by-page basis a mixture of U.S., English and Canadian case law and academic literature, without even distinguishing between the jurisdictional sources of the material concerned.¹⁶ At the end of the majority judgment, the Court emphasised the internationality of the approach it was following in its announcement that the “ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years”.¹⁷

¹² *Stockdale v. Hansard* (1839) 9 Ad. & E. 1, *Case of the Sheriff of Middlesex* (1840?) 11 Ad. & E. 273, cited in *Kilbourn v. Thompson*, n. above, pp. 183-6.

¹³ *Beaumont v. Barrett* (1841?) 1 Moo. P.C. 59, *Kielley v. Carson* (1841) 4 Moo. P.C. 63, cited in *Kilbourn v. Thompson*, n. above, pp. 187-8.

¹⁴ At 189.

¹⁵ (1961) 367 US 568.

¹⁶ At 571-602.

¹⁷ At 602.

Given the vocal opposition to the use of non-U.S. authority expressed in cases such as *Lawrence* by Justice Scalia (supported by Chief Justice Rehnquist), it is perhaps surprising also to see the Supreme Court's 1997 decision in *Washington v. Glucksberg*, in which the majority held that state level legislation prohibiting assisted suicide did not violate the Due Process Clause.¹⁸ For here, Chief Justice Rehnquist, for the majority and supported by Justice Scalia, was happy to invoke comparative evidence. Rehnquist C.J. began by noting that it was a crime to assist a suicide "in almost every western democracy",¹⁹ before citing a mixture of case law, legislation and literature from the U.K., Canada and New Zealand and invoking the "Anglo-American common-law tradition".²⁰ If the reasoning in cases such as *Kilbourn* and *Culombe* suggest that the U.S. Supreme Court did not traditionally have an antithesis towards the invocation of non-U.S. authority in appropriate contexts,²¹ the reasoning in *Glucksberg* may be more baldly indicative simply of inconsistency.

It is against this background that the recent debate concerning comparative and international authority must be examined. Other than *Lawrence* (to be discussed below), it has been particularly visible in a trilogy of Eighth Amendment cases before a divided Supreme Court – *Thompson v. Oklahoma*,²² *Stanford v. Kentucky*²³ and *Roper v. Simmons*²⁴ – concerning the imposition of the death penalty on offenders who were juveniles when their crimes were committed. In *Thompson*, a majority of the Supreme Court accepted that the Eighth Amendment forbade the infliction of such punishment on offenders who had been under the age of sixteen at the relevant time,

¹⁸ (1997) 521 U.S. 702.

¹⁹ At 709.

²⁰ At 711.

²¹ See also *Trop v. Dulles* [ref].

²² (1988?) 487 U.S. 815.

²³ (1989?) 492 U.S. 361.

²⁴ (2005?) 543 U.S. 551.

and that the substantive requirements of the Eighth Amendment entailed consideration both of the standards acceptable to a majority of U.S. states and of [‘entailed consideration but was finally based on’?] the Supreme Court’s independent judgment. In *Stanford*, a majority accepted that the Eighth Amendment did not prohibit the use of capital punishment on offenders who had been sixteen or seventeen years of age, and (echoing the dissent from *Thompson*) that the crucial components in its determination were the standards acceptable to a majority of states as measured via legislation, as well as the pattern of jury determinations in relevant cases, not the independent judgment of the Supreme Court.²⁵ In *Roper*, a differently constituted majority concluded that *Stanford* should no longer be deemed controlling²⁶ and that the reasoning in *Thompson* in fact applied to prohibit the execution of all offenders who had been aged under eighteen at the time their crime was committed.²⁷ Since the Supreme Court has long accepted that “evolving standards of decency that mark the progress of a maturing society” provide a crucial guide in Eighth Amendment cases,²⁸ it is perhaps unsurprising that there has been argument about whether or how far non-U.S. authority can be used when measuring such standards as an element of the first ingredient of Eighth Amendment analysis. The Supreme Court’s treatment of the issue, arguably echoing its substantive reasoning, has been somewhat variable (it is also slightly unclear how far the arguments in favour of consulting overseas authority used in *Roper* extend outside the Eighth Amendment context²⁹). The *Thompson* plurality and *Roper* majority (joined by Justice O’Connor in her dissenting judgment)

²⁵ See also Brennan J’s. description (in his dissenting judgment) at 383, 390-1 of the majority position.

²⁶ At 574.

²⁷ At 570-1.

²⁸ From *Trop v. Dulles* (1958) 356 U.S. 86, 101 (Warren C.J.).

²⁹ Justice O’Connor’s comment in *Roper* concerning the nation’s evolving understanding of human dignity (below) may suggest that her views concerning relevant non-U.S. authority could be more generally applicable. However, it is unclear from Justice Kennedy’s judgment whether he viewed his comments on comparative and international authority as confined to Eighth Amendment cases or applicable more broadly.

made reference to international and overseas authority, as did the dissenting justices in *Stanford*. By contrast, Justice Scalia rejected the use of such material save in unusual circumstances in his dissent in *Thompson* and majority judgment in *Stanford*, a stance which seemingly became more general and categorical in his dissent in *Roper*. To properly understand the role played by non-U.S. authority, all three cases must be examined.

In *Thompson*, Justice Stevens, giving judgment for the plurality, examined practices at state level as expressed in legislative enactments,³⁰ as well as the record of jury determinations in juvenile death penalty cases,³¹ before “explaining” why these “indicators” of contemporary standards of decency “confirm[ed]” the Court’s own independent judgment concerning the requirements of the Eighth Amendment.³² Non-U.S. authority was brought into the picture in relation to the first ‘indicator’, with Justice Stevens observing that the “conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community”.³³ He also noted the abolition or severe curtailment of the death penalty in Australia, New Zealand and most western European nations.³⁴ This non-U.S. material was, however, presented as part of a broad set of supplementary data by Justice Stevens, the views of the American Bar Association and American Law Institute also being cited as relevant.³⁵

³⁰ At 823-9, reinforced by material set out in nn. 24-30. Note also Appendices A to F.

³¹ At 831-3.

³² At 823. The Court’s independent assessment is set out at 833-8.

³³ At 830.

³⁴ At 830 and fn.34.

³⁵ At 831, esp nn. 32 and 33.

In *Roper*, the substance of Justice Kennedy’s assessment of the Eighth Amendment question, in his majority judgment, turned on two issues. First, using empirical analysis of developments at U.S. state level, he concluded that there was a national consensus against the use of the death penalty for juveniles, this being most obviously evidenced by the consistency of the direction of change at state level in favour of rejecting the penalty.³⁶ Secondly, evidence available to the Supreme Court enabled it to reach the independent conclusion that the death penalty should not be applied to offenders aged below eighteen.³⁷ Justice O’Connor’s judgment employed the same structure,³⁸ her dissent turning on the fact that she reached divergent conclusions on both issues.³⁹ In neither judgment did comparative and international material enter the picture until the end – in Justice Kennedy’s case, in the last, relatively short portion of his judgment, and for Justice O’Connor in a paragraph which began “I turn, finally”.⁴⁰

The approaches of Justices Kennedy and O’Connor were strongly analogous in *Roper*. Both noted that the Supreme Court had been referring to foreign and international law for nearly fifty years, in Justice Kennedy’s words as “instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual

³⁶ At 564-8, 574 (a point reinforced by Appendix A’s empirical survey of the treatment of juveniles at state level: 579 ff).

³⁷ At 568-75.

³⁸ A structure set out initially at 588.

³⁹ See Justice O’Connor’s analyses at 588-598 (national consensus), 598-604 (the Court’s independent judgment) and 605-6 (the two elements in combination). Justice O’Connor had concurred with the plurality in *Thompson* on alternative and narrower grounds to the existence of a consensus: see 848-9.

⁴⁰ At 575-8 (Justice Kennedy) and 604-5 (Justice O’Connor). Save for a reference (at 851) to the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, to which the United States had in fact agreed, there was no reference to non-U.S. material in Justice O’Connor’s concurring judgment in *Thompson*.

punishments”⁴¹ and for Justice O’Connor as “relevant to its assessment of evolving standards of decency”.⁴² Both then stressed that non-U.S. law could be used to inform and confirm decisions: a role of relatively limited scope. Justice Kennedy noted that it was “proper” for the Court to “acknowledge the overwhelming weight of international opinion against the juvenile death penalty” and that the “opinion of the world community ... does provide respected and significant confirmation for our own conclusions”.⁴³ However, he also emphasized that international opinion and the “reality” of the United States’ isolation over the juvenile death penalty *did not* “become controlling” in relation to the outcome of the case, for “the task of interpreting the Eighth Amendment remains our” – that is, the Supreme Court’s – “responsibility”.⁴⁴ Justice Kennedy briefly mentioned international law,⁴⁵ suggesting that the Court’s substantive conclusion found “confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”.⁴⁶ He also referred to English law, suggesting that it had “particular relevance” in *Roper* due to the “historic ties between our [two] countries” and the fact that the Eighth Amendment had been modelled on a provision of the 1689 English Declaration of Rights.⁴⁷ Nonetheless, Justice Kennedy concluded by stressing the centrality of the “American experience” to the Court’s decision: the “doctrines and guarantees” of the Constitution were “central” to that experience, and

⁴¹ At 575. Note also 561, where Justice Kennedy refers to *Thompson*’s invocation of ‘other nations which share our heritage’, but this is merely one reference [to authority?] among many [the rest home grown?].

⁴² At 604. Both judges cited in support of this point *Trop v. Dulles* (1958?) 356 U.S. 86 at 102-3; *Coker v. Georgia* (1977) 433 U.S. 584 at 596, n.10; *Enmund v. Florida* (1982) 458 U.S. 782 at 796-7, n.22; *Thompson v. Oklahoma* (1988?) 487 U.S. 815 at 830-1 and n.31; and *Atkins v. Virginia* (2002) 536 U.S. 304 at 317, n.21.

⁴³ At 578.

⁴⁴ At 575. See also 578.

⁴⁵ At 576-8.

⁴⁶ At 575. See also 577: “In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty”.

⁴⁷ At 577.

“Not the least of the reasons we honor the Constitution ... is because we know it to be our own”.⁴⁸ Justice O’Connor noted that “this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor wholly at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement – expressed in international law or in the domestic laws of individual countries”.⁴⁹ However, she was also clear that “the actions and views of other countries do not dictate the outcome of our Eighth Amendment inquiry”.⁵⁰

As should be apparent from their content and their location in the structures of the two judgments (namely, at the end, once the substance of the Eighth Amendment issue had been determined), the two Justices’ comments concerning comparative and international material were serving to confirm decisions which had already been reached based on domestic law. It certainly seems difficult to make sense, otherwise, of Justice Kennedy’s use of the words ‘acknowledge’, ‘other’, ‘underscores’ and ‘our own’ in his concluding assertion that it did not “lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom”.⁵¹ More concretely, in light of her dissent on the Eighth Amendment question and simultaneous rejection of Justice Scalia’s stance “that foreign and international law have no place in our Eighth

⁴⁸ At 578.

⁴⁹ At 605.

⁵⁰ At 604.

⁵¹ At 578.

Amendment jurisprudence”,⁵² it would also be impossible to make sense of Justice O’Connor’s assertion that it was *only if* a “consonant and genuine American consensus” existed on the Eighth Amendment question that any sort of “international consensus” could “serve to confirm the reasonableness” of the national consensus.⁵³ No “*confirmatory* role” could be assigned to “the international consensus described” by the majority so long as – as Justice O’Connor believed – no national consensus could be identified against the death penalty for juveniles and no convincing independent argument had been identified by the Court against its use.⁵⁴ The wording and logic of Justice O’Connor’s and Justice Kennedy’s treatments of non-U.S. authority thus seem to confirm that material’s merely persuasive – as Justice O’Connor put it, ‘confirmatory’ – status, it being used to reinforce national-level determinations, rather than to control or contradict them.

It should also be noted that the dissent in *Stanford*, as expressed via Justice Brennan’s judgment, gave a role to non-U.S. opinion, albeit as part of a broader range of materials which deserved consideration. Justice Brennan stressed that the Court’s judgment about the constitutionality of a particular punishment under the Eighth Amendment was “informed, though not determined ... by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of [state] legislatures and of juries”.⁵⁵ [How far does this ‘informed fit with *Roper* or *Thompson*?] Furthermore, the “views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention

⁵² At 604.

⁵³ At 605.

⁵⁴ At 604.

⁵⁵ At 383.

as indicators whether a punishment is acceptable in a civilized society”.⁵⁶ The organisations with expertise invoked by Justice Brennan were entirely U.S.-based, namely the American Bar Association, the National Council of Juvenile and Family Court Judges, the American law Institute (via its Model Penal Code) and the National Commission on Reform of the Federal Criminal Laws.⁵⁷ The “careful consideration” offered by each of these “respected organizations ... with expertise” was entitled to “attention as an indicator of contemporary standards”,⁵⁸ but followed as an additional factor – a “[f]urther indicator ...”,⁵⁹ in Justice Brennan’s words – after empirical analysis of practices at state level in terms of legislation and of jury sentencing practices.⁶⁰ It was in similar terms – and later in the judgment – that “legislation in other countries” was also declared relevant to Eighth Amendment analysis as an “indicator” of contemporary standards of decency.⁶¹ Nonetheless, while Justice Brennan suggested that both sets of factors provided a “strong grounding for the view that it is not constitutionally tolerable that certain States persist in authorizing the execution of adolescent offenders”, coupled with legislation at state level and sentencing practices, it was unnecessary to rest any judgment concerning the requirements of the Eighth Amendment “solely” upon such factors given that the execution of juveniles failed to satisfy the independent Eighth Amendment requirements⁶² that the punishment inflicted not be disproportionate and that it make a contribution to the legitimate goals of punishment.⁶³ It was these requirements upon

⁵⁶ At 384.

⁵⁷ At 388-9.

⁵⁸ At 388.

⁵⁹ At 388.

⁶⁰ At 384-7.

⁶¹ At 389, citing *Thompson* at 830-1; *Edmund* at 796, n.22; *Coker* at 596, n.10; and *Trop v. Dulles* at 102 and n.35.

⁶² [equivalent to the independent judgment of the Court in *Roper*? In which case one interesting factor is that o/s opinion is being confined to what would be stage 1 of the reasoning in *Roper*]

⁶³ At 390.

which Justice Brennan's conclusion was ultimately based,⁶⁴ the views of respected U.S.-based organisations and "international opinion" merely serving to "confirm" that view.⁶⁵

While Justice Scalia was sceptical about the use of non-U.S. material in his dissenting judgment on the substance of the Eighth Amendment issue in *Thompson* (with which Chief Justice Rehnquist and Justice White concurred) and in his majority judgment in *Stanford* (with which Chief Justice Rehnquist and Justices White, O'Connor and Kennedy concurred), the opposition as expressed in his later dissent in *Roper* (in a judgment with which Chief Justice Rehnquist and Justice Thomas concurred) was more visceral,⁶⁶ involving strong attacks on the majority and Justice O'Connor. In *Thompson*, Justice Scalia had suggested that it was "totally inappropriate as a means of establishing the fundamental beliefs of this Nation" to take account of reported standards of decency in other countries, and that "We must never forget that it is a Constitution for the United States of America that we are expounding".⁶⁷ In his majority judgment in *Stanford*, he was similarly clear that "it is American conceptions of decency that are dispositive" in determining modern standards of decency in terms of the Eighth Amendment, and that "the contention ... that the sentencing practices of other countries are relevant" should be rejected.⁶⁸ One narrow exception was articulated in both cases: where there was a settled consensus at national level, "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a

⁶⁴ At 403-5.

⁶⁵ At 405. [Analogous to O'Connor's 'confirmatory' stance in *Roper*; but is it in some sense more open to ... ?]

⁶⁶ However, the minority also expressed its disagreement with the approach of Justice O'Connor's dissent: see 616 fn. 8.

⁶⁷ At 869.

⁶⁸ At 318, fn.1.

historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but, text permitting, in our Constitution as well”.⁶⁹ In other words, non-U.S. material could play a positive, confirmatory role in relation to an established and uniform national-level practice. However, it could not “serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people”.⁷⁰ Where there was not a settled consensus at national level, “the views of other nations ... cannot be imposed upon Americans through the Constitution”.⁷¹

In *Thompson*, the fact that almost forty per cent of U.S. states did not, by Justice Scalia’s reckoning,⁷² rule out capital punishment for fifteen year olds – excluding any “evolved societal consensus discernible in [state-level] legislation – or at least discernible in the legislation of *this* society [i.e. the United States of America], which is assuredly all that is relevant”⁷³ – therefore prevented any consideration of the “uniform view of the rest of the world”.⁷⁴ The fact that sixty per cent of U.S. states, using Justice Scalia’s calculation method [fn.], ruled out capital punishment for those aged under sixteen [??] helps display the level of uniformity that was, on his view, in fact needed before non-U.S. authority could be brought into play. In his majority judgment in *Stanford*, Justice Scalia asserted – albeit without mentioning non-U.S. authority – that a “national consensus” in favour of a prohibition on the capital punishment of juveniles under the Eighth Amendment must be “so broad, so clear,

⁶⁹ At 869, citing *Palko v. Connecticut* (1937) 302 U.S. 319, 325 (Justice Cardozo) and cited in Scalia J’s majority judgment in *Stanford* at 318, fn.1.

⁷⁰ *Stanford* at 318, fn.1.

⁷¹ At 869. Note also the reference at 868 to “the legislation of *this* society, which is assuredly all that is relevant”.

⁷² [fn].

⁷³ At 868.

⁷⁴ At 869, fn.4.

and so enduring as to justify a permanent prohibition upon all units of democratic government”, and must thus have been evidenced in “the operative acts (laws and the application of laws) that the people have approved”,⁷⁵ in order to be determinative. The range of circumstances in which non-U.S. authority might properly be used would again be very limited (and it is interesting to note that in determining the outcome in *Stanford*, Justice Scalia did not believe that the fact that of the 37 states which permitted capital punishment, fifteen declined to impose it on sixteen year-olds and twelve declined to impose it on seventeen year-olds amounted to a sufficient ‘national consensus’ for substantive Eighth Amendment purposes⁷⁶). These points would suggest that what is open to debate, in terms of Justice Scalia’s stance, are what level of consensus might be necessary before non-U.S. authority could be invoked – might it ever be less than uniform at state level? – and how much (if at all) the threshold before which non-U.S. authority might properly be invoked could shift depending upon which part of the U.S. Constitution was in issue in the litigation in play, and whether – not least in Eighth Amendment cases – relevant non-U.S. authority was being used to support or, as in *Thompson*, as part of a challenge to, the constitutionality of U.S. state-level legislation.

In *Roper*, there appeared to be at least three parts to this attack.⁷⁷ The first lay in the claim – often voiced by those sceptical of the use of comparative authority – that it was not possible to generate a sufficient ‘fit’ between the materials being compared to allow for suitably robust comparison. Justice Scalia suggested that many of the non-U.S. authorities cited did not speak to the issue before the Court.⁷⁸

⁷⁵ At 377.

⁷⁶ At 370-1.

⁷⁷ For treatment of Justice O’Connor, see 627, fn. 9.

⁷⁸ At 623-4.

Furthermore, certain rules and values were distinctively American, rendering the use of non-U.S. authority superfluous in those contexts.⁷⁹ Justice Kennedy’s “reliance”⁸⁰ on English law was particularly indefensible, given the contemporary influence over English law of European legal norms emanating from a “legal, political, and social culture quite different from our own”.⁸¹ The second part of the attack lay in the argument that the majority was inconsistent in its use of non-U.S. precedent. Justice Scalia noted that the Court had not used such authority when ruling on the separation of church and state or in relation to the permissibility of abortion: areas in which, he suggested, non-U.S. case law was less liberal. However, if the Court wished to be consistent it could not invoke non-U.S. case law in relation specifically to the death penalty for juveniles unless it was also willing to do so in other contexts.⁸²

The third, and analytically central, part of Justice Scalia’s position was the belief that non-U.S. authority clearly – and wrongly – had a strong effect on the majority’s decision (without this third component, the first two components would have lost much of their practical significance). Justice Scalia asserted that “the views of other countries and the so-called international community take center stage” in the majority judgment⁸³ and that the “basic premise” of the majority was that “American laws should conform to the laws of the rest of the world”.⁸⁴ He vigorously disapproved of these positions, emphasizing that “approval by ‘other nations and peoples’” should not “buttress our commitment to American principles any more than

⁷⁹ At 624-7.

⁸⁰ At 626.

⁸¹ At 627.

⁸² At 625-6.

⁸³ At 622.

⁸⁴ At 624: a view which Justice Scalia declared should be “rejected out of hand”.

... disapproval by ‘other nations and peoples’ should weaken that commitment”,⁸⁵ that he did not “believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of ... foreigners”,⁸⁶ and (in his criticism of Justice O’Connor) that “Either America’s principles are its own, or they follow the world: one cannot have it both ways”.⁸⁷ Nonetheless, Justice Scalia did not produce direct evidence to show *how* the non-U.S. precedent ‘determined’ the majority’s decision, took ‘center stage’ or required conformity. Rather, his argument seemed to reduce to the suggestions that the majority was disingenuous and that its alleged inconsistency was dangerous. The accusation of disingenuousness was visible in Justice Scalia’s suggestion, made while challenging Justice Kennedy’s assertion that acknowledging the affirmation of certain rights by other nations underlined their centrality in the United States, that as the majority was setting aside a widespread practice within the U.S., “What those foreign sources ‘affirm’ ... is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America”.⁸⁸ Furthermore, the majority’s “parting attempt to downplay the significance of its extensive discussion of foreign law” was “unconvincing” when non-U.S. law was “parad[ing]”, presentation to the contrary, as “part of the basis for the Court’s judgment”.⁸⁹ These claims in turn tied back to inconsistency. Justice Scalia suggested that the Court could either reconsider areas such as church-state relations or abortion in the light of non-U.S. authority, or “should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and to ignore

⁸⁵ At 628.

⁸⁶ At 608.

⁸⁷ At 627, fn. 9.

⁸⁸ At 628.

⁸⁹ At 628.

it otherwise, is not reasoned decision-making, but sophistry”.⁹⁰ “Foreign approval” had no place in the Court’s judgments unless it was part of their basis,⁹¹ but if this was the case then the Court was simply being inconsistent.

Given the repeated attempts by Justices Kennedy and O’Connor to emphasize the limits to their use of non-U.S. material, as well as the logical structure of their arguments, Justice Scalia’s assertions do not appear to have a solid foundation. Accusations of disingenuousness or inconsistency require, as a preliminary, evidence that material is in fact being used in a particular way or to particular effect (namely, contrary to the claims of the user or without logical conformity with the user’s other actions), and yet Justice Scalia simply did not provide this. The comments made in the two judgments, together with Justice O’Connor’s concern to emphasize that for an international consensus to have any foothold in national law it must first accompany a national consensus on Eighth Amendment issues, make it hard to see how Justice Scalia’s claims could in fact have a logical correlation with the majority’s decision (or Justice O’Connor’s reasoning). Some of Justice Scalia’s comments suggest that his opposition to the use of non-U.S. material in *Roper* was in essence tied to its association with the judiciary. Given his well-known general opposition to the use of judicial interpretation to challenge legislation enacted by elected representatives, it is unsurprising that any deployment of non-U.S. authority – even if only on a ‘confirmatory’ basis – in the course of such interpretation would attract his opposition.⁹²

⁹⁰ At 627. Note also Justice Scalia’s reference at 608 to the majority “purport[ing] to take guidance from the views of foreign courts”.

⁹¹ At 628.

⁹² See 622-3, 627 fn. 9, 628.

An attempt might be made along the following lines to reconcile Justice Scalia's general hostility to the use of non-U.S. case law with *Kilbourn v. Thompson*. As is evident in [cite *Roper* 8th Amendment], Scalia is content to cite material [Hale] which would have had authority for the Founders. Given the date of *Kilbourn* – 1881 – and the novelty of the questions it raised for the U.S. Supreme Court, in referring to potentially analogous English cases and political practices, Justice Miller was effectively acting in a similar fashion. Such an attempted reconciliation will not work, however, for one and arguably two reasons. First, Justice Miller discussed authority concerning Canada, not just England, in *Kilbourn*: he was, in other words, going beyond material which would have been authoritative to the Founders. Secondly, the scale of the Supreme Court's consideration of the English and Canadian material in *Kilbourn* is simply radically greater than Justice Scalia's occasional references to [Hale] in [*Roper*]. If it was possible to argue that the two exercises were in fact analogous, the tight boundaries which Justice Scalia appears anxious to maintain around permissible citation would clearly be weakened. Originalism might, indeed, end up as a vehicle for the citation of a relatively broad range of English authority so long as it was of a particular provenance. If the attempted reconciliation of Justice Scalia's approach with *Kilbourn* does not work, however, then we reach the ironic conclusion that a pre-eminent originalist judge is himself ignoring old and venerable Supreme Court authority in seeking generally to rule out the judicial use of non-U.S. material.

A further example of the debate concerning non-U.S. authority can be seen in relation to the U.S. Supreme Court's use of comparative legal authority to help justify its conclusion, in *Lawrence v. Texas*, that a state anti-sodomy statute was incompatible with

the Due Process Clause of the Fourteenth Amendment and that the earlier and contrasting decision in *Bowers v. Hardwick* should be overruled.⁹³ Giving judgment for the Court, Justice Kennedy noted that the “sweeping references” by Chief Justice Burger in *Bowers* to “the history of western civilization and to Judaeo-Christian moral and ethical standards” as a factor supporting anti-sodomy legislation “did not take account of other authorities pointing in an opposite direction”, for example the 1957 Wolfenden Committee Report, which recommended the repeal of such legislation in England.⁹⁴ “Of even more importance”, however, was the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*,⁹⁵ decided almost five years before *Bowers*, that Northern Ireland’s criminal prohibition of private consensual gay sex contravened Article 8 of the European Convention on Human Rights: a decision which was “at odds with the premise in *Bowers* that the claim put forward was insubstantial in our western civilization”.⁹⁶ Justice Kennedy also observed that “[t]o the extent *Bowers* relied on values we share with a wider civilization ... [its] reasoning and holding .. have been rejected elsewhere”: the Court of Human Rights followed *Dudgeon* in later cases, and “[o]ther nations .. have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct ... [which] has been accepted as an integral part of human freedom in many other countries”.⁹⁷ Justice Scalia, in his dissent, challenged this use of comparative authority: “Constitutional entitlements do not spring into existence because some [U.S.] States choose to lessen or eliminate criminal sanctions on certain behaviour. Much less do they spring into

⁹³ Above, overruling *Bowers v. Hardwick* (1986) 478 US 186.

⁹⁴ At 572, referring to the *Report of the Committee on Homosexual Offences and Prostitution* (‘the Wolfenden Committee’) (1957) Cmnd. 247.

⁹⁵ (1981) 4 EHRR 149.

⁹⁶ At 573.

⁹⁷ At 576-7. Indeed, the Court went beyond *Dudgeon* in *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493 and *Salgueiro da Silva Mouta v. Portugal* (2001) 31 EHRR 47 (not cited in Kennedy J’s judgment).

existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on ‘values we share with a wider civilization,’ ... but rather rejected the claimed right to sodomy on the ground that such a right was not “‘deeply rooted in *this Nation*’s history and tradition,” The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta.”⁹⁸ He also emphasised that it was *dangerous* to use such dicta, since – citing Justice Thomas from *Foster v. Florida* – “this Court ... should not impose foreign moods, fads, or fashions, on Americans.”⁹⁹

According to William Eskridge, “*Lawrence* represents the first time that the Supreme Court has cited foreign case law in the process of overruling an American constitutional precedent”.¹⁰⁰ Looking first at the majority, it seems hard at first sight to see *exactly* what normative significance Justice Kennedy was attaching to *Bowers*’ lack of fit with values the U.S.A. ‘shares with a wider civilization’. For the issue was almost presented as one involving an empirical difference, in so far as Justice Kennedy appeared to be measuring the existence and extent of prevailing opinion and showing that analogous (and equally open-ended) constitutional provisions to those in issue in *Bowers* had been interpreted differently elsewhere: most obviously, by the Court of Human Rights in *Dudgeon*. Eskridge thus suggests that “the fact that *Bowers* had received a hostile reaction among judges in Europe” and in some “traditionalist” U.S. states “provided a neutral reason” for the *Lawrence* majority “to believe there was an emerging consensus that this precedent had not merely misread America’s libertarian

⁹⁸ At 598.

⁹⁹ (2002) 537 US 990, n.154 [?], cited at *id.*, 598.

¹⁰⁰ Eskridge, ‘*Lawrence v. Texas* and the imperative of comparative constitutionalism’ (2004) 2 International Jo of Constitutional Law 555, 555. Steven G. Calabresi suggests that this usage might “portend a revolution in American constitutional law jurisprudence”: ‘*Lawrence*, the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal’ (2004) 65 Ohio St L J 1096, 1102.

traditions” but also those of fellow democracies.¹⁰¹ At second glance, however, it is hard to avoid the conclusion that Justice Kennedy was also engaged in a normative exercise to the extent that he was concerned to reach the most *desirable* interpretation of the value-laden terms ‘due process’ and ‘privacy’: hence Eskridge’s comment, cited above, about non-U.S. precedents acting as normative focal points and normative feedback.¹⁰²

Turning to the dissenters, Justice Scalia’s comment about ‘*this Nation’s* history and tradition’ might at first look like an observation of fact (mirroring Justice Kennedy’s observations), but the context and subject-matter suggest that in reality it was playing a normative role. Indeed, the normative dimensions of Justice Scalia’s approach are later made thoroughly explicit through his *openly* normative assertion that it was ‘dangerous’ to use non-U.S. dicta which imposed ‘foreign moods, fads or fashions’ on Americans: something which might be summed up as ‘Americans know best about American values and the constitution’, a decidedly ‘imperial’ attitude. It is interesting to see how far normative positions underpin other criticisms of the *Lawrence* majority. Steven G. Calabresi, for example, notes that comparative precedent is not relevant where questions of constitutional interpretation depend for their answer on the history of the nation and constitution in question (or, one might add, the specifications of that constitution). Furthermore, “[i]f one agrees with Justices Scalia and Thomas, as I do, that most of what the Court does involves interpretation and not policy-making, then one will think foreign court decisions are usually not relevant to the Supreme Court”.¹⁰³ The use of the word ‘relevant’ is significant. Calabresi seems to be trying hard to avoid an argument about whether it is *desirable* to use comparative case law: by categorising the dispute as being about whether such case law is ‘relevant’, the focus apparently shifts to the ‘practical’

¹⁰¹ Eskridge at 557.

¹⁰² Eskridge at 557.

¹⁰³ At 1106.

question of how helpful it is. It is only if one asks whether it is in fact possible cleanly to separate ‘interpretation’ from ‘policy-making’, and if one concludes that this is not (or not always) possible, that the focus on ‘practicality’ begins to seem too thin.¹⁰⁴ a point which is reinforced by the fact that Calabresi is arguing from an explicitly ‘originalist’, and thus (in his own way) normative approach to constitutional interpretation.

An analogous pattern seems evident in Calabresi’s more specific comments about the decision in *Lawrence*. He suggests that while it may be relevant that the European Convention and the Canadian Charter have been interpreted as proscribing sexual orientation discrimination, “it is a long leap from the statement that this evidence is relevant to the proposition that the United States Supreme Court should take sides in the culture war looming in this country over gay rights by outlawing discrimination against gays”.¹⁰⁵ Western European countries and Canada are “noticeably less religious and more secular than the United States”,¹⁰⁶ people in different parts of the United States have widely different views about LGBT rights issues – differences which, in a federal republic, deserve to be respected – and there is “a big difference between supporting the decriminalization of something and making it into a new national right”.¹⁰⁷ As empirical statements, Calabresi’s remarks about the spread and depth of religious belief in the United States, Europe and Canada, and about differences of view within the U.S.A., seem uncontentious. That impression changes, however, when these remarks are joined by his particular interpretation of federalism and by his throw-away assertions – which many would dispute – that the Supreme Court was somehow ‘taking sides in a culture

¹⁰⁴ Calabresi’s suggestion, at 1106, that the majority of Supreme Court Justices treat the Court’s role as one of policy-making rather than interpretation does not involve the concession that the two types of issue are not always cleanly separable.

¹⁰⁵ At 1122.

¹⁰⁶ At 1122.

¹⁰⁷ At 1123.

war’, asserting a ‘new national right’ or ‘outlawing discrimination’ (a considerable exaggeration of what was decided in *Lawrence*).

It is also important to note that Calabresi and his fellow *Lawrence*-critic Joan L. Larsen appear, in the quotes cited earlier, to strongly over-estimate the extent to which non-U.S. authority was decisive for Justice Kennedy (Calabresi implied that such sources were ‘dispositive’ while Larsen argued that they ‘determined’ the content of domestic constitutional law). However, in reality, as Cass Sunstein notes, the *Lawrence* Court “did not simply announce that the Constitution protects sexual conduct as such Instead, the Court stressed an ‘emerging recognition,’ *which it located in a number of places*”, including the US Model Penal Code and trends in the legislative histories of the US states *as well as* the comparative examples cited.¹⁰⁸ It is not difficult to speculate that Calabresi’s and Larsen’s over-estimations may be influenced by their normative distaste for the result (although it must be noted that Calabresi accepts the use of “foreign constitutional law doctrines” in the “writing of constitutions, constitutional amendments, or leading statutes”,¹⁰⁹ and that Larsen accepts the use of comparative authority for ‘expository’ purposes and for testing the likely effects of a given interpretation¹¹⁰). A similar point may, perhaps, be made about Justice Scalia’s emotive language about ‘danger’.

If it is not possible to separate the ‘technical’ opposition to *Lawrence* considered here from ‘normative’ opposition, how might that normative opposition be understood?

¹⁰⁸ ‘Liberty After *Lawrence*’ (2004) 65 Ohio State LJ 1059, 1061 (emphasis added). Sunstein’s interpretation is surely borne out by the distance between Justice Kennedy’s guiding formulation that “*When our precedent has been .. weakened*” by subsequent Supreme Court decisions “criticism from other sources *is of greater significance*” (at 576, emphasis added) and claims that overseas precedent is ‘determinative’ or ‘dispositive’.

¹⁰⁹ At 1103.

¹¹⁰ At 1288-91.

In reality, conservative opposition to the use of comparative authority might be seen as an assertion that the political, social and moral power of the United States is such that its laws must be interpreted according to American values only and should in no sense be degraded by reinterpretation in the light of non-American precedent (a position which is not far removed Justice Scalia's assertion about the 'danger' of using non-American precedent). This interpretation draws support from Eskridge's analysis (as a defender of *Lawrence*) of alternative senses in which Justice Kennedy might be seen as having used the comparative material in *his* judgment. First, Eskridge suggests that the use of foreign precedent enabled the majority "to signal other countries that the Court is attentive to their norms and is a cooperative court", thus enabling it to exercise "leadership in a range of constitutional issues", including an expectation of "respect and help" from others where appropriate.¹¹¹ Secondly, having noted that Western democracies are pluralistic and have embraced a variety of groups within their political systems, including "identity-based social groups" such as women and lesbians and gays, Eskridge notes that despite being "Long demonized as abominable or predatory enemies of the state, lesbians, gay men, bisexuals, and transgendered people have demanded recognition of their rights as decent and productive citizens. And country after country has recognized rights for gay people without negative consequences for the body politic."¹¹² This "political experience" is, he suggests, "instructive for the United States, as Justice Kennedy implicitly recognized Once other countries have accorded gay people – or any other long-despised or suppressed minority group – equal treatment without wrenching their pluralist systems, the price of denying gay people the same rights in the United States goes up and the arguments against equality grow shakier".¹¹³ On this view, the Supreme Court's acknowledgement of the *power* of lessons from

¹¹¹ At 558.

¹¹² At 559.

¹¹³ At 559.

overseas was the very opposite of 'imperialist', perhaps in contrast to Justice Scalia's approach, which is more akin to 'we know best'.

[In conclusion, compare with Indian, South African and U.K. examples, which are much stronger and more assertive].