Transnational Constitutionalism in the United States: Toward a Worldwide Use of Interpretive Modes of Comparative Reasoning

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AMONGST ALL THE common law jurisdictions, the United States has probably the most insular constitutional system. The United States Supreme Court has generally been resistant to surveying foreign case law when adjudicating domestic disputes. The general position of the Court on comparative constitutionalism is succinctly captured in Justice Scalia's majority opinion in Printz v. United States: "[C]omparative analysis [is] inappropriate to the task of interpreting a constitution . . ." As observed by Paul Kahn, "While others are pursuing a transnational constitutional discourse, Americans are determined to locate

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1. Admittedly, there are some early signs that the Court might be more receptive to the examination of foreign materials in the future, as exemplified in Roper v. Simmons, 125 S. Ct. 1183 (2005), Lawrence v. Texas, 539 U.S. 558 (2003), and Atkins v. Virginia, 536 U.S. 304 (2002). In Atkins, the Court held that the execution of mentally retarded criminals is a cruel and unusual punishment prohibited by the Eighth Amendment. Atkins, 536 U.S. at 311–12. Interestingly, the majority made a footnote reference to an amicus curiae brief filed on behalf of the European Union, citing the overwhelming disapproval of the world community towards the execution of the mentally retarded. Id. at 316. Similarly in Lawrence, the Court concluded that a Texas statute criminalizing sodomy is in violation of a person's constitutional right to privacy. Lawrence, 539 U.S. at 564–79. In support of its decision, the majority made reference to decisions from the European Court of Human Rights. Id. at 576. In Roper, the Supreme Court invalidated state executions of persons who committed capital crimes when they were juveniles. Roper, 125 S. Ct. at 1198. To buttress its position, the Court referred to a litany of international covenants and state practices against the use of juvenile executions. Id. at 1199. Notwithstanding this, as discussed later in this Article, it would seem thus that the United States judges are still coy about overt engagement with comparative constitutionalism.

3. Id. at 921 n.11.
their constitutional discourse within their own unique text and their own historical narrative.\textsuperscript{4}

This Article puts forward two main claims. First, judicial engagement with foreign case law is legitimate within America's constitutional framework as comparative constitutionalism was within the contemplation of the Framers, and such a transnational dialogue is also consonant with the historical practices of the United States Supreme Court.

In defending this claim, this Article addresses two formal objections against the judicial use of comparative materials: (1) judicial acceptance of foreign case law effectively undermines the national sovereignty of the United States by subjugating the domestic jurisdictions unilaterally to foreign rules; and (2) the application of prevailing current norms of foreign practices in resolving constitutional disputes would not be within the original contemplation of the Framers at the time the Constitution was drafted and is tantamount to the judicial usurpation of legislative power, thus undermining popular sovereignty.

Notwithstanding the Court's formal reservations about the inception of comparative materials on the ground of legitimacy, this Article advances the argument that the resistance of American courts in engaging with foreign materials actually stems from the judges' substantive disagreement with the prevailing socio-political foreign norms. Essentially, it is a political choice for the courts to foreclose these disagreeable views at their inception so as to avoid having to challenge their validity on the merits; this judicial sleight of hand thus allows courts to legitimize domestic practices that have been abandoned abroad without having to confront the socio-political or normative justifications for the disparate difference between local conditions and prevailing global developments.

Despite the judicial insularity that is prevalent in the United States constitutional system, legal scholarship on comparative constitutionalism is a burgeoning field within academic circles. Two recent articles are particularly insightful in their discussions of the theoretical bases for using comparative materials in constitutional adjudication. In one, Professor Mark Tushnet identifies three uses for comparative constitutionalism: functionalism, expressivism, and brico-

lange.5 In the other, Professor Sujit Choudhry argues that comparative materials may be applied in three interpretive modes, i.e. genealogical, dialogical, and universalist.6 The second thesis claim of this Article incorporates and further builds on the analytical models laid out by Professors Mark Tushnet and Sujit Choudhry. Essentially, I argue that there are in effect five normative uses of foreign case law that would make comparative constitutionalism a worthwhile endeavor. Specifically, comparative materials have diagnostic, expository, affirmative, functional,7 and universalist8 value.

First, foreign constitutional cases have diagnostic value. Local courts can use foreign precedents to identify the current constitutional issue posed. These comparative sources aid the court in illustrating the existence of a particular problem and help frame relevant issues for consideration. Second, comparative jurisprudence can be put to expository use. This use, while encompassing the expressivist approach advocated by Tushnet,9 goes further as the domestic court, in using comparative reasoning, can also come to the realization that its own constitutional culture warrants a rejection of the foreign sources. Third, courts can use comparative sources in an affirmative way where the foreign materials do not assist the courts in the adjudicatory process, but instead, only buttress the strength of a court's decision after it has been reached using domestic sources. Fourth, national courts can use foreign constitutional materials functionally.10 Under this mode, comparative jurisprudence is used as a learning aid.

7. Tushnet, supra note 5, at 1228. Mark Tushnet, in his article, argues that a functional use of comparative constitutionalism allows a state to "use a mechanism developed elsewhere to perform a specific function, to improve the way in which that function is performed" in the receiving state. Id.
8. Choudry, supra note 6, at 841–55. Sujit Choudhry argues that the universalist mode of interpretation holds that constitutional guarantee are cut from a universal cloth, and, hence, that all constitutional courts are engaged in the identification and interpretation of the same set of norms. Id.
9. Tushnet, supra note 5, at 1236. The expressivist approach to comparative constitutional law states that comparative inquiry may help us see our own practices in a new light and might lead courts using comparative methods to results they would not have reached had they not consulted the comparative material. Id.
10. Id. at 1238. The functional use of comparative sources is similar to the dialogical mode of interpretation advocated by Professor Choudhry. Choudhry argues that courts identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparative jurisprudence of other jurisdictions; through a process of interpretive self reflection, they may thus conclude that foreign and domestic
National courts can learn from the constitutional experiences of foreign jurisdictions and avoid potential pitfalls or find better solutions to the status quo. Finally, a universalist use of comparative sources allows national courts to engage with foreign jurisprudence, and in the process, discover universal or transcendent principles that should be incorporated locally.

Additionally, this Article argues why Professor Tushnet's bricolage process and Professor Choudhry's genealogical mode of interpretation are invalid normative bases for using comparative sources.

Professor Tushnet understands bricolage as a judicial process whereby courts adjudicate by making a "random or playful selection from [comparative] materials at hand." While he has indeed convinced this author that judges often problem-solve by co-opting existing materials at hand, this "unconscious, natural" use of comparative sources has only been justified as a matter of the practice, rather than on any positive normative basis. Essentially, the bricolage process lacks a theoretical, normative basis for justifying comparative constitutionalism. On the other hand, Professor Choudhry argues that since some "constitutions are often tied together by complicated relationships of genealogy and history," prima facie relevance of each other's case law is established without the need for "an interpreting court to come to a nuanced understanding of the rationales underlying comparative jurisprudence." This Article argues against this use of comparative materials as it presupposes that the constitutional future to be chartered by each state would necessarily be the same, when a country shares a historical nexus with another. The main danger with the genealogical mode of interpretation is that it permits courts to dispense with scrutinizing the intrinsic value and relevance of foreign case law and blindly accepting its legitimacy simply on the ground that there had been a common shared past between the constitutional systems.

This Article is divided into four parts. Part I begins with an evaluation of two formalistic objections often raised against the judicial reception of comparative materials. These objections are that the assumptions are sufficiently similar to warrant the use of comparative law. Choudry, supra note 6, at 825.

11. Id. at 1237.
12. Id. at 1238.
13. Id. at 1286.
14. Choudry, supra note 6, at 838.
15. Id. at 871.
eighty and is simultaneously undemocratic as these norms are incompatible with the Framers' original understanding of the Constitution. This part also surveys the historical practices of the United States Supreme Court and examines the level of judicial receptivity to comparative constitutionalism in the country's early years. Part II continues with a scrutiny of the substantive political realities behind the judicial pronouncements that drive the Court's insular rhetoric. Part III provides a brief survey of five normative uses for comparative sources as elaborated above and also argues against the use of the "bricolage" process and the genealogical mode of interpretation as advocated by Professor Tushnet and Professor Choudhry. Part IV forms the bulk of this paper whereby I examine how various common law courts around the world have enriched their domestic adjudicatory process by using the foreign materials in the five abovementioned ways, i.e. diagnosis, exposition, affirmation, functionalism, and universalism.

I. Formalistic Concerns with Comparative Reasoning

Legal particularists have used "sovereignty" as a shield to fend off the critiques of comparativists who argue for a more extensive judicial use of comparative materials during constitutional adjudication.16

This part of the Article takes issue with the sovereignty concerns raised by legal isolationists. As a prelude, I would like to point out that there has been an unfortunate conflation of two separate notions of sovereignty. The first aspect relates to national sovereignty, and the second implicates popular sovereignty. The first warns of the potential violation of a nation's right to self determination that comparative constitutionalism brings. By introducing foreign rules and practices into the home jurisdictions, judges effectively undermine the national sovereignty of their home nations by cuffing them to international norms. The second, but related, objection raises the specter of judicial supremacy as a caution against comparative constitutionalism, i.e. the judicial application of prevailing foreign norms that are inconsistent with the Framers' original understanding of the Constitution is tantamount to judicial usurpation of popular sovereignty.

In discussing the abiding importance of sovereignty, Ernest Young argues:

When law binding on American actors is made or enforced outside of these [specified constitutional] processes, the problem is not

simply one of affront to the "grandeur" or "dignity" of the State. Rather the concern is that the circumvention of ordinary domestic processes renders those processes ineffective in their role of safeguarding liberty.\textsuperscript{17}

Professor Young refers to concerns of national sovereignty in his first sentence, while in the second, he warns against counter-majoritarian dangers of judicial review, i.e. popular sovereignty. Similarly, Roger Alford maintains that the use of "global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements."\textsuperscript{18} Here, Professor Alford speaks of the erosion of popular sovereignty as opposed to national sovereignty. It might be more useful to draw a terminological distinction between both aspects of sovereignty as they implicate different concerns that can be met by separate arguments.

To defend legal particularism, an isolationist can perhaps find no better spokesperson than Justice Scalia of the United States Supreme Court. In his scathing dissent against the Court's decision to invalidate the imposition of the death penalty on juvenile offenders under sixteen years of age, he admonished:

\begin{quote}
We must never forget that it is a Constitution of the United States of America that we are expounding . . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.\textsuperscript{19}
\end{quote}

In the same vein, Justice Scalia was incensed when the Court concluded that a Texas statute criminalizing sodomy is in violation of a person's constitutional right to privacy.\textsuperscript{20} What irked him most was perhaps the majority's reference to European precedents and practices in support of their decision to invalidate that statute:

\begin{quote}
Constitutional entitlements do not spring into existence . . . because foreign nations decriminalize conduct . . . . The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."\textsuperscript{21}
\end{quote}

21. \textit{Id.} at 598 (emphasis in original) (quoting Foster v. Florida, 537 U.S. 990 (2002)).
Chief Justice Rehnquist has been equally scornful about the use of foreign case law in constitutional adjudication. In his dissent in *Atkins v. Virginia*, he wrote:

I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws ... and opinion polls in reaching its conclusion. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved."

Therefore, Rehnquist contended that "the viewpoints of other countries simply are not relevant" in establishing a national consensus against the execution of mentally retarded criminals in the United States.

In the previous dissents, Justice Scalia and Chief Justice Rehnquist appear to argue that the judicial use of comparative materials implicates national and popular sovereignty concerns. Both formal objections will be examined in turn.

A. National Sovereignty Concerns

First, Justice Scalia essentially perceives the application of foreign precedents as an act of surrender of national sovereignty to foreign decision makers who are not accountable and responsible to the American public. The judicial homogenization of substantive laws would be a mode of cultural imperialism whereby the receiving jurisdictions would be compelled to accept the supremacy and efficacy of the foreign norms.

Scalia's appeal to American exceptionalism obscures the fact that many non-comparativists would accept that legislatures can legitimately establish treaties to homogenize their substantive laws. After all, many countries decide that it is in their countries' best interest to accede to agreements that impose duties and obligations on them vis-à-vis the international community. This partial cession of domestic control results from an internal cost-benefit calculus and an exercise of domestic will. Indeed, Scalia's apparent displeasure stems from the

24. Id. at 325.
25. See Alford *supra* note 16.
judicial homogenization of substantive law in the absence of legislative mandate. There may be some merit to the argument that the judiciary should not be the branch of government to import foreign norms into the domestic framework. However, the rhetorical appeal of how national sovereignty has been undermined through this internalizing process obfuscates the fact that essentially it is a domestic adjudicator who decides that a foreign rule is applicable. Herein, foreign law only becomes domestically binding when local judges deem it to be; any objections to that should not be met by raising the national flag. The principle of self-determination is not violated if a nation, through one of its branches, executive, legislative, or judicial, makes an autonomous decision to align its laws with other nations. This choice, exercised independently of other nations, constitutes an exercise of, and not a violation of, a state's right to self-determination.

B. Popular Sovereignty Concerns

The second objection to the judicial import of foreign value points to counter-majoritarian dangers of judicial review. According to this viewpoint, when courts constitutionalize prevailing foreign norms that are not within the original understandings of the constitutional Framers, they circumvent the popular mandate granted to the democratically-elected legislatures to make law. This is essentially the thrust of Alford's grievance with comparative constitutionalism:

If international majoritarian values cannot find expression through the political branches, advocates resort to the courts. But in the courts, overcoming sovereign values reflected in legislative enactments can be achieved only through constitutional supremacy. Hence the strategy to utilize international law to interpret the Constitution. If what is good and just cannot be achieved by democratic governance, then it shall be foisted upon the governed through constitutional interpretation.

This objection is founded on two assumptions. First, the Framers did not intend prevailing global opinion to have any weight within the domestic interpretive framework. Second, the Framers only intended the Constitution to address specific concerns they had in mind, thus foreclosing any contemporary adaptation to modern developments. In essence, this objection is not advanced against the use of comparative reasoning per se but questions instead the role of the judiciary vis-à-vis constitutional interpretation.

26. This raises the popular sovereignty concern addressed infra Part I.B.
The first assumption can be easily dispelled when one examines the historical documents and practices at the time of the country's founding and the early years pursuant to it. The signatories to the 1776 Declaration of Independence expressed their belief in paying "a decent respect to the opinions of mankind . . . "28 Amongst the signatories, Thomas Jefferson was particularly inspired by the political ideals shared by Scottish Enlightenment thinkers such as Francis Hutcheson who had exalted a republican notion of honor.29 Essentially, honor was a vanguard of virtue; it held men's opinion in the highest esteem and held an individual's actions accountable to the rest of mankind. Eminent legal historian Garry Wills has thus argued that pursuant to this republican code of conduct, honor held "men's opinion in high esteem, and felt shame to be caught in less than virtuous action before mankind."30 Thus to uphold honor and virtue, the exhortation to pay a decent respect to the opinions of mankind translates into a requisite to explain oneself to others and a mandate to take into account their responses and reactions in America's domestic decision making process.

In the Federalist Papers No. 63,31 Madison also exhorted the American people to pay "attention to the judgment of other nations" and "the opinion of the impartial world" so that the United States would in turn make decisions that were the "offspring of a wise and honorable policy."32 Madison and Hamilton also spoke of the lessons of "[e]xperience [being] the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred."33 Comparative constitutional insights undoubtedly had a pervasive and profound influence on the United States Founding Fathers,34 and it is inconceivable that they would prevent future generations from engaging in the

28. The Declaration of Independence para. 1 (U.S. 1776). In his dissent in Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (denying certiorari), Justice Breyer stated that "[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'" Id.
30. Id.
31. The Federalist No. 63 (James Madison).
32. Id.
33. The Federalist No. 20 (Alexander Hamilton & James Madison). Hamilton and Madison in Federalist No. 20 were referring to the experiences of federations like Germany, Poland, and the United Netherlands, which would serve as models for America to learn from. Id.
same process of comparative reasoning that led to the adoption of the United States Constitution.

Justice Scalia nevertheless makes a valiant, but weak, attempt to discount the probative value of these documents so far as they endorse comparative constitutionalism. In *Printz*, he wrote, "comparative analysis is inappropriate to the task of interpreting a Constitution, though it was of course quite relevant to the task of writing one." Essentially, Scalia seeks to distinguish between the use of comparative materials in creating a Constitution and its use in interpreting one. This dichotomy is certainly quite perplexing especially because there is no shred of evidence that the Framers subscribed to drawing such a distinction. Neither has Justice Scalia offered a reason for coming to such a conclusion. Furthermore, given that the Framers had adopted comparative analysis in the design of the United States Constitution, surely it is not implausible that they had envisioned the judicial branch, a component of their institutional design, to undertake the same mode of comparative analysis in the discharge of their constitutional duty. Moreover, as pointed out by Epstein and Knight, if we perceive constitutional borrowing, whether performed by judicial or legislative actors, as the institutional design of a society, we need not differentiate between the two modes as any theory of institutional design ought to be able to accommodate both.

Turning to the early historical practices of the United States Supreme Court, we can observe how receptive the judges were toward comparative reasoning. America's first Chief Justice, John Jay, held that "by taking a place among the nations of the earth, [the United States had] become amenable to the laws of [other] nations." In *Schooner Exchange v. McFaddon*, the Supreme Court followed the "usages and received obligations of the civilized world" and ruled that a foreign sovereign vessel in an American port was not subject to the jurisdiction of United States courts. Similarly, the Court held in *Thirty Hogheads of Sugar v. Boyle* that "[t]he decisions of the Courts of

36. *Id.*
37. In essence, Knight and Epstein advance the theory that it is the political preferences of the judges that motivate courts to select one institutional design of a constitutional system over the other. *See* Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 204, 209 (2003).
39. 11 U.S. 116 (1812).
40. *Id.* at 137.
41. *Id.* at 145–46.
42. 13 U.S. 191 (1815).
every country, so far as they were founded upon a law common to
every country, will be received, not as authority but with respect."
Even in the infamous Dred Scott v. Sandford decision, both the majority and the dissent cited European practices to justify their respective decisions. It would thus seem that the review and survey of foreign and transnational legal sources is consistent with the United States' earliest and oldest constitutional traditions. Admittedly, there is a distinction between the Supreme Court determining what customary international law exists that binds the domestic polity and what foreign rule exists that may be applicable to the local constitutional system. Nonetheless, in both instances the historical practice of looking beyond the borders to identify the state of law in the United States underscores the receptivity of the early courts to rules that are formulated outside the domestic system. This early judicial receptivity to foreign decisions and the "law of nations" in constitutional adjudication indicate that America's authoritative canon may have been more inclusive in the past and is amenable to judicial change over time.

Yet a group of constitutional theorists known as the originalists remains unconvinced of the legitimacy in considering contemporary foreign norms during constitutional adjudication. Justice Scalia, in interpreting the Constitution, would "look for a sort of objectified intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris." In deriving this objective intent, Scalia would look to historical understandings and practices that were accepted at the time the constitutional provisions were adopted. Thus, contemporary practices, especially foreign ones, would be irrelevant during constitutional adjudication.

Originalists often caution that if judges were allowed to stray from the original understanding of the Constitution, they would be given a free rein to amend the Constitution and violate the separation of powers principle sacredly enshrined within the constitutional text. Chief Justice Rehnquist warns that in such an eventuality, "Judges then are

43. Id. at 198.
44. 60 U.S. 393 (1856).
45. Id. at 408, 468.
no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures and federal administrative officers concerning what is best for the country." 48 In the process, judges, who are non-elected officials, would be imposing norms that the people have not accepted through their democratically elected representatives. 49

Yet originalists appreciate that the abolition of an independent judiciary would subject the individual to the whims of pure majoritarianism. In essence, originalists argue that their theory offers the only viable solution by which the Court can restrain itself from encroaching into the legislative domain and yet act as the bulwark against the evils of majoritarian excesses. 50 As pointed out by Vicki Jackson, this tension between democracy and self-rule on one hand and the judicial enforcement of rights on the other, is "magnified when the basis for judicial determinations is a source of law beyond the control of the judges' own polity." 51 Essentially, it would appear that United States’ resistance to transnational and comparative law rests on a vibrant idea of popular sovereignty as the source of the rule of law. 52 Originalists claim that judges should enforce only the original meaning of the Framers as that was the meaning duly ratified by the people in a referendum; the espousal of any other modes of constitutional interpretation would be to condone illegitimate constitutional change through judicial interpretation.

The second assumption made by originalists is that the Framers intended to codify their specific original practices within the constitutional framework and bar judges from having recourse to contemporary moral norms, foreign or domestic, during adjudication. 53 However, this assumption is not supported by any historical evidence. In fact, where the Framers wanted to exclude a certain mode of constitutional interpretation they were explicit in spelling it out. This took the form of the Ninth Amendment, which states that "[t]he enumera-

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51. Jackson, supra note 46, at 328.
52. Paul Kahn, supra note 4, at 2702.
53. Scalia, supra note 47, at 140-41.
tion in the Constitution, of certain rights, shall not be construed to
deny or disparage others retained by the people."54

Moreover, even if a common practice was accepted at the time
the constitutional provisions were adopted, this does not establish the
fact the Framers intended to constitutionalize that convention for sub-
sequent generations to obey. It is equally possible that the Framers
had given little thought to that issue or preferred to allow future gen-
erations to decide the issue for themselves. This interpretation is also
more consistent with a textual reading of the constitutional provi-
sions. The Framers have used both specific and broad provisions
within the constitutional text, thus indicating that separate clauses
should be interpreted at different levels of generality.55 Consider for
instance the Equal Protection Clause enshrined in the Fourteenth
Amendment.56 The Framers chose to use open-textured and relativis-
tic terms instead of expressly confining the scope of the Equal Protec-
tion Clause to specific bases of discrimination such as race or specific
instances of discriminatory practices.57 Where the Framers wanted the
constitutional clauses to be read strictly, they used highly specific and
particular words. For example, elections for the House of Represe-
tatives have to be held every two years and not "periodically" or "regu-
larly."58 Given that the Framers had intentionally left the
constitutional provisions enshrining "due process" and "equal protec-
tion" ambiguously worded, fully comprehending that the language
was not specific and could be interpreted in various ways, the choice
to adopt a broader principle must be thus respected. After all, if a
prohibition's reach was restricted to the practices that were thought to
fall afoul of the Constitution at the time the provisions were adopted,
its leave no room for reasoned adjudication of practices that
technological advancements bring.59 Thus, broadly phrased constitu-
tional clauses like "equal protection" or "freedom of speech" have to
embody abstract principles rather than just encapsulate mere histori-
cal practices.

Originalists, nonetheless, have found ways to reconcile the view
that constitutional provisions stand for abstract principles with their
theory, by maintaining that these constitutional principles must be in-

54. U.S. Const. amend IX.
55. See id.
56. U.S. Const. amend. XIV, § (1).
57. Id.
terpreted such that original practices would always be upheld in a constitutional challenge. Justice Scalia wrote: "Whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."60

Such a reading of the Constitution might be coherent if not for the fact that most originalists often become ambitious and seek to maintain the integrity of their constitutional theory whilst defending the decision of *Brown v. Board of Education*61 Robert Bork, for one, argues that although the Framers of the Fourteenth Amendment did not intend to ban segregation, the Court "cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the Framers omitted, requiring equality in this case but not in another."62

Bork's attempt to reconcile an originalist understanding of the Constitution with *Brown* seems rather disingenuous. Originalism is premised on the understanding that specific practices accepted at the time the constitutional provisions were adopted should not be held unconstitutional by future courts; given the fact that the historical record indicates that the Framers of the Fourteenth Amendment did not intend to outlaw state-imposed segregation per se,63 there is no reason for Bork to select a higher level of generality to interpret the Equal Protection clause in this instance. Bork essentially gerrymanders the levels of generality found within the abstract constitutional principles and selects an arbitrary frame of reference to suit his political philosophy.

Justice Scalia, on the other hand, glosses over *Brown*:

I argue for the role of tradition in giving content only to ambiguous constitutional text . . . . In my view the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.64

Justice Scalia suggests here that judges need not observe an originalist understanding of the Constitution when the constitutional text is unambiguous and clear. This concession is most puzzling. If a term like "equal protection of the law" is considered unambiguous, I would dare say nothing in the United States Constitution can be deemed vague.

Nevertheless, some credit must be given to Justice Scalia for conceding that "originalism . . . must somehow come to terms with reality" and that no judge, however committed to originalism, would sustain branding or public lashing today, even if those practices were well accepted in 1791. This crucial concession points out that eventually, if we want to commit ourselves to the glorious generalities of the Constitution, we have to read the Constitution in light of "evolving standards of decency" and cannot blindly uphold all original practices of yesteryears. Drawing principles from practices may in turn lead to the possibility of rejecting these same practices. A more nuanced understanding of the Constitution is, in essence, what Justice Brennan was driving at when he stated:

Current Justices read the Constitution in the only way we can: as twentieth century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

II. Substantive Concerns with Comparative Reasoning

Part I argues that the judicial use of comparative materials in the United States is neither a surrender of national sovereignty nor a usurpation of popular sovereignty. Thus, judicial engagement with foreign case law is legitimate within the American constitutional framework as comparative constitutionalism was envisaged by the Framers. Furthermore, such "jurisprudential cosmopolitanism" is also consistent with the historical practices of the United States Supreme Court.

66. Greenberg & Litman, supra note 59, at 617.
Part II argues that the militant provincialism espoused by some Justices on the Supreme Court stems not from the judicial concerns over the illegitimacy of comparative constitutionalism, but from the judges' substantive disagreement with the contemporary socio-political overseas norms. Essentially, it is a political choice by the judiciary to foreclose these disagreeable views at their inception so as to avoid having to assess their validity on the merits; this judicial sleight of hand thus permits the Court to uphold local practices that are unpopular abroad without having to justify how these domestic conditions are socially necessary or normatively superior to the prevailing global developments. What unfortunately happens is that judges essentially cite foreign materials when they are in accordance with their preexisting views and erect a cultural barrier to ward off the overseas norms they do not support.

The foregoing discussions have shown Justices Scalia and Rehnquist to be averse toward comparative constitutionalism, yet they have not been consistently so. In *McIntyre v. Ohio Elections Comm'n*, the majority of the Supreme Court held that an Ohio legislative provision that prohibited the distribution of anonymous campaign literature was in violation of the First Amendment. In his dissent, Justice Scalia interestingly referred to the legislative practices of England, Canada, and Australia to buttress his argument that permitting anonymity of campaign literature did not improve the quality of the electoral campaign:

> The Justices of the majority set their own views... up against the views of... state legislatures and the federal Congress. We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning.

Scalia's receptivity to invoking comparative practices in other Western democracies here stands in sharp contrast with the parochial and insular rhetoric he espoused in *Printz* and *Lawrence v. Texas*.

Similarly, Chief Justice Rehnquist, joined by Justice Scalia, held that the Washington state ban on physician assisted suicide was constitutional. What is significant is that Rehnquist, albeit in a footnote,

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69. See id.
71. Id. at 358.
72. Id. at 381 (Scalia, J., dissenting).
referred to other legislatures, such as the British and New Zealand legislatures, which were "embroiled in similar debates," and specifically pointed to the Supreme Court of Canada’s rejection of "a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide."\textsuperscript{76} Earlier in his dissent in \textit{Planned Parenthood v. Casey},\textsuperscript{77} Chief Justice Rehnquist had referred, albeit flatly and in a footnote, to a German decision.\textsuperscript{78} Two years after \textit{Roe v. Wade},\textsuperscript{79} the West German constitutional court,\textsuperscript{80} by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected.\textsuperscript{81} While he did not embellish this information with any commentary, his implication that \textit{Roe} was not universally accepted by other national courts was clear. In a more overt display, Chief Justice Rehnquist affirmed his support for comparative constitutionalism in an extrajudicial address:

> Now 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 their deliberative process. The United States courts, and legal scholarship in our country generally, have been laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the near future.\textsuperscript{82}

In the foregoing instances, these same supposedly anti-comparativists in \textit{Atkins v. Virginia}\textsuperscript{83} and \textit{Lawrence}\textsuperscript{84} had abandoned their qualms about comparative constitutionalism and were rather unabashed about using the judicial and legislative practices of other nations to criticize the approach taken by the Court. But is this any wonder? Justice Scalia and Chief Justice Rehnquist are conservative jurists renowned for defending the rights of the states to carry out

\textsuperscript{76} Id. at 718 n.16.
\textsuperscript{77} 505 U.S. 833 (1992).
\textsuperscript{78} Id. at 945 n.1 (Rehnquist, C.J., dissenting).
\textsuperscript{79} 410 U.S. 959 (1973).
\textsuperscript{83} 536 U.S. 304 (2002).
\textsuperscript{84} 539 U.S. 558 (2003).
capital punishment, to limit the availability of abortion, and to criminalize sodomy. Given their political preferences, it should come as no surprise when they invoke comparative doctrines that buttress their legal position and dismiss those that argue against it.

An alternative explanation for the pattern of uses of foreign sources by Justice Scalia and Chief Justice Rehnquist would be that these judges draw a normative distinction between the reliance on non-domestic sources when upholding the reasonableness of a statute (which they accept) and the use of foreign materials to invalidate local legislations (which they reject). Pursuant to this reading, the judges do not deem recourse to foreign materials as illegitimate per se but merely object to their relevance when used to invalidate domestic statutes, largely because foreign materials are not responsive to the cultural peculiarities of the domestic system and cannot prove that the local statute is necessarily unconstitutional. This interpretation may be plausible if not for the fact that these judges had roundly rejected the use of comparative constitutionalism per se and had in no way limited their objections to the extent to which foreign materials are used. As discussed earlier, Scalia had viewed foreign opinions as "meaningless dicta," while Rehnquist had admonished his more liberal brethren for issuing decisions that "place weight on foreign laws."

It is thus evident that these judicial actors essentially adjudicate according to their normative beliefs about what should constitute the ideal state of law. The selection and/or dismissal of foreign case law merely reflects the judges' substantive disagreement with their legal principles as opposed to their discomfort with the national or cultural pedigree. One could only hope that these judges would be more forthcoming about their substantive disagreements with the foreign case law and engage these viewpoints on their merits, rather than just brush them off by erecting a wall of cultural diffidence.

88. Id. at 598 (Scalia, J., dissenting).
89. Atkins, 536 U.S. at 322 (Rehnquist, C.J., dissenting).
90. Epstein & Knight, supra note 37, at 208.
III. Critique on Bricolage and Genealogical Modes of Comparative Reasoning

Notwithstanding the judicial parochialism that exists in the United States constitutional system, legal scholarship advocating comparative constitutionalism is emerging as a burgeoning field within academic circles. Two recent articles are particularly insightful in their discussions of the theoretical bases for using comparative materials in constitutional adjudication. In one, Professor Mark Tushnet identifies three uses for comparative constitutionalism: functionalism, expressivism, and bricolage.91 In the other, Professor Sujit Choudhry argues that comparative materials may be applied in three interpretive modes: genealogical, dialogical, and universalist.92

Functionalism claims that specific constitutional provisions are created to serve particular functions in any constitutional model; "[c]omparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems."93 Expressivism is based on the normative premise that comparative inquiry may help recast the practices of the domestic legal system in new light; this might thus lead courts using comparative methods to legal results that they would not have reached had they not engaged in comparative scrutiny.94 This is similar to the dialogical use of foreign materials as advocated by Choudhry whereby courts engage with comparative jurisprudence "in order to better understand their own constitutional systems and jurisprudence."95 As for bricolage, it is a process whereby judges are asked to randomly select legal materials from other jurisdictions and apply them to the cases they are adjudicating at hand.96 Universalist interpretation holds that all constitutional courts are engaged in the identification and interpretation of the same set constitutional norms such that foreign judgments may provide a more expeditious way for domestic courts to analyze the same repository of transcendent legal principles.97 Finally, the genealogical mode of comparative reasoning

91. See Tushnet, supra note 5, at 1228.
92. See Choudhry, supra note 6, at 825.
93. Tushnet, supra note 5, at 1228.
94. Id. at 1236.
95. Choudhry, supra note 6, at 836.
96. Tushnet, supra note 5, at 1237.
97. Choudhry, supra note 6, at 835.
justifies the import of foreign cases when constitutions are tied together by the same relationship of history and descent.\(^9\)

Building on these analytical models laid out by Tushnet and Choudhry, this Article argues that there are, in effect five normative uses of foreign case law that would justify the import of comparative materials into the domestic legal system. Specifically, comparative materials have diagnostic, expository, affirmative, functional, and universalist value. Firstly, foreign constitutional cases have diagnostic value. Domestic courts can use foreign precedents to identify the constitutional issue posed. Comparative jurisprudence can assist the court in illustrating the existence of a particular problem and help frame the relevant legal issues under consideration. Second, comparative sources can be put to expository use. This use, while encompassing the expressivist approach advocated by Tushnet, goes further as the domestic court, when engaging in comparative study, can also come to the realization that its own constitutional culture necessitates a renunciation of overseas sources. Third, national courts can use foreign materials in an affirmative way where the foreign sources do not assist the courts in the adjudicatory process but instead add weight to the strength of courts’ decisions after they have been reached using domestic materials. Fourth, courts can use foreign constitutional materials functionally. Under this mode, comparative jurisprudence is used as a learning aid. National courts can pore over the constitutional experiences of other jurisdictions and learn from them to avoid potential pitfalls or find improved solutions to the status quo. Finally, a universalist use of foreign sources allows courts to engage with comparative jurisprudence and in the process allows courts to determine transcendent principles that should be incorporated domestically.

Before exploring how common law courts around the world have adjudicated using these various modes of comparative reasoning, I would also endeavor to argue at the outset why Professor Tushnet’s bricolage process and Professor Choudhry’s genealogical mode of interpretation are invalid normative bases for using comparative sources.

Professor Tushnet perceives bricolage as a judicial process whereby courts adjudicate by making a “random or playful selection from [comparative] materials at hand.”\(^9\) While Tushnet has pointed out that judges indeed often problem solve by co-opting existing

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98. Id. at 825.
99. Tushnet, supra note 5, at 1237.
materials at hand, this “unconscious, natural”\textsuperscript{100} use of comparative reasoning has been only justified as a matter of the practice, rather than on any positive normative basis.\textsuperscript{101}

Although this Article addresses the popular and national sovereignty concerns attached to comparative reasoning, thereby establishing that comparative constitutionalism is not an illegitimate mode of adjudication \textit{per se}, this Article is not advocating an automatic import of foreign legal principles in every instance of adjudication. While the legitimacy of a comparative survey is not at issue, the applicability of a specific foreign norm or institution may be at issue. Undeniably, constitutions emerge and reflect particular national circumstances and identities; therefore, to justify the use of comparative resources, judges have to appeal to the normative value of the materials and assess how they would tie in with their countries’ own history, culture, and experience. Admittedly, the bricolage process might be no different in principle from ordinary common-law reasoning, but the same normative objection to the bricolage process does not exist when federal courts randomly cite state cases, and vice versa, or when Commonwealth Caribbean courts receive English cases. In the former, the case law, though different, emerge from the same national polity, and to varying degree is subject to the revision of the United States Supreme Court, the parental legal order. In the latter, cases from the Commonwealth Caribbean can be appealed to the Privy Council in the United Kingdom, thereby justifying the reception of English precedents by the lower national courts.

Nevertheless, when materials are randomly drawn from outside the legal polity, the concern that these sources may not be applicable is left unaddressed. The danger with bricolage is that it permits the adjudicator to skip the justificatory process and merely import the cases on the ground that they are available, with no attempt made to analyze whether these same norms are applicable in the domestic legal system. The absence of an overt engagement with the normative value of the comparative resources opens their reception to abuse. When judges are allowed to “simply use what they find lying around,”\textsuperscript{102} they may end up selecting foreign case law that supports their views and omitting those that contradicts their positions. Consequently, the absence of a normative basis for justifying comparative

\textsuperscript{100} \textit{Id.} at 1238.
\textsuperscript{101} \textit{Id.} at 1237.
\textsuperscript{102} \textit{Id.} at 1304.
constitutionalism makes the bricolage process an unsuitable mode of constitutional interpretation.

On the other hand, Professor Choudhry argues that since "some constitutions are often tied together by complicated relationships of genealogy and history,"103 prima facie relevance of each other's case law is established without the need for "an interpreting court to come to a nuanced understanding of the rationales underlying comparative jurisprudence."104 I would argue otherwise.

This genealogical mode of interpretation seeks to establish linkage with the comparative resources, not on the basis that there are prevailing commitments to common normative premises, but on a shared inherited past. The method of comparative reasoning wrongly assumes that each sovereign nation emerging from the same parental legal order or sharing the same common lineage would want to chart the same constitutional future. The main danger with this line of argument is that it licenses courts to dispense with an exacting examination of the intrinsic merits and relevance of foreign case law and to blindly accept the validity of the foreign practices on the basis that there had been a common shared past between the constitutional systems. While a shared history between two constitutional systems would make the case law from one jurisdiction "persuasive authority"105 in the other, it does not sanction the careless import of comparative materials that the genealogical mode of reasoning condones. When legal materials are located outside the domestic resources, the positivist appeal of the law is absent; any weight they have must be justified on normative grounds. As genealogical claims are positivist and content-independent,106 they lack a normative premise to explain why "the past commands of a sovereign should command obedience today."107 If anything, the mindless adoption of foreign materials is inimical to the standing of a nation as a separate sovereign state.

IV. Five Modes of Comparative Reasoning

Common law courts around the world have enriched their domestic adjudicatory process by using foreign materials in the five aforementioned ways: diagnosis, exposition, affirmation, functionalism, and universalism. This judicial cross-fertilization occurs not be-

103. Choudhry, supra note 6, at 838.
104. Id. at 871.
106. Choudhry, supra note 6, at 870.
107. Id. at 892.
cause the foreign decisions are in any way binding on the domestic polity, but because courts appreciate that they are engaging in a “process of collective judicial deliberation on a set of common problems.”\textsuperscript{108} This section explores in-depth each of the five modes of comparative reasoning.

A. Diagnosis

When comparative jurisprudence is used diagnostically, it is used mainly to aid the court in framing the constitutional issue at hand. Comparative legal materials are employed to identify and illustrate a constitutional problem that exists commonly amongst many jurisdictions. The national court does not need to engage in the merits of the foreign decisions nor does it need to consider whether the foreign sources are applicable locally. Instead, the domestic court merely uses the comparative resources to highlight a common constitutional ailment that plagues other nations, thereby warranting the court’s own attention. In a way, the foreign materials thus act as a backdrop for the local courts to define the relevant issue for domestic consideration.

1. \textit{Knight v. Florida}

An illustration of a diagnostic use of comparative sources would be Justice Breyer’s dissent in the Court’s denial of certiorari in \textit{Knight v. Florida}.\textsuperscript{109} In that case, the Supreme Court of the United States refused to consider whether the Eighth Amendment prohibited, as “cruel and unusual punishment,” the execution of prisoners who have spent twenty years or more on death row.\textsuperscript{110} Justice Breyer, dissenting from the denial of certiorari, cited a wide range of foreign precedents, not to endorse their constitutional merits, but to illustrate the pressing necessity for the Court to consider the constitutional propriety of long delays in executions within the American framework.\textsuperscript{111}

Justice Breyer canvassed two lines of conflicting foreign treatments on this issue, observing that the Privy Council, Supreme Courts of India, and Supreme Court of Zimbabwe had decided that lengthy delays in administering a lawful death penalty would render the ultimate execution inhuman and unusually cruel, while noting that the

\textsuperscript{109} 528 U.S. 990 (1999).
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 997 (Breyer, J., dissenting).
Supreme Court of Canada\textsuperscript{112} had found otherwise.\textsuperscript{113} Justice Breyer did not argue in support of any particular outcome, but proposed that the existence of an excessive execution delay might implicate a constitutional issue worthy of consideration.\textsuperscript{114} By exploring the constitutional jurisprudence of foreign courts that had considered "roughly comparable questions under roughly comparable legal standards,"\textsuperscript{115} Justice Breyer urged the Supreme Court of the United States to enter the fray of this debate and not abdicate its constitutional duty to resolve an important legal issue.\textsuperscript{116}

2. \textit{Foster v. Florida}

In \textit{Foster v. Florida},\textsuperscript{117} the Supreme Court of United States again denied a writ of certiorari from an accused who had been on death row for more than twenty years.\textsuperscript{118} Justice Breyer, in his dissent from the Court's denial of certiorari, once again adopted a diagnostic use of comparative materials. He noted that the Privy Council, the European Court of Human Rights, and, more recently the Supreme Court of Canada, had all held that lengthy incarceration before execution was degrading, shocking, or cruel.\textsuperscript{119} It is instructive to note that Breyer was not arguing that these foreign decisions would lead the Court to hold that the existence of the "death row phenomenon" in American penitentiaries violated the Eighth Amendment. Instead the main thrust of his arguments was that the resolution of similar cases by the highest courts in foreign jurisdictions underscored a pressing need for the United States Supreme Court to address this dilemma for its own domestic audience.\textsuperscript{120} The foreign trend thus justified the petitioner to ask whether such punishment is both unusual and cruel in America.

3. \textit{Washington v. Glucksberg}

The Chief Justice of the United States Supreme Court has also used comparative constitutional materials diagnostically. In \textit{Washington-
Chiefton v. Glucksberg. Chief Justice Rehnquist wrote the main opinion in which the Court held that Washington's statutory prohibition against assisted suicide was not in violation of a terminally ill patient's constitutional right to due process.

Rehnquist began his opinion by providing a sketch of how laws against suicides and assisted suicides developed in the United States, by tracing their roots to Anglo-American common law traditions that were later codified as statutory criminal sanctions. One could see that herein, Chief Justice Rehnquist was merely framing the issue of assisted suicide in context. This overview of state practices culminated in a footnote reference to two conflicting lines of judicial authorities:

Other countries are embroiled in similar debates: The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide . . . . On the other hand, on May 20, 1997, Colombia's Constitutional Court legalized voluntary euthanasia for terminally ill people.

Rehnquist did not embellish these comparative citations with a commentary on the merits of the cases. He merely noted that other courts had been confronted with similar debates on euthanasia. Essentially, he was using the comparative legal materials to illustrate a constitutional theme that had surfaced in several jurisdictions, thereby justifying the intervention of the Supreme Court to address the issue for the American public. After setting out the problem, Rehnquist resolved this constitutional issue by referencing only domestic case law. Ergo, it is apparent that while the Chief Justice may be receptive to the use of comparative cases in the diagnosis of a constitutional ailment, he shuns foreign aid in its treatment.

B. Exposition

An expository use of comparative jurisprudence allows courts to engage with foreign sources, with the sole purpose of differentiating the constitutional cultures and in the process, justify/explain its own unique position. The comparative exercise is undertaken with the aim of exemplifying and underscoring the inherent differences between

122. Id. at 705–06.
123. Id. at 711–13.
125. Glucksberg, 521 U.S. at 718 n.16.
the local and foreign constitutions. By comparing domestic and foreign constitutional practices, courts can, in the process, sharpen an understanding of its own constitutional culture and justify its judicial will to differ. This is an expository tool as the comparative exercise allows the court to explain and justify why the local law deviates from foreign practices. As observed by Pierre Lepaulle:

When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary . . . things which are simply due to historical accident or temporary social situation . . . . To see things in their true light, we must see them from a certain distance, as stranger, which is impossible when we study . . . phenomena of our own country.\(^\text{126}\)

A heightened awareness of foreign experiences and comparative insights is often the essential first step for domestic courts to work out their own approaches to resolving problems. By filtering foreign experiences through the sieve of local conditions, judges can interrogate how existing doctrines are consistent with their deepest values; this in turn leads to a greater level of self-awareness that sharpens and does not blunt the constitutional state's national distinctiveness.

1. **Attorney General v. Barry Wain**

The High Court of Singapore in *Attorney General v. Barry Wain*\(^\text{127}\) had to decide whether the common law of contempt was in violation of a citizen's right to freedom of expression. In that decision, the court was adamant about not following Canadian and American case law dealing with contempt of court, emphasizing instead that it was important "not [to] lose sight of local conditions."\(^\text{128}\) As it still stands, under Singapore law, the onus is on the speaker to prove that his contemptuous words are true. In contrast, in Canada, it had to be proved that the accused acted willfully or with reckless disregard so that harm to the administration of justice was a reasonable consequence of his words/actions.\(^\text{129}\) Nonetheless, the Singapore court did engage with comparative jurisprudence and took some pains to explain why the local courts should depart from foreign practices. The court stressed that the law on contempt of court in Singapore was derived from the


\(^{127}\) Attorney Gen. v. Barry Wain, [1991] 2 M.L.J. 525 (Sing.).

\(^{128}\) *Id.* at 531 (internal quotations omitted).

old English common law position. In contrast, the common law in England had been altered subsequently by a new statute, and decisions from Canada were based on the Canadian Charter, "which has no parallel in Singapore." The court also highlighted the fact that unlike other Commonwealth jurisdictions, the judge in Singapore was both a trier of fact and law; scandalous remarks imputing judicial bias would thus "potentially have a more damning effect on [his] judicial reputation" than on his foreign counterparts.

Regardless of whether one agrees with the court's legal arguments for deviating from foreign practices, this case illustrates an expository use of comparative materials where the court engaged with foreign law so as to differentiate local culture from foreign norms and justify why Singapore was charting a separate constitutional path.

2. S. v. Mamabolo

Interestingly, the Constitutional Court of South Africa came to the same conclusion as the Singapore court and upheld the constitutionality of the common law of contempt. Justice Kriegler, writing for the majority in S. v. Mamabolo, exhorted caution when South African courts sought to transplant First Amendment doctrines into local jurisprudence. In distinguishing the two constitutional regimes, Kriegler pointed to the terse, direct, and peremptory language of the First Amendment, which reflected the libertarian aspirations of the Founding Fathers, while explaining that the South African Constitution's more nuanced and qualified phraseology spoke to the Framers' intent of creating a more balanced and counterpoised instrument.

In addition, Justice Kriegler was emphatic about how the social values underpinning the South African and the United States constitutions differed:

The fundamental reason why the test evolved under the First Amendment cannot lock on to our crime of scandalizing the court, is because our Constitution ranks the right to freedom of expression differently. With us it is not a pre-eminent freedom ranking above all others. Moreover, the [South African] Constitution,

131. Id.
133. For a critique of the legal reasoning of this case see Michael Hor & Collin Seah, Selected Issues in the Freedom of Speech and Expression in Singapore, 12 SING. L. REV. 296 (1991).
134. 2001 (1) SACR 686 (CC) (S.Afr.).
135. Id.
136. Id. at 705.
in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression.\(^1\)

Therefore, in light of South Africa's constitutional focus on the value of human dignity, the citizenry's right to the freedom of expression is not conferred the same level of superior status as it is in the United States. Herein, by filtering the foreign doctrines through the prism of local experience, Justice Kriegler was able to clarify how existing domestic doctrines were more consonant with the intrinsic values of the South African constitutional polity; this in turn led to a greater level of self-awareness that sharpened the state's national distinctiveness.

3. **Raines v. Byrd**

In *Raines v. Byrd*,\(^2\) the Supreme Court of the United States had to consider whether a group of Congressional members had institutional standing under Article III of the United States Constitution to challenge the constitutionality of the Line Item Veto Act.\(^3\) Chief Justice Rehnquist noted that "some European constitutional courts operate under one or another variant of such a regime,"\(^4\) which permitted institutional standing by legislators in similar situations. While the Court conceded that there "would be nothing irrational"\(^5\) in adopting such an approach, Rehnquist argued that "it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III."\(^6\)

By juxtaposing the more flexible European systems alongside the more restrictive approach of the United States, the Court was able to underscore the unique features of the American Constitution. This expository use of the comparative materials highlights the special constitutional limits placed by Article III on the courts to adjudicate over specific case or controversy where the plaintiff has suffered personal and particularized harm. The role of the American judiciary is to protect "individual citizens and minority groups against oppressive or dis-

\(^{137}\) *Id.* at 705–06.


\(^{139}\) *Id.* at 813–14.

\(^{140}\) *Id.* at 828.

\(^{141}\) *Id.*

\(^{142}\) *Id.*
criminatory government action,"\(^{143}\) and unlike some European models, it is not created to ensure "some amorphous general supervision of the operations of government."\(^{144}\)

4. **Reference re Electoral Boundaries Commission**

In *Reference re Electoral Boundaries Commission*,\(^{145}\) the Supreme Court of Canada was asked to decide whether the variances in size of voter populations amongst the Saskatchewan provincial constituencies, as recommended by the Electoral Boundaries Commission, violated the Charter guarantee of the right to vote.\(^{146}\) In declining to uphold the "one person one vote" model espoused by the United States Supreme Court,\(^{147}\) the majority appealed to the differences in history and traditions underpinning Canadian society:

> [D]emocracy in Canada is rooted in a different history than in the United States . . . . Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition . . . . It was a tradition of evolutionary democracy . . . a tradition which, even in its more modern phases, accommodates significant deviation from the ideals of equal representation . . . . The concept of absolute voter parity does not accord with the development of the right to vote in the Canadian context and does not permit of sufficient flexibility to meet the practical difficulties inherent in representative government in a country such as Canada.\(^{148}\)

Eventually, in light of the need to recognize different cultural and group identities and to accommodate diversity in the electoral process, the majority judges held that an electoral system that focused on effective representation was more important than one that emphasized mathematical parity as exemplified in the United States electoral system. By interrogating the practices in America and Canada, the Supreme Court of Canada was able to identify how effective representation was integral to Canada’s democracy and consonant with its unique aspirations to weave diversity into the social mosaic.

5. **Regina v. Keegstra**

The Supreme Court of Canada in *Regina v. Keegstra*\(^{149}\) upheld the constitutionality of a penal statute which prohibited the willful promo-

\(^{143}\) Id. at 829.

\(^{144}\) Id.


\(^{146}\) Id.

\(^{147}\) Id. at 188.

\(^{148}\) Id. at 186, 189.

tion of hatred towards any section of the public distinguished by color, race, or religion. The impugned provision was challenged as a violation of the applicants' constitutional right to the freedom of expression.

It was significant how the Supreme Court of Canada approached the American jurisprudence on hate propaganda. The majority was very thorough in exploring the applicability of the American case law and held specifically that "it is important to be explicit as to the reasons why or why not American experience may be useful" in the Charter analysis. They acknowledged that the "practical and theoretical experience" to be gleaned from American constitutionalism was immense and "should not be overlooked by Canadian courts," but nonetheless, the majority recognized that differences may require Canada's constitutional vision to depart from that endorsed in the United States.

In *Keegstra*, the expository use of comparative jurisprudence was affirmed as the court expressed their enthusiasm in drawing from the well of American constitutionalism as long as the foreign doctrines undergo domestic distillation. Particularly instructive was Chief Justice Dickson's examination of Canada's fundamental values and how they differ from America's:

The special role given equality and multiculturalism in the Canadian Constitution necessitates a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression . . . . If values fundamental to the Canadian conception of a free and democratic society suggest an approach that denies hate propaganda the highest degree of constitutional protection, it is this approach which must be employed.

By juxtaposing the legal traditions of both countries, the Canadian court in the process has clarified its own understanding of the country's own constitutional culture. The expository use of comparative resources underscores the cultural distinctiveness of Canada and highlights how the Canadian social vision departs from the American one.

150. *Id.* at 740.
151. *Id.*
152. *Id.*
153. *Id.*
C. Affirmation

When courts make an affirmative use of comparative resources, they essentially use foreign materials to confirm a legal result they have reached on their own interpretation of domestic law. This search for parallel citations outside the domestic polity is often a calculated move by the courts. These citations buttress the precedential value of the decision or enhance the persuasiveness of the new principle being formulated. By demonstrating how other courts or legislatures have reached the same constitutional destination, as noted by William N. Eskridge:

One way for a judge to know to be more certain that she is not reading her own views into the Constitution’s open-textured provisions is to see if differently situated judges elsewhere in the world are reaching the same normative judgment. If they are, an American jurist can be more confident that her judgment reflects some objective normative reality or consensus and not just her own preferences or ideology.\(^{155}\)

The following cases illustrate how courts have used foreign legal sources in an affirmative sense, whereby the legitimacy of a domestic practice is enhanced by the consensus it shares with an external legal polity.

1. *Thompson v. Oklahoma*

In deciding whether the execution of minors below sixteen years of age at the time of the capital offense was cruel and unusual, the majority of the United States Supreme Court in *Thompson v. Oklahoma* \(^ {156}\) surveyed contemporary standards of decency as evidenced by the practices of state legislatures. Justice Stevens’s examination of the existing penal statutes and state practices led him to conclude that the execution of such youthful prisoners was disapproved by an overwhelming majority of states.\(^ {157}\) After his extensive survey of domestic state practices, Justice Stevens interestingly cast his eye beyond the constitutional shores of America:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share

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157. *Id.* at 829 n.29.
our Anglo-American heritage, and by leading members of the Western European community.\textsuperscript{158}

Justice Stevens provided a laundry list of countries, which included the United Kingdom, Australia, Germany, France, Portugal, the Netherlands, the Scandinavian countries, and the then Soviet Union, that prohibited juvenile executions.\textsuperscript{159} It is crucial to note Justice Stevens's emphasis that his views were consistent with foreign practices, highlighting the fact that these comparative sources only consolidated his views and had not shaped it. He was essentially making an affirmative use of comparative resources to buttress the persuasiveness of the new constitutional rule he was articulating. While the foreign trend may have enhanced the weight of his argument, his response was not formed nor supplemented by these international practices.

2. \textit{Atkins v. Virginia}

In \textit{Atkins v. Virginia},\textsuperscript{160} Justice Stevens once again undertook the same methodological approach as he did in \textit{Thompson} to deem the execution of the mentally retarded cruel and unusual.\textsuperscript{161} By surveying state penal statutes across the country and the state practices, he concluded on behalf of the majority that a national consensus had developed against the execution of the mentally ill.\textsuperscript{162} To augment his conclusion, Stevens once again turned to comparative law for support, albeit this time in a footnote:

\begin{quote}
Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved . . . . Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.\textsuperscript{163}
\end{quote}

This somewhat coy use of comparative resources betrays the Supreme Court's discomfort, even amongst the liberal and moderate judges, with using foreign case law to strike down a domestic statute. By placing these comparative sources in a footnote, Justice Stevens was signaling to the dissent and the readership at large that these resources were not crucial to shaping his view but were merely cited as additional evidence to affirm his decision. In the rest of his Eighth Amendment analysis, Justice Stevens did not refer to comparative sources

\begin{itemize}
\item \textsuperscript{158} \textit{Id.} at 830 (emphasis added).
\item \textsuperscript{159} \textit{Id.} at 830–831.
\item \textsuperscript{160} 536 U.S. 304 (2002).
\item \textsuperscript{161} \textit{Id.} at 311–21.
\item \textsuperscript{162} \textit{Id.} at 316.
\item \textsuperscript{163} \textit{Id.} at 316 n.21 (emphasis added).
\end{itemize}
again. The subtle implication that the majority had reached their decision on the basis of domestic law was abundantly clear.

3. *Lawrence v. Texas*

In *Lawrence*, a majority in the Supreme Court held that Texas’s penal prohibition against private, consensual homosexual sex violated a person’s right to due process, and thus overruled its older decision in *Bowers*. Although some may consider this decision a breakthrough for comparative constitutionalism in the United States, it is imperative to note that the majority only cited foreign case law in two instances. With regard to the first, in referencing the European decision of *Dudgeon v. United Kingdom*, Justice Kennedy did not argue that *Bowers* was bad law in light of this European Court of Human Rights decision. Instead, he was merely using *Dudgeon*, which was decided five years before *Bowers*, to expose the flaw in Chief Justice Burger’s previous claim that homosexual behavior was antithetical to the values of Western civilization.

In the second instance, Justice Kennedy merely made affirmative use of foreign case law. It is crucial to note that the Court eventually overruled *Bowers* on the basis that it was inconsistent with its own decisions in *Casey* and *Romer v. Evans*, both of which were decided after *Bowers v. Hardwick*. In *Casey*, the Court affirmed that the most intimate and personal choices of a human being, central to her personal dignity and autonomy, are protected by the Fourteenth Amendment. Later, in *Romer*, the Court invalidated an amendment to Colorado’s constitution that sought to deprive homosexuals of protection under state antidiscrimination laws on the basis that the change was born of animosity toward gays and lesbians and had no rational relation to a legitimate governmental purpose. It was only after Justice Kennedy concluded that *Bowers* had sustained serious erosion from these recent Supreme Court decisions that he turned to comparative case law to affirm and buttress his view that the Texas statute in question was unconstitutional: “Other nations, too, have taken action

168. *Id.* at 572–573.
consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct . . . . The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." Justice Kennedy did not use any of the doctrinal frameworks utilized by the European Court to scrutinize how state intervention into the private sphere of the citizenry was unwarranted in this instance. Neither did the Court make any concession on how transnational norms should shape the boundaries of the domestic constitutional jurisprudence. Essentially, Justice Kennedy used the foreign precedents to reinforce the majority's decision and to enhance the objective nature of the Court's decision.

4. Roper v. Simmons

In the recent decision of *Roper v. Simmons*, the United States Supreme Court held that it is cruel and unusual for States to execute prisoners who were juveniles at the time the capital crime was committed. Interestingly, the value and use of foreign legal materials was discussed extensively by both the majority and the dissent.

In writing for the majority, Justice Kennedy explicitly held that juvenile executions were unconstitutional because a national consensus had developed against their use. He noted that thirty states in the United States prohibited juvenile death penalty and in twenty others, the practice was infrequent. This notation highlighted that the consistency of change by the states in the direction of abolishing juvenile capital punishment formed the basis of the Court's decision, and such a blanket national prohibition was constitutionally mandated.

It was only after the Court invalidated the Missouri law at issue using domestic indicia that the majority turned to foreign materials to buttress their decision: "Our 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." In his opinion, Justice Kennedy noted the litany of international covenants prohibiting juvenile death penalty and the fact

175. *Id.* at 1198.
176. *Id.* at 1192.
177. *Id.* at 1198 (emphasis added).
that the United States was one of only eight countries in the world who had executed juveniles since 1990 to affirm the precept that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our conclusions."\textsuperscript{179}

In response to Scalia's dissent that such an approach would be inconsistent with the Framers' original understanding of the Constitution, Justice Kennedy retorted: "It does not lessen our fidelity to the Constitution, or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."\textsuperscript{180}

While dissenting from this decision, Justice O'Connor was quick to disavow Justice Scalia's parochial understanding of the American Constitution. She decided against the petitioner because she was not convinced that there was a genuine national consensus against the juvenile death penalty.\textsuperscript{181} But if this had been established, she would have no qualms about using the "international consensus of this nature . . . to confirm the reasonableness of a consonant and genuine American consensus."\textsuperscript{182} As she emphasized:

\begin{quote}
[T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values . . . .\textsuperscript{183}
\end{quote}

The \textit{Roper} decision is groundbreaking to the extent that the Court was more explicit about their receptivity to engaging with foreign legal materials. Unlike \textit{Atkins}, where the majority confined their comparative study to a meager footnote, in \textit{Roper}, the judges were unabashed about analyzing the implications of foreign materials in the main text. Nonetheless, the judges were also anxious to emphasize that these foreign sources were only meant to augment local sources, not displace them. In this regard, unfortunately, \textit{Roper} has in no way advanced the comparative cause. To the extent that the foreign materials are used only to buttress the conclusions the judges have already reached on domestic grounds, comparative study in no way facilitates

\begin{itemize}
\item \textsuperscript{179} Id. at 1200.
\item \textsuperscript{180} Id. (emphasis added).
\item \textsuperscript{181} Id. at 1206 (O'Connor, J., dissenting).
\item \textsuperscript{182} Id. at 1216 (emphasis added).
\item \textsuperscript{183} Id. at 1215–16.
\end{itemize}
the adjudicatory process, and its value lies merely in the enhancement of the persuasiveness of the judicial decisions.

It is not the intention of this Article to explore in detail Scalia’s dissent in *Roper*. His tirade is, in essence, a rehash of his earlier arguments against comparative constitutionalism raised in *Lawrence* and *Thompson*. However, he did make a novel and valid point when he criticized the majority for only considering foreign law when the Eighth Amendment was at issue and disavowing overseas decisions when other constitutional provisions, such as the First and the Fourteenth Amendment, were challenged. As he lamented:

> The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of its reasoned basis of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making but sophistry.

Leaving aside the fact that Justice Scalia himself has been guilty of cherry-picking, as a matter of judicial consistency, the Court may want to take up Scalia’s challenge and survey foreign decisions regardless of which constitutional provision was being challenged. If the Court only assigns an affirmative role to foreign legal materials, as a matter of logic or practicality, it should not matter which constitutional right is at stake. Since the Court would reach its decision on the basis of the domestic sources alone, the casting of a wider comparative net should in no way affect the indigenousness of the domestic system the Court is so quick to protect.

**D. Functionalism**

Functionalists perceive courts as similarly constituted institutions performing the same tasks common to all systems of governance. Tushnet observes that comparativism is inevitable and natural when one subscribes to a functional use of foreign materials, for only when one compares different political systems, can one identify the functions common to all and the institutions that serve them.

When comparative sources are used functionally, the national court’s focus is on learning from foreign jurisdictions by drawing on their constitutional experiences. The foreign jurisprudence is used as a preceptive tool to guide the domestic court in reaching a decision

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184. *Id.* at 1228 (Scalia J., dissenting).
185. *Id.* (emphasis added).
186. See discussion [*supra* Part II].
187. Tushnet, [*supra* note 5, at 1228].
when a similar issue confronts them. In turn, courts might move toward homogeneity in their judicial response to the same constitutional dilemmas as they are all drawn by the intrinsic logical force of the foreign constitutional discourse. As pointed out by the Constitutional Court of South Africa in Sanderson, "[c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies." Comparative studying might lead courts to find two conflicting lines of authorities; in evaluating the normative positions of both constitutional positions, the judges can identify the most functional constitutional paradigm that warrants domestic assimilation. A functional use of comparative jurisprudence thus allows courts to explore constitutional options and draw from the vast repository of knowledge available beyond national boundaries. In the process, courts may find better solutions to the status quo or be cognizant of potential pitfalls to avoid when engaging in constitutional adjudication. The following cases demonstrate ways in which courts have used the functional mode of comparative reasoning to avoid such pitfalls.

1. United States v. Then

The United States Court of Appeals for the Second Circuit in United States v. Then considered an equal protection challenge to the disparity between the sentences meted out to crack and powder cocaine offenders.

In a concurring opinion, Judge Calabresi referred to the constitutional practices in Germany and Italy where the courts had adopted the practice of judicial forewarning as opposed to a direct nullification of unconstitutional legislations. Calabresi did not adopt Chief Justice Rehnquist's approach in Raines and merely uphold the Marbury v. Madison mode of judicial review as uniquely American, and therefore unassailable. Instead, he justified his turn to comparative sources on the basis that all judges confronted a common constitutional dilemma when faced with state statutes that had "been made irrational by the passage of time, change of circumstances, or the availability of new knowledge."
After observing that courts were performing this same constitutional function, the solution Calabresi conceived in response to this uncertainty over the degree of legislative (in)action necessary before judicial intervention was warranted, was to recommend the Continental courts' method of providing legislative notice prior to actual nullification of statutes. In endorsing the Continental approach, the learned judge justified his functional use of comparative resources on the basis that the foreign variations of judicial review, were "our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children."193

2. *Printz v. United States*

In *Printz*,194 the majority of the United States Supreme Court held that the impugned provisions of the Brady Act were unconstitutional, as they failed to adhere to the design and structure of the federal constitutional scheme.195

Justice Breyer, in his dissenting opinion, examined a variety of federal systems in Europe and argued that a comparative "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."196 He believed that by analyzing European experiences, America may discover a system that better serves the purpose of reconciling central authority with state autonomy.197 In support of this view, he pointed to the fact that in "some other countries facing the same basic problem,"198 it was usual for state bureaucracies to implement federal law. Justice Breyer clearly wanted to undertake a functional use of comparative resources whereby an evaluative comparison of federal systems would furnish an "empirical confirmation"199 of the most ideal solution.

193. *Id.* at 469.
195. *Id.* at 933.
196. *Id.* at 977 (Breyer, J., dissenting).
197. *Id.*
198. *Id.* at 976.
199. *Id.* at 971.
3. **H.K. Sar v Ng Kung Siu**

In *H.K. Sar v. Ng Kung Siu*,\(^{200}\) the Hong Kong Court of Final Appeal held that the Special Administrative Region’s criminal prohibition against the desecration of the national flag was not in violation of the accused’s constitutional right to freedom of expression.\(^{201}\) Particularly pertinent to our purpose is Justice Bokhary PJ’s concurring opinion, where he adopted a functional use of comparative resources when surveying the constitutional experiences of other liberal democracies. He first noted that in America, the United States Supreme Court had struck down both state\(^{202}\) and federal\(^{203}\) statutes criminalizing desecration of the American flag, albeit each decision was carried by a bare majority of five to four. The judge went on to contrast the American experience with the constitutional decisions of Italy\(^{204}\) and Germany,\(^{205}\) where the courts upheld the constitutionality of laws that protect the national flag and render breaches punishable by a fine or imprisonment. Faced with two conflicting lines of authorities, Bokhary stated:

> There are, it seems to me, essentially *two coherent approaches* in this area of constitutional law. One approach would be to say that even though there are always far more effective ways of making a point than by desecrating the national or regional flag or emblem, such desecration, however boorish and offensive, should nevertheless be tolerated as a form of expression. The other approach would be to say that by reason of the reverence due to them for what they represent and because so protecting them would never prevent anyone from getting his or her point across in any one or more of a wide variety of ways, those flags and emblems should be protected from desecration.\(^{206}\)

> It was only after examining both lines of authorities and assessing their normative merits that the judge came to the conclusion that the current safeguards to the sanctity of the national emblem in Hong Kong could be reconciled with the constitutional protection accorded


\(^{201}\) Id. at 926.


\(^{204}\) See Re Paris Renato, (Corte Suprema di Cassazione, Judgment No 1218, General Registry No 3355 of 1988, unreported) (Court of Cassation of Italy).


to a citizen's right to free speech. As he observed, the ban did not affect the substance of expression but touched "upon the mode of expression only to the extent of keeping flags and emblems impartially beyond politics and strife."\footnote{207} In the end, by exploring the vast constitutional resources outside the national borders, the judge reached the conclusion that the national flag was an intrinsic, solemn representation of statehood, and a prohibition against its desecration would only constitute a minimal impairment of a person's right to expression. He thus endorsed the European line of legal authorities as functionally more suited to the governance of Hong Kong.

E. Universalism

Some advocates of comparative constitutionalism speak of certain universal principles that are embedded in the law of the community, which may be discovered if judges engage in a universal use of comparative materials.\footnote{208} This use of comparative jurisprudence allows courts to examine the universal, or transcendent moral truths, discovered by their foreign brethren, with the eventual aim of incorporating them domestically. In the words of Sujit Choudhry, universalists subscribe to the notion that "constitutional guarantees are cut from a universal cloth"\footnote{209} and hence comparative sources would be eminently useful as "all constitutional courts are engaged in the identification, interpretation, and application of the same set of norms."\footnote{210}

This assimilation of foreign materials into the domestic fabric may arise out of the judicial recognition that norms in some measure may be explicable in terms of certain universals that transcend national boundaries. This recognition of global human rights does not translate into the anointing of one specific tribunal with the final authority to adjudicate over these rights; instead this power is dispersed amongst all national courts to interpret and apply these rights such that courts around the world resolve them in colloquy with one another.\footnote{211} In this instance, domestic courts are elaborating on, and interpreting, common norms drawn from the same constitutive core that resonates and animates through most if not all cultures. This section explores several foreign cases highlighting this normative core.

\footnote{207} Id. at 933.
\footnote{209} Choudry, supra note 6, at 825.
\footnote{210} Id. (emphasis added).
\footnote{211} Slaughter, supra note 108, at 122.
1. *Chng Suan Tze v. Minster of Home Affairs*

In the landmark 1989 decision of *Chng Suan Tze v. Minister of Home Affairs*,212 the Court of Appeal of Singapore decided that the judiciary would “objectively” review the exercise of the President’s discretion to detain persons under Sections 8 and 10 of the Internal Security Act, thereby overruling its previous decision that the President’s discretion was “subjective” and not open to judicial review.213 The court decided that the Singapore courts would ascertain whether the President’s detention orders were issued on the basis of national security considerations, rather than accept his word at face value.214 In this decision, Chief Justice Wee Chong Jin noted the judicial trend emanating from the Privy Council and that the highest courts in the Commonwealth required the Head of States to furnish reasonable grounds for a person’s preventive detention.215 The conclusion he drew was that “the time has come for us to recognize that the subjective test in respect of sections 8 and 10 of the ISA [Internal Security Act] can no longer be supported.”216 More importantly, for our purposes, Chief Justice Wee premised the Court’s new stance on the universalist understanding of the rule of law as illuminated by the comparative constitutional discourse: “The notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.”217

In vindicating the rule of law in Singapore, Chief Justice Wee appealed to transnational principles to justify the epistemological transplant into local soil. Although this decision was subsequently reversed by a constitutional amendment truncating judicial review in national security cases,218 *Chng Suan Tze* had laid down a groundbreaking legal precedent in Singapore for the universalist approach to adjudication to take root.

212. [1988] 1 S.L.R. 132 (Sing.).
213. Id. at 152.
214. Id.
215. Id. at 153.
216. Id. at 149.
217. Id. at 156.
218. Article 149 of the Singapore Constitution was amended to include a notwithstanding clause, thereby exempting laws enacted on the grounds of national security from the operation of constitutional liberties. The judiciary is also removed of any powers to invalidate any such laws.
2. **S. v. Makwanyane**

In *S. v. Makwanyane*,219 the Constitutional Court of South Africa unanimously held that the use of capital punishment in the criminal justice system was an unjustifiable violation of a person's right to life and dignity.220 What is perhaps most striking about this decision is the extensive embrace of comparative constitutionalism by all the judges. The judges, in separate opinions, surveyed over a hundred cases emanating from over ten nations.

Justice Mahomed was emphatic that "the dignity of all of us, in a caring civilization,"221 must be compromised by the act of repeating, systematically and deliberately, what society finds to be so repugnant in the conduct of the offender in the first place. In the same vein, Justice Mokgoro noticed the striking parallels between the Western concepts of humanity and menswaardigheid and the ethos embraced by the African notion of ubuntu: "Generally, ubuntu translates as humanness. In its most fundamental sense, it translates as personhood and morality. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality."222

Similarly, Justice O'Regan declared that "human dignity is important to all democracies,"223 as it is the "essence and the cornerstone of democratic government."224 By appealing to the transcendence of humanity that underpinned all societies, the judges were able to extract a commonality between the intrinsic values of traditional African society and the universal trend toward abolition of the death penalty. Essentially, it was the employment of this universalist approach to constitutional adjudication that permitted the court to vindicate a regime change in the South African penal system.

3. **S. v. Williams**

The Constitutional Court of South Africa in *S. v. Williams*225 invalidated the use of corporal punishment on juvenile offenders as cruel

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219. 1995 (2) SACR 1 (CC) (S. Afr.).
220. Id. at 88.
221. Id. at 96.
222. Id. at 106.
223. Id. at 112.
224. Id.
225. 1995 (3) SA 632 (CC) (S.Afr.).
and degrading. The court came to this conclusion after surveying the judicial and legislative practices of Canada, United States, Australia, New Zealand, Europe, Namibia, Zimbabwe, and Mozambique. As opined by the unanimous court, the comparative sources clearly demonstrated "unmistakably a growing consensus in the international community that judicial whipping ... offends society's notions of decency." Having identified this transcendent standard of decency, the court felt that although it was not bound to follow the international consensus, "neither can we ignore it." In fact, the Williams court declared passionately that "the Constitution now offers an opportunity for South Africans to join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights."

It is instructive to note that the Constitutional Court held that the international consensus against juvenile corporal punishment "found expression through the courts and legislatures of various countries." Through this holding, it implicitly recognized that the universality of certain norms need not be solely established by a supranational tribunal, but may be also articulated by a chorus of national legislatures and courts around the world acting in tandem to explicate norms that transcend national boundaries.

4. United States v. Burns

In United States v. Burns, the Supreme Court of Canada held that the Minister of Justice was constitutionally bound to obtain an assurance that the death penalty would not be sought against two Canadian fugitives as a condition for their extradition to the State of Washington. In reaching this decision, the court affirmed that the constitutional principles of fundamental justice included "principles which have been recognized by ... international conventions"
and that “the various sources of international human rights law . . . must . . . be relevant and persuasive sources for the interpretation of the Charter's provisions.”235 In weighing the factors in favor and against requiring extradition without assurance, the Supreme Court took pains to explore the state practices that favored the abolition of death penalty and the state practice amongst abolitionist states in requiring such assurances. The court concluded that the evidence did not establish an international law norm against the death penalty, or against extradition to face the death penalty.236 However, it also noted that the trend toward abolition in the Western democracies "mirrors and perhaps corroborates the principles of fundamental justice"237 that led to the abolition of the death penalty in Canada, thereby mandating such a Ministerial assurance.

The Burns decision illustrates how a universal use of comparative jurisprudence could lead courts to discover transcendent principles that warranted local incorporation. This judicial search for common norms outside the domestic polity is premised on the understanding that global courts are engaged in the common enterprise of expounding universal rights unconfined by national or political demarcations.

Conclusion

Montesquieu, the father of comparative law, had observed that "the political and civil laws of each nation . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another."238 According to this view, a country's laws are intrinsically linked to its history, politics, and geography, which is unique to itself, such that no comparative analysis "can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience in others."239 Although more than two hundred years have passed since Montesquieu's pessimistic warning, it would appear that his ghost is still alive and well in the United States.

Legal particularists' concern that the haphazard import of comparative materials would compromise the integrity of the domestic

235. Id. at 330-31 (emphasis added).
236. Id. at 287.
237. Id. at 335.
239. Tushnet, supra note 5, at 1265.
constitutional experience is largely misplaced as constitutional borrowings do not imply a mindless transplant of entire bodies of legal doctrine. The very nature of comparative analysis demands a rigorous examination of whether the empirical conditions within a specific area of consideration are conducive for "constitutional cross fertilization." Even the South African courts, which have been most zealous in using comparative reasoning, have held that "the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management." Similarly, the European Court of Human Rights has acknowledged that signatory states are permitted to implement the Convention with a "margin of appreciation," thus recognizing that socio-political differences may necessitate differential implementations in separate regions. When empirical and contextual variables have been properly considered, comparative constitutional analysis can facilitate the identification of relevant convergences in the different jurisdictions. This analysis consequently provides an indication of the extent to which transplanted constitutional materials would assume in their country of adoption the same role they had played in their country of origin.

Admittedly, the extent to which a constitutional state is susceptible to using comparative jurisprudence also depends on what it perceives to be the country's constitutional model: "what it means to have a constitution." Specifically, Seth Kreimer has identified three such constitutional models:

First, a constitution may be seen as the basic "operating system" by which the political and legal mechanisms of a society are structured. Second, a constitution might be viewed as a series of moral conceptions that constitute the best account of moral ideals by which a society should be guided. Finally, a constitution may be modeled as an element that defines national identity.

Pursuant to these categorizations, he has argued that "the receptiveness of a system of constitutional law to borrowings from other systems

245. Id.
depends... on which of these models governs the relevant constitutional interpretation."

Regardless of which of the three constitutional models a court may subscribe to, none of them forecloses the use of comparative sources in constitutional adjudication. Even if one views the constitution as an embodiment of national identity, a diagnostic expository or affirmative use of comparative materials, as explained above, would only facilitate this process of self examination. Alternatively, if one perceives the constitution to be an operating system, a functional use of foreign sources would be licensed, as domestic courts would only import features of other constitutional regimes "have shown themselves to be efficacious in advancing the goals our Constitution sets for itself." Finally, for those who view the Constitution as an embodiment of universal moral ideals or natural law, courts may find the universalist use of comparative sources most fruitful in discovering transcendent principles that warrant local incorporation.

The spread of democracy and the advent of globalization have led to a proliferation of dialogue within the transjudicial community. Anne-Marie Slaughter and Lawrence Heifer hail this development of overlapping judicial networks through collective deliberation as a positive step toward the promotion of a global rule of law. Yet in the United States, save in a few exceptional decisions, the highest courts have preferred to steer clear of this growing constitutional trend and remain on the sidelines of this global phenomenon.

In this age of judicial globalization, it would be most timely for the United States courts to recognize that a four-wall doctrine that insulates American jurisprudence from foreign influences serves no purpose today other than to preserve a misguided and unfounded sense of historical legitimacy. As Justice Brandeis once taught, "If we would guide by the light of reason, we must let our minds be bold." Perhaps it is time to raze these walls to the ground, once and for all.

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246. *Id.*
247. *Id.* at 641.
250. See discussion *supra* Part IV.