Justice Kennedy's Legacy of Constitutional Comparativism: An Australian Perspective

JEMIMAH ROBERTS*

Abstract

Justice Anthony Kennedy retired from the United States Supreme Court in 2018, after more than 30 years serving in the influential role. During his time on the bench, significant controversy was sparked following Kennedy J's citation of foreign law in a number of majority opinions interpreting and applying the United States Constitution. The intensity of these debates notably contrasts with Australian attitudes and practice regarding the use of comparative analysis in constitutional adjudication. This article offers a reflection on this aspect of Kennedy J's judicial legacy from an Australian perspective

Keywords

Comparative Constitutional Law; Justice Anthony Kennedy; United States; Australia; Use of Foreign Law; Constitutional Interpretation

I INTRODUCTION

On 27 June 2018, Associate Justice Anthony Kennedy announced his retirement from the United States ('US') Supreme Court, effective 31 July. Following his nomination by President Reagan in 1987 and swearing in on 18 February 1988, Kennedy's retirement follows 30 years in office on the nation's highest court. Widely regarded as the Court's pivotal 'swing' vote, many landmark decisions were authored by his Honour during this period, including *Citizens United v Federal Election Commission*[1] (holding that the First Amendment to the US *Constitution* protects the rights of corporations to make political expenditures) and *Obergefell v Hodges*[2] (holding that the fundamental right to marry is guaranteed to same-sex couples under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment). This article will reflect on one particular aspect

* BA, LLB (Hons 1) (USyd), PhD candidate (UNSW). Associate Lecturer in Law, Macquarie Law School. My thanks to Kate Gleeson, Denise Meyerson and the anonymous reviewers for helpful comments on an earlier draft. Thanks also to Rosalind Dixon and Gabrielle Appleby for their ongoing support and supervision of my PhD thesis, which sparked my interest in the topic of this article. All errors are my own. Contact: jemimah.roberts@mq.edu.au

1 *Citizens United v Federal Election Commission*, 558 US 310 (2010).

2 *Obergefell v Hodges*, 576 US ___ (2015).

of Justice Kennedy's judicial legacy: the use of foreign law in the process of interpreting and applying the US *Constitution*.

Justice Kennedy is not the first to cite foreign law in a Supreme Court decision.[3] The relevance of the law of other jurisdictions to American constitutional jurisprudence has been advocated by a number of members of the Court in the past,[4] but has also attracted heavy criticism.[5] Two of the more vocal participants associated with this discussion were Justices Stephen Breyer and Antonin Scalia, who notably engaged in a rare public debate on this issue,[6] and expressed their divergent views in a number of judicial opinions.[7]

Against this background, the significance of Justice Kennedy's contribution to these broader debates stems from his Honour's citation of foreign law in two high profile decisions in the early 2000s — *Lawrence v Texas*[8] and *Roper v Simmons*.[9] The majority opinions authored by Kennedy J in these cases overruled the Court's existing precedent in two relatively

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3 For an overview of the US Supreme Court's historical practice regarding use of foreign law see Steven G Calabresi and Stephanie Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision' (2005) 47 *William and Mary Law Review* 743; Steven G Calabresi, 'A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 *Boston University Law Review* 1335; David Fontana, 'Refined Comparativism in Constitutional Law' (2001) 49 *UCLA Law Review* 539, 544–9.

4 For example, in *Atkins v Virginia*, 536 US 304, 316 n 21 (2002), Stevens J (delivering the opinion of the Court) referenced the views of the 'world community' in a supporting footnote, suggesting that amongst such comparative jurisdictions 'the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.' Support for the practice has also been expressed extra-judicially by members of the Court, including Justice Ruth Bader Ginsburg: see, eg, Ruth Bader Ginsburg, 'Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2003) 40 *Idaho Law Review* 1; Ruth Bader Ginsburg, 'A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication' (2006) 1 *FIU Law Review* 27.

5 See, eg, Justice Antonin Scalia, 'Keynote Address: Foreign Legal Authority in the Federal Courts' (2004) 98 *American Society of International Law Proceedings* 305 (criticizing the use of *modern* foreign legal materials in the interpretation of the US *Constitution*).

6 Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 519.

7 For example, in *Printz v United States*, 521 US 898, 977 (1997), Breyer J (in dissent) consulted the constitutional experience of other federations, arguing that although 'we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own', comparative experience may 'nonetheless cast an empirical light on the consequences of different solutions to a common legal problem'. In contrast, Scalia J (delivering the opinion of the Court) was critical of this approach, stating that '[w]e think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one': at 921 n 11.

8 539 US 558 (2003) ('*Lawrence*').

9 543 US 551 (2005) ('*Roper*').

controversial areas of jurisprudence, and in doing so referenced the legislative practice and constitutional decisions of a number of foreign jurisdictions. In the wake of these cases, debate surrounding the role of foreign law in domestic constitutional interpretation intensified in the US, and the practice was thrust into a new and unprecedented level of public prominence and scrutiny. In addition to the heated judicial and academic discussion triggered in response, there was also a remarkably hostile reaction from Congress, seen in a number of (unsuccessful) attempts to limit the very ability of the Supreme Court to consider foreign law.[10]

It is not the intention of this article to comprehensively re-produce these debates, which have already been examined in the rich and extensive literature generated largely in response to these cases.[11] However, re-visiting the references to foreign law in these decisions has relevance for a number of reasons. Importantly, it provides the opportunity to reflect more generally on Justice Kennedy's legacy and the principles that arguably animated his constitutional vision on the bench. Further, recent developments in Australian constitutional jurisprudence, informed by comparative analysis, provide an interesting point of contrast with US debates and attitudes in this area. By examining Kennedy's approach itself from a comparative perspective, the article will consider the salience of these debates for Australian constitutionalism, drawing a contrast with the role played by foreign law in the Australian High Court's recent practice.

The article is structured as follows. Part II draws upon the existing literature to identify some key preliminary definitions and considerations, providing a theoretical framework for the subsequent examination of US and Australian comparative practice. In Part III, Justice Kennedy's particular use of foreign law in *Lawrence v Texas*[12] and *Roper v Simmons*[13] will be explored. Specifically, Part IIIA will examine Justice Kennedy's stated use of comparativism in these cases, noting the types of foreign legal sources cited and purpose behind the survey of comparative practice. In light of the significant academic, judicial and political reaction that followed in the US, Part IIIB will then introduce some of the common objections to Justice Kennedy's approach, by reference to the concerns articulated by Scalia J in dissent in these cases. In doing so, it will consider

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[10] One such example was a bill introduced in 2005 shortly after the *Roper* decision — the 'Constitution Restoration Act' — s 201 of which purported to ban the use of all forms of foreign law in interpreting and applying the US *Constitution*, other than 'English constitutional and common law up to the time of the adoption of the Constitution of the United States': See Constitution Restoration bill, S 520, 109th Congress (2005) <https://www.congress.gov/bill/109th-congress/senate-bill/520/text> ('*Constitution Restoration*').

[11] For a comprehensive book-length treatment of the subject see Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007); Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2013) ('*Constitutional Engagement*').

[12] *Lawrence* (n 8).

[13] *Roper* (n 9).

the relevance of these reservations to constitutional comparativism more generally, and beyond the US context for jurisdictions such as Australia.

Finally, from an Australian perspective, re-visiting the use of foreign law by Kennedy J in these cases prompts reflection on the complex and varied uses of comparative legal sources available to domestic courts, and the ways in which comparativism has been utilised in our own constitutional system. To this end, Part IV draws a point of contrast with Australian attitudes and practice regarding the role of comparative analysis in constitutional adjudication. To provide a concrete illustration of these general themes, the article concludes by examining a prominent recent instance of comparativism in the Australian context — the role played by foreign law in the High Court's jurisprudence on the (implied) freedom of political communication — by reference to the cases of *McCloy v New South Wales*[14] and *Clubb v Edwards; Preston v Avery*.[15]

II Comparativism in Domestic Constitutional Adjudication

There are numerous reasons why the constitutional law of other jurisdictions may be consulted by domestic actors. For example, foreign constitutions are often examined as potential models to draw upon during the process of constitution-making. In contrast with this role in the drafting context, this article is focused on the use of foreign law at the later stage of constitutional *adjudication* — specifically, when foreign legal sources are consulted by courts to assist in the interpretation and application of a national constitution. The term constitutional 'comparativism' has been frequently employed to describe this use,[16] and a number of taxonomies have been proposed to classify the different methods of, and approaches to, the practice.[17]

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14 (2015) 257 CLR 178 (*'McCloy*').

15 [2019] HCA 11 ('*Clubb'*).

16 Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] (1) *New Zealand Law Review* 45; Fontana (n 3); Roger Alford, 'In Search of a Theory for Constitutional Comparativism' (2004) 52 *UCLA Law Review* 639.

17 See, for example, Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) *Indiana Law Journal* 819 ('Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation') ('universalist', 'dialogical' and 'genealogical'); Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108(6) *The Yale Law Journal* 1225 ('functionalism', 'expressivism' and 'bricolage'); Jackson, *Constitutional Engagment* (n 11) ('resistance', 'convergence' and 'engagement'); Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56(4) *American Journal of Comparative Law* 947; Rosalind Dixon and Melissa Vogt, 'Comparative Constitutional Law and the Kable Doctrine' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 108 ('doctrinal', 'deliberative', 'historical', 'empirical/functional', 'reflective' and 'moral-cosmopolitan').

Some important preliminary considerations are the definitions of 'foreign' and 'law' for these purposes. Many legal sources could be considered 'foreign' from the perspective of a local constitutional court. For example, a court may consult the comparative *case law* developed by a foreign national court (or supranational court from a different legal system, where no hierarchical relationship exists with the local court). As described by Adrienne Stone, 'most judges charged with the interpretation of constitutions … commonly refer to, analyse, and are sometimes persuaded by, the analyses of courts in other countries that have decided similar questions.'[18] More specifically, under the taxonomy put forward by Rosalind Dixon, within a body of comparative jurisprudence the sites of comparison may be 'doctrinal' (including the substantive doctrine and analytical tools developed by a foreign court), or even the 'deliberative' reasoning and arguments raised in the foreign constitutional decision-making process.[19]

Writing extra-curially, Sir Anthony Mason has identified a number of trends regarding this approach to comparativism, where there is a tendency for:

> … a new court, especially a court of final appeal, lacking a corpus of jurisprudence of its own creation, [to look] to a body of developed jurisprudence when it is apparently relevant to the question which confronts the court. This tendency is the more pronounced when there is a similarity in the text or structure of the constitutions being compared and one is modelled upon the other. With the passage of time and the development of a more sophisticated understanding of its own constitution, a national court is more likely to fashion its own solution to the problems that arise.[20]

Looking beyond the jurisprudential developments of foreign courts, a domestic court may also consult the legislative or policy approaches adopted in other jurisdictions, or draw empirical insights from broader practical comparative constitutional experience.[21]

Although these sources have 'persuasive' value due to the assistance they potentially offer in resolving domestic constitutional questions, they are not binding on the local court. When referenced in this context, such sources are cited 'through a process of reasoning that lies entirely within

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18 Stone (n 16) 45.

19 Dixon and Vogt (n 17) 113–14 citing; Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119(1) *Harvard Law Review* 109 ('Constitutional Comparisons').

20 Sir Anthony Mason, 'Progressing Comparative Constitutional Law' (Speech, 13th Commonwealth Law Conference, 2003) 6–7.

21 Dixon and Vogt (n 17) 108, 113; See also Rosalind Dixon, 'George Winterton: A Friend to Students and Foreign Law' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) (on more pragmatically-informed approaches to comparativism).

the discretion of the [national] court.'[22] In contrast, *international* law arguably has a stronger claim regarding its authoritativeness and influence on domestic constitutional interpretation.[23] Due to the distinct questions this raises, this body of law is not considered 'foreign law' for the purposes of this article (although the role such sources played in Kennedy J's comparative approach will certainly be canvassed).

Once a foreign legal source has been identified as relevant to consider, there are a number of complex and varied ways in which it may be treated by the local court. For example, the purpose of comparison may be to 'borrow' a foreign constitutional idea[24] (such as a particular legal doctrine) and incorporate it into the local system. As Rosalind Dixon and Melissa Vogt have described, comparison in this sense may involve 'considering how foreign courts ha[ve] drafted doctrinal solutions to similar constitutional controversies as those arising locally',[25] providing a range of ideas for the local court to draw upon in developing its own body of constitutional jurisprudence.

An important theme in recent scholarship has been the rejection of the idea that foreign law is simply 'transplanted' from one legal system to the other,[26] in favour of a more nuanced understanding of the varied ways in which foreign constitutional sources are used, including the potential for comparativism to be a *critical* exercise.[27] For example, foreign law (such as a particular legal doctrine) may be positively relied upon and incorporated by a court into its own jurisprudence. However, as Gunter Frankenberg has put forward, when constitutional 'items' transfer between jurisdictions, this may involve a process of 're-contextualisation' where the original item is adapted to suit the new constitutional context[28] (resulting

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[22] Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13(1) *Indiana Journal of Global Legal Studies* 2, 39 n 6 ('The Use and Misuse of Comparative Constitutional Law').

[23] As Adrienne Stone notes, international law 'raises the dimension of obligation: international law, unlike the judgments of foreign courts, sometimes places obligations on nation-states': Stone (n 16) 46; Cheryl Saunders similarly observes that the claims of international law '[derive] from membership of the international community and, in some cases, from commitments to international norms accepted by other branches of government, on behalf of the country as a whole': Saunders, 'The Use and Misuse of Comparative Constitutional Law' (n 22) 39 n 6.

[24] On 'borrowing' see Symposium, '*Constitutional Borrowing*' (2003) 1 *International Journal of Constitutional Law* 177–324.

[25] Dixon and Vogt (n 17) 113 (citations omitted).

[26] On 'legal transplants' see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University Press of Virginia, 2nd ed, 1993).

[27] Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411. More recently, the metaphor of 'migration' has been adopted by some commentators due to its capacity to convey this broader range of uses of foreign law: see Sujit Choudhry, 'Migration in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 1.

[28] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8(3) *International Journal of Constitutional Law* 563, 574.

in a modified version of the foreign source being adopted), or even rejection of items that are too context- specific or dependent.[29]

Further, as Adrienne Stone has observed, comparison may serve as 'a form of empirical research into the likely effects of a given doctrine',[30] providing 'guidance as to how a certain kind of constitutional rule — adopted for independent reasons — might work in practice'.[31] Relatedly, under an 'aversive'[32] approach to comparison, foreign law and experience can provide a 'negative' model to be *avoided* due to concerns regarding the perceived consequences associated with the approach.[33]

Comparativism may also serve other purposes. For example, courts may engage in a survey of comparative constitutional practice in an attempt to identify if there is a global 'moral'[34] or 'practical' consensus on a particular issue. Under a 'reflective'[35] or 'dialogical'[36] approach, comparison may assist in highlighting points of difference in order to facilitate self-reflection and greater understanding of one's *own* legal system.

III Justice Kennedy and the Use of Foreign Legal Sources

In the early 2000s, Justice Kennedy authored a number of majority opinions in which the legislative practice and constitutional decisions of foreign jurisdictions were referenced in the context of the US Supreme Court overruling its own precedent. The cases of *Lawrence v Texas*[37] and

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29 Ibid 572–3.

30 Stone (n 16) 59 (citations omitted).

31 Ibid; Vicki Jackson similarly observes that comparativism may 'provide empirical information from comparative experience about the consequences of alternative interpretations': Jackson, *Constitutional Engagement* (n 11) 77.

32 Kim Scheppelle, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.

33 See, eg, Sujit Choudhry, 'The Lochner Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1 ('The Lochner Era and Comparative Constitutionalism').

34 Such an approach has been described (but not necessarily endorsed) by Rosalind Dixon as a 'moral-cosmopolitan' theory of comparison: Dixon (n 17) 956–7, citing Eric A Posner and Cass R Sunstein, 'The Law of Other States' (2006) 59 *Stanford Law Review* 131; Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119(1) *Harvard Law Review* 129 as examples. The term 'universalism' has also been used in this context: see, eg, Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26(2) *The University of Queensland Law Journal* 317, 320–1.

35 On 'reflective' comparison see Dixon (n 17) (arguing in favour of a more 'dynamic' reflective theory of comparison). See also Jackson, 'Constitutional Comparisons' (n 19) 119; Jackson, *Constitutional Engagement* (n 11) 73 ('Transnational sources may be seen as interlocutors, offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflection of others') .

36 On 'dialogical' comparison see Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (n 17) 835–8; Choudhry, 'The Lochner Era and Comparative Constitutionalism' (n 33).

37 *Lawrence* (n 8).

Roper v Simmons[38] are two of the more high-profile examples from this period, responsible for triggering much of the subsequent judicial, political and academic debate in the US.

In this part, the role played by foreign law in Kennedy J's reasoning in these cases will be considered. Further, in keeping with the broader theme of reflection upon Kennedy J's legacy, examining these decisions also provides the opportunity to explore his Honour's unique contribution to the development of American constitutional jurisprudence in two key areas — interpretation of the substantive dimension of the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment's 'cruel and unusual punishment' prohibition.

A *Justice Kennedy's Comparative Approach*

1 Lawrence v Texas

Justice Kennedy's judicial philosophy is commonly described as being committed to the principle of constitutionally protected personal liberty. At his confirmation hearing, Kennedy expressed the view 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.'[39] This focus was reflected in his Honour's constitutional jurisprudence, particularly cases concerning 'substantive due process' under the Fifth and Fourteenth Amendments to the US *Constitution*. Both Amendments contain a 'Due Process Clause' (providing that the federal government (or states) may not deprive persons of 'liberty' 'without due process of law'), that the Supreme Court has held contains a substantive dimension protecting certain fundamental rights from government interference.

Of particular relevance for the purposes of this article, in the 2003 decision of *Lawrence v Texas* ('*Lawrence*'),[40] the Supreme Court (by a 6–3 majority)[41] struck down as unconstitutional a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct, on the grounds that the law violated the liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment. The majority opinion was delivered by Kennedy J, joined by Stevens, Souter, Ginsburg and Breyer JJ. Justice Kennedy commenced the opinion by framing the case as one concerning liberty, broadly conceived:

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38 *Roper* (n 9).

39 Transcript of Senate Hearings, *Nomination of Anthony M Kennedy to be Associate Justice of the Supreme Court of the United States* (No J-100-67, Senate Judiciary Committee, 14-16 December 1987) 122 <https://www.loc.gov/law/find/nominations/kennedy/hearing.pdf>.

40 *Lawrence* (n 8).

41 Justice O'Connor agreed that the law was unconstitutional, but based this conclusion on the Fourteenth Amendment's Equal Protection Clause: ibid 579–85 (O'Connor J concurring).

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[42]

Specifically, Kennedy J considered that the legal issue was 'whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteen Amendment'.[43] This involved re-considering a case decided 17 years earlier — *Bowers v Hardwick* ('*Bowers*')[44] — holding that the US *Constitution* conferred no such fundamental right in this context.

In concluding that *Bowers* should be overruled,[45] Kennedy J's reasoning was grounded in US case law and tradition. Of importance were developments in US constitutional jurisprudence regarding the liberty aspect of the Due Process Clause — decisions from before *Bowers* was decided,[46] as well as the subsequent evolution of the doctrine in later cases, particularly *Planned Parenthood v Casey* ('*Casey*').[47] For example, as described by Kennedy J:

> [In *Casey*] the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.[48]

Justice Kennedy drew upon the *Casey* holding in *Lawrence*, reasoning that: 'Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.'[49] The *Lawrence* opinion also examined US state legislative practice as evidence of the emerging commitment to liberty under US laws and traditions, notably the continued practice of repeal of state anti-sodomy laws, and a pattern of non-enforcement with respect to consenting adults engaging in sexual intimacy in private.[50]

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42 *Lawrence* (n 8) 562 (Kennedy J).

43 Ibid 564.

44 *Bowers v Hardwick*, 478 US 186 (1986) ('*Bowers*').

45 *Lawrence* (n 8) 578 (Kennedy J).

46 See *Lawrence* 564–6 discussing: *Pierce v Society of Sisters*, 268 US 510 (1925); *Meyer v Nebraska*, 262 US 390 (1923); *Griswold v Connecticut*, 381 US 479 (1965); *Eisenstadt v Baird*, 405 US 438 (1972); *Roe v Wade*, 410 US 113 (1973); and *Carey v Population Services International*, 431 US 678 (1977).

47 *Planned Parenthood v Casey*, 505 US 833 (1992).

48 *Lawrence* (n 8) 573–4 (Kennedy J).

49 Ibid 573–4.

50 Ibid 573.

In what ways, then, was foreign law relevant to the Court's determination in *Lawrence*? Specifically, the law and practice of other jurisdictions was cited at two points. First, British and European law was cited in response to a declaration in Burger CJ's concurring opinion in the earlier case of *Bowers* that '[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.'[51] Justice Kennedy was critical of the Chief Justice's 'sweeping references' in this statement, on the grounds that it 'did not take account of other authorities pointing in an opposite direction.'[52]

To counter the Chief Justice's earlier claim, in *Lawrence* Kennedy J cited (1) the British 1957 Wolfenden Report recommending the repeal of laws criminalising men's homosexual sex (resulting in the *Sexual Offences Act 1967* (UK)); and (2) a pre-*Bowers* decision of the European Court of Human Rights (*Dudgeon v United Kingdom* ('*Dudgeon*'))[53] holding that anti-sodomy laws were invalid under the European Convention on Human Rights.[54] Justice Kennedy noted that as *Dudgeon* was authoritative in all countries that are members of the Council of Europe,[55] the decision was 'at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.'[56]

Second, after considering the impact of US jurisprudential developments in cases such as *Casey* (discussed above),[57] foreign law was again cited[58] to illustrate that '[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.' [59] According to Kennedy J's analysis, '[t]here has been no showing that in this country [the US] the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.'[60]

In summary, the sites of comparison included foreign legislation and the case law of a supranational court, marshalled for the purpose of countering the specific reasoning and historical premises purportedly relied upon in

51 Ibid 571 quoting *Bowers* (n 44) 196.
52 *Lawrence* (n 8) 572 (Kennedy J).
53 *Dudgeon v United Kingdom* (1981) 45 Eur Court HR (ser A) ('*Dudgeon*').
54 *Lawrence* (n 8) 572–3 (Kennedy J).
55 21 nations then, 45 nations at the time of *Lawrence*.
56 *Lawrence* (n 8) 573 (Kennedy J).
57 Justice Kennedy expressed the view that '[t]he foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance': ibid 576.
58 *Lawrence* (n 8) 576–7 (Kennedy J), discussing European law (ECHR decisions) and citing 'Brief for Mary Robinson' (amicus brief) pages 11–12 (referencing the UN Human Rights Committee decision of *Toonen v Australia* 1994, and domestic legislation repealing such laws in countries including Canada, New Zealand, Israel and South Africa).
59 Ibid 576–7.
60 Ibid.

the earlier US case (*Bowers*). Notably, Justice Kennedy's stated use of foreign law was that it was not determinative to the holding, but supplemented the Court's reasoning based upon domestic legal sources (US legal precedent and state legislative practice).

2 Roper v Simmons

The use of foreign law in domestic constitutional interpretation was raised again two years later in *Roper v Simmons* ('*Roper*').[61] In this case, the issue was whether imposition of the juvenile death penalty violated the prohibition on 'cruel and unusual punishments' under the Eighth Amendment to the US *Constitution*.[62] Under the relevant legal test (established in *Trop v Dulles*),[63] it is necessary to take into account 'the evolving standards of decency that mark the progress of a maturing society'[64] to determine which punishments are so disproportionate as to be 'cruel and unusual'. Significantly, when applied in *Stanford v Kentucky*[65] (decided 16 years before *Roper*), the Supreme Court had rejected a similar challenge on the basis that there was no national consensus in US society that the imposition of the death penalty on 17- or 16- year old offenders violated such standards.

In *Roper*, however, a 5–4 majority overruled *Stanford*, with Justice Kennedy again delivering the opinion of the Court.[66] The majority's reasoning rested upon two considerations: (1) a perceived 'national consensus' by 2005 against the juvenile death penalty among US state legislatures (evidenced by 'the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice');[67] and (2) the Court's own determination that the death penalty is a disproportionate punishment for juvenile offenders, reasoning in part from its view regarding the moral capacities of adolescents.

Significantly, the entirety of Part IV of the majority opinion was then devoted to surveying comparative constitutional practice and international law on this issue. According to Kennedy J, the Court's determination that the death penalty is disproportionate punishment for offenders under 18 'finds 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.'[68] Specifically, a number of international covenants were cited (such as the United Nations Convention on the Rights of the Child)

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61 *Roper* (n 9); See also the earlier case of *Atkins v Virginia*, 536 US 304 (2002).

62 The Eighth Amendment provides 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

63 *Trop v Dulles*, 356 US 86 (1958).

64 Ibid 100–01 (plurality opinion).

65 *Stanford v Kentucky*, 492 US 361 (1989).

66 Joined by Stevens, Souter, Ginsburg and Breyer JJ.

67 *Roper* (n 9) 567 (Kennedy J).

68 Ibid 575.

prohibiting the juvenile death penalty,[69] and it was noted that 'only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.'[70]

British legislative experience regarding abolition of the juvenile death penalty was then considered,[71] with Kennedy J expressing the view that this held particular relevance for interpretation of the US Eighth Amendment due to the 'historic ties' between the two countries and modelling of the Eighth Amendment on a parallel UK provision.[72] After engaging in this survey of comparative and international practice, the opinion concluded that '[i]n the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.'[73]

Throughout the opinion, Kennedy J's stated use of comparativism was that it was not 'controlling' of the outcome, but provided 'respected and significant confirmation for [the Supreme Court's] own conclusions.'[74] It was considered 'proper' to 'acknowledge the overwhelming weight of international opinion against the juvenile death penalty'.[75] Justice Kennedy defended this approach, arguing 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

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69 Ibid 576: 'Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18 … Parallel prohibitions are contained in other significant international covenants.'

70 Ibid 577.

71 Ibid: 'As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter.'

72 Ibid: 'The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modelled on a parallel provision in the English Declaration of Rights of 1689'. A number of terms have been put forward to describe this emphasis upon the historical relationships between jurisdictions as justification for engaging comparatively – see, eg, Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (n 17) 838–9 (describing a 'genealogical' mode of comparative constitutional interpretation); Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' (1992) 14 *Cardozo Law Review* 533 (on 'genetic' historical influences).

73 *Roper* (n 9) 577 (Kennedy J). As expressed earlier at 577 following the review of international covenants and comparative practice, '[i]n 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.'

74 Ibid 578.

75 Ibid.

> by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[76]

3 Reflections

Although a number of observations can be made regarding the role of comparative analysis in *Lawrence* and *Roper*, two brief comments are offered below.

First, the use of foreign legal sources (along with international law) in these cases was quite particular — foreign law (predominantly comparative legislative practice) was surveyed in an attempt to ascertain global opinion on these two issues. Reflecting on this approach, Vicki Jackson has characterised the majority's use of foreign law in *Roper* as an example of 'engagement' with transnational legal sources,[77] as Kennedy J was 'in principle willing to look to outside law and practice to interrogate [his] judgment of whether that punishment for those offenders was constitutionally disproportionate in the United States, but only after considering more important factors, including state law and practice.'[78] However, others have suggested that Kennedy J's 'distinctive' use of foreign law in these cases was more vulnerable to attack than other applications of comparativism, as it arguably assumed 'the pervasive qualities of universalism', and was not necessary for the purposes of argument in either case.[79] For present purposes, a key take away is that Kennedy J's use of comparative constitutional sources differs to the more traditional approach of 'borrowing' constitutional doctrine or argument from overseas courts.

Second, it is worth noting that both *Lawrence* and *Roper* concerned morally divisive issues that were hotly contested in the United States during the period these cases were decided: the constitutionality of (a) the criminalisation of homosexual relations between consenting adults; and (b) the juvenile death penalty. As Cheryl Saunders observes, due to the unique nature of these cases, it may therefore be 'that the criticism [of Kennedy J's use of foreign law] has been exacerbated by certain features of the cases that have sparked the debate'.[80]

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76 Ibid.

77 Jackson contrasts this approach with the alternative models of 'convergence' and 'resistance' (that respectively 'assum[e] the desirability of convergence with other nations' laws' or 'relish[] resistance by national constitutions to outside influence'): Jackson, 'Constitutional Comparisons' (n 19) 112.

78 Jackson, *Constitutional Engagement* (n 11) 75.

79 Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?' (2006) 59(1) *Current legal problems* 91, 93 ('Comparative Constitutional Law in the Courts'). As Saunders notes, this approach arguably leaves the Justices open to Judge Richard Posner's accusation that consultation of foreign law in such instances amounts to merely 'counting . . . noses': ibid 93 n 14 citing Richard A Posner, 'The Supreme Court, 2004 Term' (2005) 119(1) *Harvard Law Review* 28, 151.

80 Saunders, 'Comparative Constitutional Law in the Courts' (n 79) 93.

B *Judicial Objections and Response*

Justice Kennedy's references to foreign law in *Lawrence* and *Roper* provoked a strong reaction in the US. Notably, there was a remarkably hostile response from Congress, seen in a number of (unsuccessful) attempts to limit the ability of the Supreme Court to consider foreign law. One such example was a bill introduced in 2005 shortly after the *Roper* decision — the 'Constitution Restoration Act' — section 201 of which purported to ban the use of all forms of foreign law in interpreting and applying the US *Constitution*, other than 'English constitutional and common law up to the time of the adoption of the Constitution of the United States'.[81]

Disagreement was also evident in the scathing dissents issued by Scalia J (joined by Rehnquist CJ and Thomas J) responding to Kennedy J's majority opinions in these two cases. There are, of course, important features of these debates extending beyond the issues raised explicitly in the *Lawrence* and *Roper* opinions.[82] Although thus not an exhaustive account, these broader US debates will be introduced through the lens of the two main objections articulated by Scalia J in dissent. The article will critically assess the strength of these concerns regarding constitutional comparativism more generally, along with their potential relevance beyond the American context for jurisdictions such as Australia.

1 Democratic Sovereignty

Justice Scalia has expressed concern regarding the perceived *democratic illegitimacy* of citing foreign law in the process of interpreting the US *Constitution*. In *Lawrence*, Scalia J described the majority's reference to foreign law as '[d]angerous dicta, … since "this Court … should not impose foreign moods, fads, or fashions on Americans"'.[83] Similarly, in the earlier death penalty case of *Stanford v Kentucky*[84] (which *Roper* overruled), Scalia J emphasised that 'it is *American* conceptions of decency that are dispositive' when applying the 'evolving standards of decency'

81 *Constitution Restoration* (n 10).

82 See Pierre Legrand has questioned the very possibility of meaningful comparison (for the purposes of 'transplantation' or 'borrowing') due to the inextricable relationship between a legal rule and its local context: Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111. However, others have persuasively argued that the challenges posed by contextual difference should not be overstated. As Cheryl Saunders observes, in the Australian context '[t]he High Court has had practice in making allowance for difference for over 100 years, without jeopardising the benefits that it has derived from active engagement with foreign law' (for example, drawing comparative insights from the United Kingdom and New Zealand, despite the absence of an entrenched Constitution in these two jurisdictions): Cheryl Saunders, 'Judicial Engagement in the High Court of Australia' (20 June 2012) 13–14. A further important aspect of these debates is the role of judicial philosophy / constitutional interpretive theory: see, eg, Alford (n 16); Stone (n 16) 52ff.

83 *Lawrence* (n 8) 598 (Scalia J in dissent) (emphasis in original), citing *Foster v Florida* 537 US 990 (2002) (Thomas J, concurring in denial of certiorari).

84 *Stanford v Kentucky* 492 US 361 (1989).

test.[85] These claims are thus 'normatively oriented'[86] — it is not denied that meaningful comparison may be possible, but rather, that it should be avoided for these reasons. As described by one commentator, such an objection 'points to the character of the Constitution as a compact between members of a national democratic community which, it is argued, should be interpreted and applied by organs of the community that in turn are accountable to the sovereign people.'[87]

A number of points can be made in response to this concern. First, as noted above, Kennedy J's references to foreign law in *Lawrence* and *Roper* were largely a survey of comparative practice. This can be contrasted with other more traditional methods of comparison — for example, a court consulting the legal doctrine or reasoning articulated by overseas courts as a source of ideas to potentially draw upon (or reject). As has been acknowledged by critics, the democratic sovereignty concern is arguably less applicable to these broader uses. For example, Ernest Young's objection to Kennedy J's use of foreign law in *Roper* and *Lawrence* (on the grounds that it is illegitimate to include foreign practice in the 'denominator' for determining whether a consensus exists on a particular practice) is explicitly focused upon the use of foreign law 'to bolster claims of "consensus" against (or in favor or) a particular practice.'[88] Young acknowledges that this is different, for example, from a judge 'searching foreign court opinions for innovative doctrinal formulae or new arguments not found in the American discourse (even though we might well find such if we looked).'[89]

Second, the strength of this critique is arguably lessened when courts engage in a nuanced, critical and self-reflective approach to comparison — that may ultimately result in foreign law being rejected or modified. Cheryl Saunders has observed that when this objection is applied to constitutional comparativism more generally, it arguably 'overstates the way in which foreign law is used. National judges are not obliged to engage with foreign law. When they do so they are accountable for its use in the ordinary way, which includes published reasons for decision.'[90] Adrienne Stone similarly suggests that such concerns 'are weakened where comparative practice is more critical.'[91] As Stone explains, comparison can be seen 'as a source of

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85 Ibid 361 n 1 (emphasis added).
86 Aroney (n 34) 320.
87 Cheryl Saunders, 'Judicial Engagement with Comparative Law' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 571, 585 (footnote omitted).
88 Ernest A Young, 'Foreign Law and the Denominator Problem' (2005) 119(1) *Harvard Law Review* 148, 148.
89 Ibid 153 (citations omitted).
90 Cheryl Saunders, 'Judicial Engagement with Comparative Law' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 585 (citations omitted).
91 Stone (n 16) 59.

reasons or ideas about a constitutional problem that are then subject to independent assessment.'[92]

Third, the prominence of this objection in the US context can arguably be partly explained by what has been described as the phenomena of American 'hegemony' and 'exceptionalism'. For example, Sujit Choudhry argues that an attitude of 'legal hegemony' is what explains the unwillingness of US courts to look at foreign jurisprudence:

> While hegemonists would agree that American courts cannot learn from foreign jurisprudence, they would nevertheless believe that courts *abroad* could learn a great deal from American case law. This attitude is premised on the belief that all systems of judicial review are derivative on American constitutionalism.'[93]

Similarly, Steven Calabresi has suggested that the US Supreme Court's general reluctance to rely on foreign law is one manifestation of the broader phenomenon of 'American exceptionalism'.[94] Vicki Jackson echoes this point, positing that in the US, resistance to the 'foreign' in constitutional interpretation is grounded 'in the idea of popular and legal "exceptionalism" — the belief in the uniqueness, and, more important, the superiority of the US and its legal system',[95] which may contribute 'to more aggressive assertions of the autonomy of US constitutional law'.[96] Due to differences in constitutional culture and history, this objection may therefore have less relevance and persuasive value in other jurisdictions (such as Australia). Indeed, as Cheryl Saunders has put forward, '[m]any of the arguments against the legitimacy of the use of foreign law that have currency in the United States are unpersuasive elsewhere in the common law world, for reasons that are in large part to do with attitudes to law, including constitutional law, and to judicial reasoning.'[97]

2 Sources and Judicial Discretion

In *Lawrence*, Scalia J (joined by Rehnquist CJ and Thomas J) described the Court's discussion of foreign views as 'meaningless dicta' that '[ignored]… the many countries that have retained criminal prohibitions on sodomy'.[98] Similarly, in *Roper*, Scalia J accused the majority of inconsistency in its willingness to consider 'the views of foreigners', given the Court's failure to consult comparative law in its interpretation of other constitutional provisions (such as the First Amendment Establishment

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92 Ibid 60.
93 Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (n 17) 832 (citations omitted).
94 Calabresi (n 3).
95 Jackson, *Constitutional Engagement* (n 11) 27.
96 Ibid.
97 Saunders, 'Comparative Constitutional Law in the Courts' (n 79) 110.
98 *Lawrence* (n 8) 598 (Scalia J in dissent) (emphasis in original), citing *Foster v Florida*, 537 US 990, n (2002) (Thomas J, concurring in denial of certiorari).

Clause).[99] According to Scalia J, '[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.'[100]

These statements reflect an objection raised by some academic commentators that citation of foreign law illegitimately expands judicial discretion, due to the potential for selectivity or 'cherry-picking' of comparative legal sources. For example, Charles Fried has expressed concern that reference to comparative constitutional law in the context of judging (as opposed to legal scholarship) 'expand[s] the canon of authoritative materials from which constitutional common law reasoning might go forward.'[101] Similarly, in his extra-judicial writings, Judge Richard Posner has argued that citation of foreign decisions is a form of 'judicial fig-leafing' of a judge's own personal value choices, and opens up 'promiscuous opportunities' for judges.[102]

This objection arguably has more relevance for other jurisdictions, as the question of appropriate choice and justification of comparators is a legitimate consideration. However, it can be noted that such concerns are not specific to the use of foreign law, when it is consulted for its potentially persuasive (rather than binding) value. Judges exercise choice in relation to a range of materials drawn upon as 'aids to the deliberative process' — for example, when scholarly writings are referenced.[103] Further, when such sources are in fact consulted, and contribute to the ultimate decision, rather than relying upon 'implicit' forms of borrowing, a degree of transparency is arguably desirable. As expressed by Vicki Jackson:

> Comparison today is inevitable. It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one's own. These impressions, which may influence views of U.S. constitutionalism, could be incorrect or subject to interpretive challenge. Overt references to what judges believe about other countries will often provide helpful transparency.[104]

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99 *Roper* (n 9) 625 (Scalia J, dissenting). According to Scalia J, '[t]he 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* of its decisions': ibid 627.

100 Ibid.

101 Charles Fried, 'Scholars and Judges: Reason and Power' (2000) 23(3) *Harvard Journal of Law & Public Policy* 807, 819.

102 Richard Posner, 'No Thanks, We Already Have Our Own Laws' [2004] (July/August) *Legal Affairs*.

103 Judges utilising a 'deliberative', self-reflective form of comparative engagement with foreign law 'may consider the laws and practices of foreign nations, *as they may consider the writings of scholars, as aids to the deliberative process*': Jackson, *Constitutional Engagement* (n 11) 77 (emphasis added).

104 Ibid 119 (citations omitted).

As the argument goes, absent special circumstances (where prudence in explicitly referencing foreign materials may be required),[105] generally 'candor is to be preferred because giving reasons, thereby subjecting analysis to rational scrutiny, is one of the most important constraints on judging.'[106] Jackson notes that a similar view has been put forward by the Honourable Michael Kirby, where his Honour suggested that 'the real issue is not whether [foreign] sources will inform' decisions (as is inevitable), but whether 'judge[s] should disclose — and be ready to debate' their views.[107]

IV Comparativism in the High Court of Australia

In contrast with the heated debate attached to the practice in the US, in Australia appeal to foreign law in constitutional adjudication has been a long-standing practice of the High Court, and in general is not 'especially controversial.'[108] As expressed by Cheryl Saunders and Adrienne Stone (drawing upon an empirical analysis of the historical citation of foreign precedent by the High Court), comparativism is 'an established feature of Australian judicial reasoning that has never been controversial merely on the ground of citation of a source from another jurisdiction.'[109] Indeed, writing extra-curially, Justice Stephen Gageler (along with Will Bateman) has suggested that the approach has largely been accepted as 'orthodoxy' in the Australian context.[110] However, as Rosalind Dixon observes, comparative analysis by the High Court has typically focused on comparative *jurisprudence* (ie doctrinal / deliberative insights developed in foreign court decisions), as opposed to empirical engagement with practical comparative constitutional *experience*.[111]

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105 For example, where there is risk of political backlash: ibid 119 n 53.

106 Ibid.

107 Ibid 119 n 52 citing Michael Kirby, 'International Law — The Impact on National Constitutions' (Speech, Grotius Lecture at the Annual Meeting of the American Society of International Law, 29 March 2005) 40.

108 Aroney (n 34) 317. This notably contrasts with debate regarding the influence of *international* law — as illustrated by the exchanges between McHugh and Kirby JJ in *Al-Kateb v Godwin* (2004) 219 CLR 562.

109 Cheryl Saunders and Adrienne Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 22. In this study, Saunders and Stone found that over the period 2000 to 2008, the High Court cited over 2,800 foreign authorities in a total of 193 constitutional cases: ibid 23. The United Kingdom was the comparator jurisdiction most frequently cited, followed by the United States, Canada, New Zealand and the European Court of Human Rights. See 'Table 1: Total Foreign Precedent Citation, arranged by Country': ibid 34.

110 Stephen Gageler and Will Bateman, 'Comparative Constitutional Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 261.

111 'To date … the High Court has made relatively limited use of comparative constitutional *experience* — or comparative constitutional developments outside overseas courts. Comparative constitutional experience is often more difficult for courts to assess and

Numerous explanations have been offered regarding the divergence between the US and Australia in this regard, including the relevance of constitutional culture and the historical development of Australia's constitutional arrangements under the influence of both the British and American traditions.[112] The difference in attitude is helpfully illustrated by contrasting the commentary surrounding the appointment of the Honourable Susan Kiefel as Chief Justice of the High Court of Australia, with that of her American counterpart, Chief Justice John Roberts of the US Supreme Court. For example, during the US Senate confirmation hearing of Judge Roberts (as he then was) shortly after the *Roper* decision was handed down, a number of concerns were raised in questioning regarding the legitimacy of US courts even referencing foreign law to determine the meaning of the US *Constitution*.[113] In response, Judge Roberts largely agreed with these concerns and explicitly objected to the practice, expressing the view (amongst other things) that 'looking at foreign law for support is like looking out over a crowd and picking out your friends'.[114]

In contrast, Chief Justice Kiefel is well known for her familiarity and engagement with comparative jurisprudence, having written extra-judicially on the subject,[115] and demonstrating a willingness to draw upon foreign law in the doctrinal development of Australian constitutional jurisprudence.[116] This has not attracted widespread criticism — rather, the cosmopolitan approach has been *commended* by the political branches of government. For example, at the Chief Justice's swearing-in ceremony in

comprehend than comparative constitutional decisions. It may also call for the admission of evidence at first instance, rather than the assessment of relevant development by an appellate court. Yet it can provide a rich source of potential learning for judges in a variety of areas': Dixon and Vogt (n 17) 108. See Dixon (n 21) xxv–xxviii for an argument regarding the potential learnings available from a more 'pragmatic' comparison (drawing upon practical foreign constitutional experience), in the context of voting rights and section 92 of the Australian Constitution.

112 Saunders, 'The Use and Misuse of Comparative Constitutional Law' (n 22) 62ff; Gageler and Bateman (n 110) 262; Aroney (n 34) 318.

113 See, eg, concerns raised by Senator Kyl regarding *Roper* and the use of foreign precedent: *Confirmation Hearing on the Nomination of John G Roberts, Jr to be Chief Justice of the United States: Hearing Before the S Comm on the Judiciary*, 109th Congress 201 (2005) 199–200 <https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf>.

114 Ibid 200–01.

115 Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85; Susan Kiefel, 'Section 92: Markets, Protectionism and Proportionality — Australian and European Perspectives' (2010) 36 *Monash University Law Review* 1; Susan Kiefel and Gonzalo Villalta Puig, 'The Constitutionalisation of Free Trade by the High Court of Australia and the Court of Justice of the European Union' (2014) 3(1) *Global Journal of Comparative Law* 34.

116 See, in particular, her Honour's discussion of European-style structured proportionality in the context of the High Court's freedom of political communication jurisprudence — discussed below.

early 2017, then Attorney-General George Brandis openly noted her Honour's 'enthusiasm for comparative law', stating that:

> In your judicial work, the intellectual influence upon you of your study of comparative law has been evident. We look forward to the development of the jurisprudence of the Kiefel Court, and the influence which civilian notions, such as proportionality, will have upon it.[117]

Notwithstanding these general themes, the High Court's actual practice regarding use of comparative constitutional sources is understandably more complex.[118] For example, despite a willingness to engage positively with the law of certain comparator jurisdictions, there has been a somewhat inconsistent use and at times marked hostility towards comparative learnings from others.[119] Further, the practice has certainly not been universally endorsed, with some members of the Court expressing reservations often linked with underlying interpretive commitments.[120] Writing extra-judicially in 2018, Sir Anthony Mason has characterised the Court's approach to utilising foreign law in domestic constitutional adjudication as continued but 'selective'.[121]

A *Comparativism in Practice* — McCloy v NSW *and* Clubb v Edwards; Preston v Avery

From an Australian perspective, re-visiting the use of foreign law in Kennedy J's *Roper* and *Lawrence* majority opinions prompts helpful reflection on the complex and varied approaches to comparativism available to, and utilised by, the Australian High Court in its constitutional decision-making. By situating Kennedy's approach within the broader literature, it is evident that the role played by foreign law in these landmark American cases differs to some of the more traditional forms of comparative engagement by courts — including the High Court in its historical and recent practice.

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117 The Hon George Brandis, 'Address at the Swearing-in of The Honourable Susan Kiefel AC as Chief Justice of Australia' (Speech, High Court of Australia, Canberra, 30 January 2017) <http://inbrief.nswbar.asn.au/posts/7be4753ee4e26b4fd93440f8194c83ad/attachment/kiefel.pdf>.

118 For a helpful analysis of these issues from an Australian perspective see Stone (n 16); Saunders, 'The Use and Misuse of Comparative Constitutional Law' (n 22); Aroney (n 34).

119 For example, Sir Anthony Mason has suggested that the attitude towards US-style 'categorisation' of the plurality in *McCloy* is a continuation of a broader and persistent 'reluctance to embrace United States jurisprudence' displayed by certain members of the High Court: Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 122.

120 See, for example, Adrienne Stone's analysis of the divergent views on the role of foreign law expressed in the various judgments in *Roach v Electoral Commission* (2007) 233 CLR 162: Stone (n 16) 49–52. On the link between interpretive theory and attitudes towards comparativism see Alford (n 16).

121 Sir Anthony Mason, 'Foreword' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) v.

For example, a prominent recent instance of comparativism in the Australian context is the endorsement by a majority of the High Court in the 2015 case of *McCloy v NSW*[122] of 'structured proportionality' as a framework through which to assess the constitutional validity of burdens on political communication. Here, analytical tools developed by overseas courts have been drawn upon by certain members of the High Court to assist in the doctrinal development and application of Australian constitutional jurisprudence.

By way of background, in the earlier seminal decision of *Lange v Australian Broadcasting Corporation* ('*Lange*'),[123] the High Court unanimously established a distinctive framework ('the *Lange* test') for assessing whether a burden on speech impermissibly infringes the freedom of communication about political and governmental matters impliedly guaranteed in the Australian *Constitution*'s text and structure ('the implied freedom').[124] Under this test (as explained and modified in the subsequent cases of *Coleman v Power*,[125] *McCloy*[126] and *Brown v Tasmania*)[127] courts will inquire (1) whether a law effectively burdens the freedom; (2) if the purpose of the law is legitimate (that is, is it compatible with the constitutionally prescribed system of representative and responsible government); and (3) whether the law is reasonably appropriate and adapted to advance that purpose.

Significantly, in *McCloy* a narrow majority (French CJ, Kiefel, Bell and Keane JJ) expressed the view that the 'reasonably appropriate and adapted' question could be assessed through a form of 'proportionality testing'[128] that involves three stages of inquiry: (1) whether a provision has a rational connection to its purpose ('suitability'); (2) if there is an obvious and compelling alternative that has a less restrictive effect on the freedom ('necessity'); and (3) whether it is 'adequate in its balance' (described as 'a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom').[129] Sir Anthony Mason has suggested that this endorsement is perhaps 'the most notable example' of comparativism in Australian constitutional jurisprudence, as this structured three-part inquiry

122 *McCloy* (n 14).
123 (1997) 189 CLR 520 ('*Lange*').
124 First recognised by a High Court majority in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
125 *Coleman v Power* (2004) 220 CLR 1.
126 *McCloy* (n 14).
127 *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown v Tasmania*')
128 *McCloy* (n 14) 194–5 (French CJ, Kiefel, Bell and Keane JJ).
129 Ibid 193–4, [2]. Majority support for the role of this three-part 'structured proportionality' test as an analytical tool has been repeated in subsequent cases: See, eg, *Brown v Tasmania* (n 127) 368 [123] (Kiefel CJ, Bell and Keane JJ), 416–17 [278]–[280] (Nettle J).

has 'German and European antecedents'[130] and 'takes us closer to the stronger forms of analysis employed by such courts as the Supreme Court of Canada, the Strasbourg Court, the UK Supreme Court and European constitutional courts.'[131]

Much has been written (and debated) on the normative desirability and utility of adopting structured proportionality in Australian constitutional law, and potential future developments in the High Court's approach in its post-*McCloy* jurisprudence. Although important considerations, it is not the purpose of this article to form a view on these particular debates, or some of the broader issues regarding the role of constitutional comparativism in the Australian context. However, in light of the attention focused on this area of Australian jurisprudence in recent years, cases such as *McCloy* provide a useful vehicle through which to illustrate and consider a more discrete aspect of these issues. Specifically, the article will conclude by offering a high level overview of the *stated* methodology put forward by members of the Court regarding their engagement with foreign law in these cases, and typical contours of judicial debate regarding the use of comparative legal sources in the Australian context (as a point of contrast with the US discussion in Part III).

As noted in the analysis of Kennedy J's majority opinions above, at times Judges may explicitly describe the purpose they attribute to foreign law when it is referenced in a domestic constitutional decision. In *Roper*, for example, Justice Kennedy posited that the foreign legal sources cited were 'instructive'[132] as they provided 'respected and significant confirmation' for the Court's determination that the death penalty is a disproportionate punishment for offenders under 18, but were not 'controlling' of the outcome.[133] Although the actual role played by foreign law may in fact differ to such stated purposes (and 'unconscious' or 'implicit' forms of constitutional borrowing may occur that are not directly acknowledged),[134] it is argued that there is still value in exploring how Judges themselves explain their approach and purport to view the task of comparativism.

In *McCloy*, for example, after setting out the three-stage 'proportionality' test discussed above, French CJ, Kiefel, Bell and Keane JJ (writing jointly) explicitly discussed their approach to comparative analysis. The plurality noted that '[a]nalogous criteria [to 'suitability', 'necessity', and 'adequate in its balance'] have been developed in other jurisdictions, particularly in Europe',[135] with such foreign law being described as 'a source of analytical

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130 Mason (n 121) v.
131 Mason (n 119) 117.
132 *Roper* (n 9) 575 (Kennedy J, for the Court).
133 Ibid 578.
134 As expressed by Edelman J in *Clubb* (n 15) [466] 'Foreign doctrines can become part of the local jurisprudence, consciously or unconsciously, where they have a force that transcends jurisdictional boundaries'.
135 *McCloy* (n 14) 195 [3] (French CJ, Kiefel, Bell and Keane JJ).

tools which, according to the nature of the case, may be applied in the Australian context'.[136] The utility of these inquiries was said to be their potential contribution to advancing Australian-specific constitutional commitments — here, in answering the questions necessitated under the distinctive *Lange* test.[137] However, it was emphasised that this '[did] not involve a general acceptance of the applicability to the Australian constitutional context of similar criteria as applied in the courts of other jurisdictions', or 'acceptance of the application of proportionality analysis by other courts as methodologically correct.'[138]

Later in the judgment, their Honours gestured to the possibility of comparativism being both *critical* and *adaptive* (as introduced in the theoretical discussion in Part II). After noting that 'the use of proportionality in other jurisdictions, to test the justification of a restriction on a constitutional right or freedom, has gained greater acceptance', the plurality expressed the view that 'it is not to be expected that each jurisdiction will approach and apply proportionality in the same way, but rather by reference to its constitutional setting and its historical and institutional background.'[139]

The perspective put forward by French CJ, Kiefel, Bell and Keane JJ in *McCloy* regarding the role of structured proportionality was not shared by all members of the Court. In particular, although Justice Gageler concurred in the outcome of the case, his Honour emphasised that '[u]nlike a majority of the Court … I do not reach that result through the template of standardised proportionality analysis.'[140] Relevantly, however, Gageler J's reluctance to embrace structured proportionality was not grounded in an objection to the use of foreign law per se. Rather, it related to 'two principal reservations'[141] regarding this *particular* comparative approach: concerns regarding the 'prescriptive'[142] and 'standardised'[143] nature of the proposed proportionality test (and risk of a 'one size fits all' approach);[144] and the final 'adequate in its balance' criterion of validity.[145] Justice Gageler has

136 Ibid.
137 'The utility of the criteria is in answering the questions defining the limits of legislative power relevant to the freedom which are derived from [*Lange*]': ibid, 195–6 [4].
138 Ibid (emphasis added).
139 Ibid 215 [72].
140 *McCloy* (n 14), 222 [98] (Gageler J).
141 Ibid 235 [141].
142 Ibid 234 [140].
143 Ibid 235 [142].
144 Ibid 236 [142]–[143]. For example, Gageler J expressed that view that he was not convinced 'that standardised criteria, expressed in unqualified terms of 'suitability' and 'necessity', are appropriate to be applied to every law which imposes a legal and practical restriction on political communication irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be': at 236 [142].
145 Ibid 236 [145].

maintained these reservations in subsequent cases, including *Brown v Tasmania*.[146]

The divergence between these alternative perspectives is consistent with Nicholas Aroney's observation that typically debate in Australian constitutional adjudication has been framed not as a question of '*whether* comparative law should or should not be used, but as to *which* body of comparative law should be applied.'[147] Relevantly, in the implied freedom context Gageler J has expressed support for and applied a 'precedent-based calibrated scrutiny'[148] that is broadly analogous to the archetypal approach to judicial review developed by the US Supreme Court — tiered scrutiny based upon 'categorisation'.[149] As described by his Honour:

> The approach seeks to address the ['reasonably appropriate and adapted'] stage in a way which adjusts the level of scrutiny brought to bear on an impugned law to the nature and intensity of the risk which the burden imposed by the law on political communication poses for the constitutionally prescribed system of representative and responsible government.[150]

Reflecting these parallels, in the recent joint cases of *Clubb v Edwards; Preston v Avery* ('*Clubb*'),[151] Gageler J explicitly drew upon legal doctrines developed by the US Supreme Court for the First Amendment 'free speech' clause[152] to assist in applying the above approach. In these cases, the High Court was tasked with assessing the constitutional validity of Victorian and Tasmanian laws prohibiting certain forms of communication and activities around abortion clinics in the respective States.

In the course of identifying and calibrating the appropriate level of scrutiny to be applied to the impugned legislation, Gageler J agreed with the suggestion that 'some assistance is to be gained … from an examination of the approach taken to determining whether laws restricting the time, place and manner of communications infringe the express guarantee of freedom of speech in the First Amendment to the Constitution of the United States.'[153] Although the US free speech guarantee extends beyond political communication and is understood as a 'personal right' (two points of difference with the Australian position), his Honour reasoned that in light

146 *Brown v Tasmania* (n 127) 376–7 [157]–[161] (Gageler J).
147 Aroney (n 34) 327 (emphasis in original).
148 *Clubb* (n 15) [161] (Gageler J).
149 On the parallels between these two approaches see Shipra Chordia, 'Structured proportionality after *McCloy* and *Murphy*' (Paper, AACL Seminar, 5 May 2017) 19.
150 *Clubb* (n 15) [161] (Gageler J) citing earlier statements in *Tajjour v New South Wales* (2014) 254 CLR 508 at 576–581 [139]–[152]; *McCloy v New South Wales* (n 14) 222–34 [99]–[139], 238–9 [150]–[154]; *Brown v Tasmania* (n 127) 377–9 [162]–[166].
151 *Clubb* (n 15).
152 The First Amendment to the US *Constitution* relevantly provides that 'Congress shall make no law … abridging the freedom of speech'.
153 *Clubb* (n 15) [178] (Gageler J).

of the privileged level of protection afforded to *political* speech under the First Amendment, comparative US case law and scholarship can still be 'instructive in considering the implied freedom'.[154] Noting that 'First Amendment case law and scholarship have been drawn upon extensively by the High Court from the earliest articulation of the implied freedom',[155] Gageler J suggested that:

> Reference to them is appropriately continued as our own body of case law develops, provided that it is constantly borne in mind that danger lies in 'uncritical translation' of any foreign doctrine.[156]

Specifically, his Honour considered it 'instructive[]' in the present case to consider the tests developed by the US Supreme Court in this context regarding 'content-neutral' versus 'content-based' restrictions on the 'time, place or manner' of speech — noting the higher level of scrutiny applied to the latter category.[157]

In summary, as evident in the cases discussed above, the Australian High Court has referenced foreign law on a relatively frequent basis in its doctrinal development and application of the implied freedom. Relevantly, comparative analysis has not been controversial per se — it has generally been accepted that comparative jurisprudence can provide valuable assistance to Australian courts engaging in constitutional adjudication in this context. Interestingly, across the judgments in these cases there was a stated commitment to comparativism purportedly being undertaken as a *critical* endeavour, with a need to assess the appropriateness of foreign legal approaches as against the *Australian* constitutional tradition.

V CONCLUSION

Justice Kennedy's concurrence in the widely publicised 'travel ban' case (*Trump v Hawaii*)[158] was his final judicial opinion delivered on the US Supreme Court. After a contentious confirmation hearing, Judge (now Justice) Brett Kavanaugh was sworn in to fill the vacated seat. Legal commentators are likely to watch with interest the future direction of the Court's jurisprudence following Kennedy J's departure, including in the two areas explored in this article.

From an Australian perspective, re-visiting the use of foreign law in Kennedy J's *Roper* and *Lawrence* majority opinions (and the resultant controversy in the US) prompts reflection on the use of comparativism within our own constitutional tradition. As seen in the discussion of the

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154 Ibid [179] (Gageler J).
155 Ibid.
156 Ibid citing *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178 [17] and *McCloy* (n 14) 229 [120].
157 *Clubb* (n 15) [180] (Gageler J).
158 585 US ___ (2018).

various judgments in *McCloy* and *Clubb*, members of the High Court appear to be relatively at ease with drawing *doctrinal* insights from comparative case law — although emphasising the need for this to be a critical endeavour. Overall, in both jurisdictions, an aspect of Kennedy J's legacy that will likely continue past his time on the Bench is an increased appreciation of the complexity and nuance of constitutional comparativism.