Justice Anthony Kennedy's Comparative Constitutionalism

The longstanding academic debate[1] over the appropriate use of comparative materials in the interpretation of the U.S. Constitution has recently become more prominent. Several current Supreme Court justices have spoken out on the issue in public speech and it has even been the topic of a rare public debate between two sitting justices, Stephen Breyer and Antonin Scalia.[2] The use of comparative materials by the Court has even inspired a backlash in Congress, where members of the House and Senate have introduced resolutions condemning the use of foreign law by American courts.[3]

At the center of this debate—as he is of many debates on the Court—is Justice Anthony Kennedy. Kennedy has recently authored recent controversial majority opinions which have made prominent use of comparative materials to overturn precedent. In 2003 he wrote the Court's opinion in Lawrence v. Texas,[4] which struck a state law criminalizing homosexual sodomy and overturned Bowers v. Hardwick[5]. And in March 2005, he wrote the majority opinion in Roper v. Simmons,[6] striking the execution of a person who committed capital crimes before the age of 18 as a violation of the Eighth Amendment's prohibition of cruel and unusual punishment and overturned Stanford v. Kentucky.[7] In each of these cases Kennedy appeals to the legislation and constitutional decisions of other nations to justify his conclusion, and in each case his reasoning---and his use of these materials—was derided by Justice Scalia, once as merely "the subjective views of five Members of this Court and like-minded foreigners."

This paper analyzes Kennedy's use of comparative materials in these opinions in light of the larger academic debate. It begins by reviewing the Scalia-Breyer debate and the arguments presented for and against the use of comparative law in American

constitutional interpretation. Part Two tracks Kennedy's interest in comparative law, even before his nomination the Supreme Court to a conference of Canadian judges, and ties that interest to his conception of the proper judicial role. Part Three focuses on Kennedy's opinion in Lawrence, which uses and builds upon his pre-nomination comments. Part Four of this paper examines Kennedy's use of comparative constitutional law of other nations in Roper v. Simmons, and it assesses the extended criticisms of result and method stated in Scalia's dissent. The paper concludes by situating Kennedy's comparative examples within the ongoing debate inside and outside the Court about the appropriate use of comparative materials and—ultimately—about the appropriate role of judges in interpreting the U.S. Constitution.

I. Debating the relevance of comparative constitutionalism

The recent debate between Justices Breyer and Scalia was notable not just for the identity of the participants, but for the sharp divergence of their position. Breyer is by far the justice most likely to cite comparative materials in his opinions,[8] and Scalia has been the justice most vehement in his rejection of the U.S. use of foreign law.[9] In this debate, both Justices defended their position on the relevance of decisions and law from other nations.[10]

Breyer defends the use of comparative materials as part of the process from which law emerges. Lawyers and judges cite materials they find "useful," and judges in other nations "are human… They have problems that often, more and more are similar to our own. They're dealing with certain texts, texts which more and more protect basic human rights. Their societies more and more have become democratic." If one assumes "our

people in our country are not that much different than people in other places," to Breyer "what is at issue is the extent to which you might learn from other places facts that would help you apply the Constitution of the United States." Just as lawyers read state cases and law reviews, they should consult the opinions of other nations, because "you never know where you'll get your explanation."

Scalia disagrees with the use of foreign law, and offered several lines of criticism consistent with his larger jurisprudence. He first gives a practical criticism: American law is fundamentally different: "we don't have the same moral and legal framework as the rest of the world, and never have." On the legal matter, he references that Russia follows the *Miranda* rule regarding confessions, but has no exclusionary rule. "One of the difficulties is that you don't understand the surrounding jurisprudence."

His larger objection to its use, however, is political. It arises from his belief that the greatest danger in judicial interpretation is that judges will read their own preferences into the law[11] and thus deny the power of the people and their representatives in a democracy. For this reason, Scalia has long objected to the idea that the Constitution reflects the evolving standards of decency of American society. He further opposes the concept that the Constitution incorporates "not the standards of decency of the world, not the standards of countries that don't have our background, that don't have our moral views."

Further, Scalia says that Breyer's approach emphasizes this problem. "I am not looking for the evolving standards of decency of American society; I'm not looking for what is the best answer in my mind as an intelligent judge," he states. "I try to understand what it meant, what was understood by the society to mean when it was adopted. And I

don't think it changes since then." Scalia sees the use of foreign law as part of the process of judges imposing their own preferences in place of those of the majority and their elected representatives. "Doesn't it seem somewhat arrogant of you to say, I can make up what the moral views of America will be on all sorts of issues, such as penology, the death penalty, abortion, whatever? That's the only context in which the use of foreign law makes sense, because what we're doing is not looking to history, as I do, not looking to the mores of contemporary society…you're looking for the moral perception of the justices."

Scalia sees the citation of the law of other nations as a means for obscuring the imposition of these personal preferences. He criticizes the selective use of foreign law to disguise personal preference. "It lends itself to manipulation," he states. Judges

> have to write something that--you know, sounds like a lawyer…. I can't cite a prior American opinion because I'm overturning two centuries of practice. I can't cite the laws of the American people. So, my goodness, what am I going to use? I have a decision by an intelligent man in Zimbabwe or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly. And it lends itself to manipulation. It just does.

Essentially, Scalia defines the debate over the use of comparative materials as one about the larger role of judges and courts. He believes that an argument for the use of comparative materials in American constitutional interpretation "assumes that it is up to the judge to find THE correct answer. And I deny that. I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended."

Scalia's objection to the use of the law of other nations corresponds to a different idea of the role of a judge. He believes constitutional interpretation in complex cases where the Court has used foreign materials mostly "involve moral sentiments," and thus "you're not going to come up with a right or wrong answer." In those situations, "you can have arguments on one side and the other, but what you have to ask yourself is what does American society think?" The only reliable answer to that "is certainly not to ask a very thin segment of American society—judges, lawyers and law students—what they think but rather look at the legislation that exists in states, democratically adopted by the people." And in that process, recourse to decisions in other nations is irrelevant. "I'm sure that intelligent men and women abroad can make very intelligent arguments," he states, "but that's not the issue, because it should not be up to me to make those moral determinations."

If you want to change the law, Scalia states, "persuade your fellow citizens and repeal the laws." Otherwise, the law "morphs" and "you do not know what you're saying when you swear to uphold and defend the Constitution of the United States." In contrast, for Scalia originalism "is unchanging. It is a rock to which the polity is anchored." Once judges consult the law of other nations, they will inevitable cite selectively to support the arguments not from the Constitution, but from their own personal preferences.

Breyer defends his use of comparative materials as a response to a different conception of the judicial role and a different conclusion about the apparent indeterminacy of the broad phrases in the constitutional text. Scalia champions originalism as a rock, a chain, an anchor or a certain historical criterion for judicial decision making independent of personal preferences. Breyer, in contrast, states that "I

am probably more willing to work with a certain degree of uncertainty. And I think law is filled with uncertainty all over the place." In response to Scalia, Breyer states "if I thought these things could be deduced form sort of fairly clear, logical rules and a history book, if I thought it were possible, I would agree with you…But, you see, I don't think it's possible." Rather, he states, "I think it's important to look on the ground to see how other people are reacting." And part of the relevant ground to examine may include the law and practices of other nations.

For all their differences, one commonality between Scalia and Breyer is the assumption that the Constitution is fundamentally democratic, and that judicial review is fundamentally problematic.[12] Breyer agrees with Scalia that judges imposing their preferences and overruling majority decisions is a danger. "If in fact you give judges too many open ended procedures, rules and practices," he states, "what you will discover is that a man, a woman, who suddenly has this power, for better or for worse, maybe not even wanting to, will substitute her judgment for the judgment of the legislature. And that's wrong in a democracy." But he disagrees with Scalia's resolution of "trying to cabin that with very strict procedures, legal rules and processes." If that is done, he states, "you can control, but the law will be divorced from life." Fundamentally, Breyer states, "there is no way, actually to resolve it." Rather, in offering these answers "both groups of people are appealing to consequences in support of a way of approaching the Constitution that they believe, on balance, will achieve objectives that everybody wants. Nobody wants to divorce law from life, and nobody wants undemocratic judges substituting their view for that of the legislature." To Breyer, then, the dispute over the use of comparative sources arises from an essential dilemma of judicial interpretation.

II. Kennedy's openness to comparative constitutionalism

While Breyer has been the most public exponent of comparative constitutional law in the American context, Kennedy has been its most influential practitioner on the Court. Breyer has used comparative law the most times, but always in concurrence and dissent. In contrast, Kennedy—perhaps due to his pivotal role on a divided Court--has written two of the three majority opinions citing foreign law.

Kennedy signaled his turn to comparative constitutional interpretation before coming to the Supreme Court. As a Court of Appeals judge, he sought a way to escape the problems of originalism. He believes that the constitution includes protections of broad moral rights, such as liberty, and broad prohibitions on governmental power, such as the cruel and unusual punishment clause. To Kennedy, judges have the obligation to determine the nature of liberty and apply it to the cases and particular circumstances that come before them. His expansive ideal of the judicial role lead him to investigate the content of broad provisions of the Constitution. This leads him to a Dworkinian fusion of constitutional law and moral theory. [13] In his effort to find right interpretations of the indeterminate text of the American constitution, Kennedy is led to look to the law and practices of other nations.

The distinctive interpretive approach Kennedy employs in Lawrence has visible roots in statements he made before coming to the Court.[14] Kennedy clearly rejected originalist methodology based on text, history and specific tradition and publicly presented specific contemporaneous criticism of the majority opinion in Bowers v. Hardwick. Instead, Kennedy advocates an ideal of judicial power requirement to enforce

the full and necessary meaning of liberty that fuses constitutional law and moral philosophy.

Kennedy clearly rejected the originalist ideal of defining constitutional rights by recourse to text and longstanding tradition. These spacious phrases of liberty, cruel and unusual punishment and equal protection contained in the Constitution express moral ideas, [15] and judges must see these concepts not as bounded by original or historic interpretations, but as moral ideals containing an objective meaning that transcends history. "Essentially," Kennedy stated, "we look to the concept of individuality and liberty and dignity that those who drafted the Constitution understood" (170-171, my emphasis). Kennedy does mention the need to determine "whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers." He also admits that "in very many cases, the ideas, values, the principles and rules set forth by the framers" can serve "as a guide to the decision."[16]

Kennedy argues, contrary to the originalist, that present-day Americans have a better understanding of the meaning of the Constitution than the framers themselves did. "Over time the intentions of the framers are more remote from their particular political concerns," he said, "and so they have a certain purity and a certain generality now that they did not have previously" (183-184). History can provide better or worse definitions of liberty, but study of history alone cannot reveal its full and necessary meaning. As Kennedy said, "it sometimes takes humans generations to become aware of the moral consequences of their own conduct. That does not mean that moral principles have not remained the same" (153). Kennedy thus articulates an obligation of courts to examine

the moral content of liberty anew in each case. As he later states, "we have 200 years of history, of detachment, in which we can see the folly of some ideas, the wisdom of others."[17]

To Kennedy judges are bound to enforce the larger ideas, values and principles the founders expressed in the constitutional text. "The framers had...a very important idea when they used the word 'person' and when they used the word 'liberty,'" he testified. "And these words have content in the history of Western thought and in the history of our law and in the history of our Constitution, and I think judges can give that content" (231). This content may be illuminated by historically accepted interpretations and practices, but cannot be defined by them. The text of the Fourteenth Amendment--and the Constitution as a whole--includes moral principles and commitments to equality and liberty that imply consequences with "far more validity and far more breadth than simply what someone thought they were doing at the time." In Kennedy's view, "the whole lesson of our constitutional experience has been that a people can rise above its own injustices, that a people can rise above the inequities that prevail at a particular time" (149). The object of constitutional interpretation by the judiciary, he stated, "is to use history, the case law and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed" (187, emphasis added). To Kennedy, constitutional interpretation is an art, not a science. Understanding the American constitutional tradition begins with historical study, but cannot end there. Echoing Frankfurter, Kennedy testified that "I just do not think that the Fourteenth Amendment was designed to freeze into society all of the inequities that then existed. I simply cannot believe it" (150-151).

Kennedy applied this moral reading of the constitutional text most specifically to the term *liberty*. He admitted that the concept of liberty is "spacious," but it one "central to the American tradition and the rule of law." It implies "a zone of protection, a line that is drawn where the individual can tell the government: Beyond this line you may not go." He admits the precise location of that line is "wavering," "amorphous," and "uncertain," but judges still have a duty to police that line and to devise principles that defend it (86). Despite uncertainty about where this line is to be drawn, Kennedy stated, "the enforcement power of the judiciary is to insure that the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it" (122). Judges cannot rely on how others have previously interpreted the meaning of liberty. They must investigate its meaning for themselves.

Although he embraced an expansive role for courts in securing the full and necessary meaning to liberty, Kennedy expressed skepticism about using the terminology of the right to privacy to illuminate that meaning. Introducing a term not in the text of the Constitution, he writes, tends to "create more uncertainties than we solve."[18] As a result, Kennedy concludes that "with reference to the right of privacy, we're very much in a state of evolution and debate" (166).

Because the ideal of privacy is imprecise and raises both interpretive and substantive objections, Kennedy thus prefers to focus on the term liberty, which actually is in the Constitution (233). In making this move, Kennedy attempts to escape the common distinction between enumerated and unenumerated rights. The relevant constitutional issue then becomes "whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the

courts" (87). Kennedy's expressed willingness to focus on the term liberty indicated his attempt to employ a moral interpretation of language of liberty while remaining faithful to constitutional text. When asked how he would determine what sort of activities the Constitution protects under the term liberty, Kennedy replied that "a very abbreviated list" of factors he would consider include "the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential" (180).

The considerations Kennedy outlines as significant in the judicial determination of the full and necessary meaning of liberty are not essentially textual, historical, or traditional. They broadly outline a moral substantive theory of personhood, one that requires judges to make moral determinations about the true meaning of human flourishing, dignity, pain and anguish. By rejecting originalism, Kennedy raises the possibility and perhaps inevitability of looking to extra-textual sources and even practical consequences to determine the meaning of constitutional guarantees.

Kennedy did just this in an address to the Canadian Institute for Advanced Legal Studies one month after *Bowers* was decided. In a speech titled "Unenumerated Rights and the Dictates of Judicial Restraint,"[19] Kennedy contrasted Bowers with the Dudgeon case[20] decided by the European Court of Human Rights four years earlier that would preview the approach of his own opinion in *Lawrence*.

While Kennedy discusses other constitutional questions in this speech (such as the right to travel and the right to vote), he focuses primarily on the right to privacy, which is not explicitly stated in the American Constitution. Personal privacy is a value explicitly

protected by Article 8 of the Convention of Human Rights,[21] but Kennedy agrees with the statement of a dissenting ECHR justice that "mere invocation of word 'private' does not resolve the question of whether there is a right of free choice. It simply restates the problem" (8).

Further complications exist in the American context, Kennedy states, when a court is "faced with the question under a constitution which does not contain the word 'private' or 'privacy' at all" (9). Again, Kennedy here finds serious problems with the recourse to the right to privacy. "If a court begins by announcing such a right," he states, "it seems to go, on the one hand, beyond the case before it by adopting a phrase more extensive than required for its resolution of the case." Yet "on the other hand, it goes not far enough because there remain so many further issues to be resolved" (9). Kennedy states a further interpretive objection to the right to privacy in the American context. But in doing so, he offers an alternative solution. One criticism is that "the debate then shifts to the word 'privacy,' rather than to a constitutional term, such a 'liberty.'" After quoting Keats on heard and unheard melodies, Kennedy states that the use of constitutional concepts such as privacy "is good inspiration for poets, but promises considerable misunderstanding for judges charged with enforcing a written constitution" (9-10).

Shifting the constitutional debate from privacy to liberty solves an interpretive problem, but that still does not resolve the substantive constitutional issue. Invocation of privacy leaves many questions unresolved. These include "whether the word embraces a substantive right of autonomous choice; if so, whether that choice insures the manifestation of one's personality and if so, whether it extends to conduct with others; whether it was legitimate for the legislature to regulate on the question of morals; what

the morals and religious values of the particular community were; and whether those concerns were in fact advanced by the law in question" (9). Some of these considerations are factual, but many of them are essentially moral. Use of the word liberty in place of privacy does not resolve the substantive empirical and moral issues raised by this case. But use of liberty has the benefit of avoiding the initial interpretive issue, and it brings these considerations—and the judicial role in enforcing them—to the forefront of constitutional debate.

Kennedy initially appears sympathetic with the questions raised by the dissenting judges in *Dudgeon*. But he soon expresses criticism of the majority opinion in *Bowers*. He finds the decision inconsistent with several cases involving constitutional protection for family, education and child raising. Kennedy states that *Bowers* might be justified "by pointing to the lack of traditional approval for homosexual conduct," but even so "the tension in methodology remains." Given his own expansive ideal of liberty, and the catalogue of considerations he mentions earlier, it is unlikely Kennedy would accept traditional approval, standing alone, as sufficient to override a claim of liberty that would be successfully answer all other concerns.

Kennedy closes his address by conceding to originalists that "the constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern the judges" (20). Yet he rejects their attempt to rely solely on text and longstanding tradition, because "saying the constitutional text must be our principle reference is in a sense simply to restate the question of what the text means." Kennedy thus criticizes both the right to privacy (as not in the text) as well as the rejection of substantive due process, which rejects the textual guarantee of liberty. He also admits

that mere recourse and recognition of the components of liberty will not alone decide constitutional issues; many other questions must be answered. But a focus on liberty has the benefit of bringing these vital empirical and moral considerations to the forefront. As Kennedy concludes, "uncertainty over precise standards of interpretation does not justify failing in the attempt to construct them, and still less does it justify flagrant departures" (22).

Kennedy, like Breyer, finds uncertainty in the law yet rejects the attempt of Scalia's originalism to construct precise standards through mere "lawyer's work" to discern text and tradition. [22] In addition to these interpretive uncertainties, Kennedy believes, judges must also consider the practical and political results of their decisions. As a result, Kennedy states "while it is unlikely that we will devise a conclusive formula for reasoning in constitutional cases, we have the obligation to confront the consequences of our interpretation, or the lack of it."[23] To Kennedy, then, judges must determine the best answers to the constitutional questions before them, but there is no foolproof formula or method to arrive at those right answers. With this approach Kennedy—like Breyer--clearly seems open to analyzing legal opinions and legal developments in other nations, even if they provide a frame for criticizing existing American law.

III. Lawrence v. Texas: A toe into comparative waters

Kennedy's opinion for the Court in *Lawrence* has deep rhetorical and substantive roots several arguments made in his pre-nomination addresses. The opinion begins and ends with an expansive ideal of the conception of personal liberty and of the duty of the judiciary to enforce it. It incorporates both his criticisms of Bowers and the terminology of the right to privacy in statements that echo his address to the Canadian judges 17 years

earlier. And the opinion includes approving references to the law of other nations, including the ECHR decision in *Dudgeon*.

Read in light of his commitments prior to coming to the Court, the reasons behind Kennedy's interpretive project in Lawrence and his use of comparative law in that opinion become clearer. As in *Casey*, the interpretive shift in *Lawrence* is apparent: Kennedy's opinion begins with the word liberty and ends with the word freedom.[24] In Lawrence, however, the opening passage goes further. It contains an elaboration on the confusing nature of interpreting liberty (or other constitutional guarantees) as a right to privacy. To Kennedy, liberty "protects the person from unwarranted governmental intrusions into a dwelling or other private places."

Yet to Kennedy liberty embodies more than spatial. As he writes, "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." Liberty "presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." This statement parallels but expands Griswold's inclusion of marriage under the First Amendment right of association. To Kennedy, "the instant case involves liberty both in its spatial and more transcendent dimensions" (571-572).[25]

To support this reasoning, Kennedy specifically cites international law at two places in his Lawrence opinion. The first is to respond to a statement from Chief Justice Burger's concurrence in Bowers that "decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of these practices is firmly rooted in Judaeo-Christian moral and ethical standards (Bowers at 196). Kennedy disagrees on two grounds. First,

departing from originalism he states "that our laws and traditions in the past half century are of most relevance here." A vast majority of states had repealed sodomy laws, and the others, even after *Bowers*, had overturned them through courts. To Kennedy, "these references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." This follows from his expansive conception of the full and necessary meaning of liberty and his belief that judges can see the wisdom of some ideas and the folly of others.

Further, Kennedy uses comparative materials to criticize the "sweeping references" of Burger's concurring opinion in Bowers. Kennedy argues that it "did not take account of other authorities pointing in an opposite direction" (572). One authority is British law, as shown by the Wolfenden report of 1957 and Parliament's adoption 10 years later of its recommendation to repeal laws criminalizing homosexual conduct. But "of more importance," Kennedy writes, is the ECHR decision in Dudgeon, "a case with parallels to Bowers and to today's case." Dudgeon struck the law that Bowers upheld, and to Kennedy "the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization" (573). Unlike in his pre-nomination speech, Kennedy mentions nothing about the reasoning in the opinions, or how (and to what extent) the moral reasons and considerations there are relevant in the American context.

Kennedy's second reference to comparative law responds to the argument that overruling the precedent *Bowers* would cause legal and social uncertainty. To the contrary, Kennedy argues "*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding" (577). To support this argument, he

cites precedents in the American context[26] before 1986—Roe and Griswold--and two later majority opinions written by Kennedy--Planned Parenthood v. Casey and Romer v. Evans.[27] He also cites the experience of the European Court to argue that "to the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding of *Bowers* have been rejected elsewhere" (576). The ECHR had followed not *Bowers* but *Dudgeon* in three later cases.[28] Other nations had followed the lead of the ECHR, not of the US. To Kennedy, this has normative consequences. "The right the petitioners seek in this case has been accepted as an integral part of human freedom in other countries," Kennedy writes. "There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" (576-577).

Kennedy's turn away from originalism--and reference to other nations in determining the essential content of liberty--is emphasized in the concluding paragraph of the opinion. "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities," he writes, "they might have been more specific. They did not presume to have that insight. They knew that time can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom" (578-579). Thus, consistent with his general approach to liberty and the considerations he had stated to the Canadian Institute, Kennedy can conclude "Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent" (578).

Scalia's dissent casually dismissed Kennedy's citation of the opinions of other courts and nations. He argues fundamental rights are not defined by "emerging awareness" but must be "deeply rooted in this Nation's history and traditions." Rights do not exist because states have repealed laws; "much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct" (598, italics in original). Scalia thus asserts that "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." It's meaningless yet "dangerous," Scalia writes, because it may allow or serve as cover for a majority to "'impose foreign moods, fads, or fashions on Americans" (598).[29] Scalia expanded on this criticism in his American debate, stating that the opinion in Lawrence cited European law enacted "not by some democratic ballot but by decree" and "did not cite the rest of the world" including countries that had maintained criminal prohibitions against sodomy or homosexuality.

To that time, Kennedy's opinion in Lawrence had been the most prominent use of comparative materials in a majority opinion by the US Supreme Court. [30] Yet Kennedy would expand upon its use in *Roper* and be met by more forceful criticism from Scalia.

IV. **Roper v. Simmons: Comparative law as confirmation or controlling?**

In Roper v. Simmons, as in Lawrence, Kennedy writes for a five-Justice majority that overturns an earlier precedent—this time, one he had joined. Kennedy more expansively cites comparative and international law to support his expansive reading of liberty, and again he attracts a spirited dissent from Scalia on not just the result of his opinion but also his use of "alien law" to interpret the American Constitution.

In the first parts of the opinion, Kennedy argues that "we must determine, as an exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles" (1192). In the main sections of the opinion, he argues that "objective indicia of consensus"—through its repeal in law by the states and infrequency of imposition by juries—show an evolving belief in the U.S. that juveniles "are less culpable than the average criminal" (1192, 1194). He also argues that the death penalty for juvenile offenders is disproportionate because as a class juveniles are less mature, more susceptible to peer pressure and have not sufficiently developed emotionally and intellectually (1195).

To defend his decision, Kennedy devoted the entire final section of the opinion (Part IV) to showing that the Court's ruling is consistent with international law. He concludes that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." He states "this reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility." Nevertheless, consulting the laws of other nations is "instructive" (1198). He cites Article 37 of the United Nations Convention of the Rights of the Child—which the US did not sign—as expressly prohibiting execution for crimes committed before 18, that only seven nations—none of them paragons of human rights: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo and China--have executed juvenile offenders since 1990 and all have since abolished the penalty or stated a repudiation of the practice, and that British law has prohibited the practice since 1948. "In sum, it is fair to say," Kennedy concludes, "that the United States now stands alone in a world that has turned its face against the juvenile death penalty" (1199).

Further, Kennedy finds these international developments to be relevant—if not decisive. "It is proper," he writes, "that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." And here he cites a brief from the Human Rights Committee of the Bar of England. "The opinion of the world community," he writes, "while not controlling our outcome, does provide respected and significant confirmation for our own conclusions" (1200).

Kennedy finishes his opinion with a defense of the use of international law. Although the Constitution "sets forth, and rests upon, innovative principles original to the American experience" such as federalism, separation of powers and specific rights of the accused, it also includes "broad provisions to secure individual freedom and preserve human dignity" (1200). He finds these constitutional commitments to be "central to the American experience and remain essential to our present-day self-definition and national identity." Kennedy states that "not the least of the reasons we honor the Constitution, then, is because we know it to be our own." Nevertheless, there are other and more important reasons to respect it—namely, its commitment to these broad principles and many-faceted security of individual rights. The document may be innovative and original to Americans, but "it does not lessen our fidelity to the Constitution or 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" (1200).

This conclusion is both contrary to and consistent with the ideals of the judicial role Kennedy stated prior to coming to the Court. In earlier speeches, he had focused on the uniqueness of the American experience, including its new vision of sovereignty. Nevertheless, in his confirmation testimony he stated that "the enforcement power of the judiciary is to ensure that the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[31] He sees the primary commitment is to liberty, and his understanding of liberty informs his larger reading of the Constitution in several other areas of law. In a signature move, he again ends this opinion with the word freedom, and this opinion shows that Kennedy will consider claims of liberty afresh, even if he has to overturn past precedent and even his own previous vote. Clearly, for Kennedy that reconsideration of liberty and its consequences can take account of the actions of the courts and legislatures of other nations.

The two main dissents in this case took different views of the use of international law. Justice O'Connor agrees that courts must exercise independent judgment about whether this law constitutes cruel and unusual punishment "must draw its meaning from the evolving standards of human decency that mark the progress of a maturing society"[32] and she admits that "this Nation's evolving understanding of human dignity certainly is neither wholly insulated from, nor inherently at odds with, the values prevailing in other counties" (1215-1216). She states that "the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus." But she finds no such consensus opposing the death penalty for crimes committed while juveniles within the U.S., "and the recent emergence of an otherwise

global consensus does not alter that basic fact" (1216). Because no U.S. consensus exists, and because "reasonable minds can differ as to the minimum age at which commission of a serious crime should expose the defendant to the death penalty," she would "not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of our Nation's legislatures" (1217, 1206).

While Justice Scalia voted with O'Connor , his view of the use of international law is far less sympathetic. His arguments clearly reflect the views expressed six weeks earlier in the American debate. He argues that in this case the Court is bound by no rules and "thus proclaims itself the sole arbiter of our Nation's moral standards." Scalia must dissent "because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of our other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners" (1217).

Scalia's dissent expands upon his objections to Kennedy's majority opinions in other areas of law—that he is enforcing his own personal value judgments in the name of the Constitution and those of the majority.[33] He begins Part III of his opinion by stating "though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage" (1225). He lists some omissions in Kennedy's catalogue: the US never signed the UN Convention on the Rights of the Child, and the US Senate expressly reserved capital punishment for juveniles in 1966 when it ratified the International Covenant on Civil and Political Rights. Further, he criticizes Kennedy for taking the nations who disavow the juvenile death penalty at their words, and notes that several of the nations which excepted juveniles have a mandatory death penalty. Thus the survey of other nations "says nothing

about our system," where juries can consider mitigating circumstances (1226). This follows from his argument against wrenching another nation's law or judicial rulings out of the context of its larger political, legal or criminal justice systems.

Scalia further rejects the idea "that American law should conform to the rest of the world" (1226). He argues its use is selective and manipulative to support the personal preferences of judges. Many American Court rules—such as the exclusionary rule, its broader reading of establishment of religion, and abortion—differ from those followed by other nations in the international community (1227-1228). Thus, Scalia concludes "the Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the reasoned basis for its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry" (1228). And he makes this accusation not merely to Kennedy's opinion, but to O'Connor's as well (1228 n. 9), stating "either America's principles are its own, or they follow the world; one cannot have it both ways."

Scalia concludes his criticism of the use of the law of other nations by responding to Kennedy's closing oratory. "I do not believe," Scalia states, "that approval by other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by other nations and peoples' should weaken that commitment." Scalia's main objection, though, is that the law of other nations "are cited to set aside the centuries-old American practice—a practice still engaged in by a large majority of the relevant states—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death

penalty" (1229). This is consistent with his larger "text and tradition" originalism and his criticism of individual Justices reading their own personal views into the Constitution. In this case, "what these foreign sources 'affirm,' rather than repudiate is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America" (1229). While Kennedy tries to de-emphasize his use of foreign law as merely confirming the Court's own independent judgment, Scalia writes, "'acknowledgement' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment—which is surely what it parades as today" (1229). Scalia here repeats his belief that the use of comparative law is to dress personal preferences in the garb of legal citation.

V. A qualified endorsement of comparative constitutionalism

Kennedy's embrace of comparative constitutionalism in *Lawrence* and *Roper* is consistent with his larger conception of the judicial duty to enforce the full and necessary meaning of liberty. While he claims the experience of other nations is not controlling but merely confirms his own independent judgment, his use of it raises several concerns. Even if Kennedy can respond to most of Scalia's rejection, there are other reasons why American judges should be more cautious in the citation of comparative materials.

Scalia's first objection is that other nations may have a different moral framework than Americans. However, all constitutional courts have to deal with what rights inherently belong to the individual and the legitimate claims of the community, as well as the proper role of constitutional courts in a system of majority rule. Just as it may go too far to say the opinions and decisions of other nations are always relevant, it seems too much to claim, as Scalia does, that they could never have any relevance.[34]

Scalia's second objection is that use of comparative materials is selective; some nations are mentioned, others are not. This objection, however, could be extended to any citations of cases, law review articles or other scholarship. Scalia's third objection is that using these sources lack democratic legitimacy in the American context. However, many state and federal court decisions would fall to the same objection; certainly, citations of law review articles and other scholarship would suffer from the same problem.

Scalia's fourth objection to the use of comparative source—and perhaps the most serious--is that it gives the veneer of legal legitimacy to the result that judges prefer personally. There may be something to this as it seems difficult to believe that an American judge's decision is affected significantly by the fact a legislature in another nation has repealed a law or that a court in another nation ruled a different way. This objection really reveals two problems inherent in judicial interpretation: what a judge means to signal when he cites a case as an authority? How should a judge respond to the uncertainty in the meaning and application of constitutional text?

The increasing length and sourcing of judicial opinions in recent years has raised the problem Scalia suggests. If one expects judicial decisions to look lawyerly, then a judge will look to sources that appear useful, as Breyer states. The use may be to provide a supporting argument; or it may be, as a pragmatist like Posner suggests, as "one more form of judicial fig-leafing" to obscure the indeterminacy of constitutional interpretation. Posner argues that "citing foreign decisions is probably best understood as an effort, whether or not conscious, to further mystify the adjudicative process and disguise the political decisions that are the core, though not the entirety, of the Supreme Court's

output."[35] One can extend this criticism to the increasing trend of citation of both legal and extra-legal sources in judicial opinions.

If this is the case, one must turn the question around. Of what value is the citation of the law of other nations? What purposes do these citations serve? The ultimate test for citation of foreign sources should be whether these sources provide not merely confirmation of independent judgment, but whether they contain arguments that American courts do and should find persuasive as a matter of legal reasoning. I argue that comparative materials are acceptable when they reveal not mere confirmation of judicial conclusion but confirmation to the reasoning behind those conclusions and a demonstration that its reasoning is applicable to the American context.

If this is a sound standard, Kennedy most appropriately uses comparative materials in his pre-nomination address. He uses the ECHR opinion in *Dudgeon* to point to the underlying moral and practical factors that the U.S. court should have considered in *Bowers* but that the majority did not.

The use of comparative materials in *Lawrence* deserves a middling grade. It is most effective when it refutes the sweeping claims about Western civilization made by Chief Justice Burger's concurring opinion in *Bowers*. He is a bit less persuasive, however, when he carries his analysis to the cases decided after *Dudgeon*. While Kennedy properly notes that the ECHR has followed *Dudgeon*, not *Bowers*, he states that "the right petitioners seek in this case has been accepted as an integral part of human freedom in other countries." Kennedy then states that "there has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" (576-577). It is unclear, what additional weight this section of the

argument carries in the argument, particularly in comparison to the expansive ideal of liberty at the opening of the opinion and the affirmation of the judicial role to investigate "the component of liberty in its manifold possibilities" (578). As he claims that Bowers was wrong when it was decided, the citation of *Dudgeon* and the British example does provide confirmation for the expansive ideal of liberty he had expressed even before coming to the Court.

Kennedy's use of comparative materials in *Roper* is more problematic. Although he states that the reality of international opinion against the death penalty for offenders under 18 "does not become controlling," that reality does merit its own section of the opinion and it "does provide respected and significant confirmation for our own conclusions" (1199-1200). That confirmation appears more legislative and diplomatic than judicial. Kennedy makes much of the fact that "the United States now stands alone in a world that has turned its face against the juvenile death penalty…resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." This does confirm the reasoning he gave in the first parts of the opinion, but his citation here for the comparative material to support this conclusion is not a judicial opinion or even a legislative preamble, but an amicus brief for the Human Rights Committee of England and Wales (1200).

While Kennedy finds confirmation of his decision in "the opinion in the world community," it's unclear why he needs the references. He states that "it does 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." But

why is this acknowledgement necessary? This quote underscores Kennedy's commitment to interpreting the Constitution in light of a commitment to finding the essential meaning to terms such as liberty. When an opinion gives references to mere results without explanations of the reasoning behind it, and its citation for confirmation of the substantive argument is an amicus brief from an interest group, then it is susceptible to Scalia's charge of manipulation.

For all their differences, one commonality between Scalia and Breyer is the assumption that the Constitution is fundamentally democratic, and that judicial review is fundamentally problematic.[36] For Kennedy, however, the Constitution is fundamentally about the preservation of liberty, and that requires him to find what Scalia derides as the THE right answer in a particular case. Thus he is not as hesitant to use judicial power to enforce that conception of liberty, and he is willing to look to other sources—including those of other nations—to define and enforce his ideal of liberty.

Because he minimizes the problem of democratic legitimacy, Kennedy's jurisprudence runs the problem of judicial hubris. This problem is similar to the possibility of explicitly reading personal conceptions and preferences into the law this is a problem with Justice Brennan, who admitted his jurisprudence of human dignity is inescapably personal.[37] Kennedy's danger is more likely, as Scalia argues elsewhere, that the search for right answers is problematic from the standpoint of democracy. And if a judge searches the law of other nations to find these right answers, he has an obligation to show how these answers are relevant to the United States. To make this case, he needs more than results of foreign consensus. He needs to show that the reasoning in these other nations is persuasive, and essentially judicial.

This likely raises a problem in all legal citation--one exaggerated by the modern institutional trend on the U.S. Supreme Court toward longer opinions and added citations. In Kennedy's case this applied with added force, given his penchant for citing scholarship in other areas outside of the law such as economics, psychology and sociology.[38] Essentially, his ideal of democratic legitimacy is less of a restraint on his legal reasoning than it is for Scalia. For Kennedy, the problem is not one of democratic legitimacy in interpretive method, but one of democratic acceptance of results. As he stated in a public address at New York University Law School a month after *Roper* was decided, "We make a substantial withdrawal from the reservoir of public trust when we make a decision on a difficult case. And we have to replenish that trust by sticking to traditions."[39]

Kennedy's references to comparative law in his opinions on the Court reveal both less and more than at first glance. While it often seems unclear what weight these references play in his argument—whether controlling or confirmation—they do underscore Kennedy's underlying commitment to looking wherever he feels he must to define the full and necessary meaning of liberty. The objections to his use of foreign sources are aimed, then, not at the references themselves but at this larger conception of the role of judges in discerning the meaning of uncertain constitutional text and applying that meaning to controversial and changing circumstances. References to comparative law by the U.S. Supreme Court can not themselves resolve the tension inherent in constitutional interpretation between adjusting law to life and the substitution of personal preference of judges. If done more carefully and transparently, however, the use of comparative source can help to bring to the forefront the moral, practical and political considerations judges must consider in order to decide the cases before them.

Notes

[1] See, for example, Donald P. Kommers, "Comparative Constitutional Law: Its Increasing Relevance," in *Defining the Field of Comparative Constitutional Law*, eds. Vicki C. Jackson and Mark Tushnet. Westport, Connecticut: Praeger (2002); Anne-Marie Slaughter, "A Global Community of Courts" 44 *Harvard International Law Journal* 191 (2002).

[2] U.S. Association of Constitutional Law Discussion. "Constitutional Relevance of Foreign Court Decisions." Washington, D.C: American University, Washington College of Law, 13 January 2005. Transcript available at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument

I discuss this debate in greater detail in Part I below.

[3] The House resolution (H.R. 97) was introduced in February 2005, before Roper was decided. The resolution specifically mentioned the decision in *Lawrence* and has 54 co-sponsors. The Senate resolution, S. Res. 92, was introduced on March 20, 2005, less than three weeks after *Roper* was decided. It cited the Court's decisions in *Lawrence* and *Roper* as well as another death penalty case--Atkins v. Virginia 536 U.S. 304 (2002). Both conclude "That it is the sense of the House/Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States." Neither resolution has been moved on in committee.

[4] 539 U.S. 558 (2003).

[5] 478 US 186 (1986).

[6] 125 S. Ct. 1183 (2005).

[7] 492 U.S. 361 (1989).

[8] Over the past ten years, the Court has included references to the law of other nations in about 30 cases, mostly in concurrence or dissent. Breyer is by far the leader, with 11 opinions that cite cases from other nations. Statistics from Donald P. Kommers, "American Courts and Democracy: A Comparative Perspective" (Oxford University Press: forthcoming), p. 30.

[9] Scalia once famously scolded Breyer for his reference to European norms in a case involving American federalism, stating that while the experience of other nations may be useful when formulating a Constitution, "comparative analysis is inappropriate to the task of interpreting a Constitution." Printz v. United States 521 U.S. 898 (1997).

[10] It is also likely that Breyer and especially Scalia had Roper in mind during this debate, as the Court had surely begun engaging in the internal process of opinion writing for that case.

[11] Scalia has long made this argument in his dissents and in public addresses. See Antonin Scalia, "Originalism: The Lesser Evil" 57 *University of Cincinnati Law Review* 849 (1989).

[12] See also another recent address given by Justice Breyer titled "Our Democratic Constitution" Cambridge: Harvard University 17 November 2004. Transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html.

[13] I argue in the larger dissertation that Kennedy's interpretive approach echoes that of Ronald Dworkin. See Dworkin, *Taking Rights Seriously* (1977), p. 134-146, 185 and *Freedom's Law* (1996), introduction.

[14] My sources for this section derive from two main sources: (1) Kennedy's statements before the U.S. Senate in his confirmation hearings. U.S. Senate Judiciary Committee, "Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States" 14-16 December 1987 (cited hereafter as "Nomination"). (2) Transcripts of public addresses that Kennedy submitted to the Judiciary Committee after his nomination but before his confirmation hearings. These files are located at the National Archives in Washington, D.C. I would like to thank Bill Davis at the Archives for his assistance in locating these addresses and sending me copies of the addresses.

[15] "Rotary Speech," Sacramento Chapter of the Rotary Club, 15 October 1987, p. 6.

[16] Nomination, p. 141. Following citations in text refer to that testimony.

[17] Joan Biskupic, "Supreme Court Film Offers Glimpse Behind Justices' Closed Doors" Washington Post 17 June 1997, p. A15.

[18] Nomination, p. 233. Following citations in text refer to this testimony.

[19] Anthony Kennedy, "Unenumerated Rights and the Dictates of Judicial Restraint" Palo Alto: Canadian Institute for Advanced Legal Studies, 24 July-August 1 1986. Following page citations in text refer to this address.

[20] Dudgeon v. United Kingdom 45 ECHR P52 (1981).

[21] Article 8(1): "Everyone has the right to respect for his private and family life, his home and his correspondence."

[22] This is my interpretation of Scalia's statement in *Casey* that "as long as this Court thought (and the people thought) that we Justices were doing essentially lawyer's work here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about."

While the proper interpretation of text and tradition can lead to objectively true, or factual answers, as Kennedy describes, discovering the full and necessary meaning of that text or of the relevant constitutional tradition is not "essentially lawyer's work." It requires a moral interpretation and evaluation from outside of history to discover its full and necessary meaning.

[23] "Unenumerated Rights," p. 4.

[24] Compare with the plurality opinion in *Casey*, which begins with "liberty finds no refuge in a jurisprudence of doubt" and ends with "We invoke it [judicial responsibility] once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty"

[25] Kennedy has also applied his expansive conception of liberty to several other constitutional contexts. One recent study concludes that of the Justices currently on the Court, Kennedy is most likely to strike government action on grounds of freedom of speech and association. Eugene Volokh, "How the Justices Voted in Free Speech Cases 1994-2000" 48 *UCLA Law Review* 1191 (2001). Volokh has updated his data through the 2001 Term on his website (http://www1.law.ucla.edu/~volokh/howvoted.htm).

I discuss Kennedy's expansive ideal of free speech in Chapter Four of my dissertation.

[26] Griswold v. Connecticut 381 US 479 (1965) and Roe v. Wade 410 US 113 (1973).

[27] Planned Parenthood v. Casey 505 US 833 (1992) and Romer v. Evans 517 US 620 (1996).

[28] PG & JH v. United Kingdom (2001); Modinos v. Cyprus 259 ECHR (1993); Norris v. Ireland 142 ECHR (1988)

[29] The internal quote is from Justice Thomas's opinion denying cert. in Foster v. Florida. In that case, the Court denied cert to a case questioning whether serving more than 20 years on death row constituted cruel and unusual punishment. Justice Breyer, in his dissent from the denial, had cited decisions from several other nations.

[30] See William N. Eskridge, Jr. **"**United States: *Lawrence v. Texas* and the imperative of comparative constitutionalism**"** 4 International Journal of Constitutional Law 555 (2004).

[31] Nomination, p. 122.

[32] Trop v. Dulles 356 US 86 (1958).

[33] See, in particular, his dissents in Casey, Romer v. Evans, Lawrence v. Texas.

[34] For a similar point, see Kommers, "American Courts and Democracy: A Comparative Perspective," p. 32.

[35] Richard Posner, "No Thanks, We Already Have our Own Laws" *Legal Affairs*, August 2004.

[36] See also another recent address given by Justice Breyer titled "Our Democratic Constitution" Cambridge, Mass.: Harvard University, 17 November 2004. Transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html.

[37] See William Brennan, "The Constitution of the United States: Contemporary Ratification" Washington: Georgetown University, 12 October 1985. In contrast, Kennedy said in *Casey* and repeated in *Lawrence* that "Our obligation is to define the liberty of all, not to mandate our own moral code."

[38] See Kennedy's majority opinion in Lee v. Weisman, 505 U.S. 577 (1992) striking down public school prayer at graduations, which cited psychological studies about the development of adolescents. Scalia dissented to the use of these sources in *Lee* and derided its relevance in a legal opinion as "psychology practiced by amateurs." See also his recent majority opinion in Granholm v. Heald (decided May 16, 2005), which cited several economic studies in striking down state laws that prohibited direct delivery of wine to customers by out-of-state wineries but allowed in-state wineries to do so.

Of course, the most famous and most controversial use of such sources is in Chief Justice Warren's famous footnote in Brown v. Board of Education which cited Kenneth

Clark's doll tests and Gunnar Myrdal's *The American Dilemma* among other studies in psychology and sociology. See Brown 347 U.S. 483 (1954) at 484 fn. 11.

[39] Kira Peikoff, "Justice Kennedy on tough cases." *Washington Square News* April 6, 2005. Article available at http://www.nyunews.com/news/campus/9329.html