CONSTITUTIONAL CONVERGENCE AND COMPARATIVE COMPETENCY: A REPLY TO PROFESSORS JACKSON AND KROTOSZYNSKI

David S. Law*

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Textualism, originalism, purposivism, structuralism, pragmatism. Each has a place in the pantheon of American constitutional theory; each is the subject of extensive debate over whether, when, and in what ways it ought to be deployed as a methodology of constitutional interpretation. If there remained any doubt as to whether comparativism enjoys sufficient scholarly attention or normative justification to merit a place of its own in the pantheon, Professor Jackson’s masterful and learned book, Constitutional Engagement in a Transnational Era,1 ought to put those doubts to rest. It has established itself as canonical in the field of comparative constitutional law while simultaneously elevating the importance of the field itself.

The descriptive typology presented in the first part of the book—contrasting judicial “postures” of “convergence,” “resistance,” and “engagement” toward transnational law2—has entered the basic lexicon of comparative constitutional law. The second part of the book is explicitly normative and offers a thoughtful and persuasive account of why the U.S. Supreme Court ought to practice “deliberative engagement” with foreign and international law.3 Although the topic is explicitly comparative, her argument falls squarely in the mainstream of American constitutional scholarship, in the sense that it advocates an approach to constitutional interpretation that both reflects and improves upon existing interpretive practices and commitments. Both the descriptive and normative

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* Professor of Law and Professor of Political Science, Washington University in St. Louis; Martin & Kathleen Crane Fellow in Law and Public Affairs, Princeton University. I am deeply grateful to Ron Krotoszynski and Vicki Jackson for their wisdom and extensive constructive feedback and to the editors of the Alabama Law Review for their gracious invitation to participate in this exchange.
1. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).
2. See id. at 8.
3. See id. at 103.
components of the book deserve thoughtful, critical reflection, which Professor Krotoszynski’s penetrating and illuminating review in this volume provides in spades. 4 In this reply to both Professors Jackson and Krotoszynski, I do not dispute but instead build upon Professor Krotoszynski’s observations to offer a few reflections of my own on Professor Jackson’s book.

With respect to the descriptive portion of the book, this Essay suggests that Professor Jackson’s three-part typology of judicial “postures” toward transnational law 5 may in practice be closer to a two-part typology because the option of “convergence” 6 tends to be normatively untenable or to collapse into the option of “engagement.” 7 With respect to Professor Jackson’s normative argument in favor of “deliberative engagement” by the U.S. Supreme Court, 8 my views are in accord with those of Professor Krotoszynski. Even if one accepts Professor Jackson’s argument, the U.S. Supreme Court lacks the institutional capacity to engage competently with foreign law. Not only is comparativism a resource-intensive interpretive methodology, but it demands resources that happen to be unusually scarce in the United States.

I. IS CONVERGENCE A VIABLE POSTURE?

Professor Jackson’s argument that courts have the option of adopting a normative posture of “convergence with the transnational” 9 does not distinguish explicitly between convergence with international law and convergence with foreign law. 10 This distinction has crucial implications for the viability of the convergence posture. As Professor Jackson’s examples demonstrate, 11 countries can and do commit themselves to following international law, a fact that renders a judicial posture of convergence toward international law broadly defensible. Making a normative commitment to mimicking the laws of some other country is, however, a different story. It is difficult to imagine a constitutional court in this day and age explicitly rejecting the idea of constitutional distinctiveness and openly embracing the wholesale imitation of another

5. See JACKSON, supra note 1, at 8.
6. See id. at 39.
7. See id. at 71.
8. See id. at 103–17.
9. See id. at 39.
10. See id. (defining convergence as “a posture of national identification with transnational legal norms”).
11. See id. at 43–45 (citing Justice Kirby and Lord Bingham).
country’s constitutional system.\textsuperscript{12} It is harder still to imagine a nation’s leaders or citizenry tolerating such an approach.

Constitutional court judges who consider foreign law generally pay at least lip service to a set of generic platitudes about their reasons and criteria for doing so. To wit: foreign law is often instructive and persuasive but never binding; blind reception of foreign law is unacceptable; judges must reflect critically on foreign approaches before adopting them; comparativism is an aid to deliberation and not a substitute for deliberation. This standard script smacks heavily of engagement rather than convergence. The justifications given by most judges, most of the time, for engaging in comparativism\textsuperscript{13} are also the justifications for deliberative engagement given by Professor Jackson.\textsuperscript{14}

If recitation of the usual platitudes qualifies as a posture of “engagement” toward foreign law, however, then engagement commands such broad support as to leave no room for convergence. Instead, the “large

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\item Nineteenth-century Argentina may qualify as a rare historical example of an openly pro-convergence judicial posture, and even then, the convergence posture may have been acceptable only because Argentina’s constitutional framers themselves embraced convergence with the U.S. model. \textit{See} Carlos F. Rosenkrantz, \textit{Against Borrowings and Other Nonauthoritative Uses of Foreign Law}, 1 \textsc{Int’l J. Const. L.} 269, 273–74 (2003) (discussing the deliberate adherence of Argentina’s constitutional framers to the U.S. model and the consequent efforts of Argentinian courts to adhere to Supreme Court constitutional precedent). In the contemporary world, examples of convergence might include highly atypical states that lack genuine autonomy such as Monaco, which is in many respects a satellite state of France, but even in such cases, it may be questionable whether convergence is the product of genuinely normative commitments.
\item See, e.g., Michel Bastarache, \textit{How Internationalization of the Law Has Materialized in Canada}, 59 \textsc{U. New Brunswick L.J.} 190, 190 (2009) (“The Supreme Court of Canada . . . wants to develop the law cognizant of other nations’ views, but does not believe fairness requires that the treatment of citizens of one country must mirror the treatment of citizens in any other particular nation. The confrontation of ideas is an enrichment . . . . Diversity is also an important value and we therefore want to borrow or share what will help us make better decisions.”); Stephen Breyer, The Supreme Court and the New International Law, 97th Annual Meeting of the American Society of International Law (Apr. 4, 2003); The Honourable Claire L’Heureux-Dubé, \textit{The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court}, 34 \textsc{Tulsa L.J.} 15 (1998); David S. Law, \textit{Judicial Comparativism and Judicial Diplomacy}, 163 \textsc{U. Pa. L. Rev.} (forthcoming 2015) (summarizing the reasons given by constitutional court judges in Japan, Korea, Taiwan, and Hong Kong for engaging in comparativism); Sir Anthony Mason, \textit{The Place of Comparative Law in Developing the Rule of Law and Human Rights in Hong Kong}, 37 \textsc{Hong Kong L.J.} 299, 307 (2007) (“In many situations, it will be instructive to ascertain how the same, a similar or a related question of law has been dealt with by the courts of another jurisdiction. No jurisdiction has a monopoly on judicial wisdom. It may be that the courts of another jurisdiction have succeeded in evolving an approach to a particular problem which is superior to that so far adopted by the home jurisdiction. It is possible that a foreign court, through adopting an approach similar to that accepted in the home jurisdiction, develops a refinement in the application of that approach – a refinement which throws light on the resolution of the problem.”); Sandra Day O’Connor, \textit{Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law}, 45 \textsc{Fed. Law.} 20 (1998); William Rehnquist, \textit{Constitutional Courts – Comparative Remarks}, in \textsc{Germany and Its Basic Law: Past, Present and Future – A German–American Symposium} 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (“[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”).
\item See \textit{Jackson, supra} note 1, at 282–83.
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middle ground” of engagement\textsuperscript{15} swallows the option of convergence.\textsuperscript{16} Professor Jackson herself acknowledges that the convergence and engagement postures have the potential to blur into one another; by her own description, the various postures she describes are points on a “spectrum” rather than wholly discrete categories.\textsuperscript{17} The problem is, though, that it is unclear whether a posture of convergence toward foreign law occupies any terrain at all in the real world.

To be sure, some courts borrow so extensively from foreign jurisprudence that the practical result can resemble convergence upon another country.\textsuperscript{18} Reaching a practical result of convergence, however, is not the same as adopting a normative posture of convergence. Even in cases of heavy borrowing from a specific country, a court is unlikely to forswear the obligation—much less the option—of tailoring foreign law to local conditions. Courts can instead profess a normative posture of engagement while nevertheless practicing convergence.

Decisions of the Hong Kong Court of Final Appeal (HKCFA), for example, rarely depart from English case law. Heavy reliance on English law is encouraged by an array of factors. Although Hong Kong is part of China, its Basic Law explicitly preserves the “common law,”\textsuperscript{19} authorizes judges to “refer to precedents of other common law jurisdictions,”\textsuperscript{20} and even provides that judges may be “recruited from other common law jurisdictions”\textsuperscript{21} and need not be Chinese citizens.\textsuperscript{22} In short, Hong Kong law gives every indication of permitting, if not encouraging, convergence with English law. Meanwhile, most Hong Kong judges—including all of the permanent members of the HKCFA—are graduates of English law schools.\textsuperscript{23} Yet the judges of the HKCFA consider it their responsibility to depart from English law as circumstances dictate, and they point with pride to the fact that Hong Kong land law has departed from English land law.\textsuperscript{24} In other words, even though the HKCFA rarely rejects English law in practice, its self-described posture is one of engagement rather than convergence.

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\footnotetext{15}{See Jackson, supra note 1, at 9.}
\footnotetext{16}{Cf. Melissa A. Waters, Book Review, 59 Am. J. Comp. L. 602, 607 (2011) (reviewing Jackson, supra note 1) (describing the “middle ground” of engagement as “constantly shifting” and “shad[ing] into weak forms of convergence”).}
\footnotetext{17}{See Jackson, supra note 1, at 9.}
\footnotetext{18}{See id.}
\footnotetext{19}{Xianggang Jiben FA art. 8 (H.K.).}
\footnotetext{20}{Id. art. 84.}
\footnotetext{21}{Id. art. 92.}
\footnotetext{22}{Id. art. 90.}
\footnotetext{23}{See Law, supra note 13.}
\footnotetext{24}{This departure has been justified by the almost complete lack of freehold estates in Hong Kong. See id.}
\end{footnotes}
A convergence posture toward international law, by contrast, is not only normatively defensible, but also consistent with global trends. Although Professor Jackson is entirely correct to observe that total global constitutional convergence does not appear to be in the cards, the evidence is also clear that there exists a growing generic or international component to the manner in which constitutions today are drafted and interpreted.

Once again, however, convergence and engagement can be difficult to distinguish. Professor Jackson defines the convergence posture as a “posture of national identification with transnational norms” aimed at “creating or adhering to a harmonized transnational legal order,” whereas the supposedly distinct “relational engagement” posture combines an “obligatory sense” that transnational law must be considered with a “simultaneous acknowledgment” that transnational law is not binding. Yet there is obvious overlap between the two postures: both involve identification with, and adherence to, transnational norms. The relational engagement posture does explicitly reserve to courts the right to reject international law after careful consideration and for good reason. This caveat does not distinguish the two postures very sharply, however, because even under the convergence posture, a court is under no obligation to adopt international law as is. The correct approach for the court is to attempt to influence international law rather than to explicitly reject it, but the practical result may be quite similar.

The “deliberative engagement” posture is not much easier to distinguish from the convergence posture. Courts that pursue convergence with international law cannot help but participate in creating the very international law that they are trying to adopt. It is impossible for a court to adopt an international legal norm without also identifying, articulating, refining, and reinforcing the norm. To pursue convergence with international law is therefore, in a literal sense, to engage with international law: it is engagement in a shared enterprise of creating common norms. This participatory engagement may not be precisely the same as the deliberative engagement that Professor Jackson has in mind, but it seems

25. See, e.g., Jackson, supra note 1, at 68 (noting that an “end-state of convergence” is “unachievable,” if not also “unhealthy”).
26. See David S. Law & Mila Versteeg, The Evolution and Ideology of Global Constitutionalism, 99 Calif. L. Rev. 1163, 1194–1202, 1243–44 (2011) (documenting a significant and growing generic component to the rights-related provisions of national constitutions, finding that the differences that do exist divide systematically along just two dimensions, and questioning as a result whether constitutions are in fact “unique statements of national identity and values”).
27. Jackson, supra note 1, at 39.
28. Id. at 71.
29. Id. at 80.
no less deserving of the “engagement” label. At root, both judicial postures are fundamentally similar in that both reject blind, unthinking imitation of international law and instead require courts to become involved in shaping the norms that they adopt.

II. THE COMPARATIVE COMPETENCY OF THE U.S. SUPREME COURT

I agree wholeheartedly with Professor Krotoszynski—and have argued elsewhere—that the U.S. Supreme Court lacks the institutional capacity to engage in comparativism in any meaningful way. Therefore, as compelling as Professor Jackson’s normative argument in favor of deliberative engagement happens to be, it seems unlikely to have the desired effect on its intended target. The U.S. Supreme Court is like any other institution: regardless of what its members might want to do, it cannot do what it is incapable of doing. A court’s institutional capacity for engaging in comparativism is a function of both the resources available to the institution and the manner in which the institution is designed. Some of the most crucial resources, such as foreign legal expertise and linguistic aptitude, cannot be generated by courts on their own but must instead be found outside the institution.

And it is here that America fails miserably. As Professor Krotoszynski argues so capably at length, American legal education neither generates nor values the intellectual and human resources necessary for comparativism to flourish. As just one rough indicator of the state of comparativism in American law schools, consider the proportion of constitutional law professors who have studied law overseas. At leading American law schools, the figure is well under 10%. At top law schools in Japan, the number is closer to 50%; in Korea, Taiwan, and Hong Kong, it is 100%. Professor Jackson suggests various institutional mechanisms that might begin to compensate for the lack of native expertise, but in a country where it has become illegal for any federal court to hire foreign law clerks, the prospect of adopting such mechanisms seems rather dim. Thus,
even if the Justices were to be wholly persuaded by Professor Jackson’s normative argument in favor of deliberative engagement, it is unclear how they could put her approach into practice. Institutional reform that extends beyond the courthouse steps into the law school classroom will be needed if the Supreme Court is to join the majority of the world’s constitutional courts in considering transnational law on a routine basis.

Professor Krotoszynski cites the Taiwanese Constitutional Court (TCC) as an example of a court that does possess the institutional capacity to practice comparativism,37 and he is entirely right to do so.38 What must also be said, however, is that the TCC is no outlier in this regard. Rather, it is the U.S. Supreme Court that seems unusually ill-equipped from a comparative perspective. The TCC’s institutional capacity for comparativism is nothing special compared to that of other courts in the same neighborhood. Western scholars praise the Israeli Supreme Court and the South African Constitutional Court for their comparative prowess,39 but by East Asian standards, they are not exceptional. They simply happen to be better known by Western scholars.40

37. See Krotoszynski, supra note 4, at 136–39.
39. See, e.g., Andrea Lollini, The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law, 8 Utrecht L. Rev., May 2012, at 55, 55 (naming the Israeli Supreme Court and South African Constitutional Court—but no courts in East Asia—as being among the constitutional courts “most active in using foreign law,” and describing South African constitutional jurisprudence as “one of the most interesting on a global level” because South African judges have been forced “to tackle the problem of systematically setting up the criteria and limits” of comparative analysis); Alexander Somek, The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review, 1 U. Pa. J. Const. L. 284, 284 n.1 (1998) (describing the Israeli Supreme Court as “the most important comparative constitutional law institute of the world”).
40. The preoccupation of the comparative constitutional law literature with a standard set of European and common law courts, to the exclusion of most of East Asia, is well documented. See, e.g., Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 25, 40 (2014) (observing that “[v]ery little is known” about the scope of constitutional court engagement with foreign law in entire regions of the world, including “large parts of Asia,” and that the few empirical studies of the phenomenon that do exist limit themselves to “a dozen ‘usual suspect’ courts”); Mark Tushnet, Advanced Introduction to Comparative Constitutional Law 5 (2014) (suggesting that “South and East Asia are relatively neglected areas of study,” “[p]artly because of language issues”); Sujit Choudhry, Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies, in Constitutional Design for Divided Societies: Integration or Accommodation? 3, 8 (Sujit Choudhry ed., 2008) (observing that “[f]or nearly two decades,” the comparative constitutional law has been “oriented around a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India”); Ran Hirschl, The Question of Case Selection in Comparative Constitutional Law, 53 Am. J. Comp. L. 125, 128–29 (2005) (observing that case selection in comparative constitutional scholarship is “seldom systematic”).
Consider the wealth of resources available to the members of the Korean Constitutional Court. Not only are the court’s career clerks entitled to study abroad after several years of service, but the court also hires specialized clerks with doctoral or equivalent degrees in foreign law for the specific purpose of performing case-related comparative research. That is not even counting the constitutional law professors with comparative training who work on a part-time basis at the court, or the court’s free-standing constitutional research institute staffed by even more foreign-trained researchers. For the Korean justices, expert analysis of relevant law from three or four leading jurisdictions by foreign legal specialists is just a phone call or e-mail away (assuming the analysis has not already been performed automatically).

Hong Kong’s Court of Final Appeal likewise highlights the enormity of the comparative competency gap between the U.S. Supreme Court and other courts in the world. Compared to the Korean Constitutional Court, the HKCFA is a far more modest enterprise consisting of just four permanent justices, a roster of visiting and semi-retired judges, and a handful of novice clerks shared with the lower appellate courts. Nevertheless, the opinions of this nominally Chinese court are so riddled with foreign citations that they read as if they might have been authored by British or Australian judges. This impression is, in fact, partly true: every case is decided with the participation of a “non-permanent judge” recruited from “other common law jurisdictions.” It also helps that, as of this writing, all of the HKCFA’s permanent and visiting judges, as well as a majority of the clerks, have studied law overseas.

The institutional capacity needed to practice comparativism is, perhaps more than anything, what sets comparativism apart from the other great “isms” of the American constitutional pantheon. Interpretive methodologies need not only normative justification but also institutional support to flourish. Critics may argue that comparativism lacks

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41. See Law, supra note 13.
42. See id.
43. See id.
44. See Simon N.M. Young, Constitutional Rights in Hong Kong’s Court of Final Appeal, 27 Chinese (Taiwan) Y.B. Int’l L. & Aff. 67, 82–83 (2011) (detailing the HKCFA’s citations to foreign law by country of origin).
45. Hong Kong Court of Final Appeal Ordinance, (1997) Cap. 484, 3, § 9 (H.K.) (establishing a “list to be known as the list of judges from other common law jurisdictions”); see Young, supra note 44, at 81 (reporting that every constitutional case decided by Hong Kong’s Court of Final Appeals from its inception in 1997 through 2009 included the participation of a former or sitting member of the Australian High Court, the British House of Lords, or the Privy Council).
46. See Law, supra note 13.
justification, but as Professor Jackson’s book illustrates, it can be justified on both epistemological and consequentialist grounds. Comparativism of the “deliberative engagement” variety promises better-informed, high-quality constitutional decisions by enabling judges to test the strength and suitability of competing approaches and arguments in a global marketplace of ideas.

What comparativism does lack in this country, however, is the necessary institutional infrastructure. It requires resources that methodologies such as originalism, textualism, and structuralism do not require, and those resources happen to be especially scarce in the United States. Consider, for the sake of comparison, what it takes to engage in originalism. A plausible starter set for the would-be originalist would take up a single shelf of an average bookcase: the Federalist Papers, the Anti-Federalist Papers, Farrand’s Records of the Federal Convention, Madison’s notes on the Constitutional Convention, a collection of Jefferson’s writings, Blackstone’s Commentaries, a couple of distinguished scholarly works by prominent historians, and perhaps not much else.

Indeed, not even a bookshelf is required anymore. Just the single computer disc bundled with a low-cost introductory textbook is sufficient to hold a comprehensive archive for originalist (and textualist) research. The material poses no language barriers, is in the public domain, and is both tractable and static in quantity. A basic course in constitutional law, of the type currently required of all American law students, furnishes every law school graduate in the country with the necessary context to make sense of the material. Textualism requires even less in the way of resources; just a tiny fraction of the extra space on the same disc that holds the originalist archive is sufficient to hold a bevy of historical and contemporary dictionaries and usage guides alike.

It is doubtful that there exists an equivalent, low-cost, one-stop, portable, English-language resource for would-be comparativists in the United States. Nor does technology in its current form offer an easy solution either. To be sure, courts increasingly publish their opinions online; courts increasingly translate those opinions into English as well; and free machine translation is improving by the minute. But even if online access to English-language translations of foreign law were to reach

48. For example, LexisNexis’s Modular Casebook Series in constitutional law has for several years included a DVD of supplemental materials that included “Tools for Originalists” and “Tools for Textualists,” as well as a number of Founding-era constitutional law treatises under the category of “Tools for Traditionalists.” See, e.g., THOMAS H. ODOM, FEDERAL CONSTITUTIONAL LAW: INTRODUCTION TO INTERPRETIVE METHODS AND INTRODUCTION TO THE FEDERAL JUDICIAL POWER (2008).
perfection at this very moment, where would that leave the typical American judge? For sundry reasons, I recently performed an online search for a medical condition known as “XMEA,” and Google duly returned “about 2,420 results” pertaining to “x-linked myopathy with excessive autophagy.” All hail the Information Age. But how does one navigate that sea of information, and what use could it be without the training to put it in context? Is there any reason to doubt that online comparative research performed by judges and clerks without prior training in foreign law would be plagued by precisely the same problems?

Some might point out that incompetence has not prevented the Court from practicing other methodologies. Historians, in particular, might object that the hypothetical bookshelf/real computer disc described above is insufficient to support competent historical research, yet that has not stopped originalists from brandishing dog-eared copies of the Federalist Papers in service of risible “law-office history.” Why, one might ask, should the Court refrain from practicing comparativism with the same combination of incompetence and gusto that characterizes its practice of originalism? Is the highly selective analysis of poorly understood materials any more objectionable—or any less likely—in the realm of comparativism than in the realm of originalism? Presumably, the type of “deliberative engagement” that Professor Jackson urges upon the Supreme Court is meant to be conducted with greater integrity and sophistication, or else it would not seem very attractive as a normative matter. Given the Supreme Court’s institutional incapacity and history of methodological malpractice, however, advocates of comparativism may need to decide whether they would prefer that it be practiced poorly, or not at all.

49. See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 299–300 (1988) (deeming it a “notorious fact” that the Justices routinely “abus[e] historical evidence in a way that reflects adversely on their intellectual rectitude as well as on their historical competence”); Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 155 (assessing the “law-office history” produced by the Court as “very poor indeed” from a “professional point of view”).