# Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*

TABLE OF CONTENTS



## I. INTRODUCTION

In *Printz v. United States*,[1] Justice Scalia, writing for the court, called


* J.D. candidate 2001, University of San Diego School of Law.


1. Printz v. United States, 521 U.S. 898, 935 (1997) (holding unconstitutional the "Brady Act's" interim provisions directing local law enforcement to conduct required background checks on purchasers of handguns as inconsistent with principles of U.S. federalism).

the use of foreign experiences "inappropriate" to the interpretation of a constitution.[2] Only one day earlier, however, in *Washington v. Glucksberg*,[3] Chief Justice Rehnquist, writing for the majority,[4] made extensive use of foreign experience to inform the Court's consideration of the constitutionality of Washington's statutory ban on assisted suicide.[5] One case explicitly condemns the use of foreign experiences, or comparative analysis, while the other explicitly invokes their use.[6] In interpretation of the Constitution, examples of foreign experiences appear in both Supreme and lower court decisions, but the justification for their use remains unclear.[7]

Dissenting in *Stanford v. Kentucky*,[8] Justice Brennan claims that a string of case law recognizes the legitimacy of the use of foreign legislation as an "indicator[] of contemporary standards of decency."[9]

---

2. *Id.* at 921 n.11.

3. Washington v. Glucksberg, 521 U.S. 702, 735–26 (1997) (upholding the constitutionality of a Washington statute making it a felony to cause one to commit or assist another in committing suicide).

4. Note that Justice Scalia joined the majority opinion in *Glucksberg*. *Id.* at 704.

5. *See Glucksberg*, 521 U.S. at 734–35.

6. Note that the cases could be distinguished in that *Printz* addressed issues of federalism, while *Glucksberg* addressed issues of due process. Scalia, however, at least in his writings, has been consistent in his condemnation of the practice, and has expressed the same sentiment in regard to issues of due process. *See* Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988).

7. Several articles have endorsed, at least to a limited degree, the use of comparative analysis in constitutional interpretation. *See generally* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999). These articles focus on the various ways in which a court might use foreign experiences in the resolution of domestic issues. What these authors attempt to show is how courts actually fit these methods of comparison into the larger framework of constitutional interpretation, and how some justification may be derived from the manner of use with regard to the courts interpretive methodology. Numerous authors have recognized the possible role of comparative analysis in constitutional adjudication. *See, e.g.*, Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772–73 (1997); J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1005 (1998); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 371–73 (1997).

8. Stanford v. Kentucky, 492 U.S. 361 (1989).

9. *Id.* at 389. In the majority opinion, Scalia rejects the practice. *Id.* at 369 n.1. Each in the line of cases includes reference to foreign experiences. *See* Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) (citing numerous examples of nations where juvenile executions are prohibited); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (noting the absence, severe limitation, or abolishment of the doctrine of felony murder in continental Europe, England, Canada, and India); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (noting that of sixty major nations surveyed in 1965, only three retained the death penalty for rape); Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (reporting that a survey of eighty-four countries revealed only two that imposed denationalization as a penalty for desertion).

The first in this line of cases is *Trop v. Dulles*.[10] In *Trop*, Justice Warren does use foreign materials,[11] but he enunciates no clear justification for their use.

Concurring in *United States v. Then*,[12] Judge Calabresi argues that the experiences of Germany and Italy might someday influence the interpretation of our Constitution's Equal Protection Clause.[13] Judge Calabresi justifies this assertion by noting that the constitutional systems in those countries are our "constitutional offspring."[14]

On one hand there is Justice Brennan's use of foreign materials in Eighth Amendment analysis. His use is limited in scope, but poorly justified. On the other hand, Judge Calabresi supplies a more thorough justification, but there is no clear limitation to the extent of foreign influence under his reasoning. These different approaches raise the question: Can foreign experience properly inform interpretation of the United States Constitution?[15]

Judges and academics are divided as to whether the resolution of constitutional disputes must turn wholly on domestic inputs or if there is in fact any room in United States constitutional jurisprudence to learn from the experiences of other nations.[16] Objections to the practice are

10. 356 U.S. 86 (1958).
11. *See id.* at 102–03.
12. United States v. Then, 56 F.3d 464 (2d Cir. 1995).
13. *See id.* at 468–69.
14. *Id.* at 469.
15. The answer to this question is necessarily linked to a court's interpretive method. Implicit in every debate over constitutional issues is a second debate as to how those issues are to be decided; that is, what interpretive methodology should be employed in reaching a decision. For a historical account and overview of several dominant interpretive theories, see PHILIP BOBBITT, CONSTITUTIONAL FATE (1982). There is no single accepted method, and the methods espoused take varied and distinctive forms. For a recent attempt to illuminate the debate over interpretive methods, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999).
16. *See* Choudhry, *supra* note 7, at 823; Jackson, *supra* note 7, at 583; Tushnet, *supra* note 7, at 1226–28. Choudhry, Jackson, and Tushnet each support some form of comparative analysis in constitutional interpretation. The current members of the Supreme Court also differ regarding the propriety of comparative analysis. Several justices have expressed support for the use of foreign materials. *See* Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) (stating foreign experiences can be useful even though not binding); William Rehnquist, *Constitutional Courts—Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993) (commenting on the growth of comparative law); Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24 (reporting Justices

premised upon the assertions that constitutional solutions should derive from purely domestic sources and that fundamental differences in constitutional systems will render attempts to transplant solutions ineffective.[17] The purpose of this discussion is to show (1) that courts do in fact use comparative analysis in the interpretation of the Constitution, (2) that courts use foreign materials in three distinct manners and within a limited framework, and (3) that the framework dissuades the objections to the use of foreign materials by limiting the scope of the use and the impact of those foreign materials.

Part II of this Comment provides a brief background of comparative analysis. This discussion is followed in Part III by an overview of the controversy surrounding the use of comparative analysis in domestic constitutional law. An examination of the motivation for providing support or justification for interpretive methods, in Part IV, completes the foundation necessary for the rest of the analysis to proceed.

Courts use comparative analysis in three different ways. The critical feature of each method, and the main thrust of this Comment, is that the use of comparative analysis is introduced into an opinion and structured such that the concerns voiced by the primary criticisms are deflected. This idea is summarized in Part V and is elaborated upon in Parts VI and VII. Courts use comparative materials to (1) illustrate the existence of relevant issues and to justify the court's consideration of those issues,[18] (2) provide the reader with a better understanding of independent reasoning by highlighting unique features of American constitutionalism,[19] and (3) illustrate possible empirical consequences where the court considers a departure from or modification of existing practice or doctrine.[20] Each mode is discussed in turn, using actual case examples.

## II. BACKGROUND

Comparative analysis, or the study of foreign legal systems, is not a novel concept.[21] A great deal of comparative work has been done in the

---

O'Connor and Breyer express the possibility of citing decisions by the European Court of Justice). *But see* Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (writing for the Court, Justice Scalia, calls the use of foreign experiences "inappropriate" to the interpretation of a constitution).

17. *See* discussion *infra* notes 25–38 and accompanying text.

18. *See* discussion *infra* notes 71–154 and accompanying text.

19. *See* discussion *infra* notes 155–74 and accompanying text.

20. *See* discussion *infra* notes 175–236 and accompanying text.

21. *See generally* MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS (1979). Comparative study finds its roots in the civil law nations of Europe, subsequently spreading to common law systems. *See* Christopher Osakwe, *K. Zweigert & H. Kotz's An Introduction to Comparative Law*, 62 TUL. L. REV. 1507, 1507 (1988) (book review).

area of constitutional law.[22] In recent years, the spread of constitutional democracies[23] has catalyzed the reemergence of comparative analysis as a significant issue in constitutional interpretation. The United States Supreme Court, however, has been reluctant to adopt the process. The Supreme Court's reluctance to incorporate foreign experiences into the interpretation of constitutional issues contrasts markedly with practices in various other constitutional democracies.[24]

---

22. This work has focused on the identification and illumination of structural similarities and differences among systems, comparisons of doctrine, and more complicated examinations of one nation's jurisprudential methods and assumptions in light of another's. *See* Choudhry, *supra* note 7, at 827–30. Until recently, however, the potential impact of comparative analysis on the actual interpretation of constitutions has been largely ignored. *See id.* Thus, a significant amount of work has used comparative materials to examine different constitutional systems, but little of it has addressed the actual use of comparative materials in constitutional interpretation. Although the amount of work in this field remains limited, several scholars have recently examined the implications of comparative analysis on the interpretation of constitutions. *See* sources cited *supra* note 7. Despite the relatively light academic treatment of comparative analysis in the resolution of constitutional issues, some courts have actively employed the comparative method. The Canadian Supreme Court has employed the method, and the South African Supreme Court does so with a specific constitutional mandate. *See* sources cited *infra* note 24.

23. *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) (discussing the recent spread of constitutional democracies); Irwin P. Stotzky, *Establishing Deliberative Democracy: Moving from Misery to Poverty with Dignity*, 21 U. ARK. LITTLE ROCK L. Rev. 79, 79 (commenting upon the "dramatic expansion of interest in the ideas of constitutionalism"); *see also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 890 (1996) (recognizing the present as "a time of constitutional ferment in much of the world").

24. Many examples emerge in South African and Canadian court opinions where foreign experiences influence the resolution of domestic controversy. For examples of instances in which South African courts have utilized comparative analysis, see State v. Makwanyane, 1995 (3) SALR 391 (CC), *available at* http://www.concourt.gov.za/judgments (banning capital punishment as cruel and unusual punishment under South Africa's Interim Constitution); Du Plessis v. De Klerk, 1996 (3) SALR 850 (CC), *available at* http://www.concourt.gov.za/judgments (holding that, under the Interim Constitution, the Bill of Rights did not apply to litigation between private parties); *In re* National Education Policy Bill 83 of 1995, 1996 SALR 1176, 1220–42 (CC), *available at* http://www.concourt.gov.za/judgments. Canadian courts have openly incorporated the influence of U.S. decisions in the interpretation of constitutional issues impacting the land rights of aboriginal peoples into the interpretation of Canada's Charter of Rights. *See* Choudhry, *supra* note 7, at 866. For examples of cases developing Canadian doctrine in the area of aboriginal rights and incorporating the reasoning of U.S. courts, see Van der Peet v. The Queen, [1996] S.C.R. 507, 541; Calder v. Attorney-Gen. of British Columbia, [1973] S.C.R. 313; St. Catharine's Milling & Lumber Co. v. The Queen, [1887] S.C.R. 577. Examples of comparative analysis in constitutional adjudication, however, are not limited to these two nations alone. Israel, for example, has drawn extensively from Canada's treatment of their Charter of Rights. *See generally* Adam M. Dodek, *The*

### A. *The Domestic Controversy*

There are several significant objections to comparative analysis in constitutional adjudication. Some objections arise because the use of comparative materials conflicts with the critic's preferred interpretive method.[25] Originalism and textualism are particularly incompatible with comparative analysis.[26]

---

*Charter . . . in the Holy Land?*, 8 CONST. F. 5 (1996).

Canadian use of comparative jurisprudence, while more extensive then that of U.S. courts, pales in comparison to the practice of South African courts. South African courts have used foreign experiences in the interpretation of both their interim and new constitutions. For a good general discussion of the use of comparative analysis in South Africa, see generally Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998).

What is more impressive, and may to a great extent marginalize the influence of the South African experience on attempts to justify comparative analysis in U.S. courts, is the fact that both the temporary interim constitution and the new constitution specifically authorize the use of comparative analysis in judicial review. *See* S. AFR. CONST. ch. 2, § 39, *available at* http://www.polity.org.za/govdocs/constitution/saconst02.html#39. The United States Constitution provides no explicit mandate for judicial review, although it has been interpreted as authorizing the practice. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–74 (1803). Necessarily, then, the text of the Constitution provides no clear license to invoke foreign materials in its interpretation. In light of the South African court's clear license to use comparative analysis, that court has not had to provide normative justification for the use of comparative analysis in the absence of a specific license. As a result, South African courts have not provided any justification that may be borrowed by American courts. The South African experience is, however, still informative in several ways: it provides empirical evidence of the practical results of comparative analysis in constitutional adjudication, illustrates the potential benefits of examining foreign experiences, and proves the viability of a system using comparative analysis.

25. For a practical summary of the various widely accepted methods of constitutional interpretation, see generally BOBBITT, *supra* note 15.

26. The intentions of the original founders of the Constitution are, to some degree, always fundamental to U.S. constitutional adjudication. Some commentators propose a very central role for these original intentions. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–65 (1989). Others, who may discount the role of originalism, are still hesitant to claim that originalism serves no purpose whatsoever. *See* Strauss, *supra* note 23, at 881. Originalism and its variants are hard to square with comparative analysis. It is no simple endeavor to show how the constitutional experiences of Australia or Switzerland might inform us as to what the intentions of the original founders may have been. However, if the question is framed differently (for instance: how might the use of foreign materials inform the resolution of an issue, such that the result reflects the intentions of the original drafters), foreign experiences may serve as indicators of the possible empirical results of any particular interpretation. A study of practices in foreign nations may help illuminate whether a proposed interpretation will in fact produce an empirical result in line with the intentions of the founders. For the proposition that foreign experiences may illuminate empirical consequences, see *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

The same criticism, that comparative analysis is not cohesive with the interpretive method, may be made, though perhaps to a lesser degree, by proponents of text based interpretation. For a discussion of textualism, see BOBBITT, *supra* note 15, ch. 3. Text

Another line of criticism stems from the related notions of American "exceptionalism"[27] and legal "particularism."[28] Exceptionalism can be thought of as the idea that the United States Constitution is unique and that the experience surrounding it is unique.[29] Particularism is the very similar idea that constitutions are unique expressions of national character.[30] Particularists claim that a constitution is defined by its people.[31] If particularist claims are valid, foreign experiences may be inappropriate to the interpretation of a constitution.

Criticism of the use of foreign materials in constitutional adjudication also focuses on the possible impact of variations between legal systems. Differences in legal systems are unavoidable. Even where they may appear minor, these differences will quite often have a significant impact on the validity of any reasoning derived from comparative materials.[32] Direct borrowing or transplantation of legal solutions or doctrines will, in the opinion of many scholars, be severely impacted by fundamental cultural and social differences.[33] In the opinions of some comparative

based interpretive methods seek to understand the text in terms of the modern social context. *See id.* It is conceivable that foreign experiences could play some role in a court's understanding of modern society. Nonetheless, if originalism or textualism is central to a particular interpretive method, the proponent of that method may be hesitant to consider foreign experiences.

27. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3 n.12 (1991) (expressing the sentiment that the United States should break free of European influence in defining itself and its Constitution); Michael Kammen, *The United States Constitution, Public Opinion, and the Problem of American Exceptionalism*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS AND RESPONSIBILITIES 267 (A. E. Dick Howard ed., 1992) (commenting upon the longstanding tradition of exceptionalism in American history).

28. *See* Choudhry, *supra* note 7, at 830–32. For criticism of the use of comparative analysis in constitutional interpretation on the grounds of particularism, see generally William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986); George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737 (1993); Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865 (1993).

29. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181–82, 188–93 (1999) (viewing the Constitution as an expression of American character).

30. *See* Choudhry, *supra* note 7, at 830–32.

31. *See id.*

32. *See* Jackson, *supra* note 7, at 595; *see also* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993) (discussing the advantages and disadvantages of legal transplants).

33. *See* J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 355 (1997); *see also* Daniel H. Foote, *The Roles of Comparative Law: Inaugural Lecture for the Dan Fenno Henderson*

scholars, transplantation simply cannot work and, "nothing can be translated."[34] Other critics counter that basic principles of constitutional law are "the same around the world."[35] If basic principles are indeed the same, fears that foreign experiences will be misinterpreted may be exaggerated.

An examination of the relatively few cases employing foreign materials in any significant manner reveals a rather dramatic shift with respect to early and later cases.[36] The shift is not in the positive justification for the practice, but in the manner in which comparative materials are employed. While none of these cases contain a specific or well-developed justification for the inclusion of foreign materials,[37] the

---

*Professorship in East Asian Legal Studies*, 73 WASH. L. REV. 25, 36 (1998).

34. John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 620–21 (1998). Practical problems are also important. The limited availability of documents from other systems, particularly non-English speaking courts, may detract from the practical impact of foreign materials. *See* Jackson, *supra* note 7, at 595. Simple, but fundamental, differences in the style in which opinions are crafted may inhibit accurate interpretation of a foreign jurisdiction's law. *See id.*

35. DAVID BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 10 (1995).

36. Early examples of foreign influence in constitutional adjudication tend to employ a technique more along the lines of borrowing. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (determining that the right to expel aliens is an "inherent and inalienable right of every sovereign and independent nation" by using European examples); Kilbourn v. Thompson, 103 U.S. 168, 187–89 (1880) (borrowing from England the notion that the power to hold for contempt is a judicial function, and can not, in matters of private rights, be enforced by the legislature). These earlier cases engage in lengthy discussions of foreign practice, derive the underlying legal principles, then transplant these principles into the domestic constitutional doctrine. *See Fong Yue Ting*, 149 U.S. at 707–11; *Thompson*, 103 U.S. at 183–90. In more recent opinions, the Court uses comparative materials in a less central role. *See, e.g.*, Washington v. Glucksburg, 521 U.S. 702, 732–35 (1997) (illustrating the existence of a legitimate state interest in restricting physician-assisted suicide by using Dutch experiences with euthanasia); Culombe v. Connecticut, 367 U.S. 568, 577–601 (1961) (using the practices of foreign nations to suggest that the United States Constitution contains limitations on police power that are deserving of consideration).

37. This is not to say that no justification for comparative analysis in constitutional adjudication has been offered. A series of opinions cite *Trop v. Dulles*, 356 U.S. 86 (1958), as authority for the proposition that foreign materials may inform certain aspects of Eighth Amendment jurisprudence. *See supra* note 9 and accompanying text. In *Trop*, however, Justice Warren provides no explicit normative justification for the use of comparative materials. Alternatively, Judge Guido Calabresi asserts that the common lineage of different constitutions supports the use of foreign experience in the interpretation of those constitutions. *See* United States v. Then, 56 F.3d 464, 468–69 (2d Cir. 1995) (concurring opinion). But these attempts to promote the use of comparative analysis in constitutional adjudication have not offered any specific guidance as to how these materials should be used, nor have they addressed any of the criticisms of comparative analysis.

Two scholars, Mark Tushnet and Sujit Choudhry, have proposed various methods by which courts may employ comparative analysis in constitutional adjudication. *See* Choudhry, *supra* note 7; Tushnet *supra* note 7. Both authors also offer a normative justification for each proposed method.

Tushnet describes what he calls a functionalist approach and an expressivist approach.

later cases have integrated foreign materials into their interpretive method in such a manner as to better preserve the fundamentally domestic roots of any legal conclusions.[38] Justification for the use of comparative analysis

---

*See generally* Tushnet, *supra* note 7. Functionalism asserts that particular constitutional provisions create structural arrangements designed to accomplish particular functions within a governmental framework. *See id.* at 1228. Comparative analysis may be used to illuminate the various functions and to show how constitutional provisions in other countries promote the same function. *See id.* This examination may reveal an opportunity to use foreign mechanisms, designed to achieve equivalent functions, within the U.S. constitutional scheme. *See id.* Tushnet finds justification for the functionalist approach where the Constitution requires an empirical inquiry. *See id.* at 1235–36. A determination of standing requires, in some instances, that the court determine whether to resolve the issue will alter the relationship amongst the three branches. This is a functional analysis, and Tushnet argues that "functional inquiries are inherently empirical" and that "in resolving empirical inquiries it makes sense for a decisionmaker to use whatever empirical information he or she can. In this way, a functionalist analysis of Article III does indeed license comparative inquiry." *Id.* at 1235.

Expressivisim contends that "constitutions help constitute the nation, to varying degrees in different nations, offering to each nation's people a way of understanding themselves as political beings." *Id.* at 1228. Comparison of one system to another provides an opportunity to learn about one's own constitutional system. *See id.* at 1228–29. The license to use the expressivist method comes from the basic nature of the informed and educated judge. It is one more input, like knowledge of history, philosophy, or literature that a decision-maker may use to inform his interpretation of the Constitution. *See id.* at 1236–37.

Choudhry proposes three methods not entirely dissimilar to those proposed by Tushnet. *See generally* Choudhry, *supra* note 7. The first proposed method, universalist interpretation (similar to Tushnet's functionalism, but oriented more towards individual rights), expresses the notion that "constitutional guarantees are cut from a universal cloth, and, hence, that all constitutional courts are engaged in the identification, interpretation, and application of the same set of norms. Those norms are comprehended as transcendent legal principles that are logically prior to positive rules of law and legal doctrines." *Id.* at 825.

The second method, genealogical interpretation, focuses on the relationships of "descent and history" among related constitutional systems. *Id.* These relationships are offered as justification for the importation of constitutional solutions from one system to another. *See id.*

Choudhry's third method, dialogical interpretation, proposes that courts may "identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions." *Id.* Similarities may warrant the importation of ideas, and differences "may sharpen an awareness of constitutional difference or distinctiveness." *Id.*

The bulk of each author's discussion relates to the use of comparative analysis by foreign courts, rather than interpretation of the United States Constitution.

38. For example, the decision in *Culombe v. Connecticut*, 367 U.S. 568 (1961), is derived directly from existing precedent, despite the extensive discussion of foreign practice. *See* discussion *infra* notes 71–117 and accompanying text. The decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is rooted in domestic practice, tradition, and precedent. *See* discussion *infra* notes 177–215 and accompanying text.

in constitutional interpretation is furthered by employing foreign materials within the context of an interpretive framework based on precedent that both focuses and limits the foreign material's impact. The limiting effect of this framework prevents the occurrence of the dual risks, borrowing and nondomestic solutions, most often cited by critics of comparative analysis in constitutional interpretation.

### *B. Judicial Review and the Need for Justification*

The impetus to support an interpretive theory with an underlying justification originates in concern for the integrity of the judicial process and respect for the rule of law. Neither judicial review itself, nor, consequently, any guidelines for the exercise of judicial review, is explicitly established by the text of the Constitution.[39] The justification for these practices must then depend, at least in part, upon extrinsic sources.[40] Just as any theory of interpretation is more effective when justified by some underlying rationale, the use of comparative materials within a specific interpretive method needs justification.

Controversy over judicial review existed prior to ratification of the Constitution and persisted for some time after.[41] Justice Marshall, in *Marbury v. Madison*,[42] settled the issue.[43] The most effective of Justice Marshall's arguments was grounded in the notion of the Constitution as the supreme law, but law nonetheless. If the Constitution is law, then interpretation of the Constitution remains within the scope of the Court's powers enunciated in Article III.[44] The practice of treating the Constitution as law, rather then something of a different nature, draws support from Alexander Hamilton's statement that, "[a] constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."[45] Hamilton justifies this notion by describing the Constitution as the will of the people, and asserting that the will of the people should always trump the acts of elected representatives.[46]

---

39. *See* U.S. CONST. art. III.
40. *See* Fallon, *supra* note 15, at 539.
41. For a brief description of the origins of judicial review in the United States, see JOHN ARTHUR, WORDS THAT BIND 8–16 (1995).
42. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
43. Justice Marshall's opinion has been credited with providing the "classical defense" for judicial review. *See* ARTHUR, *supra* note 41, at 10.
44. *See* ARTHUR, *supra* note 41, at 13–14.
45. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
46. *See id.* at 467–68.

Once judicial review is established, various means of performing the task begin to develop.[47] An extensive body of literature, enunciating explicit normative justifications for each method within the specific context of American constitutional jurisprudence, supports various interpretive constitutional methodologies.[48]

In *Constitutional Fate,* Philip Bobbitt concludes his discussion of judicial review by declaring that there is no "fundamental principle" underlying and legitimizing the process of judicial review.[49] Judicial review, contends Bobbitt, needs no foundation, and further, none can be derived.[50] Legal truths do exist, but only in the context of a specific structural argument or convention, and there is no way to definitively choose a particular convention.[51] Bobbitt's conclusions might allow one to then ponder the need to actually justify a chosen interpretive method for its own sake, but this conclusion tends to leave an unpleasant taste.

In framing his own discussion of comparative analysis in constitutional interpretation, Sujit Choudhry nicely puts a more attractive proposition.[52] The need to justify a mode of constitutional interpretation, he asserts, arises from "the premise that law is the source of, and the means for the exercise of, the coercive power of the state."[53] The exercise of power by the executive and legislative branches is legitimized through "public justification" of the law via the courts.[54] This process of justification is accomplished through reasoned discourse; the courts legitimate the exercise of power by serving as a forum where lawmakers are able to enunciate their reasons.[55]

The process of reason giving, however, does not end with the lawmakers. It is equally important that courts give public justification for their own decisions, and this requirement of reason giving extends to justification of the interpretive methods employed in arriving at a decision. For Choudhry, a court's interpretive methodology defines its

47. For a summary, see BOBBITT, *supra* note 15. For a discussion of the philosophical justification for judicial review and a discussion of the various means by which it may be accomplished, see ARTHUR, *supra* note 41.
48. *See generally* Fallon, *supra* note 15.
49. *See* BOBBITT, *supra* note 15, at 237.
50. *See id.*
51. *See id.* at 234.
52. *See* Choudhry, *supra* note 7, at 824.
53. *Id.* Choudhry, in his discussion, is concerned only with comparative analysis, but his reasoning may transcend methodologies.
54. *Id.*
55. *See id.*

"institutional identity," and "the very legitimacy of judicial institutions hinges on interpretive methodology."[56]

Thus, the integrity of judicial review depends on the use of interpretive methods that can themselves be justified. The question then becomes whether or not American courts can justify the use of comparative analysis as an interpretive method (or, more precisely, as part of an interpretive method) or, alternatively, whether our particular form of constitutionalism is not receptive to the influence of foreign experiences. In other words, does the explicit use of comparative analysis undermine the legitimacy of American judicial review?

### *C. A Justification in the Method*

Judicial proponents of comparative analysis in constitutional interpretation have, in some cases, adapted the manner in which comparative materials are used within the interpretive framework so as to address the primary concerns of critics.[57] Positive justifications based on ancestral linkage,[58] functional similarity[59] or empirical illumination[60] (which separately or individually lend support to the use of comparative materials) are supplemented by adapting the means in which these materials are used in order to meet criticisms. Supporters of comparative analysis have used foreign materials within interpretive frameworks, and in such ways, as to allow for the material's productive contribution to the interpretive process, while simultaneously limiting the effects of foreign materials objected to by critics of their use. By meeting the concerns of critics, the supporters of comparative analysis, both explicit and implied, are better able to justify the use of foreign materials. Any amount of positive support for a legal or interpretive contention may falter if criticisms are left unaddressed. The early cases explicitly employing foreign experiences illustrate this problem.[61] More

---

56. *Id.*; *see also* Tushnet, *supra* note 7, at 1229–30.

> [C]onstitutional interpretation is an exercise within U.S. constitutional law, which has its distinctive methods and sources on which interpreters may justifiably rely. We must know what methods and sources authorize interpreters to refer to constitutional experience elsewhere before we can examine how that experience aids us in interpreting the Constitution.

Tushnet, *supra* note 7, at 1229–30.

57. *See* discussion *supra* notes 25–38 and accompanying text.

58. *See* United States v. Then, 56 F.3d 464, 468–69 (2d Cir. 1995).

59. *See* Printz v. United States, 521 U.S. 898, 976–78 (1997) (Breyer, J., dissenting).

60. *See* Washington v. Glucksberg, 521 U.S. 702, 734–35 (1997).

61. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893). In *Fong Yue Ting*, the majority opinion focused on the traditional powers of sovereigns in other nations. *See id.* at 707–11. The constitutionality of the act depended on the extent and nature of the government's power. *See id.* at 711. The Court's determination is made

recent cases utilizing foreign experiences have employed them in such a manner as to address the primary criticisms.[62]

Objections to the use of comparative materials tend to stem either from fears over the practical complications of direct "borrowing," or from exceptionalist or particularist concerns that constitutional interpretation be rooted in the American experience. These objections are countered by basing any interpretive exercise employing foreign materials in an interpretive method centered on the examination of established precedent.[63]

---

almost entirely by analogy to foreign practice. The nature of the opinion, and its use of foreign authority, leaves it vulnerable to the criticisms of the two dissents. Justice Brewer, in dissent, emphasizes the unique nature of the United States' federal government and the Constitution's role in emphasizing the very deliberate departure from the practices of other states. *See id.* at 737–38. Justice Brewer writes:

> The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

*Id.* at 737.

Justice Field, echoing Justice Brewer, objects to the importation of the notion of a sovereign's inherent power to banish. *Id.* at 757. Justice Field contends that "even if that power were exercised by every government of Europe, it would have no bearing in these cases." *Id.* Essentially, Justices Breyer and Field object to the foreign, rather than domestic, source of the interpretive solution. The majority opinion is vulnerable to this criticism in two ways. First, it does not offer a positive justification for the use of foreign practices to reach an interpretive conclusion regarding the Constitution, and second, the manner of use leaves the author of the opinion unable to effectively answer the criticism of the dissenting Justices. The solution to the interpretive puzzle has its source in foreign experience, not in an examination of domestic law, history, or tradition.

62. *See, e.g.*, Knight v. Florida, 528 U.S. 990 (1999) (Breyer, J., dissenting). Justice Breyer uses comparative materials to argue for the consideration of an issue, rather than for an actual conclusion. *See* discussion *infra* notes 119–54 and accompanying text. Justice Frankfurter employs comparative materials in the same manner in *Culombe v. Connecticut*, 367 U.S. 568 (1961). *See* discussion *infra* notes 77–118 and accompanying text. Other examples exist in which courts have used comparative materials in a limited manner. *See* discussion *infra* notes 155–236 and accompanying text.

63. Phillip Bobbitt calls interpretive methods centered on precedent "doctrinal." *See* BOBBITT, *supra* note 15, at 43–47. A court must follow existing precedent, distinguish it, or overrule it. *See id.* at 43.

Some scholars propose that constitutional adjudication takes a form that is essentially that of the common law. *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 127 (1990); Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 470 & n.41 (1989) (book review). *See generally* Strauss, *supra* note 23. This need not come as a surprise considering the central role the common law method plays in our courts and teaching institutions. *See* Strauss, *supra* note 23, at 887–88.

Comparative materials are employed in three distinct facets of the interpretive process. Justices have employed comparative materials, for instance, to help illustrate the existence of an issue and to justify the Court's address of that issue.[64] Justices may also support the adoption of one line of reasoning over another by using comparative materials to highlight the unique aspects of the Constitution.[65] Lastly, justices have

---

Strauss argues that the accepted notions of how the Constitution is interpreted cannot offer a complete understanding of actual practice. *See id.* at 890. For example, neither textualism nor originalism accurately reflect actual practice. *See id.* Where the text speaks clearly, there is no practical need for careful consideration by the courts. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244 (1987). Sometimes original intentions are decisive. *See* Strauss, *supra* note 23, at 881. Often, however, the actual practice of courts cannot easily be squared with the text, and original intentions count for little or nothing. *See id.*

Text in particular, and original intentions to a lesser degree, cannot be ignored entirely. At some level, judicial decisions must be reconcilable with the Constitution's text. However, a realistic assessment reveals that the text is, for the most part, treated quite liberally in written opinions. *See id.* Entire opinions often completely neglect any specific discussion of the actual wording of the Constitution. *See id.* The intentions of the Constitution's framers are always a factor, at least in the sense that, to some degree, they have contributed to the development of current doctrines. Original intentions have long been, and remain, an authoritative basis for constitutional interpretation. Despite the predominance of original intentions in interpretive theory, they are hardly ever the sole or major determinative factor in a court's reasoning, and original intentions are always susceptible to contradiction or alternative interpretation. *See id.* For discussions of the applications of originalism, see Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 472–500 (1981); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

In many opinions, precedent plays the central or dominant role in the Court's determinations. *See, e.g.*, Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994). In many instances, constitutional issues are resolved without a single quote from the Constitution. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Culombe v. Connecticut, 367 U.S. 568 (1961). Issues are decided wholly on whether or not the facts of the case at hand can be distinguished from precedent, and where they cannot, the Court may engage in a discussion of the desirability of breaking with established doctrine. For an overview of the manner in which courts are bound by, work with, and modify existing precedents or doctrine, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 362–648 (1958). As the various Constitutional doctrines have evolved away from the strict interpretations of text and original intentions, the doctrines developed by the Court have developed an independent legitimacy. As put by David A. Strauss, "our written constitution has, by now, become part of an evolutionary common law system, and the common law—rather then any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law." Strauss, *supra* note 23, at 885.

64. See *Knight v. Florida*, 528 U.S. 990 (1999), in which Justice Breyer uses foreign experiences to illustrate the need to consider the possible constitutional prohibitions on extremely lengthy delays of executions. Consider also *Culombe*, 367 U.S. 568, in which Justice Frankfurter uses examples of foreign experience to argue that the constitutional limitations of police interrogation warrant the Court's consideration.

65. See *Raines v. Byrd*, 521 U.S. 811, 828 (1997), in which Chief Justice Rehnquist uses foreign practice to highlight the Constitution's distinct standing requirements.

used foreign materials to inform the empirical consequences of differing treatments of doctrine.[66]

This discussion explores how comparative materials have, in recent cases, been used in constitutional interpretation such that they are not central to any conclusion reached, and that the resulting interpretation of the Constitution could stand independently of foreign support. Solutions to constitutional questions are neither borrowed, nor are they rooted in any source other than domestic. Foreign materials are used only to clarify, or lend support to, the reasoning behind discrete steps in the interpretive process. Just as the foreign materials are presented so as to affect only specific and limited aspects of the reasoning process, the central role of precedent dramatically limits the possible impact or overextension of the foreign materials.[67]

---

66. See *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997), in which Chief Justice Rehnquist considers the Dutch experience with euthanasia in assessing the various state interests in maintaining a statute banning assisted suicide. *See also* United States v. Walton, 207 F.3d 694, 698 n.5 (4th Cir. 2000) (using similar foreign practice to bolster the contention that there is no constitutional requirement that a trial court define "beyond a reasonable doubt").

67. Proponents of more traditional textual or originalist interpretive standards promote the tendency of these interpretive techniques to limit the impact of a judge's moral disposition on the resolution of constitutional issues. *See* Strauss, *supra* note 23, at 925. The primary criticism of common law type constitutional interpretation is that it does not sufficiently limit the judiciary's discretion. *See id.* Strauss argues that this criticism of the common law method is inaccurate. *Id.* at 925–26. The common law has developed a self-limiting system. Precedent binds judges, and where they wish to break ties with an existing doctrine, the integrity of the court depends upon the showing of good and well-considered reasons. *See id.* at 926–28. Strauss sees the limiting effect as arising from two different traits of the common law method. The first, traditionalism, is the idea that there is a strong presumption in favor of precedent because previous holdings have stood the test of time and represent a sort of "accumulated wisdom." *Id.* at 891–92. The second aspect, conventionalism, encourages respect for precedent on the grounds that some issues are better settled, even if not ideally. *See id.* at 906.

Where a court proposes to break with established doctrine it may do so upon a showing that moral or policy concerns are sufficient to outweigh the presumption in favor of established practice. Courts must strike a balance between respect for precedent and the current needs of society. "The reason for adhering to judgments made in the past is the counsel of humility and the value of experience. Moral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do, traditionalism must give way." *Id.* at 902.

For an alternative view of the importance of precedent, see generally James C. Rehnquist, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345 (1986).

## III. THREE USES OF COMPARATIVE MATERIALS

The Court has used comparative materials in three distinct fashions. In each case the predominant focus of the interpretive effort is on review and treatment of relevant precedent. Also, in each case, the role of comparative materials is limited (not to be confused with being made insignificant) by the interpreter's reliance on doctrine.

The three uses of comparative materials in written opinions are: (1) to illustrate the existence of, or define, relevant issues and justify the Court's consideration of those issues;[68] (2) to provide the reader with a better understanding of independent reasoning by highlighting unique features of American constitutionalism;[69] and (3) to illustrate possible empirical consequences where the Court considers a departure from, or modification of, existing practice or doctrine.[70]

### *A. Definition and Justification of Relevant Issues*

Comparative materials have been used to help define relevant issues and to justify judicial scrutiny of those issues. Before a court may embark upon the task of resolving a dispute, the court must first determine, with some specificity, what the relevant issue or issues are.[71] More importantly, the court must also justify the exercise of its appellate authority over the presumably well-considered and good-faith determination of the lower court. Support for a court's consideration of issues is especially important where the issue or issues are constitutional in nature.[72] A decision on constitutional questions practically removes the issue from the consideration of the legislature and the democratic process.[73] This distinctive aspect of constitutional adjudication demands that a court be particularly thorough in making the determination to settle disputes on constitutional grounds.[74] Only after relevant issues are isolated, and their consideration supported, can the search for relevant

68. *See* discussion *infra* notes 71–154 and accompanying text.
69. *See* discussion *infra* notes 155–74 and accompanying text.
70. *See* discussion *infra* notes 175–236 and accompanying text.
71. The need to clearly articulate the issue to be addressed is particularly strong with regard to the Supreme Court and lower Article III courts. The various requirements of justiciability demand a clear understanding of the issues at hand. For example, the standards for standing require that, in all controversies, the nature of the harm must be defined. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Some issues, particularly those involving questions of federalism, may require a determination as to whether the issue is a nonjusticable political question. *See* Baker v. Carr, 369 U.S. 186, 198–99 (1962).
72. *See* Moore v. East Cleveland, 431 U.S. 494, 502 (1977).
73. *See id.*
74. *See id.*

precedent begin. Comparative materials or foreign experiences can provide valuable insight as to what really may be at issue and reinforce the importance of addressing those issues.

The following discussion focuses on two cases, each of which uses comparative materials to help the court define the relevant issue and justify the decision to consider the materials. The first is the majority opinion of Justice Frankfurter in *Culombe v. Connecticut*.[75] The second is the more recent use by Justice Breyer in his 1999 dissent to the Court's denial of certiorari in *Knight v. Florida*.[76] Both justices employ foreign materials in a very similar fashion.

### *1. Culombe v. Connecticut*

In *Culombe*, Justice Frankfurter uses foreign experience to support the necessity of the constitutional analysis that follows. The Court's conclusion, however, is ultimately derived entirely from an examination of existing precedent.[77]

The structure of Justice Frankfurter's opinion is important. The Court's treatment of precedent is preceded by an introductory overview and a lengthy discussion incorporating many examples of foreign practice. This discussion of foreign practice gives the reader a stronger sense of the gravity of the issues addressed. It also illuminates the fact that, while the liberty issues addressed may be universal, the treatment is not necessarily homogenous. The following discussion illustrates the various portions of Justice Frankfurter's opinion. In doing so, it emphasizes the role of comparative materials and distinguishes the portion of the opinion integrating foreign practice from the portion where an actual examination of the constitutional implications of precedent occurs.

*Culombe* addressed the petitioner's claim that the admission into

75. Culombe v. Connecticut, 367 U.S. 568 (1961). Justice Frankfurter was an enthusiastic advocate of the use of comparative materials. In several cases, for instance, Justice Frankfurter applies foreign experiences to issues of federalism. *See* Freeman v. Hewit, 329 U.S. 249, 251 n.1 (1946) (majority opinion); New York v. United States, 326 U.S. 572, 580 n.4 (1946) (majority opinion); United States v. County of Allegheny, 322 U.S. 174, 198 (1944) (dissenting opinion); Williams v. North Carolina, 317 U.S. 287, 305–06 (1942) (concurring opinion); State Tax Comm'n v. Aldrich, 316 U.S. 174, 183–84 (1942) (concurring opinion); Graves v. New York, 306 U.S. 466, 490–91 (1939) (concurring opinion). For another decision in the area of Fourth Amendment rights, see Malinski v. New York, 324 U.S. 401, 416–17 (1945) (concurring opinion).

76. Knight v. Florida, 528 U.S. 990, 993 (1999).

77. *See Culombe*, 367 U.S. at 601–22.

evidence of his murder confession was an error and a violation of his Fourteenth Amendment due process rights.[78] The petitioner, Culombe, was of questionable mental competency,[79] and his treatment by police officers, including the duration of detainment,[80] access to counsel[81] and emotional manipulations,[82] raised questions as to the validity of the murder confession obtained during that detainment.[83]

An overview of Justice Frankfurter's opinion reveals the structure of his reasoning. Justice Frankfurter begins his analysis with a review of the related precedent and domestic concerns.[84] Justice Frankfurter's introduction gives the reader the background necessary to understand the analysis that follows.

In light of the proposition that "one cannot adopt 'an undiscriminating hostility to mere interrogation,'"[85] Justice Frankfurter frames the relevant issue by asking what "characteristics" of interrogation are allowable, consistent with conceptions of the "Anglo-American accusatorial process."[86] The first step in Justice Frankfurter's analysis of the issue is to review the competing concerns: the need for interrogation, the methods that necessarily accompany interrogation, the dangers of withholding counsel, and the risk that providing counsel will impede the police in solving the crime.[87] With these factors in mind, Justice Frankfurter concludes: "The

78. *See id.* at 570. *Culombe* is Justice Frankfurter's "ambitious attempt" to provide lower courts much needed guidance in application of the voluntariness test for confessions. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 568–69 (1999). Most commentators considered the attempt overly complicated and of little help in practical applications by lower courts. *See id.*

79. Culombe is described as a "thirty-three-year-old mental defective of the moron class with . . . a mental age of nine to nine and a half years." *Culombe*, 367 U.S. at 620. Culombe was "suggestible" and subject to intimidation. *Id.* at 621.

80. Culombe was detained on a Saturday afternoon, and questioned repeatedly until finally confessing to murder on the following Wednesday night. *See id.* at 607–11. Culombe was questioned repeatedly during the course of his detainment, and the delay in arraignment (from Saturday until Tuesday) amounted to a violation of state law. *See id.* at 609–11.

81. Culombe made repeated requests for counsel but his requests were denied. *See id.* at 609.

82. The investigators convinced Culombe's wife to pressure him to confess, which, following a discussion with his wife, he did. *See id.* at 612–16.

83. *See id.* at 570.

84. Justice Frankfurter recognizes that interrogation or questioning is an integral part of law enforcement activity, so much so that it may be justified "even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths." *Id.* at 571. Justice Frankfurter also recognizes the potential for police abuse and the risk that, despite legal prohibitions against improper techniques, intimidation alone may accomplish the interrogator's goal. *See id.* at 574–75.

85. *Id.* at 576.

86. *Id.* at 577.

87. *See id.* at 577–78.

nature and components of this problem, concerning as it does liberty and security, had better be overtly and critically examined than smothered by unanalyzed assumptions."[88]

Following this summary of practical concerns,[89] and a resulting conclusion that the proper extent of police conduct in questioning demands careful consideration,[90] Justice Frankfurter engages in a discussion meant to bolster his contention that the concerns over the constitutionality of confessions warrant careful scrutiny.[91] Justice Frankfurter, because of the practical consequences of any decision on the issue, supports his decision to address the constitutionality of the confession with an independent argument. The independent argument is meant to emphasize the importance of the issue, not resolve it.[92]

It is in this second portion of his opinion that Justice Frankfurter employs foreign materials.[93] Justice Frankfurter's goal at this stage is not to resolve the issue, but rather to support his proposition that there is ample concern to warrant a new examination of the constitutional limitations on police interrogation.[94] Discussion of binding precedent is reserved for later in the opinion, and there is, at this stage, no attempt to apply the particular facts of the case to the discussion.[95]

Justice Frankfurter devotes nearly twenty-five pages to this second portion of the opinion.[96] In order to support consideration of the issue, and to help illustrate the many dimensions of the issue, Justice

88. *Id.* at 578. Justice Frankfurter describes the two "poles" of the discussion. The first pole is the understanding that "[q]uestioning suspects is indispensable in law enforcement." *Id.* at 578 (quoting People v. Hall, 413 Ill. 615, 624 (1953)). The second pole is comprised of the "cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it." *Id.* at 581.

89. *See id.* at 568–77.

90. *See id.* at 578.

91. *See id.* at 577–601.

92. In addressing Culombe's contentions, the Court (assuming any new departure from, or expansion of doctrine) circumscribes to some degree the legislative autonomy of state governments. By setting constitutional guidelines for the proper extent of police questioning, the issue is removed from the democratic sphere. The decision to embark upon an analysis of constitutional issues thus demands ample justification.

93. References to foreign materials are only made within one discrete portion of the opinion. *See id.* at 577–601.

94. Justice Frankfurter has not yet discussed the facts of the case. *See id.* at 577–606. Justice Frankfurter, at this stage of the opinion, is therefore not in a position to resolve any issue because the issue has not been concretely defined.

95. Note that this portion of the opinion precedes the summary of facts. *See id.*

96. *See id.* at 577–601.

Frankfurter engages in a wide-ranging discussion of the many similar instances that have been settled by both state and foreign courts, and by reference to academic literature.[97]

Foreign experiences discussed by Justice Frankfurter include France's practices regarding the requirements of counsel.[98] French experiences highlight the fact that any decision affecting a suspect's right to counsel will impact the effectiveness and nature of interrogation.[99] The effectiveness of interrogation and crime prevention must be considered concurrent with concerns for individual rights.[100] Any treatment of the constitutionality of certain police practices must be conducted with an awareness of this tradeoff.[101]

French and English experiences are cited to help distinguish inquisitorial from accusatorial systems.[102] Whether a system of justice is inquisitorial or accusatorial impacts the role and scope of police interrogation. In framing the limits of our own system, Justice Frankfurter uses foreign experiences to help illustrate its accusatorial nature.[103] An understanding of the accusatorial nature of our system is important because it raises considerations of fairness and propriety in interrogation which are distinct from those of an inquisitorial system.[104]

A more than cursory discussion, with citations of significant case law, is included in a footnote accompanying mention of the English requirement that extrajudicial confessions be voluntary.[105] The English

---

97. *See id.* Justice Frankfurter finds broad similarity amongst the various courts reviewed: "[T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials." *Id.* at 589–90.

98. *See id.* at 580 n.20. French law (at the time Frankfurter wrote the opinion) required that an accused be allowed representation by counsel before the "juge d'instruction." *See id.* Justice Frankfurter comments: "It is significant that critics of French criminal procedure attribute the presence of third-degree methods and extra-judicial police interrogation in France to the impediment to judicial inquisition . . . ." *Id.*

99. *See id.* at 580 n.20.

100. *See id.*

101. *See id.* at 587.

102. *See id.* at 582 n.24. The permissible bounds of interrogation and the techniques employed depend on the requirement of the accusatorial system "that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Id.* at 582. Justice Frankfurter notes that continental countries employing the inquisitorial method have long since abandoned reliance on torture. *See id.* at 582 n.24.

103. *See id.*

104. *See id.* at 583–84.

105. *See id.* at 583–84 n.25. The original rationale for the English exclusionary rule is the reliability of confessions. Justice Frankfurter asserts that the additional rationale of preserving the fundamental tenet of the accusatorial system—that men not be compelled to convict themselves—would be compromised by less than voluntary confessions. *See id.*

requirement that extrajudicial confessions be voluntary[106] simply supports the notion that the voluntariness of a confession may have important implications. If voluntariness is important, then a review of practices that affect the voluntariness of confessions may be warranted.

The widespread requirement in state law that a prisoner be taken before a judicial officer with some promptness is supplemented by an overview of related foreign practice, including the experiences of Canada, Scotland, and the Philippines.[107] The practices of these foreign nations illustrate the effect that prompt presentment before a judicial officer may have on the determination of the fairness of any confession that follows.[108] These fairness concerns underlie, in part, the Court's decision to consider the issue. The conclusion that Justice Frankfurter draws is that there is "unanimity for the proposition" that presentment before a judicial body within a reasonable period of time is implicit in the protection of personal liberty.[109]

Not only is the discussion of the limitations of police power supplemented by the inclusion of foreign materials, but the experiences of those very same foreign governments also help inform the recognition that limitations of police power cannot be absolute and that there is a very real need for police interrogation.[110] In short, Justice Frankfurter proposes that there is a need to limit police conduct, but that those limitations cannot be absolute. He uses foreign materials to help illustrate his point.

It is important to note that, at this point, Justice Frankfurter has not attempted to address the facts of Culombe's case.[111] There is also a notable absence of real discussion of applicable Supreme Court decisions.[112] If the issues delineated at the outset are not addressed here,

106. *See id.*

107. *See id.* at 584 n.26. The proposed purpose of these laws is to "protect criminal suspects from all of the dangers which are to be feared when the process of police interrogation is entirely unleashed." *Id.* at 584.

108. *See id.*

109. *Id.* at 586 n.26.

110. *See id.* at 588–90. Justice Frankfurter cites the practice of English and Canadian courts to allow the introduction of confessions secured during interrogation. *See id.*

111. The portion of the opinion containing the foreign references, *see id.* at 577–601, does not contemplate the specific facts of Culombe's confession, nor does it explore the constitutional implications of any of the relevant facts.

112. There are, however, some contrasts made between foreign and domestic materials. *See id.* at 590–92.

so much as related issues are reviewed, and if the facts relevant to the determination of those issues are in no part factored into the discussion, what then has Justice Frankfurter accomplished? The answer is that he has justified the next step of his analysis (resolution of the issue), and he has clarified the issue. The universal nature of the liberty concerns at issue facilitates comparison to foreign experiences.[113] These foreign experiences are not offered for the solutions or conclusions they propose, but to support the contention that the concern for proper treatment is a genuine one, and that this concern warrants consideration in light of constitutional standards. Once this initial step is established (with the help of comparative materials), then the analysis can legitimately turn to the actual content of the U.S. Constitution and the meaning of voluntary.[114]

That this initial portion of the discussion is not material to Justice Frankfurter's actual resolution of the issue becomes apparent when one reads on. The references to foreign experiences and materials no longer appear. Instead, Justice Frankfurter proceeds with a very traditional-style overview of related and binding precedent, a discussion of the facts of the case, and an application of the cases discussed to those facts.[115] Justice Frankfurter concludes that the confession was indeed coerced and this determination is made entirely upon application of U.S. precedent.[116]

Justice Frankfurter constructs an opinion that reflects the influence of the common law method. His interpretation of the Fourteenth Amendment issue does not revolve around any reading of the text; in fact, there is no discussion whatsoever of the Constitution's text.[117] This opinion also fails to invoke, in any serious manner, the intentions of the founders. Justice Frankfurter's opinion rests entirely upon application of precedent and the established doctrines.[118] The doctrines that have developed from Fourteenth Amendment adjudication have enveloped the text of the Amendment to the point that discussions of issues that arise do not interact with the text, but with surrounding precedent. The text of the

113. Justice Frankfurter engages in a sort of analysis resembling Sujit Choudhry's "Universalist" method. *See* discussion *supra* note 37.

114. *See Culombe*, 367 U.S. at 602.

115. *See id.* at 601–02.

116. *See id.* at 601–22 (Justice Frankfurter considers the many cases involving determinations of voluntariness, and based upon the review of precedent, finds that Culombe's confession was not coerced).

117. This is to say, no specific language is quoted. There is no discussion as to how the actual wording of the Constitution might affect the determination of voluntariness. *See Culombe*, 367 U.S. 568–605.

118. Justice Frankfurter's analysis is doctrine centered; there is no discussion of framer's intentions. *Id.*

Constitution may comprise the nucleus of this body of law, and influence the nature of any exchange, but the tangible and important reactions occur in the field of doctrines that surround the document.

This final portion of the opinion stands on its own, independent of the preceding discussion and the discussion's inclusion of comparative materials. Because Justice Frankfurter first justifies the Court's consideration of the issue, the conclusions derived in the second portion of the opinion are clearer, stronger, and may be applied with greater ease in lower courts and subsequent exercises of the Supreme Court. Foreign materials provide instrumental support to the conclusion that there is an issue which warrants the attention of the Supreme Court. Overturning a ruling of a state's highest court is no small matter, and the reasons justifying a different outcome need to be well-defined, and their importance well-supported. Comparative materials are not the sole source of such support, but neither should their potential contribution be presumptively ignored.

### 2. *Knight v. Florida*

In November of 1999, Justice Breyer dissented to the Court's denial of certiorari in *Knight v. Florida*[119] and *Moore v. Nebraska*.[120] In both cases, petitioners claimed that excessive delays in their execution violated the Constitution's Eighth Amendment prohibitions on cruel and unusual punishment.[121] Twenty-five years had passed since Knight was sentenced to death, and nineteen since Moore's sentencing.[122] The delays were due to constitutional defects in the states' death penalty procedures.[123]

---

119. Knight v. Florida, 528 U.S. 990, 993 (1999). Justice Breyer's dissent is instructive, not for any binding power, but because it illustrates a manner in which comparative materials can inform constitutional interpretation while minimizing the risks associated with borrowing or solutions not rooted in the domestic experience.

120. 528 U.S. 990 (1999) (reporting both *Knight* and *Moore*).

121. *Id.* at 993. Justice Breyer calls the delays "astonishingly long." *Id.*

122. *Id.* at 993–94.

123. *Id.* The petitioner in each case challenged state procedure by appellate and collateral review. *See id.* at 993–95. Both petitioners were resentenced after modification of state procedures. *See id.* Justice Thomas, in his brief concurrence to the denial of certiorari, contends that there is no "support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Id.* at 990. Justice Thomas proposes that if there were support in domestic jurisprudence, petitioners would have more to rely on than foreign authority.

Justice Breyer's dissent is instructive in that its central purpose is to argue that there is an issue that should be addressed by the Court.[124] Justice Breyer does not attempt to resolve the issue. Instead, his dissent focuses on illuminating the issue of potentially serious humanitarian repercussions in cases where executions are delayed and the need to examine the current state of the law.[125] In short, Justice Breyer is engaged in the isolation and definition of the relevant issue.[126]

Justice Breyer uses several different types of authority to support the contention that there is a relevant issue,[127] but he does not apply the facts to any binding precedent.[128] Foreign sources are the predominant authority cited.[129] Foreign sources are used to illustrate the need to consider the propriety of extremely delayed executions within the context of the U.S. constitutional system. Foreign sources are not used to interpret the Constitution, nor to draw any conclusion from the facts.

The summary of facts is followed by a brief discussion of the Court's prior treatment of death penalty issues.[130] Justice Breyer cites decisions that recognize the very serious suffering that accompanies the wait for execution.[131] These decisions are not mentioned for the proposition that they have any binding effect upon the court as applied to the facts of the instant case. Instead, these cases support the proposition that there is, in U.S. constitutional jurisprudence, recognition of the suffering inherent in any wait for execution. This is the first step in his attempt to illuminate the issue and to justify its further consideration.

Justice Breyer also cites a California Supreme Court decision recognizing the "dehumanizing" effect of the wait for execution.[132] He further considers academic treatment of the subject regarding evidence

---

*See id.* The subtle difference between the manner in which the foreign materials are employed in Justice Breyer's dissent, and the manner in which Justice Thomas contemplates their use, is that Justice Breyer uses them only to support the contention that there may exist, within the bounds of the United States Constitution, a concern for, and protection against, delayed executions, and that the constitutional implications are worthy of the Court's consideration.

124. *See id.* at 994–99. Justice Breyer makes no conclusions, but he does assert that, "[w]here a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." *Id.* at 993.

125. *See id.* at 994.

126. In this regard, Justice Breyer's dissent may be compared to the first portion of Justice Frankfurter's opinion in *Culombe*. *See* discussion *supra* notes 84–88 and accompanying text.

127. *See id.* at 995–97.

128. Justice Breyer's discussion of domestic law, including state treatment, is limited to one paragraph. *See id.* at 994–95.

129. *See id.* at 995–98.

130. *See id.* at 994–95.

131. *See id.* (citing cases from both the U.S. Supreme Court and various state courts).

132. *Id.* at 994 (citing People v. Anderson, 493 P.2d 880, 894 (Cal. 1972)).

of suicide rates among inmates on death row and the correlation of suicide rates with the psychological toll inflicted upon those inmates.[133]

Justice Breyer first contends that excessive delays compromise the fundamental retributive and deterrent value of the punishment.[134] He also contends that there is no historical justification for lengthy delays, and for this proposition, he cites a recent English decision.[135] Despite the English decision's foreign nature, he contends that the decision may inform certain originalist notions of what is acceptable treatment of death penalty cases.[136] Thus, Justice Breyer begins by laying the domestic groundwork for concerns over delayed execution. What follows only clarifies and supports his contention.

Justice Breyer provides further support for the need to address the constitutional implications of excessive delay in execution by surveying the subject's treatment in foreign nations.[137] He believes that the facts present an issue that should be addressed,[138] and he uses foreign materials to bolster this assertion. He argues that a "growing number" of foreign courts have found that excessive delay of execution amounts to inhumane punishment.[139] The decisions of the courts of England, India, Zimbabwe, and the European Court of Human Rights are all advanced in support of this assertion.[140]

Justice Breyer does not, however, view these examples as definitive.[141] The point of his dissent is not to argue a particular outcome, but to argue that excessive delays in execution may implicate the existence of a constitutional issue worth consideration.[142] He emphasizes the unsettled

133. *See Knight*, 528 U.S. at 995–96.
134. *Id.*
135. *Id.* Justice Breyer refers to *Pratt v. Attorney Gen. for Jamaica*, 4 LAW REPORTS 769, 773 (P.C. 1993) (en banc) (holding Great Britain's "Murder Act" of 1751 required speedy execution).
136. *See Knight*, 528 U.S. at 995, stating: "Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades." *Id.* Justice Breyer supports this statement by reference to *Pratt*. *See id.*
137. *See id.* at 995–96.
138. *See id.* at 993.
139. *See id.* at 995.
140. *See id.* at 995–96.
141. *See id.* Justice Breyer recognizes that the foreign authority is not binding and makes reference to objections to foreign materials made by Justice Scalia in *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988). *See id.*
142. *See Knight*, 528 U.S. at 996. The purpose of the dissent to certiorari, after all, is to argue for consideration of an issue. Justice Breyer contends that because of the similar circumstances involved, the decisions of the foreign courts may be "useful even

and complex nature of disputes over delayed execution by reference to treatments by two additional foreign bodies that contrast with the stances of the earlier mentioned courts.[143] The Canadian Supreme Court extradited a prisoner facing the death penalty in the United States. Justice Breyer makes the implicit inference that the Canadian court did not see the risk of delay as conflicting with that country's constitutional standards.[144] He also notes that the United Nations Human Rights Committee has written that a delay of ten years does not necessarily amount to a violation of the standards set forth in the *Universal Declaration of Human Rights*.[145] The manner in which either body would handle the lengthy delays in *Knight* is not clear. As Justice Breyer notes: "Given the closeness of the Canadian Court's decision (4 to 3) and language that the United Nations Human Rights Committee used to describe the 10-year delay ('disturbingly long'), one cannot be certain what position those bodies would take in respect to delays of 19 and 24 years."[146] The nonconclusory nature of Justice Breyer's dissent is supported by his use of the opposing foreign treatments. There is no argument as to the superiority of one method over another, just a discussion of the various decisions of other nations.[147] The review of various foreign decisions supports the contention that excessive delays in execution can be problematic and may conflict with the Constitution's prohibition on cruel and unusual punishment.

There is no binding force to the foreign authority used and Justice Breyer is very forthright in his admission of this fact.[148] He goes so far as to quote Justice Scalia when he criticized the use of foreign experiences in his *Thompson* dissent.[149] Nonetheless, Justice Breyer contends that the "Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[150] Justice Breyer further contends that a "[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.'"[151]

---

though not binding." *Id.* at 997–98.

143. *See id.* at 996. The point of this contrast is to show that there is no single accepted notion of the extent to which delayed executions are cruel and unusual punishment. The further inference may be made that the current state of domestic jurisprudence amounts to an inaccurate or incomplete understanding of the Constitution's true protections.

144. *See id.*

145. *Id.*

146. *Id.*

147. *See id.* at 997.

148. *See id.* at 996. "Obviously this foreign authority does not bind us." *Id.*

149. *See id.*

150. *Id.* at 997.

151. *Id.*

How these views are to be considered, and in what manner they impact our own constitutional adjudication, is of course the critical concern. As discussed previously, direct borrowing of foreign solutions, or application of foreign solutions to a course of reasoning on specific facts may violate certain norms of interpretation, may involve certain risks of misunderstanding, and are certainly subject to very volatile criticism.[152] If Justice Breyer's dissent is construed as resembling the initial stage of a doctrine-based interpretive method, where relevant issues are isolated and supported, then the manner in which the foreign materials are used does not conflict with the aforementioned criticisms. Analysis of facts, and the resulting interpretation of the Constitution, are separate from the dissent's use of comparative materials.

Justice Breyer does not contend that the delay in execution always amounts to cruel and inhumane punishment, but that it *may*, as applied to the facts.[153] The discussion never gets this far. Justice Breyer, in a manner consistent with a dissent to certiorari, only contends that there is an issue, and that it is worthy of consideration by the Court.[154] Foreign materials facilitate a stronger, clearer understanding of Justice Breyer's position, but their use has no direct impact on the conclusion with respect to constitutional interpretation.

### *3. Conclusion*

Courts must clearly define the issues to be addressed, and they must also support the decision to address a particular issue. This is especially true where the issue to be addressed involves constitutional interpretation.

In the above examples the authors used foreign sources to support the position that the issues involved warranted consideration. The use of foreign examples is independent of any conclusions of law. Because foreign materials do not contribute to the actual resolution of constitutional issues raised by these cases, there is no risk that foreign solutions will be borrowed or that interpretations derived will be from other than a uniquely domestic origin.

152. *See* discussion *supra* notes 25–38 and accompanying text.
153. *See Knight*, 528 U.S. at 998.
154. *See id.* at 999.

### *B. Comparative Analysis to Clarify Reasoning*

In ruling on constitutional issues, the Court faces an obligation to make its reasoning clear.[155] This obligation is complicated by the complex nature of the subject matter. Both civil liberties and federalism issues may be wrapped in layers of precedent and years of evolving historical practice. It is critical to the Court's ability to effectively resolve issues that it gains an understanding of the system in question. An ability to convey this understanding to lower courts and practitioners is equally important. By using comparative materials, the Court is able to contrast the United States' constitutional system with the systems of foreign courts. This exercise produces an awareness of differences that helps the Court to better understand its own system.[156] Within the context of a precedent-centered analysis, the Court, in the example below, uses comparisons of domestic and foreign practices to sharpen an understanding of its own unique system.

#### *1. Raines v. Byrd*

In *Raines v. Byrd*,[157] Chief Justice Rehnquist makes reference to several European systems in order to emphasize the proper scope of the judiciary's Article III powers.[158] The opinion, however, is dominated by discussion of precedent and historical practice,[159] and ultimately, the Court's conclusion is derived entirely from a domestic basis.

In *Raines*, several members of the 104th Congress filed suit against officials of the executive branch to challenge the constitutionality of the Line Item Veto Act.[160] The district court granted the Congressmen's motion for summary judgment, holding the act unconstitutional as a violation of the Presentment Clause.[161]

---

155. On the simplest level, this obligation stems from the need to give lower courts effective guidance in the application of legal standards in future cases. On a more complex level, the process of reason-giving supports not only the legitimacy of the judiciary, but also the legitimacy of the entire governmental apparatus. *See* discussion *supra* notes 25–56 and accompanying text.

156. This comparison of systems in order to better understand differences is essentially what Mark Tushnet calls the expressivist use of comparative materials. *See* Tushnet, *supra* note 7, at 1228–29; *see also* discussion *supra* note 37.

157. Raines v. Byrd, 521 U.S. 811 (1997).

158. *See id.* at 828. This brief reference to foreign materials is not enough to keep Justice Scalia from joining the opinion. Justice Scalia's failure to object to the use of foreign materials may suggest that he does not feel that foreign materials, when used in this manner, impact the analysis so as to result in an interpretation of less than purely domestic roots.

159. Only one paragraph of the seventeen-page opinion discusses foreign experiences. *See id.*

160. *See id.* at 814. The line item veto was codified at 2 U.S.C. § 691 (Supp. III 1997).

161. *See Raines*, 521 U.S. at 816–17; *see also* U.S. CONST. art. I, § 7, cl. 2.

On appeal, the Supreme Court found that the federal courts lacked jurisdiction over the suit because of a failure to meet the Constitution's "case-or-controversy" requirements.[162] The Court's determination rests on an analysis of relevant precedent.[163] The Court notes that satisfaction of the standing requirement demands an allegation of a personal injury that is particularized, concrete, and otherwise judicially cognizable.[164] Further, Chief Justice Rehnquist emphasizes the importance of a rigorous standing requirement, particularly where the court is asked to review the constitutionality of actions of one of the other branches.[165]

The Court goes on to distinguish the instances in which it has addressed legal standing for legislators.[166] The discussion of precedent is ultimately reinforced by a review of historical practice. Chief Justice Rehnquist distinguishes the case, noting that the congressmen lack support from precedent, and that "historical practice appears to cut against them as well."[167] Each instance is discussed and specifically distinguished from the case at hand.

As part of his examination of historical precedent, Chief Justice Rehnquist discusses the effects that an alternative reading of the standing requirement might have had where similar disputes between branches existed.[168] He points out that to grant standing in this case would mean

---

162. *See Raines*, 521 U.S. at 818. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)).

163. *See id.* at 818–26.

164. *See id.* at 819. "We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized' . . . ." *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

165. *Id.* at 819–20. Justice Rehnquist calls the standing requirement "especially rigorous" when the Court is asked to address the constitutionality of an act of one of the other branches. *Id.*

166. *See id.* at 820–26.

167. *Id.* at 826.

168. *See id.* at 827–28. Chief Justice Rehnquist notes the failure of Presidents Wilson, Grant, or Cleveland to challenge the controversial Tenure of Civil Offices Act, passed in 1867. The act provided that an official, whose appointment to an Executive Branch office required confirmation by the Senate, could not be removed without the consent of the Senate. *See* Tenure of Civil Offices Act, ch. 154, 14 Stat. 430 (1867). The Attorney General would have had standing to challenge the statute at issue in *INS v. Chadha*, 462 U.S. 919 (1983), because it "rendered his authority provisional rather than final." *Raines*, 521 U.S. at 828. Similarly, President Ford could have challenged the appointment provisions of the Federal Election Campaign Act and a member of

that one or another party could have maintained standing in earlier disputes where there was in fact no litigation.[169]

Chief Justice Rehnquist bases his conclusion on his reading of precedent supported by historical practice.[170] At the heart of the determination is the inability of the Congressmen to allege a personal injury.[171] Chief Justice Rehnquist emphasizes the importance that the U.S. constitutional scheme places on personal injury as a requirement for standing by comparison to systems that have less stringent standing requirements.[172] He notes that several European countries, including France and West Germany, would grant standing in similar situations.[173] The juxtaposition of the more flexible European systems against that of the United States helps him express the unique requirements of the Constitution, and the necessary effect of the limited jurisdiction of Article III courts on the outcome of the litigation.[174]

In this case, the role of comparative materials is a small one, as is the amount of space devoted to their use. The references to foreign practices are not decisive, nor can their impact be clearly ascertained. Nonetheless, comparative materials are used, and they do facilitate an understanding of the Court's reasoning. More important is the fact that foreign experiences are used in a manner that could, within the same interpretive framework, play a much greater role.

### *C. Comparative Analysis in Moral and Policy Balancing*

The third manner in which courts employ comparative analysis is to provide empirical evidence to inform the balancing of moral and policy oriented concerns.[175] The courts in the examples below employ foreign experiences within the balancing stage of the common law interpretive framework to help determine the desirability of breaking with established doctrine.[176]

---

Congress could have challenged President Coolidge's pocket veto. *Id.*

169. *See Raines*, 521 U.S. at 828.

170. *See id.* at 828–29.

171. *See id.* at 829.

172. *See id.* at 828. "There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime." *Id.*

173. *See id.*

174. Chief Justice Rehnquist notes that the United States Constitution "contemplates a more restricted role for Article III courts." *Id.*

175. Sujit Choudhry proposes a limited license to use foreign experiences in making empirical determinations. *See* discussion *supra* note 37. Justice Breyer has argued that foreign experience may "cast an empirical light on the consequences of different solutions to a common legal problem." Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

176. Balancing of moral and policy concerns is a step in the common law type of interpretive method. *See* Strauss, *supra* note 23, at 895. The common law method is

In both of the examples discussed below, the Court considers, and ultimately decides against, making a distinct departure from established doctrine. In doing so, the Court uses comparative analysis to inform the balancing determination.

### *1. Washington v. Glucksberg*

In *Washington v. Glucksberg*,[177] the United States Supreme Court considered the constitutionality of a Washington statute making it a felony to cause or assist any person in committing suicide.[178] The statute was challenged by a group of doctors and terminally ill patients.[179] Writing for the majority, Chief Justice Rehnquist crafted an opinion that explicitly employed comparative materials.[180] At issue was whether the statute infringed upon constitutional due process protections.[181]

---

doctrine based, but will accommodate departure from doctrine where relevant moral or policy concerns outweigh the desirability of adherence to established precedent. *See id.*

The practice of, and value in, adherence to precedent may arise from an underlying notion that David A. Strauss, in *Common Law Constitutional Interpretation,* calls traditionalism. *See id.* at 891–92. Traditionalism centers on the notion that a court must hesitate to reject judgments made by "people who were acting reflectively and in good faith." *Id.* at 891. The concept emphasizes not just the "accumulated wisdom" of succeeding generations but also the practical real world tests to which these decisions have been subjected: "They also reflect a kind of rough empiricism." *Id.* at 892.

While this reverence for the past cautions against change and inhibits the ability of the court to casually make dramatic departures from established practice, it does not preclude the possibility of change altogether. *See id.* at 896–97. The changes implemented by a court may be, and ordinarily are, subtle and of limited scope, accomplished by extension or limitation of existing doctrine. This is not to say that courts engaged in the common law method are incapable of dramatic and sweeping changes, or that they are bound inextricably to the past. *Id.* at 902–03. A court that is convinced that established doctrine is outmoded or morally repugnant is not hopelessly bound to precedent, but must only give the "benefit of the doubt" to the practices of past courts. *See id.* at 895. The power of the common law court is not limited to strict application of the law as they find it, but extends to the modification or replacement of a rule when application of the rule would create "malignant" results. *See* Schauer, *supra* note 63, at 456. A break with the past can be justified by overwhelming policy considerations, *see id.* at 467, or concerns of "public" and "conventional" morality. *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 82–88, 96–123 (1990). Benjamin N. Cardozo, in his discussion of the common law, recognizes the role of moral judgments by another name, repeatedly making reference to "sociology" and "the welfare of society." *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 94–97 (1921).

177. 521 U.S. 702 (1997).

178. WASH. REV. CODE § 9A.36.060(1) (2000).

179. *See Glucksberg*, 521 U.S. at 707–08.

180. *See id.* at 732–34.

181. *See id.* at 708. The Ninth Circuit, sitting en banc, found a constitutionally

Chief Justice Rehnquist makes extensive use of foreign materials and experiences to inform his discussion, emphasizing the experiences of the Netherlands and the controversy surrounding their policy of permitting physician-assisted suicide.[182] Although the opinion is grounded on an examination of U.S precedent and tradition, foreign sources are used to facilitate the Court's determination that any deviation from existing precedent is unwarranted.

After a careful examination of the domestic tradition and precedent,[183] and a refusal to extend established protections to the right to assisted suicide,[184] Chief Justice Rehnquist discusses the further constitutional requirement that Washington demonstrate a legitimate state interest.[185] The Court's conclusion that this interest exists is derived in part from its examination of foreign sources.

The determination to break from established practice requires an understanding of the possible moral and social concerns, the relative weight of each factor, and how, on balance, they interact.[186] Comparative materials can offer insight into this determination in the form of empirical experiments,[187] and indeed, Chief Justice Rehnquist puts them to this use.

The opinion employs a two-prong test to explore the constitutionality of the Washington statute. The Court must consider the impact of history and precedent on the constitutionality of the statute, and it must determine that the statute is rationally related to a legitimate state interest.

The court begins with an examination of "our Nation's history, legal traditions, and practices."[188] This examination of the debate's historical background begins with early English treatment of suicide and proceeds through suicide's treatment in the United States.[189] This portion of the

---

protected right to die, amounting to the ability to control the time, place, and manner of one's own death. The Ninth Circuit made the further determination that the state's interests were not strong enough to warrant imposition on the constitutionally protected right. *See id.* at 709.

182. There are numerous mentions of foreign experience, the most significant of which focuses on the Dutch experience. *See id.* at 734.

183. *See id.* at 710–28.

184. *See id.* at 728. Chief Justice Rehnquist writes:

> The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, *our decisions lead us to conclude* that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.

*Id.* (emphasis added).

185. *See id.*

186. *See* Strauss, *supra* note 23, at 901–04.

187. *See* discussion *supra* note 37.

188. *Glucksberg*, 521 U.S. at 710.

189. *See id.* at 710–13. It is clear that suicide was not condoned in England. *Id.* at 711 n.9. This fact is emphasized by the harsh forfeiture penalties faced (realistically) by the surviving family of the deceased. *Id.* at 713. The review proceeds with a consideration of

discussion culminates with an overview of the various state practices,[190] concluding that our laws, "have consistently condemned, and continue to prohibit, assisting suicide."[191]

The issue that the Court must address is, however, the possible unconstitutionality of the statute, and more specifically its infringement on Fourteenth Amendment due process rights.[192] Thus, Chief Justice Rehnquist engages in a careful overview of the Court's established due process adjudication.[193] Due process protection, as developed by the Court, extends beyond guarantees of fair process and the absence of physical restraint.[194] The Due Process Clause provides "heightened protection against government interference with certain fundamental rights and liberty interests."[195] Despite the scope of the protections already granted, and the recognition that these are not strictly limited, there is a policy of reluctance to further expand these protections "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[196] Chief Justice Rehnquist emphasizes the need for caution in any expansion of the doctrine.[197] What he has essentially said is that, only after careful consideration of competing concerns, and the subsequent determination that overwhelming factors exist, can the Court break from or extend existing doctrine.[198]

---

the American colonies and their fairly complete adoption of the English common law. *Id.* at 713–15. While the American approach did soften over time, it by no means moved away from its condemnation of the practice of suicide. *See id.*

190. *See id.* at 714–19.

191. *Id.* at 719.

192. *See id.* at 708. The asserted liberty interest is the right of mentally competent, terminally ill adults to commit physician-assisted suicide. *Id.* The Court finds that the statute is not unconstitutional because there is no such protected liberty interest and because the statute promotes a legitimate state interest. *Id.* at 728.

193. *See id.* at 719–29.

194. *See id.* at 719.

195. *Id.* at 720.

196. *Id.* (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

197. *See id.*

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

*Id.* (quoting *Collins*, 503 U.S. at 125).

198. That the Court may consider either extending or departing from a doctrine is significant; in *Glucksberg*, there are two possible means of extending Fourteenth Amendment protections to physician-assisted suicide. The Court may break from

Chief Justice Rehnquist's review of the Court's prior treatment of related issues does not reveal any place in that tradition for the acceptance of physician-assisted suicide.[199] His determination has its sources in doctrine, not in any reading of the text.[200] Chief Justice Rehnquist concludes that to hold the statute unconstitutional would be to "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[201]

Regardless of the well-established tradition against assisted suicide, the Court notes that the Constitution requires that the state statute be "rationally related to legitimate government interests."[202] In other words, the constitutionality of the statute depends on the existence of an acceptable governmental concern. The Court, in making the determination as to whether this sort of interest exists, must necessarily weigh the moral and policy concerns raised by assisted suicide.

The effective result of this two-prong test applied by the Court is that the constitutionality is dependent on its basis in established doctrine; but tradition and precedent alone will not sustain it. There must be a demonstrated legitimate state interest in maintaining the statute and its imposition on personal liberties.[203] If the court finds that governmental concerns are not sufficient enough to outweigh the imposition on personal liberties, then the statute is unconstitutional despite its grounding in tradition.[204]

Chief Justice Rehnquist crafts an opinion focusing on the analysis of precedent, tradition, and the interaction of Washington's statute with these elements. His final step is to engage in a process of balancing the competing moral and social concerns. This balancing determination is a technique used by courts considering a break from doctrine.[205] It is here that Chief Justice Rehnquist engages in a critical examination of foreign experience and puts that knowledge to use in guiding his own determination.

---

established doctrine condemning suicide, or it may extend a line of cases protecting an individual's control over their own body. *See id.* at 724–29.

199. *See id.* at 722–23.

200. *See id.*

201. *Id.* at 723. Not only does the established doctrine support the constitutionality of the statute, but the court is unwilling to extend two lines of reasoning protecting individual liberty. *See id.* at 724–29. Neither the reasoning supporting a patient's right to refuse life-sustaining treatment, *see* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 279 (1990), nor the reasoning supporting the right to abortion, *see* Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992), is accepted as indicative of the existence of some fundamental liberty interest that might extend constitutional protection to assisted suicide.

202. *Glucksberg*, 521 U.S. at 728 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993); Reno v. Flores, 507 U.S. 292, 305 (1993)).

203. *Glucksberg*, 521 U.S. at 728.

204. *See id.*

205. *See* discussion *supra* note 176.

Among the various state interests allegedly protected by the statute—preserving life; preventing suicide; avoiding the involvement of third parties and their use of arbitrary, unfair, or undue influence; protecting family members and loved ones; and protecting the integrity of the medical profession—is the interest in preventing any future trend towards euthanasia.[206] In assessing the risk of euthanasia, the Dutch experience is seriously considered.[207] Physician-assisted suicide is a reality in the Netherlands.[208] There is also considerable controversy surrounding the Dutch practice, and multiple commentators have concluded that there have been numerous instances of involuntary euthanasia of competent adults.[209] These claims are by no means undisputed, as there are also those critics who claim that there have been no such developments.[210] Nonetheless, the Court accepts the experiences in the Netherlands as empirical proof that the risk of euthanasia (both voluntary and involuntary) is real, and as such, there exists a legitimate governmental concern.[211] The Court determines that the risk of facilitating a trend towards euthanasia presents a sufficient government interest to support an infringement on the purported liberty interest, and thus supports the constitutionality of the statute.[212] What the Court has essentially done is to determine that the moral and policy concerns proffered by Washington weigh heavier on balance than any of the interests proposed in opposition to the statute.[213]

The Court focuses on established doctrine, but acknowledges the possibility that a sufficient showing of social concerns might be able to overcome the presumption in favor of that doctrine.[214] Comparative analysis does not play a major role in the overall determination of the Court. Despite frequent use of language purporting to recognize foreign

206. *See Glucksberg*, 521 U.S. at 728 n.20.
207. *See id.* at 732–34.
208. *See id.* at 734.
209. *See id.* at 734–35.
210. *See id.* at 786 (Souter, J., concurring).
211. *See id.* at 735.
212. *See id.* "We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection." *Id.*
213. Had the court made the opposite conclusion, there would have been grounds for finding the statute unconstitutional.
214. The balancing test is built into the test of constitutionality; there must be a legitimate governmental interest to support the constitutionality of the statute. *See Glucksberg*, 521 U.S. at 728.

experience, the bulk of the reasoning is based on purely domestic sources. The end-balancing test, however, is capable of greatly affecting the outcome of the decision. The balancing exercise stands apart from the doctrine-based aspect of the process. As such, it is not bound by the predisposition of exclusive dependency on domestic materials. That is, the primary decision is positivist in nature, but this positivist conviction can be overcome by considerations outside the established body of law.[215] Comparative analysis should legitimately be included among these sources if they are used to provide empirical insight to domestic concerns. The same conclusion could very well have been reached without the use of foreign sources. The use of foreign sources does, however, ensure a more fully informed and complete analysis.

Foreign materials only inform the determination to part with existing doctrine. The purpose of these materials, and the manner in which they are used, is not to suggest adoption of the foreign approach. Objections based on fear of borrowing, and its accompanying dangers, are addressed by limiting the role of foreign materials to the first step—determining the need for change. Foreign materials may not be used as a source of alternative constitutional interpretations if the objections are to remain inapplicable. In this respect, the use of comparative materials to inform the balancing decisions may be more readily open to abuse, and subsequent criticism.

### 2. *United States v. Walton*

In *United States v. Walton*,[216] the Fourth Circuit, sitting en banc, provides another good example of comparative analysis informing a question of social balance. Again, the issue is one of due process.

During a jury trial, the defendants, Eric A. Walton and Eldridge Mayfield, were convicted "for conspiracy to influence a petit juror and for aiding and abetting in the attempt to influence a petit juror."[217] The jury requested a definition of reasonable doubt, but the trial judge declined to give the instruction.[218] On appeal the defendants contended that the court's refusal to define reasonable doubt indicated the possibility that the defendants may have been convicted on less than the appropriate showing and that there was a violation of their due process

215. In fact, the Court finds that the determination that valid government interests exist is a part of the constitutional requirement. This sort of determination calls for an empirical determination that may be made in large part on foreign materials. The requirement of empirical determinations is one aspect of the interpretive process cited as a justification for the use of comparative materials. *See* discussion *supra* note 175.

216. 207 F.3d 694 (4th Cir. 2000).

217. *Id.* at 696.

218. *Id.*

rights.[219] The circuit court affirmed the decision of the trial court. Upon petition for rehearing, the court agreed to review that decision en banc.[220] An equally divided court affirmed the trial court decision. Judge Ervin wrote a per curiam opinion in support of the affirmance.[221]

The Fourth Circuit's practice of not requiring a definition of reasonable doubt, even when requested by the jury, was a longstanding and well-established one.[222] Judge Ervin supports the practice with a discussion of the appropriate precedent of both the Fourth Circuit and the Supreme Court.[223] The relevant decisions of both the circuit court and the Supreme Court establish that trial courts are not required to define reasonable doubt.[224] This discussion of federal law is supplemented by a review of the practices in other circuits and states.[225] The law in four other circuits and fifteen states reflects the circuit court's rule that no definition of reasonable doubt is required.[226] Judge Ervin ends this portion of the discussion with a review of similar practices in the courts of England and Australia.[227] Reference to these courts is justified by reference to their common lineage, and the "Anglo-American" heritage of the reasonable doubt standard.[228]

Judge Ervin eventually declines to make any departure from established practice.[229] He reasons that the arguments in favor of defining "reasonable doubt" are overshadowed by the greater danger that attempts at definition will only result in increased confusion on the part of the jurors.[230] The opinion neglects to discuss the reasons in favor of a definition

---

219. *Id.*
220. *Id.*
221. *See id.* at 695.
222. *Id.*
223. *See id.* at 696–97. Judge Ervin quotes *Victor v. Nebraska*, 511 U.S. 1, 5 (1994):

> [T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.

*Id.* at 696 (citations omitted).
224. *See id.*
225. *See id.* at 697 nn.3–4.
226. *See id.*
227. *See id.* at 698 & n.5.
228. *Id.* at 698 n.5.
229. *See id.* at 699.
230. *See id.* at 698. "[W]e remain convinced that attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only

requirement, though they are elaborated to some extent by the dissent.[231] Judge Ervin's opinion is a common law type analysis of a constitutional issue, finding grounding and support for current practice in the court's established precedent. He concludes that the dangers of departure from doctrine outweigh any reason to alter established practice.[232]

The sole purpose of the court's consideration of comparative sources is a review of the continued viability of the established rule.[233] This necessarily involves some weighing of the various implicated social and policy concerns. Judge Ervin's failure to explicitly discuss the arguments in favor of definition does not mean that he has failed to engage in the balancing process. He recognizes the possibility of a departure from doctrine by agreeing to review the case. A balancing test is implicit in the process of review. He, however, finds no argument persuasive in light of the concerns favoring the established practice.[234]

Judge Ervin seems very certain in his assessment of the risks of departure from doctrine. Further, he uses the lack of substantial differences amongst similar foreign jurisdictions to bolster his implicit claim that it has not left factors unconsidered that could tip the balance in favor of departure.[235] Judge Ervin is justified in his virtual neglect of competing concerns by using state and foreign experiences. The fact that no such concern has arisen in those systems, lends support to the notion that none exists in this one.

In light of well-established doctrine, and the conclusion that there are not sufficient social concerns to necessitate departure from precedent, Judge Ervin can rest comfortably in his conclusion. Again, foreign experience is not a determinative factor, but an influential one. It is a source of insight that lends a greater degree of comprehensiveness to the opinion. Foreign materials do not provide conclusions, but do lend credence to the notion that there is little reason to find an objection to current practice. The conclusion that the Constitution does not require a definition of reasonable doubt is based on domestic precedent and tradition.[236] Judge Ervin's use of comparative analysis is significantly less susceptible to objections to comparative analysis in constitutional interpretation based on either the fear of borrowing or particularist notions.

---

the words themselves." *Id.*

231. Justice King, in dissent, emphasizes moral imperative in assuring against the conviction of an innocent man. *See id.* at 701–02.

232. *See id.* at 698.

233. *See id.* at 696.

234. *See id.*

235. *See id.*

236. *See id.* at 696–97.

### *3. Conclusion*

Both *Glucksberg* and *Walton* provide examples of constitutional interpretation within a common law framework. These two cases also serve to demonstrate how the common law framework can accommodate the use of comparative materials. Comparative materials can provide empirical results that allow courts to make better-informed judgments in assessing the continued viability of established doctrine. Both *Glucksberg* and *Walton* employ comparative materials in this capacity. While the use of comparative materials may have its own basis for positive justification, it also results in an application of the knowledge in a manner that deflects, to some extent, the objections to comparative materials.

## IV. THE *PRINTZ-GLUCKSBERG* DILEMMA

One question remains to be answered: what, if anything, is to be made of the seemingly polar opposite stances expressed by the Court in *Glucksberg*[237] and *Printz*,[238] two decisions announced just one day apart.

In *Printz*, Justice Scalia's condemnation of comparative analysis is made in response to Justice Breyer's suggestion, in dissent, that the Court consider the alternative federal structures employed by certain European countries.[239] Facially, Justice Scalia's criticism of comparative analysis in constitutional interpretation appears to be a broad condemnation of the practice.[240] This understanding of Justice Scalia's comments, however, is contradicted by the *Glucksberg* opinion. *Glucksberg* specifically employs comparative materials, and not just in a cursory manner.[241] Justice Scalia joined the Court's opinion without comment.[242]

---

237. *Washington v. Glucksberg*, 521 U.S. 702 (1997), was decided on June 26, 1997. Chief Justice Rehnquist used foreign experiences to inform his discussion of euthanasia. *See id.* at 734–35.

238. *Printz v. United States*, 521 U.S. 898 (1997), was decided on June 27, 1997. Justice Scalia called the use of foreign experiences "inappropriate" to the interpretation of a constitution. *See id.* at 921 n.11.

239. *See Printz*, 521 U.S. at 921 n.11.

240. In response to Justice Breyer's proposed use of comparative analysis, Justice Scalia writes: "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." *Id.* Justice Scalia emphasizes the unique nature of the United States' brand of federalism. *See id.*

241. *See Glucksberg*, 521 U.S. at 734–35.

242. *See id.* at 704.

Justice Scalia's different reactions stem from the different manner in which Chief Justice Rehnquist, in *Glucksberg* and Justice Breyer, in his *Printz* dissent, employ comparative materials. In *Glucksberg*, the eventual determination of the Court is rooted in an examination of domestic tradition and application of domestic doctrine.[243] Foreign experience interacts only peripherally with the doctrine-based analysis.[244] Foreign experience, in *Glucksberg*, simply helps inform a determination as to the possible existence of a legitimate state concern.[245] The interest is of domestic origin, and the constitutional solutions derived are rooted firmly in domestic tradition.

In *Printz*, however, Justice Breyer proposes a more central role for comparative analysis. Justice Breyer notes that other constitutional democracies face similar issues of federalism.[246] These democracies have not found, as the *Printz* majority does, that local implementation of national policy is incompatible with the preservation of local control.[247] He suggests that a similar system of local execution of national policy is not incompatible with the United States' own federalism.[248] He posits that the success of such systems in foreign nations might cast an "empirical light" on the practicability of applying a similar system in the United States.[249] Justice Breyer suggests that the common legal dilemma (maintenance of local autonomy in federalist systems) suggests the applicability of related solutions, specifically that the solutions of our European neighbors might work within our own system.[250]

Though Justice Breyer's use of comparative analysis might be construed as resembling the modes discussed in *Culombe* and *Knight*,[251]

---

243. *See id.* at 719–29.
244. *See id.* at 733–36.
245. *See id.*
246. *See Printz*, 521 U.S. at 976. Justice Breyer writes:

> [T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body.

*Id.*
247. *See id.* at 976–77.
248. *See id.* "[T]heir experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent government entity." *Id.* at 977.
249. *See id.* at 976–77.
250. *See id.*
251. *See* discussion *supra* notes 77–154 and accompanying text.

Justice Breyer's suggestions are more readily construed as proposals for transplantation, in whole or in part, of solutions from one system of federalism to another. Justice Breyer contends that the success of one approach, in other systems, suggests the appropriateness of a similar system in the United States.[252]

Justice Breyer's dissent cannot be construed as employing comparative analysis to make empirical determinations of the type arrived at in *Glucksberg*. In *Glucksberg*, the foreign experiences cast empirical light on domestic concerns arising from domestic doctrine.[253] Justice Breyer, in his *Printz* dissent, suggests that the empirical determinations made by examination of foreign experiences suggest the possible successful application of similar systems in United States federalism.[254] Justice Breyer essentially suggests that a foreign solution might be borrowed or transplanted into the domestic system.

Justice Scalia's reaction to the use of comparative materials differs markedly because of the different manner in which they are employed. Where, as in *Glucksberg*, comparative materials are employed in a peripheral and limited manner, they are not objectionable. If, however, as in *Printz*, the proposed use of comparative materials suggests a solution that compromises the fundamentally domestic roots of a constitutional interpretation, or implicates the risks of imperfect translation, then that use of comparative analysis elicits strong opposition.

## V. CONCLUSION

Any attempt to justify the use of comparative materials in constitutional interpretation must address the concerns of critics.[255] Unconstrained use of comparative materials can lead to abuse and misuse.[256] The manner in which courts have employed comparative materials within the framework of the common law method constrains the influences of foreign experiences so as to dissuade the various fears expressed by critics of the technique.

252. *Printz*, 521 U.S. at 976–78.
253. *See* discussion *supra* notes 177–215 and accompanying text.
254. *See Printz*, 521 U.S. at 976–78.
255. *See* discussion *supra* notes 25–38 and accompanying text.
256. *See* Fong Yue Ting v. United States, 149 U.S. 698, 736–38 (1893) (Brewer, J., dissenting).

Much of the resistance to comparative influences can be attributed to American "exceptionalism" and legal "particularism."[257] These objections are grounded in the belief that the United States Constitution is a unique document and is uniquely representative of the American people.[258] The resulting view is that interpretation of the Constitution should be grounded in domestic sources and insight only.

The propriety of using comparative materials is suspect because of the unique nature of the Constitution and its interaction with the American people.[259] The courts in the above examples have used comparative materials within a doctrine-centered interpretive framework that prevents foreign influences from acting upon the relationship between the people and the Constitution. Comparative materials, instead, are used to affect our understanding of the relationship. The distinction between affecting the relationship, and affecting the understanding of the relationship, is an important one.

Comparative materials are used to facilitate an understanding of existing constitutional relationships. The manner in which the *Culombe* opinion and the *Knight* dissent employ comparative materials only clarifies their understanding of issues already present.[260] Confusion over the extent of Fourteenth Amendment protections addressed in *Culombe* was present before the issue was viewed in light of foreign experience.[261] Likewise, in *Knight*, the bounds of the Eighth Amendment's prohibition on cruel and unusual punishment were tested in light of domestic experience, with a domestic standard.[262] Foreign experiences do not suggest the issues; they only help courts to see them.

When disputes over constitutional issues arise, they come from a uniquely American background. Courts use foreign materials to help identify and justify the consideration of these issues, but the use of foreign materials does not alter the nature of the issues.

Similarly, in *Raines*, the court uses comparative materials to clarify an aspect of its reasoning.[263] The Court's treatment of foreign materials emphasizes the differences of the systems, not the similarities.[264] In

257. *See* discussion *supra* notes 27–31 and accompanying text.
258. *See id.*
259. This is an exceptionalist argument. *See* discussion *supra* notes 27–31 and accompanying text.
260. *See* discussion *supra* notes 77–156 and accompanying text.
261. *Culombe* was far from the Court's first attempt to address the proper extent of police interrogations and the voluntariness of confessions. *See* Culombe v. Connecticut, 367 U.S. 568, 603–06 (1961).
262. The roots of the discussion in *Knight* lie in domestic precedent. *See* Knight v. Florida, 528 U.S. 990, 994–95 (1999) (Breyer, J., dissenting).
263. *See* Raines v. Byrd, 521 U.S. 811, 828 (1997).
264. *See id.*

emphasizing the differences, comparative materials also emphasize the need to recognize the uniquely domestic nature of the problem.[265] No aspect of the Constitution, or the doctrines surrounding the Constitution, is altered by the use of foreign experiences.

With regard to exceptionalist objections, the use of comparative materials in moral and policy balancing could be the most difficult to reconcile. This difficulty, however, is overcome by distinguishing between concerns that are actually weighed in a determination of moral or policy considerations and factors that inform the understanding of these concerns. The courts in both *Walton* and *Glucksberg* weighed only domestic concerns. In *Glucksberg*, the Court considered the domestic fear that expansion of constitutional protection to assisted suicide could lead to euthanasia.[266] In *Walton*, the Fourth Circuit focused on the inherently domestic concerns that juries would only be further confused by attempts to define "beyond a reasonable doubt."[267] The possibility that physician-assisted suicide has lead to increased incidence of euthanasia is not factored directly into the *Glucksberg* Court's balancing exercise.[268] An awareness of the Netherlands as an empirical experiment may, however, affect the weight given domestic concerns over the expansion of euthanasia.[269] The critical point is that decisions to break with established doctrine are made entirely on consideration of domestic concerns. Comparative materials may inform the courts determination as to the significance of the individual domestic concerns.

Comparative materials, when used within the common law framework, and in the manner that courts have employed them, may be thought of as a lens and nothing more. Comparative materials do not act on the Constitution or the domestic experience. Comparative materials simply help courts see and understand the details of our own system.

Because comparative materials do not alter the interaction between the Constitution and the American people, our understanding of the Constitution remains rooted in purely domestic sources. Furthermore, because our interpretation of the Constitution remains rooted in purely domestic sources, the Constitution remains a pure representation of this nation's people. An exceptionalist objection to comparative materials is founded

265. *See id.*
266. *See* Washington v. Glucksberg, 521 U.S. 702, 734–35 (1997).
267. *See* United States v. Walton, 207 F.3d 694, 696–99 (4th Cir. 2000).
268. *See Glucksberg*, 521 U.S. at 734–35.
269. *See id.*

on concern for the unique and pure nature of the Constitution. The quality of uniqueness, however, is not necessarily compromised by the use of comparative materials.

Comparative materials have also been employed in such a manner as to address concerns over borrowing or transplantation of legal solutions. Courts using comparative materials in the examples discussed above do not look to foreign sources for the purpose of borrowing. Even if courts did try to borrow foreign solutions, concerns rooted in traditionalism[270] would significantly limit their ability to do so. While traditionalism may give way to overbearing moral or policy concerns, it is difficult to imagine concerns so great as to motivate a court to resort to a solution not grounded in domestic experience.

None of the cases discussed in the preceding section involve any form of borrowing. Where solutions are not borrowed from foreign sources, concerns over transplantation are not relevant. Imperfect comprehension of foreign legal systems or doctrine that might otherwise impact the effectiveness of any borrowed solutions becomes less bothersome if transplants do not occur.

Courts employ comparative materials in a number of ways. First, comparative materials help define issues, and facilitate an understanding of the importance of addressing those issues as they relate to the United States' constitutional scheme. Second, comparative materials also highlight relevant differences when contrasted with domestic practices. Lastly, comparative materials provide empirical evidence to inform the court's consideration of possible departures from established doctrine. The limited use of comparative materials results in a contribution to constitutional interpretation that does not warrant criticism.

LOUIS J. BLUM

270. *See* discussion *supra* note 176.